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Lubbers, Jeffrey S.

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by

Jeffrey S. Lubbers

CDAMS

Center for Legal Dynamics of Advanced Market Societies
Kobe University

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By Jeffrey S. Lubbers, Washington College of Law, American University

Professor Kenneth Culp Davis, one of the principal drafters of our Administrative Procedure Act (APA), who was also my teacher (and Ron Levin's), once called notice-and-comment rulemaking the greatest procedural invention of the 20th Century. He was talking about the APA process which basically has four simple steps—publication of notice, opportunity for written comment, publication of the final rule, and a 30-day delayed effective date.

In Japan this process has been studied for many years and is now becoming the norm, as I learned from Professor Uga's article in the first issue of the new *University of Tokyo Journal of Law and Politics*,[1] and from Professor Tsuneoka's presentation yesterday at the meeting of the Japanese American Society for Legal Studies. The Japanese APL enacted in 1993 does not contain notice-and-comment procedures. But in March 1999, the Cabinet issued a resolution (after a public comment period, I might add) requiring ministries and agencies to use a notice-and-comment process for regulations. I understand that the process has worked well and has become accepted enough within the government that there is a good chance that the APL will itself be amended to codify this process in statute. One impact of this change is that agency violations of the procedure would presumably become appealable in court.

With the hindsight of 58 years of experience in the U.S, I thought I might offer a few thoughts on some issues that have developed in our country with regard to rulemaking that may also become important in Japan.

1. What "rules" should be covered by the rulemaking process? The definition of "rule" in the U.S. is quite broad.[2] A good working definition derived (in modified

[1] Katsuya Uga, *Development of the Concepts of "Transparency" and "Accountability" in Japanese Administrative Law*, 1 U. TOKYO J. L. & POLITICS 25 (2004).

[2] *See* 5 U.S.C. § 551(4).

form) from our APA is that a "rule" is a "statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing an agency's organization, procedures, or practice requirements." Under our APA, agency actions are basically either "rules" or adjudicative "orders," each with different procedural requirements. In most cases the dividing line is clear, but some agency actions are inevitably close to the line. Of course, a definition of covered "agencies" must be included as well, along with any exemptions.

2. What is adequate publication of notice? In the U.S., notice published in our daily *Federal Register* (now available online as well) is deemed by law to be sufficiently disseminated, and that is normally how agencies provide notice.

3. What is sufficient content of the notice? Our APA provides that the notice shall include a description of any public proceedings, reference to the legal authority under which the rule is proposed; and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[3] This means that agencies need not legally publish the actual proposed text of the rule. However, 99% of the time, agencies do so, and it is probably a good idea to require this. Moreover, courts have required that the notice also include reference to underlying information and data on which the agency has relied in preparing the proposal and/or expects to rely in formulating the final rule. Any draft analyses, required by other laws or Executive Orders, should also be noted or included here. This is typically done in the "preamble" of the proposed rule.

4. What kind of opportunity for comments should be allowed? Our APA only requires agencies to allow written comments, but it permits agencies to provide for oral hearings in their discretion. This is a sensible approach. In controversial rulemakings, agencies often conduct oral public hearings, but most rulemakings are conducted in writing. Of course, with the advent of electronic communications, the comment process is increasingly done through e-mail. Our

[3] 5 U.S.C. § 553(b)(3).

APA, however, fails to provide for a definite time period for comments. By custom, the minimum period is 30 days, though it is becoming more normal to allow 60 days, and sometimes more. Sometimes, agencies build in a period for reply comments to allow commenters time to review and respond to others' comments. Sometimes, also, agencies will allow a second round of comments—especially if the agency is considering significant changes in its proposed rule. Courts will require an additional comment period where the final rule is deemed not to be a "logical outgrowth" of the proposed rule.[4]

5. What should the final rule contain? In the U.S., the actual text of the final rule must normally be published in the *Federal Register*. This text will then be inserted in the appropriate title of the *Code of Federal Regulations*. But the final rule must also be accompanied by a preamble, which contains the agency's explanation for the final rule, including its response to the comments received. Agencies need only respond to substantive or "cogent" comments, but they must treat them seriously and explain why such comments were not adopted, or risk judicial remand. Any final analyses, required by other laws or Executive Orders, should also be noted or included here. The demands of judicial review have led agencies to prepare their preambles with great care.

6. When can the rule be made effective? The agency must normally wait at least 30 days before making the rule effective unless they can shows good cause for making it effective sooner.[5]

7. What types of rules should be made subject to this procedure? Because the definition of "rule" is so broad, it must be recognized that some types of rules should not have to go through a two-step, notice-and-comment period before being issued. The U.S. APA contains several important subject-matter exceptions. Some of these exceptions are clearly necessary, but some are too broad. Each of them, however, pose definitional issues that often must be resolved by reviewing

[4] *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985).

[5] *See* 5 U.S.C. § 553(d).

courts, if a challenger claims the agency has improperly invoked the exception to avoid notice and comment.

a. Military and foreign affairs functions.[6] While clearly a necessary exemption, it would be preferable to add a proviso requiring notice and comment for such matters that clearly involve the interests of the public (such as procedures for obtaining passports, for example).

b. Matters relating to agency management or housekeeping.[7] This exemption should be narrowly drawn to cover rules concerning only the internal management of an agency which do not directly and substantially affect the procedural or substantive rights or duties of any segment of the public. Our APA also contains a broader recommendation for rules of "agency organization, practice or procedure," but I think that recommendation is unnecessary and I don't recommend that it be included.

c. Certain matters relating to the government's proprietary facilities.[8] In some situations the government function is so proprietary that the public's input on a related rule may not be necessary or appropriate. Examples include (1) a rule that only establishes specific prices to be charged for items or services offered for sale by an agency if a government-owned institution (e.g., a museum); (2) a rule concerning only the physical servicing, maintenance, or care of agency-owned or operated facilities or property; (3) a rule relating only to the use of a particular facility or property owned, operated, or maintained by the government, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property; or (4) a rule concerning only inmates of a state correctional or detention facility, students enrolled in a

[6] *See* 5 U.S.C. § 553(a)(1).

[7] *See* 5 U.S.C. § 553(a)(2).

[8] *Id.*

state educational institution, or patients admitted to a state hospital, if adopted by that particular facility, institution, or hospital.

d. Good cause.[9] To the extent an agency can show good cause for finding that any of the notice-and-comment requirements are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements should not apply, provided that the agency incorporates the required finding and a brief statement of its supporting reasons in the preamble of such a rule. This provision can be invoked for truly emergency rules, but should not be used simply because the rule is designed to improve the public's health or safety. It can also be used for clearly trivial rules, where there is little likelihood of public interest.

8. Should "non-regulatory" rules be covered? In the first place, there are many important agency rules with the force of law that might not be deemed "regulatory" in the ordinary sense. For example, rules issued by the Social Security Administration concerning eligibility for government benefits. Obviously these have great public importance and should be covered by the APA's rulemaking provisions.

   But it is also desirable for agencies to provide interpretations of their statutes and also guidance that is not intended to be binding on the public. Thus the U.S. APA provides for exemptions from notice and comment for "interpretative" rules and "general statements of policy."[10] Collectively these are known as "non-legislative" rules. However, these exemptions can be difficult to apply because the line between non-legislative and legislative rules is not always clear.

   To be an "interpretive rule," the pronouncement must truly interpret existing legislation (or a pre-existing valid legislative rule). It obviously can't be interpretive if it reverses an agency position or amends the text of an existing

[9] *See* 5 U.S.C. § 553(b)(B).

[10] *See* 5 U.S.C. § 553(b)(A).

legislative rule. But the harder cases are when the agency interpretation adds some meaning. One possible approach for drafting the APA is to provide that an agency need not follow the notice-and-comment procedures in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition. This approach would, however, require the legislature to be clear in an each agency's organic statute as to whether such authority is being delegated.

The other type of non-legislative rule, exempted from notice and comment is the "statement of general policy." If the agency's rulemaking document is not treated by the agency as binding on affected parties, it is a policy statement that is also exempt from notice and comment.

In 1992, the Administrative Conference of the U.S. summarized the appropriate approach to agency issuance of guidance documents.[11] The Conference recognized the beneficial nature of such policy statements, but was concerned "about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address." The main points of the Recommendation are as follows:

- Agencies should not attempt to bind affected persons through policy statements.
- Policy statements of general applicability, should make clear that they are not binding, and agencies should communicate that fact to all agency officials who might apply them.
- Agencies that issue policy statements should ensure that their procedures allow for an appropriate and effective opportunity to challenge the legality or wisdom of the document and to suggest alternative approaches.

[11] ACUS Recommendation 92-2, "Agency Policy Statements," *available at* http://www.law.fsu.edu/library/admin/acus/305922.html.

- When agency policy statements are subject to repeated challenges, agencies should consider initiating legislative rulemaking proceedings on the policy.

To be safe, of course, the agency may always use notice-and-comment procedures.

9. How should agencies maintain rulemaking dockets? Agencies should maintain a file (on paper and/or electronically) of all the relevant documents for each rulemaking. At a minimum, agencies will need to provide an index of all comments, whether filed electronically or on paper. This index will need to be provided in both formats, but preferably on an agency's "home page" with clickable links to all electronically filed comments. Scanning of paper comments is now feasible, but, despite fast moving technological advances, we are still some distance from *exclusive* use of electronic means for accepting comments in rulemaking. Most agencies that allow them either require, or at least permit, paper copies to be filed. This may change rapidly with the accelerating developments in information technology.

10. What are the special considerations pertaining to electronic rulemaking?[12] Obviously the advent of the Internet and electronic technology has great potential for increasing the public's participation in rulemaking. But in addition to the docketing issues, there are some important questions to address with respect to e-rulemaking:

    - Archiving issues. Do redundant paper copies need to be preserved?
    - How should exhibits, forms, photographs, etc. be dealt with?
    - How to deal with copyright concerns—both where the submitter asserts a copyright in his or her own comments, and where the submitter includes copyrighted work without permission?

[12] *See also* Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, Regulatory Policy Working Paper RPP-2002-04. Cambridge MA: Center for Business and Government, John F. Kennedy School of Government, Harvard University (2002), *also published at* 27 ADMIN. & REG. L. NEWS 6 (Summer 2002).

- Should there be different levels of access? Should one type of participants (e.g., agency staff) be able to see everything, with others having more limited access?
- Security issues—both in terms of preventing unauthorized tampering, and second with respect to make sure that sensitive information is not made available to potential criminals or terrorists.
- Privacy issues. Should anonymous comments be allowed?
- Interactive comments. What about the potential use of rulemaking chatrooms? Should they be moderated or not (and by whom)? How to best combat disruptive, uncivil, aimless, or high-volume posting? How to deal with e-mail attachments that might contain viruses, or might overload systems?

11. What additional analytical requirements should be required in rulemaking? As a general matter, agencies' final rules must be based on an adequate legal and factual justification—a requirement that can be enforced by adequate judicial review. Nevertheless, it may be appropriate (or politically expedient) to require rulemaking agencies to prepare more specialized analyses and to allow comments on draft analyses. In the United States, the most prominent types of analyses are cost-benefit analyses (sometimes called "regulatory analysis"), and various "impact" analyses, such as environmental impact analyses and small business impact analyses. In addition there are various other types of specialized impact analyses that have been required by Presidents over the years. While these can beneficially force agency attention on important issues, I would caution that an excess of such analytical requirements can unduly delay the rulemaking process, especially where such analyses are subject to direct judicial review.

12. How should ex parte communications be handled? Rulemaking is a quasi-legislative process in which policy judgments are usually more important than specific adjudicative facts. Therefore the same prohibitions against ex parte (off-the record) communications found in adjudication are normally not applicable to

rulemaking. Nevertheless, secret lobbying of rulemakers may be corrosive of public trust. The solution is to require that any off-the-record comments received by an agency after the notice of proposed rulemaking should be disclosed and included in the docket.

13. How should rules be reviewable in court? Judicial oversight provides the necessary safeguard against agency abuses. Agency rules that violate the Constitution, exceed statutory power, deviate from prescribed procedural requirements in a prejudicial way, or are not reasonably supported by the factual or policy basis presented by the agency should be set aside by a reviewing court. But there are important questions about when rules can be challenged in court, which court and by whom. In the United States, there is a presumption of reviewability, but the timing question is especially important. An important Supreme Court decision in 1967 held that adversely affected persons can normally challenge rules as soon as they are issued, without waiting until the agency seeks enforcement.[13] This has the important advantage of raising and settling legal issues early in the life of the rule.

14. What about Legislative and Executive review of rules? In a parliamentary system, with the merger of these two branches, it is rather easy to ensure centralized review. In the U.S., with our separation of powers, both the White House and the Congress have devised separate requirements of clearance of selected rules before they may go into effect. The White House (OMB) review process is especially significant in practice.

15. What about petitions for rulemaking? Under the U.S. APA, the public has the opportunity to submit petitions to initiate rulemaking proceedings. Agencies are required to respond to such petitions in a timely fashion, but their responses are subject to an especially deferential standard of review. This seems sensible.

16. How should existing rules be reviewed? As new rules are issued, the question arises, what about the expanding accumulation of existing rules? In the U.S.,

[13] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

existing rules are codified in the *Code of Federal Regulations*. Not surprisingly, agency attention tends to be focused on issuing new rules, but sometimes not enough attention is paid to the continuing requirements imposed by existing rules. One approach to deal with this problem is to require agencies to undertake periodic reviews of regulations that have "a significant economic impact." The opportunity for petitions by the public should also extend to petitions to review existing rules.

17. What about negotiated rulemaking? Certain types of rules are amenable to a negotiated solution. The standards and guidelines for such proceedings are set forth in the U.S. Negotiated Rulemaking Act.[14] Such negotiations should be directed to reaching a consensus among stakeholders on the proposed text of a rule that will then be subjected to the usual opportunity for public notice and comment.

18. What about laws that may be inconsistent with the APA? The APA should provide for the enactment of ensuing laws that might contain inconsistent provisions. Our APA specifies that subsequent statutes may not be held to supersede or modify the APA unless they do so expressly.[15]

In conclusion, I applaud Japan's ongoing legal reform and its move toward notice-and-comment rulemaking. I hope that some of our experiences in developing this technique of governance will be helpful to you as you develop it in the Japanese way.

[14] 5 U.S.C. §§ 561-570.

[15] 5 U.S.C. § 559.