



The Courts as Guardians of the Public Interest

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taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentation, conducting cross-examination, and making rebuttal submissions in such proceeding.”

5. Public Law 94-469 (1976).
6. Comptroller-General of the U.S., Opinion B-92288, February 19, 1976. This ruling reaffirmed and amplified a similar interpretation given the Federal Trade Commission in 1972. Several months after the NRC Opinion the Comptroller-General affirmed the general applicability of this Opinion to any other agency not specially prohibited by legislation from providing such assistance. This interpretation was provided in response to a query from Congressman Moss, Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce.
7. *Federal Register*, Vol. 41, No. 224 (November 18, 1976), pp. 50829-50838.
8. *Ibid.*, p. 50830.
9. *Federal Register*, Vol. 41, No. 166 (August 25, 1976), pp. 35855-35861.
10. *Ibid.*, p. 35859.
11. Comptroller-General of the U.S., Opinion 139703, December 3, 1976.
12. Conceivably this restrictive interpretation of eligibility may limit the types of groups agencies can financially assist, regardless of the potential contribution their participation might make to the proceedings.
13. Senate bill 2715, 94th Congress, 2nd Session (1976).
14. Senate bill 270, 95th Congress, 1st Session (1977).
15. Federal Communications Commission Memorandum of Opinion and Order, November 30, 1976. This order followed a rule-making proceeding on the issue.
16. *Federal Register*, Vol. 41, No. 189 (September 28, 1976), pp. 42761-42876.

## THE COURTS AS GUARDIANS OF THE PUBLIC INTEREST

Donald L. Horowitz, *Smithsonian Institution*

Of all the policy processes, the judicial process is the one that is formally most programmed for “rational” decision making. Judicial decisions must rest on evidence. Judicial opinions state results in terms of reasons. Judges and juries are insulated from extraneous influences. They are shielded from the clash of opposing interests and the process of “give-and-take” that are supposed to constitute integral parts of the other governmental processes. The courts take pride in their ability to work their way through the tangle of “special interests” and to handle issues “on their merits.” In the judicial process, no particular virtue is seen in giving everyone something; of far greater importance is reaching the “right result.” The assumption of the judicial process is that, where reason resides, the public interest will emerge.

There is a long tradition in the United States of appealing to the courts when efforts in other forums fail. Among other things, the fact that courts operate on avowedly different assumptions from other branches of government makes them attractive as alternative forums in which the play of interests can proceed. The predicate of such appeals is that institutions that are composed differently and proceed on different principles may well reach different results.

Yet the ability of the courts to proceed on different principles rests ultimately on the different burdens they have shouldered. Reason can reign when courts decide cases in which the number of unknowns is limited, in which doctrinal signposts exist, in which the relevant facts, though disputed, can be ascertained with a fair degree of reliability for purposes of the litigation, and in which the consequences of a decision one way or the other are limited in scope and generally foreseeable.

Courts still decide many cases of this kind, but their calendars increasingly include suits raising issues that tax their ability to ascertain the relevant facts, gauge the consequences of a decision one way or another, and reason to a conclusion. Most of these cases are challenges to governmental action, action usually taken by an administrative body. Many of them, involving matters such as the registration of pesticides, the regulation of effluent flows, and the approval of

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drugs and dyes, require complex assessments of risk and choice among alternatives. Some involve experimental social programs, while others deal with investment decisions having potential social costs, such as highway and power plant construction. Wholly new bodies of legal doctrine, such as the law of welfare rights and environmental protection, have grown up. The scope of judicial scrutiny has also enlarged, as the deference that judges formerly paid to administrative decisions has tended to wear thin. Courts today play a more prominent and less interstitial role in defining and protecting the public interest, often against agencies accused of neglecting it.

This article will trace some of the roots of the expanding judicial role in articulating the public interest, evaluate the prospects for resolving such issues through judicial review, and assess some of the consequences of judicial involvement in administrative decisions.<sup>1</sup>

### **The Administrative State and the Judicial Threat**

When the Administrative Procedure Act was passed in 1946, liberal proponents of the administrative state, eager to protect the New Deal agencies from the predatory attacks of a conservative judiciary and legal profession, were outraged. Among other things, they saw the Act's judicial review provisions as granting a license to the courts to thwart the creative work of the administrative process. Three decades later, the same battle is being fought, but the sides have all changed. By and large, the business interests that wanted to use the courts in their crusade against regulation never got to do so. Instead, the liberal reformers now attack the federal agencies their predecessors proudly created. They invoke the aid of the courts against the same interests that earlier fought for access to the courts—and under the same statutory provisions. The courts, far from undoing the work of the federal agencies, have in general required them to do more and better. No one seems to play his or her appointed part.

How have we arrived at this paradoxical turn of events?

The reformers' fears were not wholly ill-founded, but in the short run they proved quite mistaken. The Administrative Procedure Act (APA) was framed against the background of a long campaign to gut the New Deal agencies. With the American Bar Association in the vanguard,

critics charged that the agencies were doing judicial work but without the independence of judges, that they often espoused the cause of one of the parties before them or were captives of their staffs. It was argued that agency procedures were haphazard, irregular, and unfair. The ABA in general favored the transfer of much of the work of the agencies to the courts, viewed as more committed to traditional principles of justice.

The Administrative Procedure Act did not do this. Instead, it spelled out basic procedural rules for the agencies to follow. The Act made many administrative determinations subject to judicial review, but often within a very narrow compass. This was far short of the hopes of those who saw creeping despotism lurking behind the "fourth branch" of government.

Nevertheless, the result was to regularize and in many ways to formalize administrative procedure. Beyond that, the Act allowed judges to sit in judgment on the way in which administrators had conducted themselves. These provisions alone were sufficient to offend those who had fought long and hard for the problem-solving utility of the administrative mechanism. These people wanted "results" rather than rules, and managerial technique rather than what they saw as legal obscurantism. What they most objected to was the sacrifice of flexibility—that most vaunted virtue of the administrative process—on the altar of an abstraction, due process of law. Judges, whose administrative expertise could hardly be acknowledged and whose sympathies were questionable at best, would now have the power to issue orders undoing the work of specialists. Worse still, implementation of administrative decisions might be delayed while the pleasure of the judge was awaited; "vested interests" might use and profit from the lapse of time. This was the ultimate conspiracy of the lawyers against the public interest.<sup>2</sup>

Despite these forebodings, for the first 15 or 20 years of its operation the APA kept the courts out of the work of the federal agencies and departments far more than it let them in. Particularly was this so on the broad policy questions where arguments for administrative expertise and flexibility were most strongly invoked. Resort to the courts was possible in the vast majority of cases only where a showing of procedural irregularity was made. Rarely was it possible to challenge administrative action in court on substantive grounds—that is, by showing that,

though the agency had followed the proper procedure, it had nonetheless reached an inappropriate resolution of the problem before it.

The drafters of the APA were only a decade removed from the excesses of the Supreme Court in the 1930s. They were well aware of the Court's flights of fancy into "substantive due process," of the constitutional crisis wrought by judicial immoderation, and the "Court-packing plan" it produced. Out of such concerns came the blanket exception to judicial review for matters "committed to agency discretion." The courts were not to second-guess wholly discretionary judgments. Nor were they to overturn agency action if the agency had followed the appropriate procedure, unless the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence."<sup>3</sup> The intention was to make the procedures of the agencies predictable, to confine them to decisions that had some demonstrated basis in fact, and to prevent them from acting in disregard of statutory law or fundamental constitutional principles. Courts were not to have a central role in formulating public policy, and for quite some time they did not seek such a role.

These conditions no longer obtain. Over the last decade or more, courts have become a more prominent part of the process of administrative decision making. They have moved beyond protection of the rights of parties aggrieved by administrative action to participation in problem solving and protection of more general public interests against agencies accused of indifference to the public interest. Judicial review has passed from matters of procedure to matters of both procedure and substance. Judicial scrutiny of records of administrative decision making has become far more searching than it once was, and judges have often not liked what they have found. Courts have not merely sat in judgment on administrative action but on inaction as well; they have required agencies to do things the agencies themselves had declined to do.<sup>4</sup>

The signs of this more active role are everywhere—in legal doctrine, in frequency of litigation, in the sweep of decisions, and in judicial pronouncements on and off the bench.

The obstacles to carrying policy problems to the courts have been falling away over the years. The doctrines that barred litigants or certain classes of litigants at the threshold—requirements of standing, jurisdiction, and the like—are now much

diluted, and the defenses available to government agencies once suit was begun have also been chipped away.

At the same time, the frequency of litigation challenging governmental action, especially in the federal courts, increased considerably between the early 1960s and the early 1970s, although perfectly accurate figures are difficult to come by.<sup>5</sup> The scope of the challenges raised in such cases seems to have broadened considerably. One indirect measure of this is the steady increase in the percentage of cases brought by non-profit organizations suing to challenge governmental action. These organizations are more likely than the individual plaintiffs they have proportionately supplanted to challenge not some narrow determination, of interest to only one party, but the policy as a whole and the assumptions on which it is based.<sup>6</sup>

Finally, the scope of the exception to judicial review for matters "committed to agency discretion" has been steadily narrowed. Now even agency determinations of "feasibility" and "prudence"—the kinds of words opponents of judicialization might have made slogans of in 1946—are now immune from judicial scrutiny.<sup>7</sup> Far from eschewing discretionary judgments, some meliorist judges today see themselves as warriors in "the fight to limit discretion" on the part of administrative agencies.<sup>8</sup>

### The Backwash of the APA

In the long run, then, the anguished prophecies of the reformers have been fulfilled and overfulfilled. Courts have insisted that agencies abide by stringent procedural requirements, and in the main these requirements and the judicial role in enforcing them have been accepted without much question. But what the courts have done goes much beyond administrative procedure. Increasingly, the courts insist on having the last word on the merits of many issues of public importance. It is not anything so modest as the judicialization of the administrative process that is the issue: it is the role of the courts in sharing what was formerly taken to be the agencies' exclusive job.

Needless to say, courts have assumed such functions haltingly, unevenly, incompletely—but far beyond what opponents of the APA imagined they might do. Yet in certain ways these developments were an outgrowth of that Act. As

the APA and the courts whittled away many of the differences between agency proceedings and court proceedings, so, too, did they obliterate much of the distinctiveness of the administrative process. In some respects, agencies have simply become second-class courts. The new title, "administrative law judge," in lieu of "hearing examiner," is more than just an attempt to share in the prestige of the courts: it also marks the extent to which the trial-type hearing has become a norm of administrative practice. Judicial review of substantive issues is therefore the aftershock of the judicialization of agency proceedings. Why accept the counterfeit administrative version of a just decision when one can have the real currency, robes and all? The more similar the administrative and judicial processes become, the more the same functions will be performed interchangeably.

Furthermore, the APA and similar laws may have demanded of judges exceptional ability to compartmentalize their work. Once a judge has jurisdiction to review for procedural irregularities, how can he be expected uniformly to acquiesce in an "erroneous" decision, even if it is arrived at through impeccable procedure? Jurisdiction to review the one invites review of the other, and it is unrealistic to think that judges will always adhere to a restrictive "arbitrary and capricious" or "abuse-of-discretion" standard once the subject matter is opened up to them at all.

Broader currents have also shaped the judicial inclination to scrutinize agency action closely. The APA became law at a time of national quiescence, and it is not surprising that it should have been interpreted as it was during such a period. Equally, the courts were affected by the restlessness that affected other institutions in the 1960s, and their eagerness to probe grew apace. The bases of administrative legitimacy came under attack. Claims that once rang true began to ring hollow. "Expertise" can connote narrowmindedness, and "flexibility" may mask political compromise. The courts have not been especially tolerant of either. Generalists themselves, judges are often disdainful of specialization. They tend to be rationalists, searchers after "solutions," suspicious of the political process and "special interests" as impediments to rationality. As they sensed the growth of clientelism in the federal agencies, of departmental self-aggrandizement and bureaucratic rivalries, and official sloth, inertia, and rigidity, the courts became less and less hospitable to administrative claims to immunity from judicial

oversight and more and more disposed to weigh costs and benefits for themselves. What they saw made them, in a word, skeptical.

Those who now invoke the courts against the agencies tend to exalt these qualities of the judicial process: the generalist character of the judges and the distance from the political contest that they seem to possess. Now it is the judges, rather than the managers, who are regarded as the expeditors dissolving the sediment that has accumulated on the administrative machine. But do they have the equipment to do this job? In the race to the courthouse, this question has rarely been posed and even more rarely addressed.

### Hazards of Judicial Guardianship

Judges may be performing new roles in administrative-agency litigation, but they continue to act very much within the framework of an old process, a process that evolved, not to devise new programs or to oversee administration, but to decide controversies. The constraints of that process operate to limit the range of what can reasonably be expected from courts. The principal limitations derive from the way in which cases get to court, the way in which issues are framed and reasons adduced, and the provisions for effectuating court decisions.

Courts are public decision makers, yet they are wholly dependent on private initiative to invoke their powers: they do not self-start. Parties affected by administrative action choose to seek or not to seek judicial redress on the basis of considerations that may bear no relation to the public importance of the issues at stake, to the recurring character of the administrative action in question, or to the competence of courts to judge the action or to change it. This basic feature of judicial review has a number of important consequences.

First of all, the fact that judges do not choose their own menu makes it difficult for them to concentrate in a sustained way on any policy area. Judicial action tends to be spotty and uneven; some agencies may be subject to frequent correction in the courts, others to virtually none at all. The decisions that emerge are ad hoc; they are rarely informed by a comprehensive view of the agency's work, and they cannot aspire to anything approaching the status of a coherent policy. One of the catchwords of the administrative state—and now perhaps one of its biggest disappoint-

ments—was “planning.” Few agencies do the kind of program planning that was once expected of them. But if this is a deficiency of the administrative process in need of rectification, the courts, whose own process is fundamentally passive and piecemeal, are not the place to seek it.

The fact that courts do not deal with anything resembling a random sample of the work of administrative agencies affects their perspective in another way. They are put in the position of having to prescribe on the basis of very special, indeed often highly atypical, cases—cases that come to decision one at a time. Small wonder that their outlook on the administrative process has tended to become skeptical: they base their inferences on a skewed sample. Courts see the tips of icebergs and the bottoms of barrels. If their perspective is detached, it is not necessarily well informed.

As courts decide only special cases, so do they decide them in a special way. The framing of issues is geared to the litigant and his complaint. The mission of the courts is to set wrongs right. This means that the facts of the single case are highlighted, the facts of all cases slighted. The judicial process has a bias toward the particular and against the recurrent. Judicial standards of relevance are strict. In consequence, everything that can be labeled context or background is relegated to a distant second place in litigation. Elaborate provision is made for proving and weighing the events that give rise to the litigation. Virtually no provision is made for proving anything more general about administrative behavior. Courts are, for example, often ignorant of the scope and nuances of the programs they find themselves judging, and nothing in the rituals of litigation alerts them to this omission. On the contrary, everything pushes them toward a narrow focus on the case before them. It is this feature of adjudication that so often gives outsiders the impression that courts are fascinated by questions that are at best tangential to policy.

The sources of judicial reasoning do, of course, reside in general principles. But those principles are to be found in yet more particular cases—often cases far afield from the administrative action being challenged. The principles tend to cut across the functional divisions along which agencies are organized and policies are formulated. For purposes of decision, reality is organized in terms of categories that seem to make no sense except in court. Thus, perhaps the only thing that social

security recipients, produce handlers, and environmentalists have in common is that all must be accorded hearings by the administrators whose actions affect their interests—though the “actions,” the “effects,” and the “interests” may be completely different in kind. No doubt the propensity of courts to seek their analogies in far-flung places contributes to the development of an integrated jurisprudence, and there is much to be said for it in these terms. But this propensity again detracts from judicial attention to the program being reviewed. It also diminishes the value of the judicial decision as guidance to the administrator as he manages his program.

Judicial decisions thus embrace a limited species of reasoning. Equally important, they are *all reasoning*. The judicial process is tied to reason as the mode of decision and can scarcely be described apart from its resort to reason. Yet there are some questions that lend themselves to other modes of decision—particularly to negotiation and compromise. Sometimes that is the only way to satisfy conflicting interests and keep them from turning against the political system. Sometimes reason provides no clues to an appropriate answer. There may be a shortage of knowledge sufficient to provide answers or a shortage of resources to find the answers at the time that they are needed, at a cost that makes sense. The administrative process has at least its fair share of such problems. Courts are not the place to look for their solution.

Perhaps the ultimate hazard of relying on courts to guard the public interest is that their decisions stand a good chance of being ineffective or effective in ways not intended. Some administrators have been known to act on the view that courts decide only individual cases. A succession of cases repudiating the lawfulness of agency policy brings a series of concessions to individual litigants but no change in policy.<sup>9</sup> Those with the resources, initiative, and foresight to bring suit may force a “policy change” applicable only to their cases.

Even more generous views of the authority of courts to lay down policy can raise problems of uniformity. Decisions of the federal courts, short of the Supreme Court, are binding only in the circuit or district in which the court sits. Although this principle is a useful safeguard against settling difficult policy questions prematurely, it also permits recalcitrant bureaucrats to wait until at least several courts have spoken before bringing general policies into line with court decisions.

Typically, this time is measured in years, and there are some agencies that do not feel obliged to alter their course until the Supreme Court itself has spoken. Given the multitude of issues competing for Supreme Court consideration, this may be never. The fact that courts decide one case at a time, against agencies with varying degrees of responsiveness to judicial decisions, makes it hard for courts to force policy change all by themselves.

There is, however, a problem of impact beyond this. It lies in the propensity of all policies to have unanticipated consequences. In this respect, policies enunciated by courts are no different from the policies that emanate from other decision makers. But the courts are unusually short of machinery to detect and correct unintended consequences after they have occurred. They have no monitoring mechanisms, no inspectors, no grapevines.<sup>10</sup> Quite the opposite: judicial proprieties foster isolation of the decision maker from the environment in which his/her decisions must operate. Unless a litigant provides the courts with feedback about the consequences of their decisions, there is every likelihood that they will pass unnoticed—and unaltered. Here, again, private initiative seems inadequate to protect public interests.

### Conclusion

Different institutions tend to perform well at different kinds of tasks. Each has its own characteristic modes of operating, and these leave an indelible stamp on the matters they touch. In the case of the courts, I have argued, their procedures remain attuned to the disposition of individual controversies. This means that they function on a basis that is too intermittent, too spotty, too partial, too ill-informed for them to have a major constructive impact on administrative performance. They can stop action in progress, they can slow it down, and they can make it public (their exposing function has been too little noted). Perhaps most important, they can bring moral judgment to bear, for moral evaluation is a traditional judicial strength. But courts cannot build alternate structures, for the customary modes of judicial reasoning are not adequate for this. When it comes to framing and modifying programs, administrators are far better situated to see things whole, to obtain, process, and interpret complex or specialized data, to secure expert advice, to sense the need to change course, and to

monitor performance after decision. Courts can limit the discretion of others, but they find it harder to exercise their own discretion where that involves choosing among multiple, competing alternatives.

Although the tendency to resort to the courts for the vindication of broad public interests continues unabated, the impact of judicial intervention on administrative behavior remains uncertain. There has surely been no rush in the federal agencies to embrace judicially enunciated standards of performance beyond what is minimally required by individual decrees. Even then, many government lawyers and program managers have been inclined to read judicial opinions as narrowly as the words would warrant, secure in the knowledge that many things escape the attention of the courts, that judicial correction comes, not every budget session, but every-so-often and, at that, frequently in a different court and usually in a fresh factual setting.

But it is wrong to reckon the benefits and costs only by the effects of judicial action inside the departments and agencies. The growing judicial role has implications for the courts, too. They have so far been remarkably slow to enhance their ability to meet the new burdens they face. It is, as I have suggested, the fact that they continue to face new challenges with the old machinery very much intact that limits their ability to handle complex data, to monitor the consequences of their decrees, or to do the other things that might make them more effective partners in the process of defining the public interest.

Yet even in this failing there is something to be celebrated. The outstanding characteristic of the judicial process remains the way in which it generalizes from the particular instance. So committed are the courts to the individual case that all their machinery is tuned to resolving it. From the standpoint of policy making, this is a weakness. Retooling the judicial process means essentially giving it the capacity to function more systematically in terms of general categories, to draw probabilistic inferences, to forecast effects. Should retooling proceed beyond marginal improvements, it seems highly likely that it will occur at the expense of the commendable attention currently given to the individual case and that courts, in trying to improve other institutions, will become much more like them. The distinctiveness of the judicial process—that which unfits it for much of the important work of government—lies in its

willingness to expend social resources on individual complaints one at a time. That distinctiveness is worth preserving.

### Notes

1. In the second half of this article, I have drawn on my book, *The Courts and Social Policy* (Washington, D.C.:

The Brookings Institution, 1977).

2. For exactly this view, see Frederick F. Blachley and Miriam E. Oatman, "Sabotage of the Administrative Process," *Public Administration Review*, Vol. VI, No. 3 (Summer 1946), pp. 213-227. See also Dwight Waldo, *The Administrative State* (New York: Ronald Press, 1948), chap. 5.
3. Administrative Procedure Act, 10,5 U.S.C. 701.I have omitted references to some other refinements contained in Section 10.

### Announcement

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