Background on the Rulemaking Process

II. A Brief History of Administrative Government

A. The Early Years

Federal administrative agencies have been a critical part of our political process for over 100 years, but their role in our government has changed considerably over that period of time.

When the American republic was young, the executive branch of the government was small. The first agencies of the federal government were the Departments of War, State, Navy, and Treasury. There was also an Office of the Attorney General.

The growth of the country and the expansion of governmental responsibilities led to the creation of the Department of the Interior in 1849, the Department of Justice in 1870, and the Post Office Department in 1872.

Agencies began to adopt formal operating standards and publish rules in response to public criticism of abuses of power under the spoils system. In 1868, for instance, the Treasury Department began publishing its customs decisions, followed in 1869 by the Patent Office.

The period between 1865 and 1900 saw the birth of independent regulatory commissions. Congress created these agencies to set rates and bring order into industry competition. The first of these so-called economic regulatory agencies was the Interstate Commerce Commission. It was established in 1887 in response to charges that farmers and merchants were being forced to pay exorbitant railroad rates to ship their products to market.

Reformers believed independent regulatory commissions would bring greater, expertise, specialization and continuity to bear on economic problems than Congress could, and would operate in a dispassionate, nonpolitical environment.

However, many regulatory commissions had dual and sometimes contradictory objectives: To control and direct a specific industry and to promote those same industries. It was not long before many "independent" regulatory commissions were being accused of being "captives" of the industries they were supposed to regulate. In some cases industries themselves supported the creation of regulatory rate commissions as a way to help end competitive practices.

The economic concerns that led Congress to create independent regulatory commissions were soon joined by more social concerns such as public health and safety. For instance, in the early 1900's, the publication of Upton Sinclair's The Jungle brought nationwide attention to unsanitary practices in the meat industry. This followed news of rotten canned meat being served to American soldiers in the Spanish-American War and two decades of complaints about U.S. meat exports-for a time banned in Europe.

Congress tried unsuccessfully to solve the problem with a number of meat inspection laws. The solution was finally found in more comprehensive legislation and broadened authority for an administrative agency. The Food and Drug Act of 1906 mandates protection of the public from the health hazards of adulterated and mislabeled foods, drugs, cosmetics, and medical devices. The Bureau of Chemistry, which later became the Food and Drug Administration, was given expanded powers to implement the new law.

B. Bureaucratic Expansion

Governmental concern with social issues took an even greater leap during the Depression years. President Franklin D. Roosevelt's New Deal brought a vast expansion in federal government programs and agencies as the nation struggled toward economic recovery.

Another expansionary period took place in the 1960's and early 1970's as a result of the consumer, health and safety, and environmental movements. The Occupational Safety and Health Administration was created in 1971 and the Consumer Product Safety Commission in 1973. The Environmental Protection Agency was created by an executive reorganization plan in 1970 that pulled together 15 components from five departments and agencies.

With the creation of these regulatory agencies came an acceleration of regulatory activity. However, by the late 1970's this trend slowed. "Excessive" regulation began being blamed for everything from raising interest rates to forcing small business into bankruptcy and making U.S. businesses uncompetitive in world markets.

The regulatory process itself came under sharp attack. Complaints became commonplace about "interference in the marketplace," "red tape," "big government," and "faceless, nameless bureaucrats." The sheer volume of federal rules and regulations with their complexity, costs, and delays were leading to public and business-sector frustration and impatience with the federal government.

C. Influence of Congress and the White House

It was becoming increasingly clear that power in federal decision-making was shifting away from elected officials and toward government agencies. Subsequently, policy makers began to push back against what they perceived to be a swelling tide of regulatory bureaucracy. Congress passed a number of laws with the intention of exerting control over federal agencies. These laws include the Unfunded Mandates Reform Act and the Congressional Review Act which affords Congress an expedited process for nullifying federal regulations. The Paperwork Reduction Act, signed into law in 1980, created within the White House Office of Management and Budget (OMB) the Office of Information and Regulatory Affairs which serves as the regulatory review body for the president.

The White House led the charge in attempting to create a system in which agencies operate under the scrutiny and control of elected officials. Starting in 1971, presidents began issuing executive edicts as a means to achieve that end. The edicts often took the form of executive orders many of which focused on providing the White House some opportunity to review federal regulations during their development.

In 1971, through a memorandum from OMB, President Richard M. Nixon introduced the idea of a White House regulatory review process. The memo required agencies to submit summaries of proposed regulations as well as alternatives considered. In 1974, President Gerald Ford introduced cost-benefit analysis as a tool agency officials would be required to use in developing significant regulations. In 1978, President Jimmy Carter strengthened aspects of White House regulatory review and further defined certain issues germane to the process.

President Ronald Reagan went further in exerting White House control over the rulemaking process than any other president. In addition to tightening White House control and adding additional requirements of agencies, a 1981 executive order marked a shift in the White House's tone regarding federal regulations. Executive Order 12291, stating its intent "to reduce the burdens of existing and future regulations," reflected the administration's deregulatory viewpoint. In 1985, Reagan issued Executive Order 12498 requiring agencies to develop a detailed regulatory plan in order to assure OMB forthcoming regulations were consistent with White House priorities.

In 1993, President Bill Clinton issued Executive Order 12866 which combined and revised the two Reagan era orders to be consistent with the regulatory views of the Clinton administration. Much like the Reagan executive orders before it, E.O. 12866 became standard operating procedure for federal rulemaking. The Clinton order allowed the White House to continue to exert substantial control over agency proceedings.

In 2007, President George W. Bush made significant amendments to E.O. 12866 by issuing Executive Order 13422. The amendments allowed the White House to further manage the activities of federal agencies by including agency guidance documents (interpretive memos, guidelines, policy statements, etc.) into the regulatory review process and installing presidentially-appointed regulatory policy officers in the agencies themselves. The changes to the regulatory process, in effect as of late July 2007, continue the trend over several presidential administrations of exerting more control in the executive branch over agency rulemaking.

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