Regulation and the Courts

The Case of the Clean Air Act

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THE BROOKINGS INSTITUTION
Washington, D.C.

Library of Congress Cataloging in Publication data:

Melnick, R. Shep, 1951–
Regulation and the courts.
Includes index.
1. Air—Pollution—Law and legislation—United States.
2. Judicial review of administrative acts—United States.
3. Administrative procedure—United States. 4. Administrative law—United States. I. Title.
KF3812.M44 1983 344.73'046342 83-7694
ISBN 0-8157-5662-3 347.30446342
ISBN 0-8157-5661-5 (pbk.)

9 8 7 6 5 4 3 2 1

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Foreword

OVER THE PAST two decades federal judges—who for years had quietly deferred to the expertise of administrators—have become increasingly aggressive in their oversight of administrative action. This judicial activism has drawn praise from critics of bureaucracy spanning the political spectrum, but surprisingly little attention has been paid to its consequences for national policy and national institutions. Have the courts in fact improved policymaking? Or have they, as Felix Frankfurter might have predicted, exceeded their institutional capacity?

In this book R. Shep Melnick, assistant professor of government at Harvard University and former research fellow and research associate in the Brookings Governmental Studies program, examines how the federal courts have influenced policymaking in one highly significant and controversial area, the regulation of air pollution. He probes the long-term effects of a variety of court decisions that have helped to shape environmental policy during the 1970s. His analysis of the bureaucratic and congressional politics of air pollution control provides insight into the process of environmental regulation as well as the effects of judicial activism.

Melnick shows not only that court decisions had consequences unforeseen by judges and legal commentators, but also that the net effect of a large number of trial and appellate court decisions was to widen the gap between the promise and performance of the programs administered by the Environmental Protection Agency. He explains how these

difficulties resulted from the peculiar institutional characteristics of the judicial branch.

In his research Melnick benefited greatly from the cooperation of Environmental Protection Agency officials in Washington, Durham, and many regional offices. Without their cooperation both in granting interviews and making files available this work could not have been completed.

A number of scholars, especially at Brookings and Harvard, offered invaluable guidance to the author. Arthur Maass and Martha Derthick provided both direction and encouragement throughout nearly five years of research and writing. Robert A. Katzmann, Andrew S. McFarland, Bernard J. Steigerwald, Richard B. Stewart, and Paul J. Quirk wrote extensive comments. Nancy D. Davidson edited the manuscript. Diane Hodges provided administrative assistance in addition to massive amounts of typing. Joan P. Milan assisted with the typing, and Diana Regenthal prepared the index. The Ford Foundation and an anonymous donor provided generous financial support.

Finally, the author thanks his wife, Katherine M. Hanna, for the many hours she devoted to discussing with him the relation between politics and the law.

The views expressed in this book are the author's alone, and should not be ascribed to the persons whose assistance is acknowledged above, to the Ford Foundation, or to the trustees, officers, or other staff members of the Brookings Institution.

BRUCE K. MACLAURY
President

March 1983
Washington, D.C.

To the memory of my father, Charles H. Melnick

Abbreviations and Acronyms

ACP	area classification plan
API	American Petroleum Institute
BACT	best available control technology
CASAC	Clean Air Scientific Advisory Committee
COWPS	Council on Wage and Price Stability
ECAO	Environmental Criteria and Assessment Office
EDF	Environmental Defense Fund
EDP	emission density plan
EPA	Environmental Protection Agency
FEA	Federal Energy Administration
ICS	intermittent control systems
ISR	indirect source review
NAAQS	national ambient air quality standards
NAS	National Academy of Sciences
NRDC	Natural Resources Defense Council
NSPS	new source performance standards
OAQPS	Office of Air Quality Planning and Standards
OGC	Office of General Counsel
OMB	Office of Management and Budget
OPE	Office of Planning and Evaluation
ORD	Office of Research and Development
PSD	prevention of significant deterioration
SAB	Science Advisory Board
SIP	state implementation plan
TCP	transportation control plan

Contents

CHAPTER ONE

Law and Regulation: The Dual Transformation

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts.

—Chief Judge David Bazelon in *Environmental Defense Fund* v. *Ruckelshaus*, 1971

Recent history would indicate that the prime mover behind implementation of the Clean Air Act has not been Congress or EPA, but the courts—specifically this court. —Judge Malcolm Wilkey in *Ethyl Corp.* v. *EPA*, 1976

LITTLE MORE than a decade ago a book on the influence of federal court decisions on national air pollution control policy would have been a short one indeed. Before 1970 the norm of judicial deference to agency expertise guided the courts in their review of the relatively minor regulatory decisions made by federal administrators. State courts handled the few public nuisance suits brought by private citizens against individual polluters. Yet by 1980 the federal courts had not only heard hundreds of cases dealing with air pollution, but had issued scores of rulings profoundly affecting national environmental policies.

The federal courts have done far more than adjudicate disputes between private parties or prevent administrators from exceeding their statutory authority. They have announced sweeping rulings on policy issues left unresolved by existing legislation, often expanding the scope of government programs in the process. Consider, for example, the following decisions issued under the Clean Air Act of 1970.[1]

—In *Sierra Club* v. *Ruckelshaus*, the district court for the District of Columbia instructed the Environmental Protection Agency (EPA) to design a program that would prevent the "significant deterioration" of air quality in areas already meeting statutory air quality standards.[2] The court based its decision on the act's preface, which announced Congress's

1. 84 Stat. 1676. For an extensive review of the Clean Air Act decisions, see William H. Rodgers, Jr., *Handbook on Environmental Law* (West, 1977).

2. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), upheld by an equally divided Supreme Court, *sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973).

intention "to protect and enhance the quality of the Nation's air resources." The court of appeals for the D.C. Circuit and the Supreme Court upheld this decision. The resulting program has become one of the largest and most complex administered by the EPA, affecting nearly every new industrial facility in the country.

—In *Natural Resources Defense Council* v. *Environmental Protection Agency* the D.C. Circuit ordered the EPA to produce within a few months elaborate "transportation control plans" for cities with high levels of carbon monoxide and ozone (smog).[3] The court also told the agency to find ways to maintain air quality standards once achieved. Shortly thereafter, a reluctant EPA announced a long series of draconian and highly unpopular measures to curtail driving and parking in major metropolitan areas.

—While the Clean Air Act requires polluters to comply with all pollution control requirements necessary to meet health-based air quality standards, the courts have refused to impose sanctions on polluters unless convinced that the requisite control technology is economically and technologically feasible. The courts have used their "equity" power to fashion compliance schedules extending well past the act's deadline for meeting air quality standards.[4]

—To facilitate judicial review of agency action and to encourage public participation, the courts have required the EPA to adopt rule-making procedures more elaborate than those specified by the Administrative Procedures Act.[5] These judicially designed procedures affect nearly every action taken by the EPA.

—In a number of cases brought by environmental groups, the federal courts have required the EPA to formulate pollution control programs for airborne lead, vinyl chloride, asbestos, beryllium, and mercury.[6]

As remarkable as this flurry of activity seems when compared with the preceding period of quiescence, these decisions are not aberrations. On the contrary, they represent the convergence of two major political

3. *Natural Resources Defense Council* v. *Environmental Protection Agency,* 475 F.2d 968 (D.C. Cir. 1973).

4. *Union Electric Co.* v. *Environmental Protection Agency,* 427 U.S. 246 (1976), and, for example, *U.S.* v. *West Penn Power Co.,* 460 F. Supp. 1305 (W.D. Penn. 1978).

5. *Kennecott Copper Corp.* v. *Environmental Protection Agency,* 462 F.2d 846 (D.C. Cir. 1972) and *Portland Cement Assoc.* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

6. *Natural Resources Defense Council* v. *Train,* 545 F.2d 320 (2d Cir. 1976) and *Environmental Defense Fund* v. *Ruckelshaus,* 3 *Environmental Law Reporter* 20173 (D.D.C. 1973).

developments of the late 1960s and the 1970s: the rapid expansion of federal health and safety regulation and the increased activism of the federal judiciary. The courts have helped to shape a wide array of federal regulatory programs, including those for environmental protection, occupational safety and health, natural resources development, consumer protection, transportation, and telecommunications. While judicial opinions written in Clean Air Act cases ushered in what Judge David Bazelon termed the "new era" in administrative law, the patterns of judicial behavior established in this litigation extend far beyond the realm of pollution control.

Since these two developments, growth of federal regulation and heightened judicial scrutiny of administrative action, began at about the same time, one might suppose that the latter was an inevitable consequence of the former. The courts, it would seem, expanded their supervision of regulatory agencies to prevent bureaucrats from abusing their newly gained powers. According to this explanation, federal judges simply adapted old principles to fit a new reality. Their traditional activities became more significant and more visible as the reach of the federal government increased. If this is the case, then the apparent activism of the federal courts, far from representing a grasp for imperial power, reveals nothing more than the judiciary's continuing effort to safeguard limited constitutional government.

As convincing as it may at first seem, this explanation for judicial activism in regulatory matters suffers from two critical flaws. First, the seeds of the new era of administrative law were sown and began to take root in the mid-1960s, shortly before the explosion of regulatory legislation. The agencies reprimanded in these early decisions were not young agencies eager to expand their power, but rather entrenched bureaucracies administering well-established programs—the Federal Power Commission, the Federal Highway Administration, the Army Corps of Engineers, the Federal Communications Commission, and the Department of Agriculture. In each case the court voiced concern not about the novelty of the program, but about the agency's failure to consider novel approaches to old problems. Second, far from constraining the growth of governmental power, court decisions led to further increases in the size of government programs. Indeed, judges commonly criticized administrators for being too timid in their wielding of public authority rather than for arbitrarily encroaching upon private property. Thus, the "growth of government" argument not only distorts the history of

judicial review of agency action, but fails to recognize the qualitative changes that took place in judicial review during the 1960s and 1970s.[7]

The new era in administrative law was not an attempt by the courts to lean against prevailing political winds favoring a larger federal government nor one to round off the sharp edges of new government programs. To use a more appropriate metaphor, the courts were among the first to ride a rising political wave. Their efforts to increase the government's role in protecting the health and safety of its citizens and to decrease the influence of industry in regulatory policymaking preceded those of Congress and the White House. The courts did not follow, they led. And even when they followed, they did so with surprising eagerness and aggressiveness.

The legal literature is filled with articles, books, even entire journals that describe this flood of decisions and trace the evolution of environmental and administrative law. Such analysis focuses almost entirely on the development of legal *doctrines,* not on the *consequences* of judicial activity. If the courts were attempting primarily to follow instructions from legislators or to define and vindicate constitutional rights, then this approach might be adequate for understanding and evaluating court action. But, as will be shown, this is not the case. The federal courts have sought to reform both the regulatory policies of the national government and the agencies that help to develop them. For this reason, evaluating the courts' performance in administrative and environmental law requires detailed analysis of the long-term consequences of court action.

This book examines how a large number of court decisions have influenced policymaking under the Clean Air Act. Congress passed the

7. By far the best review of these developments is Richard B. Stewart, "The Reformation of American Administrative Law," 88 *Harvard Law Review* 1667 (1975). Also see Kenneth Culp Davis, *Administrative Law of the Seventies* (Lawyers Co-operative Publishing, 1976). Early cases include *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2d Cir. 1965); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971) (Federal Highway Administration); *Office of Communication of the United Church of Christ* v. *Federal Communications Commission,* 359 F.2d 994 (D.C. Cir. 1966); and *Environmental Defense Fund* v. *Hardin,* 428 F.2d 1093 (D.C. Cir. 1970) (Department of Agriculture).

Cases decided under the National Environmental Policy Act of 1969, which requires environmental impact statements for all major federal actions, provide examples of how the courts have used legislation passed by Congress to justify doctrines they had themselves announced previously. See Frederick Anderson, "The National Environmental Policy Act," in Erica Dolgin and Thomas Guilbert, eds., *Federal Environmental Law* (West, 1974), p. 412.

Clean Air Act in late 1970, only a few weeks after President Richard M. Nixon created the Environmental Protection Agency by executive order. As one of the earliest and most far-reaching examples of the health and safety regulation that flowered in the 1970s, the act spawned litigation that in turn produced a series of landmark decisions. Several of these decisions remain cornerstones of the new administrative law. These decisions and their consequences deserve detailed analysis not because they are unusual, but because they are part of a larger pattern of political and institutional behavior.

The New Regulation

Between 1968 and 1978 Congress passed more regulatory statutes than it had in the nation's previous 179 years. These laws include the Occupational Safety and Health Act, the Consumer Product Safety Act, the Traffic Safety Act, the Child Protection and Toy Safety Act, the Coal Mine Health and Safety Act, the Surface Mining Control and Reclamation Act, the Truth in Lending Act, the Age Discrimination Act, the Equal Employment Opportunity Act, the Clean Water Act, the Toxic Substances Control Act, and, of course, the Clean Air Act—to name but a few. New agencies appeared to administer these laws: the EPA, the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, the Mining Enforcement and Safety Administration, the Office of Surface Mining, and the Federal Energy Regulatory Commission. By 1980 the new regulatory agencies employed more than 60,000 people and spent over $5 billion per year. The total annual cost of these programs, while hard to estimate, must be counted in the tens of billions of dollars.[8]

The new social regulation of the 1960s and 1970s differs from the economic regulation that originated in the Progressive and New Deal eras in more ways than just costliness and rapidity of enactment. While the precise nature of these differences is subject to dispute, and while

8. David Vogel, "The 'New' Social Regulation in Historical and Comparative Perspective," in Thomas K. McGraw, ed., *Regulation in Perspective: Historical Essays* (Harvard University Press, 1981), pp. 155–64. Murray Weidenbaum, former chairman of the Council of Economic Advisers, has estimated the total yearly costs of federal regulation to be over $100 billion. "On Estimating Regulatory Costs," *Regulation*, vol. 2 (May–June 1978), p. 14. Many economists have questioned this figure.

some programs (such as those administered by the Food and Drug Administration and the Federal Trade Commission) seem to fall between the two categories, most students of regulation agree that the health and safety regulation of the recent period differs from most previous regulation in its purpose, scope, and structure.[9]

Purpose

While traditional economic regulation focuses above all on the problem of monopoly and its effect on prices, the new regulation focuses primarily on the quality of the products of the industrial system, namely consumer goods and externalities. The purpose of most traditional regulation is to prevent firms from using their monopoly position to charge excessive prices or to curtail service. To do this, regulators can break up existing monopolies ("trust-busting"), prevent new ones from forming (stopping mergers and outlawing unfair trade practices), or set maximum rates and minimum service levels. The purpose of most recent regulation, in contrast, is to reduce the health and safety risk created by consumer goods (such as automobiles, drugs, and toys) and by externalities (such as air pollution, water pollution, and hazards in the workplace).

The goal of protecting the well-being of citizens brings with it more political controversy than does the goal of ensuring fair and efficient pricing. It is relatively easy to delegate the task of achieving the latter to economists and other experts. But experts cannot so readily claim to know whether a consumer product is sufficiently safe and effective or whether the environment is sufficiently healthy, enjoyable, or even aesthetically pleasing. It is, moreover, somewhat easier to become angry about cancer-causing pollution than about windfall profits.

Scope

This change in the purpose of the regulation in turn expands its scope. Traditional regulation selected a few natural monopolies, near monop-

9. There is a large and growing literature on this subject, including the following: Walter Lilley III and James C. Miller III, "The New 'Social Regulation,'" *The Public Interest,* no. 47 (Spring 1977), p. 49; Paul H. Weaver, "Regulation, Social Policy, and Class Conflict," *The Public Interest*, no. 50 (Winter 1978), p. 45; Mark Green and Ralph Nader, "Economic Regulation vs. Competition: Uncle Sam the Monopoly Man," 82 *Yale Law Journal* 871 (1973); Ralph K. Winter, Jr., "Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism," 82 *Yale Law Journal* 890 (1973); and James Q. Wilson, ed., *The Politics of Regulation* (Basic Books, 1980).