THE ADMINISTRATIVE PROCESS AND THE RULE OF ENVIRONMENTAL LAW

The Honorable David S. Tatel

On October 6, 2009, the Environmental Law Institute ("ELI") sponsored a symposium entitled "An Agenda for the New EPA." The symposium was held at the Carnegie Institute for International Peace in Washington, D.C., as part of ELI's 40th Anniversary celebration. The keynote address was given by Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit. Judge Tatel's remarks follow.

Compared to the thought-provoking discussions you will have this morning about the future of the Environmental Protection Agency ("EPA"), much of what I have to say may seem a bit less exhilarating, for I plan to talk about the basic legal principles that govern the exercise of the vast authority wielded by the administrative state. Now I realize that administrative law is something of an acquired taste. But like fine scotch, it's a taste worth acquiring. As environmental lawyers well know, admin is where the action is. An unbelievable portion of the law that structures the world around us is now only loosely connected to Congress. Capitol Hill still lies at the center of this city, but the heart of government may actually reside in those red-roofed buildings along Pennsylvania Avenue. This is especially true in the environmental sphere where EPA and many other federal agencies, through environmental impact statements and similar requirements, are called upon to deploy technical expertise well beyond that normally available to Congress.

I have several reasons for speaking today about the fundamental principles of administrative law, principles that can be boiled down to two basic commandments: follow the law and give sound explanations for what you do. My first reason is this: as much as I might like to, I really can't talk about anything else. My court hears almost all the administrative law cases that matter, and so if I go much beyond the fundamentals, I'll end up having to recuse myself from all the interesting cases. Second, it's at times like these, when a new administration is determined to change environmental policy, that our commitment to the fundamental principles of administrative law is really tested. And third, my more than fifteen years on the D.C. Circuit have convinced me that these fundamentals really do matter. As I'll explain, it is basic administrative law that maintains the vital connection between democratic governance and the regulatory state. Both literally and figuratively, the United States Courthouse, located where Constitution and Pennsylvania Avenues meet, lies at the intersection of representative law-making and administrative implementation.

From my D.C. Circuit vantage, I sometimes wonder whether administrative agencies, as well as the organizations and citizens who appear before them, really care about the fundamentals in the way that courts do. To be

sure, in the vast majority of cases agencies do a commendable job addressing complex environmental issues, and I'm on the whole a great admirer of the modern administrative process. That said, in both Republican and Democratic administrations, I have too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law. In such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality. This gets it entirely backwards. It's backwards because it effectively severs the tie between federal law and administrative policy, thus undermining important democratic and constitutional values. And it's backwards because whether or not agencies value neutral principles of administrative law, courts do, and they will strike down agency action that violates those principles — whatever the President's party, however popular the administration, and no matter how advisable the initiative.

My goal this morning is to convince you not only that agencies need to take the fundamental principles of administrative law to heart, but that attention to such principles early in the policymaking process is the only way for agencies to ensure that their policy choices are both constitutionally legitimate and implemented without delay.

Now the power to invalidate agency action is strong medicine, and agency officials may wonder why we license an unelected judiciary to dispense it. After all, not only is the executive branch electorally accountable, but administrative agencies possess considerable technical expertise beyond the ken of federal courts. Given that expertise, agency professionals may find judicial review an especially bitter pill when their rules are set aside not because the agency lacked authority to adopt them, but rather because of procedural flaws in their promulgation. From the agency's perspective, such decisions by life-tenured generalist judges may seem obstructionist or even activist.

I hope I'm wrong about this. For one thing, if agency officials see administrative law as a fetter, they're liable to try to escape — something that will only lead to further trouble in the courts. More fundamentally, such a view would be just plain wrong. Judicial review of administrative action protects the very essence of constitutional democracy and the rule of law. The legislative process set out in the Constitution, with its bicameralism and veto provisions, is designed to make it difficult to alter the legal status quo. By contrast, agencies, staffed by appointment and somewhat insulated from political accountability, can exercise such power with one bureaucratic pen stroke. We tolerate such sweeping authority only because meaningful judicial review ensures that agency actions are consistent with federal law, and that those actions rest not on arbitrary reasons but on the expertise that justified the congressional delegation of authority in the first place. Thus, the two primary elements of judicial review — ensuring that agency action is authorized by law and is neither arbitrary nor capricious — work together to substitute for the constitutional requirements that govern congressional ac-

tion. This basic framework, set forth in the Administrative Procedure Act ("APA"),[1] was expressly fashioned by Congress to legitimize the broad delegation of administrative authority that began during the New Deal. Even today, with administrative agencies familiar features of the landscape, we might think very differently about not merely the wisdom, but also the constitutionality of broad congressional delegations were they not made against the backdrop of robust judicial review. In other words, judicial review performs a quasi-constitutional role: it prevents the rule of administrative policy judgment from supplanting the rule of law.

On the flip side, these rules also restrict the courts. The basic administrative law framework narrows and focuses judicial review, obliging us judges to assess not the merits of agency policy, but rather the agency's compliance with a discrete set of fairly well-defined and policy-neutral requirements. In doing so, these rules allow the judges of my court, with our widely varying backgrounds, worldviews, and political leanings, to achieve unanimity in the vast majority of cases — scholarly pronouncements about a politicized judiciary notwithstanding.

Having established what hangs in the balance, I'd like to share a set of examples in which the basic precepts of administrative law seem to have been lost in the bureaucratic shuffle. These examples — which, given the focus of this conference, come from the EPA — are particularly striking given the considerable latitude the law affords agencies to pursue their policy objectives. So although this talk may seem a little like Admin 101, cases such as these suggest the need for a refresher.

As its most fundamental inquiry, administrative law calls upon courts to determine whether an agency's action falls within the scope of its authorizing legislation. This task often involves no more than reading the law. Then-Professor Felix Frankfurter, one of the fathers of administrative law, famously admonished his students: "(1) Read the statute; (2) read the statute; (3) read the statute!"[2] This is self-evidently good advice, but you would be surprised how often agencies do not seem to have given their authorizing statutes so much as a quick skim. For example, a few years ago we decided a case involving the Clean Water Act's requirement that EPA establish "total maximum daily loads" for certain fluid discharges.[3] EPA believed that this allowed it to establish not total maximum daily loads, but total maximum seasonal or annual loads instead. Defending its interpretation, EPA argued that it could better regulate certain pollutants on a seasonal or annual basis than through daily maximum loads. For all I know, EPA was right. But, as we pointed out, Congress had not allowed it to make that decision. In no uncertain terms, Congress had directed EPA to issue regulations setting the maximum load that could be discharged not annually, not seasonally, but

---

[1] 5 U.S.C. § 706 (2006).

[2] HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 202 (1967).

[3] Friends of the Earth, Inc. v. EPA, 446 F.3d 140 (D.C. Cir. 2006).

daily. EPA's decision to ignore the statute's plain words rather than returning to Congress for authority to pursue its preferred policy still baffles me.

Of course, not all statutes are so clear. Although that's often because they're poorly drafted, sometimes statutory ambiguity is quite intentional. For example, Congress may have a general objective, say clean air, but lacks the data and expertise to achieve that goal for all pollutants throughout the nation. Or a majority of legislators may support a particular objective, say finding a disposal site for nuclear waste, but lack consensus on precisely how to achieve it. Either way, the result is intentionally ambiguous language — language that courts, acting pursuant to the Supreme Court's *Chevron* decision,[4] interpret as a delegation of authority to the agency to fill in the gaps.

But even where Congress has left an agency statutory space to choose its own interpretation, that interpretation must still be reasonable. Although agencies rarely lose at this "*Chevron* step two" stage, it remains a limitation that courts carefully enforce. A few years ago we heard a challenge to EPA's calculation of safety standards for the storage of radioactive waste at Yucca Mountain.[5] Even though the Energy Policy Act required EPA to promulgate such standards "based upon and consistent with the findings and recommendations of the National Academy of Sciences,"[6] EPA all but completely rejected the Academy's recommendations regarding the appropriate time period for the safety standards, choosing instead a period the Academy had expressly rejected. To be sure, the Act's language is hardly unambiguous — more than one possible approach could be "based upon and consistent with" a set of recommendations. But we found it unreasonable for EPA to resolve that ambiguity by utterly disregarding the Academy's recommendations and selecting a time period the Academy had expressly rejected. Though Congress had given EPA some discretion in precisely how to base a standard on the Academy's recommendations, it had not given EPA free rein to completely ignore the Academy. We thus had no choice but to vacate the rule. After all, agency authority comes only from Congress. If the agency cannot reasonably trace its action to a statute, it has no business acting. Although agencies are more accountable than courts, Congress is more accountable still.

In addition to acting within the boundaries of statutory text, agencies must respect judicial decisions interpreting that text. Judicial review would be toothless if agencies could simply disregard rulings with which they disagree. They can't, but on occasion they try anyway. For example, a provision of the Clean Air Act directs EPA to impose on certain pollution sources emissions standards no less stringent than the standards achieved by the best-performing sources. To ensure that emissions standards could be met

[4] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[5] Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251 (D.C. Cir. 2004).

[6] Energy Policy Act of 1992, Pub. L. No. 102-486, § 801(a)(1), 106 Stat. 2776, 2921 (1992) (codified at 42 U.S.C. § 10141 note (2000)).

by all sources in the category, EPA set the standard for cement kilns and other combustors well below that of the best-performing sources. The D.C. Circuit disagreed.[7] The statute, we reminded EPA, means what it says, and EPA had no authority to change the requirement just to ensure that more sources could comply. EPA sought neither en banc review nor cert. Instead, in accordance with our decision, it proposed emissions standards pegged to the best-performing sources. Combustors, however, complained that the proposal was infeasible, so EPA promulgated a new standard set at the level achieved by the *second*-best-performing sources. EPA was soon back before the D.C. Circuit, having done exactly what we had ruled the act forbids.[8] We vacated the rule and our opinion — a unanimous per curiam by a panel composed of two Reagan appointees and one Clinton appointee — concluded with this warning: "If the Environmental Protection Agency disagrees with the Clean Air Act's requirements . . . it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing en banc or file a petition for a writ of certiorari. In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court."[9]

Of course, judicial review involves far more than just ensuring that agencies act within their statutory authority. Under the APA, courts must set aside agency action that is "arbitrary" and "capricious" or "an abuse of discretion."[10] Courts police this line by requiring agencies to give reasoned explanations for their actions. As the Supreme Court explained in the landmark *State Farm* case,[11] the purpose of this reason-giving requirement relates to the rationale for an agency's very existence. Congress delegates authority to administrative agencies not to authorize any decision at all, but to permit agencies to apply their expertise. The reason-giving requirement allows courts to determine whether agencies have in fact acted on the basis of that expertise.

This rule applies with particular force when agencies change existing policy, as happens quite often during times of transition. Obviously, agencies have authority to move from one permissible position to another, but when doing so they must adequately explain why. In the words of Judge Harold Leventhal, whose seat on the D.C. Circuit I am honored to occupy, "an agency changing its course must supply a reasoned analysis indicating that prior policies . . . are being deliberately changed, not casually ignored." Judge Leventhal continued, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[12] Although the Supreme Court recently made clear that agencies are held to no higher burden of justification when they change

---

[7] Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855 (D.C. Cir. 2001).
[8] Sierra Club v. EPA, 479 F.3d 875 (D.C. Cir. 2007).
[9] *Id.* at 884.
[10] 5 U.S.C. § 706(2) (2006).
[11] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).
[12] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

a policy than when they adopt one for the first time, the Court still emphasized that agencies may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[13]

This reason-giving requirement is most familiar in the context of rulemaking, where it provides a strong check on arbitrary agency action. Several years ago, I served on a panel that reviewed an EPA rule which changed recordkeeping requirements under the Clean Air Act's new source review provision.[14] Under the previous rule, utilities predicting they would not trigger new source review were required to supply EPA with data to verify the accuracy of their forecasts. Under the new rule, utilities unilaterally foreseeing no reasonable possibility that they would trigger new source review had no obligation to submit the records that formed the basis for their predictions. Indeed, they had no obligation even to maintain such records. Rejecting this change, the D.C. Circuit stated that EPA had failed to explain how it could enforce the statute without the data it had previously required. EPA, Judge Leventhal would have said, was being "intolerably mute."

Obviously, not just any explanation counts. Agencies must expressly address contrary evidence and significant alternatives. Although an explanation that takes account just of cherry-picked fragments of the record may explain why the agency would have taken the action it did if the record consisted only of those fragments, it tells us little about the agency's choice based on the record as a whole. Earlier this year, a unanimous D.C. Circuit panel concluded that EPA had run afoul of this rule by glossing over studies showing that fine particulate matter emissions were far more hazardous than the regulation anticipated.[15]

To ensure that agencies in fact make decisions based on their expertise, courts hold them to the reasons they articulate at the time they act. Appellate counsel may not supply newly minted rationales after the fact, nor can we.

Of course, these rules are intended to facilitate judicial review of agency reasoning, not to straightjacket agency action. As courts often say, "we will uphold an agency decision of less than ideal clarity if the agency's path may reasonably be discerned."[16] Yet not all agency decisions meet even this forgiving standard. In *Massachusetts v. EPA*,[17] EPA argued that even if the Clean Air Act gave it authority to regulate carbon emissions, it had no obligation to determine whether those emissions, as the statute puts it, "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[18] Under D.C. Circuit case law, EPA may withhold such an "endangerment finding" — a predicate to regulatory action — only if it has insufficient evidence to reach a determination

---

[13] FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).
[14] New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005).
[15] Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512 (D.C. Cir. 2009).
[16] *See, e.g.*, Bloch v. Powell, 348 F.3d 1060, 1068 (D.C. Cir. 2003).
[17] 549 U.S. 497 (2007).
[18] 42 U.S.C. § 7521(a)(1) (2006).

one way or the other.[19] Instead of claiming this to be the case, EPA, seeking to avoid regulating carbon emissions, offered a host of policy reasons including its own uncertainty regarding the causes of global warming — a complete non sequitur given that the question was whether sufficient evidence exists to determine if the emissions were dangerous. I couldn't tell whether EPA was claiming that its uncertainty prevented it from making an endangerment finding, or whether that uncertainty relieved it of the obligation to regulate even if it had made the finding, or both. Neither could the Supreme Court.

Any lawyer practicing administrative law well knows these basic requirements. But when reading a set of briefs or listening to oral argument, I sometimes wonder whether the agency consulted its lawyers only after it found itself in court. I hope that's not the case. The constitutional values that animate our core principles of administrative law require agencies to consider the legality of their policies from the very beginning of the administrative process. Indeed, Julius Genachowski, the new Chair of the Federal Communications Commission, recently told me that he is working to do exactly that at his agency. I hope EPA is doing the same. I hope it's hiring and cultivating lawyers capable of providing independent legal advice, and then involving those lawyers in policy development from the outset. I hope that EPA lawyers are participating in the policy process as legal advisors, not policy advocates. Above all, I hope EPA is listening to its lawyers, even when they offer unwelcome advice. When agency officials would prefer to regulate fluid discharges annually, or to completely disregard the recommendations of the National Academy of Sciences, EPA needs lawyers who will advise it to go to Congress instead of plowing ahead.

This is not just about satisfying the D.C. Circuit. It's about being responsible public servants. As I have explained, the doctrines of administrative law are not barriers erected by activist judges to prevent agencies from exercising their natural authority to make public policy. Just the opposite. These doctrines exist for a compelling constitutional reason: they keep agencies tethered to Congress and to our representative system of government. They ensure that the complex administrative state of the twenty-first century functions in accordance with the constitutional system established in the eighteenth. In other words, the fundamentals of administrative law really do matter, and they should be understood as engines of administrative policymaking, rather than merely obstacles cluttering the road.

For example, setting forth the justification for a policy may win support for it not just among avid readers of the Federal Register, but — if the reasons are persuasive — throughout the general public. At a minimum, the requirement of reasoned justification ensures that the best arguments that can be marshaled in favor of a policy are enshrined in the public record, so that anyone seeking to undo the policy will have to grapple with and address

---

[19] *See* Massachusetts v. EPA, 415 F.3d 50, 76 (D.C. Cir. 2005) (Tatel, J., dissenting) (citing cases).

those arguments. In this way, the reason-giving requirement makes our government more deliberative. And even when it slows agency action, it makes government more democratic.

A final point: ensuring that agencies comply with fundamental principles of administrative law is an obligation that falls not just on agencies, but on everyone having an interest in successful agency action. Just as skilled lawyers work to ensure that a trial court avoids error — even in their favor — and prompt the court to make the findings necessary for appellate review, so too should those who seek to influence agency action work to ensure that the action they urge is both authorized by law and supported by adequate evidence and reasoning. And given the quasi-constitutional nature of administrative law, interested parties have not just a practical incentive to help agencies do their jobs well, but also a responsibility as citizens not to encourage agencies to act beyond their authority. Interested parties should be forthright about whether their arguments are properly for the agency or whether, because they seek to change the law, for Congress.

In sum, the "New EPA" that you are discussing today may have excellent programs it is eager to execute. But those programs will be legitimate — and will be sustained in court — only if their implementation conforms to the rule of law.