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The Administrative Law Agenda for the Next Decade

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THE ADMINISTRATIVE LAW AGENDA
FOR THE NEXT DECADE

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The flyer for this symposium asks: Is administrative law at a crossroads?

My answer might be the same as that of the Chinese monk who was recently asked his opinion of the French Revolution. His response was, "It’s too early to tell." Or I might give vent to bitterness and exclaim that of course administrative law is at a crossroads since the Administrative Conference of the United States (ACUS) is gone, and administrative law will have to fend for itself.

My real, more dispassionate answer, is that as a general supporter and defender of the Administrative Procedure Act† over the years, I believe that we have narrowly averted coming to a crossroads this year. By that I mean, if the major regulatory reform legislation had passed in the form under consideration throughout last year,‡ it would have been a major departure requiring significant changes in the way the government operates, not to mention revision of the administrative law casebooks.

Those bills, however, have not passed. In their place, a more modest Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)§ was enacted on March 29th after a unanimous vote in the Senate.¶ I do not think SBREFA is a landmark, though it will probably cause some consternation at the Environmental Protection Agency (EPA) and the

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Occupational Safety and Health Administration (OSHA), which are singled out for an unprecedented degree of oversight before they may issue rules.\footnote{The law requires that before “covered agencies” may issue any rule having a significant impact on small entities, they must convene a review panel comprised of agency, OMB and SBA officials. The panel must obtain input from representatives of small entities and must file a report with the agency within 60 days that is included in the rulemaking process. Pub. L. No. 104-121, § 244, 1996 U.S.C.C.A.N. (110 Stat.) at 867. The EPA and OSHA are the only covered agencies listed in the Act. \textit{Id.} §244(d). \textit{See generally Thomas O. Sargentich, The Small Business Regulatory Enforcement Fairness Act, 49 ADMIN. L. REV. 123 (1996) (explaining new procedural requirements on afflicted agencies and potential impact of changes).}
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I thought I could best aid this program by putting on my old hat of research director at ACUS and offering a few thoughts as to which issues and topics are most likely to dominate the administrative law agenda in the coming years.

What do downsizing and budget-cutting mean for administrative law generally?\textsuperscript{13} I think they put a new emphasis on several aspects of the regulatory process. On the larger, macro level, there will be a need to prioritize among agency regulatory targets, so I would expect renewed interest in regulatory cost accounting\textsuperscript{14} and in the concept of a national regulatory budget.\textsuperscript{15}

At the program level, there must be much more attention paid to developing alternative approaches to regulation. First, agencies must develop regulations that are more effective, yet less burdensome and more acceptable to the regulated community. In this regard, ACUS did some pioneering work in the area of negotiated rulemaking.\textsuperscript{16} We also looked at the need to take advantage of voluntary industry consensus standards\textsuperscript{17} and the need to achieve international harmonization of regulations.\textsuperscript{18} I think a lot more research is needed in all those areas.

\textsuperscript{13} See generally Richard J. Pierce, Judicial Review of Agency Actions in a Period of Diminishing Agency Resources, 44 ADMIN. L. REV. 1 (1996) (explaining doctrinal implications of present trend to increase agencies' mandates while decreasing funds necessary to fulfill those mandates). See also Mike Causey, Big Shrink, WASH. POST, Feb. 18, 1996, at B2 (reporting fact that federal employment levels are at lowest since Kennedy Administration).


\textsuperscript{17} ACUS Recommendation 78-4: Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1 C.F.R. § 305.78-4 (1993).

Second, there will be a need to develop new approaches to enforcement. At ACUS, we began to look at ways that agencies could leverage their enforcement resources through the use of audited self-regulation.\textsuperscript{19} For example, the Security and Exchange Commission (SEC) relies on intermediaries such as the stock exchanges to do the front-line regulating, while the SEC serves as a backstop and overseer of the way the stock exchanges do the regulating.

We also began to look at what we called cooperative enforcement—reliance on the employees of the regulated entity itself rather than a third-party intermediary.\textsuperscript{20} The best known example of this is the method that has just been adopted in a food safety regulation called Hazard Analysis and Critical Control Point.\textsuperscript{21} It is a real mouthful, but the process focuses on production, not the sampling of the end products. The agency approves the company’s plan, reviews operating records, and verifies that the program is working. It brings to mind President Reagan’s favorite phrase, “trust but verify.”

There is a lot more that needs to be done in this area of alternative enforcement. What about \textit{qui tam} actions under the False Claims Act,\textsuperscript{22} often referred to as the “bounty hunter” provisions?\textsuperscript{23} What about insurance-based regulations or contract-based regulations, or the continued development of systems for trading of pollution credits and other marketable rights?\textsuperscript{24} What about the increasing reliance on waivers and excep-

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\textsuperscript{23} See Robert Vogel, Invasion of the Bounty Hunters, LEGAL TIMES, Nov. 16, 1992, at 13 (discussing whistleblower provision of False Claims Act, allowing individual acting for United States to file suit and share in government’s recovery).

tions? What process is required for waivers? Is it rulemaking or adjudication? This is a neglected area.\textsuperscript{25}

Agencies will have to devote much more attention to prioritization. They will have to develop better ways to decide on the best targets for regulation, for standard setting, and for enforcement. Some pioneering work was done by the EPA Science Advisory Board\textsuperscript{26} in trying to set priorities among all the environmental hazards that EPA might choose.\textsuperscript{27} Such efforts need to be expanded.

Finally, I think that budget stringency will mean that the movement toward alternative dispute resolution (ADR) can only accelerate. Every enforcement case that is mediated saves the government many times the cost of the mediation.\textsuperscript{28} I think the emerging industry of providing ADR to government agencies will certainly grow.

In addition to budget reductions, a second major watch area is the tension between the Legislative and Executive Branches. We have seen a seesawing of control of both the presidency and Congress between the two political parties in the last few years, so it is not surprising that these new tensions have developed.

In the Reagan-Bush years, the Democratic Congress was trying to force a balky executive to enforce regulatory laws. Now, of course, activist executive agencies have their hands tied by Congress, which is using the power of the purse to de-fund agencies.\textsuperscript{29}

New laws will likely have a profound bearing on this tension. One example is SBREFA, which I mentioned earlier.\textsuperscript{30} That law contains another major title that requires agencies to submit all final rules to

\begin{enumerate}
\item See 40 C.F.R. § 1.25(c) (1995) (describing board's responsibility).
\item See \textit{ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT} (1995) (detailing agencies' savings through use of ADR).
\item See supra note 3 and accompanying text.
\end{enumerate}
Congress before they become effective—the constitutional form of the "legislative veto."\textsuperscript{31}

Major rules cannot become effective until they are sent to Congress for sixty days. This gives Congress a chance to trigger a shortcut method of legislating by passing a joint resolution, which then has to be signed by the President, who could disapprove the rule.\textsuperscript{32} This new law raises many questions about how the potential of direct congressional involvement in the rulemaking process will change the dynamics of rulemaking, agency-congressional relations in appropriations and oversight activities, and even how Congress itself operates.

Additionally, a special problem will develop at the end of each Congress because any final rule promulgated in the last sixty "legislative" days of a congressional term must be considered, for the purpose of this new law, as being introduced fifteen days into the subsequent Congress; therefore, it will likely result in a lot of jockeying at the end of each Congress to issue rules before this rather indeterminate deadline takes effect.

Other new laws will also affect this balance. The line-item veto legislation\textsuperscript{34} is scheduled to be signed by President Clinton today.\textsuperscript{35}

Also, there is the Congressional Accountability Act,\textsuperscript{36} the first law enacted by the 104th Congress, which applies many regulatory and workplace laws to the Congress.


\textsuperscript{32} The procedure is designed to avoid the constitutional problems that led to the demise of the earlier version of the legislative veto. See INS v. Chadha, 462 U.S. 919 (1983) (holding House veto of Attorney General's decision not to deport alien unconstitutional because legislative character of vote required passage by majority of both houses of Congress and presentation to President).

\textsuperscript{33} The law refers to 60 "session" days in the Senate and 60 "legislative" days in the House of Representatives. See Daniel Cohen & Peter L. Strauss, Congressional Review of Agency Regulations, 49 ADMIN. L. REV. 95 (1996).


\textsuperscript{35} The line-item veto allows the President to weed out "wasteful pork-barrel spending" in an otherwise good piece of legislation. It gives the President the authority to veto individual spending items and tax breaks in appropriations bills. The line-item veto was passed by Congress on March 28, 1996, and signed into law by the President on April 9, 1996. The Pork Debate, WASH. POST, August 13, 1996, at A10. A federal judge has since dismissed a legal challenge to the line-item veto on the basis of a lack of standing. Ernie Freda, On Washington: Court Refuses to Throw Out Line-Item Veto, ATLANTA J. AND CONST., July 4, 1996, at 16A.

The third major area, of course, is regulatory reform. Major efforts at regulatory reform, like cicadas, seem to come in thirteen-year cycles, so perhaps there will be a pause in present action to allow reflection on some of the major unpassed aspects of this year's bills. For example, there has been a great deal of experimentation in the last few administrations on reviewing existing regulations. We should stop and see what we have learned about that process before legislating it in stone.

The same goes for cost-benefit analysis and risk analysis. We simply do not know enough to require new across-the-board requirements in these areas. There are currently not enough practitioners of risk assessment in the city to do everything required by the pending bills. A better approach would be to find some pilot programs at OSHA or the EPA to test these ideas.

A fourth major area on everyone's list, I suspect, is the information revolution. As the Internet washes over us all, what will this mean for agency proceedings? Electronic rulemaking has already begun. Will we shortly be seeing global rulemaking complete with chat rooms and word searches of all records?

Agencies are beginning to computerize their documents as well. What new problems likely will be caused by this? Issues include security, confidentiality, hacking, authentication, need for backups, and access to hard copies of documents for those who do not know how to get onto the information highway. Moreover, how does our increasing reliance on e-
mail fit into our conceptions of the Freedom of Information Act (FOIA), the Privacy Act, not to mention, of course, the Paperwork Reduction Act? This area is going to require some enlightened and balanced policymaking mixed with technical expertise. We all know that lawyers and techies often do not get along; however, this is one area where communication across the professions is necessary.

A fifth major area is federalism, what one might today call the "devolution derby." The movement to devolve federal responsibility onto state and local governments has potentially profound implications for both federal and state administrative law. If federally funded programs, such as Medicaid, Medicare, public housing, supplemental security income, food stamps, and welfare are all turned into block grants and given over to the states, what should the federal role be? Will the states, with their fifty different administrative procedure acts, be able to handle the influx of rulemaking and adjudication responsibilities that would suddenly hit them? I think that state administrative law gets short shrift in most law schools and in the bar. That will have to change if these laws are enacted; therefore, I predict increased emphasis on state and local administrative law.

Sixth, with the downsizing and retrenchment in the federal government, I also foresee a renewed emphasis on the structures of administrative agencies. Is the multi-member board or commission an expensive anachronism? Is there such a thing as an independent agency, or should there be? Why does Congress create three-member agencies, or even worse, six-member commissions, like the Federal Election Commission and the International Trade Commission, with all sorts of opportunities for paralysis? Does it really make any difference if the EPA becomes a Cabinet department? What about all the hybrids, such as government-


42. 5 U.S.C. § 552a (1994).


44. There is one exception to the typical federal focus in administrative law taught in law schools. MICHAEL ASIMOW & ARTHUR E. BONFIELD, STATE AND FEDERAL ADMINISTRATIVE LAW (West 1989 & Supp. 1993).
sponsored enterprises, government corporations, and administrative quasi-courts, like the Occupational Safety and Health Review Commission, that are split off from their rulemaking agencies? And what about all the independent power centers developing within agencies: presiden tally-appointed general counsels, division heads, inspectors general, chief financial officers, and so on?

My last major issue is administrative adjudication. I mentioned expensive anachronisms. Sometimes I think that agencies believe that administrative law judges (ALJs) fit that description.

I think the state of administrative adjudication is something that also needs to be addressed again. It was not so long ago that then-Professor Antonin Scalia began an article by saying "the subject of administrative hearing officers is once again on the agenda of federal regulatory reform." That was 1979, just before the regulatory reform bills of that era fell short of passage.

Today Congress seems little concerned about the state of administrative adjudication even though agencies seem to be using all sorts of non-ALJ

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46. One of the first government corporations was created during the Depression; an independent government corporation called the Federal Surplus Relief Corporation, which distributed surplus food that would otherwise go to waste, was created out of the Agricultural Adjustment Administration. Ronen Shamir, The Relevance of Moral Agendas, 109 HARV. L. REV. 846, 850 (1996). See also Aspen Law and Business, Witnesses Voice Concerns with Proposals for Revamped PTO, 8 J. PROPRIETARY RTS. 25 (1996) (discussing proposal to create wholly-owned government corporation outside Commerce Department).

47. The Occupational Health and Safety Administration (OSHA) is an executive agency in the Department of Labor that promulgates and enforces health and safety standards. The purpose of OSHA is "to assure to every working man and woman in the Nation safe and healthful working conditions . . ." 29 U.S.C. § 651(b) (1994). To carry out OSHA's purpose, the Secretary of Labor has the power to set mandatory health and occupational standards, as well as to enforce the implementation of these standards via inspections, citations, and civil or criminal penalties. Id. §§ 651(b)(3), 657-59, 666. The act established the Occupational Health and Safety Review Commission as an independent agency that would adjudicate enforcement actions brought by OSHA. Id. §§ 651(b)(3), 661. In 1991, the Supreme Court in Martin v. OSHRC, 499 U.S. 144, referred to the division of enforcement and interpretive powers within a regulatory scheme as a split-enforcement structure.


49. See 31 U.S.C. §§ 901, 903 (1994) (creating position of chief financial officer in all departments and other enumerated agencies.)

adjudicators instead of ALJs. In fact, other than the huge number of ALJs in the Social Security Administration, the numbers at the other agencies have fallen from 410 in 1978 to 273 at present. Meanwhile, agencies are using thousands of other administrative hearing officers, administrative judges, immigration judges, asylum officers, et cetera. In my opinion, agencies have come to see ALJs as too expensive, too difficult to appoint, and too hard to manage; therefore, they avoid using them. I think this is a shame because it undermines the consistency, uniformity, and independent adjudicative values that are at the heart of the APA.

There are also some other adjudication issues. Is the ALJ corps bill, a hardy perennial for fifteen years, dead? Is that a good thing or not? How should we handle high-volume benefits programs such as the Social Security Disability Program, which now has upwards of 500,000 hearings a year with no sign of slowing down, or immigration adjudication, which is burgeoning at a very fast rate? Which cases are best assigned to agencies and which are best assigned to Article III courts or the more specialized Article I courts? Is it time that the APA included a section on informal adjudication? Can administrative tribunals handle mass tort

51. As of March 1996, there were 1,060 administrative law judges in the Social Security Administration (figures supplied to Professor Lubbers by Office of Personnel Management on March 1, 1996).
54. Lubbers, supra note 52, at 72-74.
55. Id.
56. S. 104-486, H.R. 104-1802, 104th Cong. (1995). “This legislation would extract the ALJs out of their employing agencies and locate them in a new agency that would be headed by a presidentially appointed Chief ALJ . . . [and an agency] that need[s] an ALJ would have one assigned by the Corps.” Lubbers, supra note 52, at 74-75. The proposal was first introduced in 1980, see Jeffrey S. Lubbers, A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level, 65 JUDICATURE 266, 273 (1981).
These are all questions that I think will be on the agenda in coming years.

In closing, and forgive my obvious bias on this issue, let me stress the need for a center of research and scholarship on administrative law in the federal government. Now that ACUS is in the "former agency" section of the U.S. Government Manual, the government lacks a locus of expertise on administrative procedure. Of course, pockets of expertise remain, especially in the Justice Department and the Office of Management and Budget's Office of Information and Regulatory Affairs. It is true, for example, that the Department of Justice has units on ADR and on FOIA. The Federal Mediation and Conciliation Service has taken over some of ACUS's activities on ADR. The Office of Personnel Management continues to oversee the ALJ program. But there is no place within the government for concentrated research, consensus building, and developing objective critiques of presidential and congressional initiatives. I think the future of administrative law would be better if such a place were reestablished.