Wednesday, October 27
McGowan Theatre
National Archives

TRENDS IN FEDERAL RULEMAKING AND ADMINISTRATIVE LAW

It is an honor to be here to celebrate the enactment of the Federal Register Act 75 years ago. I plan this afternoon to both describe the work of the Administrative Conference, as it begins its new life, and to outline the role that ACUS will play in helping agencies use technology to make the rulemaking process more fair, more efficient, and more open to public participation.

I. THE FEDERAL REGISTER AND THE RULEMAKING PROCESS

The Federal Register was the seminal event in the emergence of the modern administrative state. Enacted in the blitz of New Deal regulations, and spurred on by the government's accidental revocation of the unpublished order in the Panama Refining case, the Act was a recognition, really an admonishment to the Roosevelt Administration, that there can be no private law or regulations in a democratic society. In the Committee Report to the Federal Register Act, it was stated: "In the first 15 months after March 4, 1933, the President alone issued 674 Executive Orders, aggregating approximately 1400 pages. This was a greater volume than that of the preceding four years and nearly six times as great as that of the 39 years from 1862 to 1900."

That was a staggering output from FDR's New Deal. By comparison, President Obama has issued 49 Executive orders in his first 15 months. The

decision to consolidate the publication of the government's official action in the Federal Register passed both houses of Congress by voice-vote and was implemented in just nine months. While collecting and publishing the law was a beginning step, its consequences permitted the involvement of the public in the processes of government. The Freedom of Information Act, the Federal Advisory Committee Act and the Sunshine Act all grew out of this basic proposition—that the public has a right to know about the work of its government. That point has enduring relevance to the Web 2.0 technology revolution we are seeing today.

Congress would continue its regulation of the administrative state after the Federal Register Act was passed. Due to World War II, it would take 11 years before the next great document, the Administrative Procedure Act, was signed into law by President Truman on June 11, 1946.

The centerpiece of the APA was the provision for informal rulemaking, a process that Professor K.C. Davis has called one of the great inventions of modern government. [Present at the Creation, 38 Ad. L. Rev 520 (1986) (remarks of K.C. Davis).] He said this because, unlike the legislative process which it resembled and derived from, rulemaking required notice, public comment and reason-based decisionmaking. This system of informal rulemaking was well established on a paper basis by the 1950s. Cases like United States v. Storer Broadcasting, 351 U.S. 192 (1956), defined "hearing" in flexible terms, thereby encouraging agencies to proceed by rule rather than through adjudication. In the ensuing decades, rulemaking became the preferred process for agency decision-making. It offered some insulation from the politics of the executive and legislative branches, while being subjected to limited second-guessing by the

judiciary. Of course, the rulemaking process continues to evolve today. Detecting, let alone predicting, trends in this dynamic field is not easy. But it is not hard to conclude that technology will affect rulemaking in profound ways. One way, potentially, is that the rulemaking record will be rethought which could affect the role of the courts on review.

Let me explain. My first assignment as a consultant to the Conference was some 35 years ago (if you can believe it!) and the issue was how to define the "record" in rulemaking. Informal rulemaking had been essentially a legislative or non-record process, unlike formal rulemaking where the record was established much like as in adjudication. My report led to ACUS Recommendation 74-4, which established a "record" for judicial review of informal rulemaking, which included the notice, the rule, all comments submitted and the open-ended category of anything else the agency proffered for review. Once this record was established, the courts could move from legislative deference-type review to evaluation under the arbitrary and capricious or substantial evidence review standards. In the ensuing decade, rules were remanded with increasing frequency as courts began to look more closely at the record supporting the factual basis for agency rules. Rules became more contested as a result and the Supreme Court, concerned about the allocation of authority between the executive and judicial branches, ultimately called a halt to heightened review in cases like Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) and Chevron v. NRDC, 467 U.S. 837 (1984).

A new regime of rulemaking formation that allows for comments and discussion to be submitted electronically will make agencies more informed, and perhaps even more expert. But it will also challenge the

idea of a record worked out by the Conference in 1974. What does a Court do with a "record" that may include thousands of megabytes of electronic comments and submissions rather than a fixed set of papers? Do the concepts of "hard look" review and "logical outgrowth," the doctrine limiting the degree that a proposed rule can depart from the final rule, still work when the record could extend well beyond the confines of the paper comment process. It could be that both agencies and courts will have to rely on the political branch implications of Chevron even more in the future in order to accommodate this expanded record. But while the review and record collection process will be strained in the world of new media, the public will be able to participate in ways never imagined in 1946. Rather than stylized and often prepackaged written submissions unloaded at the end of the comment period, we can now envision a constant flow of information submitted throughout the comment period, or even before it begins, that permits interaction between participants and regulators alike. In addition, negotiated rulemaking, a Conference sponsored statutory initiative, can be an even more valuable asset in the world of rulemaking 2.0 which can dramatically expand the number of negotiators.

The genius of the APA has been its flexibility. This venerable statute has accommodated a broad variety of agency decision processes and now stands ready to absorb vast technological changes. E-Rulemaking has its own architecture and records system (the Federal Document Management System). A committee on the Future of Federal e-Rulemaking, sponsored by the ABA Administrative Law Section, reported in 2008 on the goals and challenges of this new process. ACUS may suggest new directions as well. Surely one thing is clear: the brave new world of technology must be

adjusted to at warp speed, if we are to take full advantage of it. So for me, technology in rulemaking with its crowd sourcing potential, is not just a trend, but a mega trend that will make rulemaking an even more significant tool of democratic governance in the future.

II. THE MANDATE AND ROLE OF ACUS

ACUS was created in 1964 to improve the fairness and effectiveness of the rulemaking, adjudication, licensing, and investigative functions of federal agencies. Making the rulemaking process more accessible to public engagement has been a long-time priority for the Conference, as this list shows. One of our first recommendations (68-5) directed federal agencies to engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views concerning rulemaking that may affect them substantially. Four years later, DoT called upon ACUS's third chairman, Antonin Scalia, to help them increase public participation in the rulemaking process. (Justice Scalia recalled this experience by the way, when he advocated for our reauthorization before the House Judiciary Committee in 2004. Justice Breyer, testifying at the same hearing, stated complete agreement with his colleague, Justice Scalia, and urged on Congress the many virtues of the then somnolent Conference.)

The Justices and other advocates from across the political spectrum caused Congress to reauthorize ACUS, which given specific new mandates,

including the promotion of "more effective public participation and efficiency in the rulemaking process."

New technologies, if properly used, should make public participation in rulemaking "more effective" as our statutory mandate requires. Still, questions remain for agencies to consider: Should a second or third round of comments be arranged? Should "chat rooms" be established or encouraged as part of the process? How will sorting or data mining mechanisms be employed to prevent rulemaking submissions from overwhelming the agency decision process? And, harking back to Recommendation 68-5, should agencies engage in efforts to ascertain directly information from those outside the process, so that the use of technology will not deprive the disadvantaged from participating effectively. This is a danger that we are duty bound to address in order to ensure that, in our enthusiasm for the world of new media, we diminish and not aggravate inequalities that stem from differential access to information. In *Digital Divide*, Pippa Norris documents the widespread concern that the internet has the unintended effect of exacerbating inequalities between the information rich and poor. We must ensure that within our information rich society there are no poor and that all views are seen, heard, or counted.

I tend to be a cyber-optimist precisely because new technology produces new ways to solve old problems. Consider *America Speaks*, a non-partisan, non-profit organization which, after Katrina, brought together poor and dispossessed citizens from 21 locations outside New Orleans to participate in the creation of a unified plan for that beleaguered city.

Ultimately, a reengineered, electronic system of rulemaking should increase participation and the public's understanding of the law. The Conference will play an essential role in surmounting the logistical challenges that agencies now face in this regard. We can develop a better understanding of how this "new transparency" may alter rulemaking agencies' traditional relationship to Congress and the Executive as well as the Courts on review.

My favorite idea from the Wiki generation is the notion that the smartest person is not in the room (or presumably in the agencies). But if the agencies can find smart ideas from the crowd and incorporate them into their decision-making, the public (whose ideas these are) will be benefitted—assuming, of course, that the definition of public includes those whose technological access is limited or nonexistent. The needs and interests of all citizens must remain an essential part of the process of democratic policymaking.

NOT DIGITIZATION, BUT TRANSFORMATION

The launch of Federal Register 2.0 – the online version of the Federal Register - is another seminal event in the administration of our nation's laws. The online edition is not a mere digitization of the paper volumes, but a transforming tool that enables members of the public to be informed of particular actions of government that most interest them.

This extraordinary accomplishment will, once again, kindle a larger and far more complex set of changes in the administrative processes that the Federal Register records. Ultimately, there may be one master

electronic document recording a rulemaking process from beginning to end: from the enabling statutes, through the agency's notice, the public's comments, the final agency action, submission to the Federal Registrar, compliance with the Congressional Review Act, and codification into the Code of Federal Regulations.

In some ways, Federal Register 2.0 is part of a larger Government 2.0 that is considering the possibilities of making all legal materials, federal, state, and local, open sourced and available on line. Carl Malamud, now a public member of our new Conference, and others have inspired this effort with the Law.Gov concept. The transparency and Data.Gov movement initiated by President Obama also drives open-source developments. What the Federal Register at 75 years has become is a way to view this larger world. The Administrative Conference is fortunate to be part of these fascinating developments. We are led by a Council of astute and dedicated public officials and private citizens. We intend to participate fully in providing, in President Obama's words, "a government that works better" for all Americans.

I would be pleased to take questions.