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MEMORANDUM FOR THE DEPUTY DIRECTOR

FROM: William M. Nichols

SUBJECT: EOP Involvement in Agency Rulemaking

The recent increased concern within the Executive Office of the President (EOP) about major and potentially costly regulations and the reform of the regulatory process in general, has focused attention on the authority of the President and his advisers and assistants to involve themselves in agency rulemaking. The activities of members of the Council of Economic Advisers (CEA) attracted considerable attention during the promulgation of the cotton dust regulations by the Department of Labor. Recently, a suit was filed (and dismissed as premature) against CEA and Secretary Andrus pertaining to communications between CEA and Interior on the strip mining regulations which will be issued by the Office of Surface Mining. Other important rulemakings are imminent. One proposed element in a strategy for regulatory reform is communication by EOP officials with the agencies to ensure that a full range of options (including the most cost effective) are presented in the record of the rulemaking and that the options are appropriately evaluated. In part, this is a principal purpose of the Regulatory Analysis Review Group (RARG) process. There are, however, limits to and risks attendant to involvement by EOP officials in agency rulemaking.

In determining the standards and procedures for formulating agency rules, both the statute authorizing the rulemaking and the Administrative Procedure Act (the "APA") must be examined. Unless the authorizing statute contains different provisions, the APA will govern. Basically, the APA sets forth procedures for two different types of rulemaking--formal and informal. These procedures may be supplemented by each agency.

Formal Rulemaking

The formal rulemaking procedures apply when a statute expressly requires that the rule "... be made on the record after the opportunity for an agency hearing." In other words, formal

rulemaking procedures apply only when a statute, such as the Clean Air Act, expressly requires a hearing and a decision based on the record generated. Formal rulemaking requires that the record be the exclusive basis of the rulemaking, and it must show the basis for each finding, decision and conclusion reached by the agency on all matters of fact and agency discretion. This formal record is also the exclusive basis for judicial review of the rulemaking. Formal rulemaking is analogous to "trial type" situations, and is most often required in quasi-judicial actions.

In formal rulemaking, ex parte communications, i.e., communications by an agency which are not made on the public record following notice to the parties, are prohibited by statute and, if made, are required to be placed on the record. Ex parte communications may constitute grounds for overturning the rules about which they were made.

Informal Rulemaking

The bulk of agency rulemaking, however, takes place under informal rulemaking procedures. These procedures require a notice of proposed rulemaking in the Federal Register at least 30 days in advance of the proposed effective date of the rule; an opportunity for interested persons to submit written data, views, or arguments on the proposed rule; and an incorporation of "a concise general statement of their basis and purpose" into the final rules. Under these procedures, neither the agency nor the courts upon review are limited to a consideration of the "record". The statement of basis and purpose that must be incorporated into the final rule is the principal concern of a court upon review. Informal rulemaking is more analogous to "legislative type" activities, and is used to promulgate standards of general applicability and future effect, rather than to make decisions pertaining to particular parties and specific events as in formal rulemaking. There are no ex parte rules established by statute for informal rulemaking.

Ex Parte Communication in the Courts

Especially within the last few years, several lower Federal courts--most notably the United States Court of Appeals for the District of Columbia--have been requiring more stringent procedures for informal rulemaking than expressly set forth in the APA. To increase the fairness of the proceedings to the parties (by prohibiting ex parte communications) and to permit more meaningful judicial review (by formalizing

a "record"), the District Circuit has held that the large number of ex parte communications in an informal rulemaking proceeding conducted by the FCC was so extreme as to void the rule (the Home Box Office case). The Supreme Court, on the other hand, has disapproved the judicial imposition of additional procedures admonishing the lower courts that this is the prerogative of the agencies (the Vermont Yankee case). The District Circuit has, nonetheless, continued to require additional procedures on the grounds that they are necessary in order to create a "record".

The case law in this area is evolving and there are few established principles. The judicial decisions rendered have been primarily from a single circuit--the District of Columbia--and these decisions have been placed in doubt by the Supreme Court.

The following points, however, are not in dispute:

1. In formal rulemaking, ex parte communications outside of the agency are prohibited. No court, however, has yet been presented with the question of whether communications by the President would be subject to the ex parte rules.

2. There is no prohibition upon communications with an agency during the public comment period. The agency may, however, be required by its own procedures, or may otherwise decide to summarize any such communication and place it in the record. It may also extend the public comment period to permit consideration of any such communication.

3. It is most unlikely that a court would seek to enjoin communications by the President with the head of an agency. However, it is possible that some of these communications could be the basis for overturning the rules which the communication concerned.

4. It is likely that courts would look askance at communications by the President's advisers who were merely "conduits" for the views of interested non-governmental personnel.

5. It is likely that courts would look with disfavor upon communications by Presidential assistants which prove to be the basis for agency rulemaking decisions, if such basis is not supported by the record and about which there was not an opportunity for public comment.

One of the unresolved questions is whether, and if so when, communications by officials in the EOP to agency officials concerning rulemaking for which the public comment period has expired may be the basis for overturning those rules.

The Justice Department Guidance

Justice has issued guidance concerning the communications of CEA with Interior on the strip mining regulations. That guidance concluded that "... there is no prohibition against communications within the Executive branch after the close of the comment period of these proposed rules." Because of the recent lower court decisions disapproving ex parte communications from interested parties outside the Executive branch after the close of the comment period, however, Justice advised that those officials of the Executive branch who communicate with Interior on the rules should avoid being a "conduit" for ex parte communications from persons outside the Executive branch.

The Justice guidance for involvement in rulemaking of the same nature as the strip mining regulations would--

1. require a cataloging of the content of communications that Executive branch officials (who intend to communicate with agency officials engaged in a rulemaking) have with persons outside the Executive branch interested in that rulemaking;

2. require that this catalog be placed on the agency record of rulemaking;

3. require an opportunity for public comment on the catalog submitted;

4. preclude communications after the close of the public comment period between the agency decisionmakers and officials who have not made and filed such a catalog;

5. preclude communications with interested non-government persons after the close of the public comment period by agency decisionmakers and Executive branch officials who have made and filed a catalog;

6. permit communications after the close of the public comment period between the agency decisionmakers and Executive branch officials who have made and filed the catalog without further cataloging of these intra-governmental communications; and

7. require a full explanation by the agency of any reliance upon the communications with the Executive branch officials.

Limitations of the Justice Guidance

While these are the guidelines applicable to the strip mining regulations, they are not applicable for involvement in all rulemaking activities. For example, they would apply only to informal rulemaking and they do not apply to formal rulemaking. Furthermore, there are rulemakings which involve competing private claims to a valuable privilege, such as a license to operate a television station in a locality. These guidelines do not apply to these quasi-adjudicatory rulemakings for which the ex parte rules are similar to those which apply in formal rulemaking.

These guidelines would also not apply if contrary to agency rulemaking procedures. In other words, if an agency has a regulation which precludes all ex parte communications from any person after the close of the public comment period, these regulations must be followed.

The statutory procedures which authorize the issuance of a rule may also frustrate the type of communication which the Justice guidance permits. For example, the approval by the Administrator of the Environmental Protection Agency (EPA) of State plans to implement the national ambient air quality standards prescribed by section 110(a)(2) of the Clean Air Act, cannot be based upon the economic or technological feasibility of the plan because that Act requires a plan to be approved if it meets eight specific criteria, none of which permits economic or technological considerations. Although the ex parte guidance of Justice might permit communications emphasizing economic or technological considerations the effect of the communications in this instance would be negligible.

Similarly, while the ex parte guidance of Justice might apply, some statutes require that the rules be issued under criteria applied "in the judgment of" the decisionmaker. For example, section 157 of the Clean Air Act Amendments of 1977, provides that the Administrator of EPA, following the submission of certain reports, the consideration of certain studies and consultation with certain officials, "... shall propose regulations for the control of any substance ... which in his judgment may reasonably be anticipated to affect the stratosphere, especially ozone in the stratosphere, if such effect in the stratosphere may reasonably be anticipated to endanger public health or welfare. Such regulations shall take into account the feasibility and the costs of achieving such control." (Emphasis added.)

Regardless of material in the record or the communications received from officials in the EOP, this standard is one which requires the personal judgment of the Administrator. If a court upon review of the regulations determines that the findings were not the judgment of the Administrator, the rules may be overturned.

Conclusion

The guidance from the Justice Department is just that--guidance. It is not, and does not purport to be, a legal analysis of the law on ex parte communications by the Executive in informal rulemaking. With an issue as unsettled as this, legal predictions are at best hazardous, and guidance which permits the impact desired while reducing the prospects of judicial disfavor is probably more useful, and maybe all that is possible. At this time, the Justice guidance on the strip mining regulations is about all there is, and, if it permits the objectives of the EOP involvement, is a good point of departure. It is important, however, that each proposed involvement in an agency rulemaking be carefully examined beforehand to understand the peculiar limits or opportunities that a particular rulemaking permits.

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