Back-Door Rulemaking: A View from the CPSC

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THREE YEARS AGO in these pages Antonin Scalia, now a U.S. appeals court judge, warned that the successes of the regulatory reform movement would have an unexpected and unwelcome consequence. As Congress and the White House redouble their efforts to control rulemaking by regulatory agencies, he said, they may simply be "squeezing the balloon of bureaucratic arbitrariness at one point, only to have it pop out somewhere else." The "recent encumberment of rulemaking" with extra procedural safeguards, he predicted, "will produce a renaissance of the previously favored mode of making law and policy—a movement back to basics, to adjudication."

In the years since then, there have emerged visible signs that the balloon is indeed popping out elsewhere—that there is a trend toward regulation by adjudication. Agencies are accomplishing more of their policy goals through the case-by-case proceedings in which they grant licenses, order product recalls, set back-pay awards, or otherwise apply the law to individual parties. The Consumer Product Safety Commission (CPSC) is a good example. While easing itself out of rulemaking, it is learning to use its adjudicatory powers to achieve the same results.

If this trend continues, the consequences for regulatory reform could be immense. Congress and the White House may find that they have been setting up checkpoints on an increasingly lonely road. They may, indeed, end up in full control of a procedural mechanism that has been abandoned by creative regulatory bureaucracies.

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CPSC Rulemaking Bogs Down

The Consumer Product Safety Act of 1973 originally envisioned that rulemaking, which applies to products generically, would be the commission's primary tool for regulating consumer safety. It soon became clear, however, that the commission was not going to produce as many rules as had been expected. The first chairman of the CPSC forecast that the commission would enact twenty mandatory safety standards a year. The commission itself promised to initiate forty standard-setting proceedings in 1975 alone. The plan was to promulgate 100 mandatory product safety standards between

1977 and 1982. By 1978 the agency actually had promulgated only three.*

Disenchanted with this performance, Congress at first took steps to make rulemaking easier. The 1978 amendments to the Consumer Product Safety Act relaxed unrealistically tight procedural deadlines as well as a cumbersome requirement that had forced the commission to rely on outside groups' offers to develop proposed standards.

Three years later, however, Congress reversed itself in the Product Safety Act Amendments of 1981. These amendments hem in CPSC rulemaking in several ways. First, they add an extra initial step to the agency's rulemaking process in the form of an "advance notice of proposed rulemaking." Second, paralleling a key provision of Executive Order 12991, they require the commission to analyze the costs and benefits of its proposals, both at the beginning of the rulemaking procedure and later after all the evidence has been gathered. These analyses must also identify the parties "likely to receive the benefits and bear the costs" of the rule and explain why alternatives were not adopted.

Third, the 1981 amendments restrict rulemaking in a number of more specific ways. The commission must now defer to a voluntary standard being adopted by an industry, for instance, if that standard is likely to reduce the risk adequately. Moreover, the commission may not issue a rule on a chronic health hazard until an expert advisory panel nominated by the National Academy of Sciences has made a report on the available evidence.

In addition, rulemaking at the CPSC is subject to a variety of constraints that apply to other agencies as well. For example, the commission must analyze the effects of its rulemakings (but not adjudications) on small business (under the Regulatory Flexibility Act of 1980) and the environment (under the National Environmental Policy Act of 1969).

All these extra requirements make rulemaking an even less attractive pursuit than it was in the 1970s. Indeed, the informal consensus in the agency is that rulemaking is dead; it simply takes too much effort. The CPSC has started only one substantive rulemaking since 1981, and it later withdrew that one in favor of a voluntary standard. No others appear to be coming along. This is not to suggest that the agency is inactive, only that its activity is taking a different form. The balloon has popped out elsewhere—in adjudication.

Regulating Children's Products

The trend toward adjudication is reflected in the commission's growing tendency to transfer products from its jurisdiction under the Hazardous Substances Act, which generally requires it to conduct a rulemaking before banning a product or ordering a recall remedy, to the Product Safety Act, which allows it (in addition) to proceed by adjudication in many of the same circumstances. The adjudicatory powers conferred by the Product Safety Act are strong. The commission can demand the recall of a product, including its replacement or refund, on the ground that it suffers from some sort of "defect"—a term the act does not define.

Initially the commission could transfer a product to the Product Safety Act only if the regulatory powers available under the Hazardous Substances Act were "inadequate to eliminate or reduce the hazard to a sufficient extent." However, finding the rulemaking procedures of the Hazardous Substances Act to be onerous—a rulemaking to set standards for fireworks dragged on for three years—the commission requested an easing of the transfer provision. Congress complied in 1976, requiring henceforth only that the transfer be in the "public interest"—a term it did not define and whose interpretation has rested with the commission itself. This virtually unlimited transfer power allows the commission in practice to use the strong adjudicatory powers of the Product Safety Act against the whole range of consumer products in its jurisdiction.

An example of the new trend is the regulation of toys and children's products. Since 1981 the commission has transferred five separate children's products from the Hazardous Substances Act to the Product Safety Act for litigatory action: (1) stuffed toys with looped string

*The total has now risen to six, but major portions of two have been struck down by the courts. The commission also has imposed two labeling requirements and six product bans under the Product Safety Act, one of which was overturned by the courts. The commission can claim credit for five more rules under the Federal Hazardous Substances Act and requirements for child resistant caps for several products under the Poison Prevention Packaging Act.

that posed a strangulation hazard; (2) squeeze toys that could become impacted in the throat; (3) mesh-sided cribs that presented a suffocation hazard; (4) expandable enclosures ("corrals") in which children could be strangled; and (5) crib hardware that, if missing or not functioning properly, could allow cribs to collapse. In the case of mesh-sided cribs and expandable enclosures, the commission filed complaints naming as defendants every manufacturer of the type of product in question, thus using adjudication in the way that most closely mimics rulemaking.

Each of the other children's product cases similarly addresses not a hazard peculiar to one manufacturer, but an industry-wide generic product condition—the sort of situation that the commission has traditionally and appropriately addressed by rulemaking. For example, when the commission learned in 1981 that children could choke on some squeeze toys, it moved to recall not just toys of the specific manufacturers or designs that had been implicated, but all toys of a general description. Likewise, when the commission recently moved to regulate crib hardware, using the threat of its adjudicatory powers, its concerns had to do with general design and material standards, not defects specific to one manufacturer.

The reason all five of the children's products were transferred to the Product Safety Act was to allow adjudication. As the CPSC noted in its *Federal Register* notice covering the squeeze toy transfer, corrective action would be available under the Hazardous Substances Act "only if the commission had first issued a rule under provisions of [that act]." By contrast, under the Product Safety Act "no requirement for rulemaking would exist in order to invoke the [recall] provisions . . . of that Act." The proposed Child Safety Act of 1984, currently pending before Congress, would add adjudicatory authority to the Hazardous Substances Act, thereby eliminating the need to transfer.

Problems with Adjudication

In principle, both rulemaking and adjudication provide procedural safeguards for affected parties—rulemaking through its notice and comment procedures, adjudication through a hearing before an administrative law judge. Both also provide for full consideration of all relevant information. But the practical differences are important.

In a rulemaking, the agency notifies the public of its interest in a particular safety hazard and then gathers evidence to enable it to assess the severity of the hazard and determine the appropriate remedy. All interested parties —regulators, consumers, and producers—help create the body of evidence on which the regulatory decision will be based. The procedure is designed, as the Supreme Court noted fifteen years ago, "to assure fairness and mature consideration of rules of general application" (*National Labor Relations Board* v. *Wyman-Gordon Co.*, 1969). Rulemaking is also prospective in its scope and its remedies: targets are given fair warning that the law is changing.

In an adjudication, the agency files an administrative complaint against a firm or firms. Other affected parties, if they learn of the litigation at all, can intervene (an option that is limited to parties materially and adversely affected) or file an amicus curiae brief. This does not provide as much scope for complicated technical comments or input from the general public as does a rulemaking procedure. Adjudication is also, by nature, retrospective—that is, it penalizes a firm for its conduct during a period before the agency acted, conduct that in many cases was legal at the time.

Although the target of an adjudicatory complaint enjoys due process protection (since it does get its day in court), in other ways it comes off worse than it would in a rulemaking. If it can afford to contest the charge at all, it may still find its reputation badly damaged. The closer the agency gets to issuing a complaint or taking the case to trial, the more likely that the toy manufacturer, for example, will read accusations in the press that its products are "child-killers." It is no wonder that more than 98 percent of the CPSC staff's preliminary allegations of substantial product hazards are settled "voluntarily" before a complaint is issued.

Consider that last fact. One of the features of adjudicatory actions at the CPSC is that they are almost always settled through negotiation —which, of course, has many advantages over no-holds-barred litigation in court. Note, however, that although the full commission must approve a decision to proceed with litigation, it does not pass on the prior staff decision to

threaten litigation. Yet such a threat is usually all that is needed to produce an industry-wide standard. If the staff presents as a *fait accompli* a settlement to which manufacturers have already consented, an overworked commission is likely to go along.

Thus, negotiation may allow the commission's legal staff to bypass effective review by the commission and all the restrictions on rulemaking as well. This can have important consequences. For example, the 1981 amendments to the Product Safety Act call on the CPSC to pursue "performance" rather than "engineering" standards. But a negotiated settlement can easily and legally take the form of an engineering standard. This happened recently when the commission negotiated an engineering fix with a group of cabinet heater manufacturers to settle a product defect allegation.

Another problem is that manufacturers may be uncertain as to the scope of the implicit product standard embodied in the negotiated settlement or litigated outcome. The Supreme Court recognized in *Wyman-Gordon* that adjudicated cases generally provide a

> guide to action that the agency may be expected to take in future cases. . . . But this is far from saying . . . that commands, decisions, or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public.

What if a manufacturer not included in the litigation refuses to accept the implicit product standard, perhaps on the view that it has invented a safe version of the generically banned product? The only way for the agency to resolve the issue is to file a separate complaint. Note, however, that the firm that agreed to the original negotiated settlement is the only one that may not try to market such an invention, a fact that might subject it to a distinct competitive disadvantage.

The greater flexibility of "adjudicative rulemaking" from the agency's standpoint can create even more uncertainty about the state of the law. Agencies have considerable latitude to disregard their prior adjudicative decisions, whereas they are legally forbidden to depart from their regulations. If a safety standard is set by rulemaking, the agency may subsequently change it only by a new rulemaking, with much advance warning. But if the standard is set by adjudication, the agency has more alternatives. It can attempt to expand the standard by filing charges against some manufacturer which thought it had been complying with the law. Or it can relax or abandon the standard simply by letting it be known that it does not intend to file any more cases in those circumstances. The new "standard" that results may meet nobody's needs or interests but those of the agency's.

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Finally, the safeguards of rulemaking also tend to rein in an agency that is ignoring public opinion or the public interest. As Justice William Douglas wrote in his dissent in the *Wyman-Gordon* case:

> The multiplication of agencies and their growing power make them more and more remote from the people affected by what they do and make more likely the arbitrary exercise of their powers. Public airing of problems through rule making makes the bureaucracy more responsive to public needs and is an important brake on the growth of absolutism in the regime that now governs all of us.

NOT TOO LONG AGO, rulemaking was held out as the great hope for public-spirited regulation, a technique that would avoid the inherently confrontational nature of litigation and instead draw industry, consumers, and the agency into a collaborative effort to everyone's benefit. As it turned out, rulemaking led to a variety of problems. The very sweep of the power it gave the agencies frequently encouraged their tendencies toward social engineering. But it would be a shame to abandon the virtues of broader public input by moving from a rulemaking process now reformed to an adjudicatory process that remains unreformed. Whatever shape it takes or whatever name it carries, much of regulation is in effect legislation. It should not be isolated from the political process. ■