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The promise of change: will administrative agencies offer a path that bypasses obstacles to legislation?

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At the dawn of a new presidential administration enjoying majority support in both houses of Congress, there was widespread expectation that trumpeted legislative 'change' was, indeed, coming. Such was the popular belief in the US one year ago, irrespective of political party affiliation or the side of various issues on which one stood. That was then. Today, approaching a first anniversary of the Obama administration and the Democratic control of both the House of Representatives and Senate, and less than one year away from the midterm congressional elections of 2010, many are recalibrating legislative ambitions, expectations and accomplishments. That makes this a good time to focus on the reality that political priorities that are not accomplished by legislative change may come through action of administrative agencies. This article examines some initiatives that are underway and suggests that those watching for new legislative developments need to be similarly alert to administrative decisions and notices of proposals to change rules or regulations.

Legislation may be inspirational, groundbreaking, and aspirational; it may be reactive to a particular, significant issue or set of circumstances; or it may be reformatory and restorative of ostensible original legislative intent once a law, as enacted, has been subjected to defining application, experience and judicial construction. The Great Depression brought New Deal social and economic reforms; the civil rights movement brought equal opportunity in voting rights, public accommodations, housing and employment; corporate scandal brought shareholder protections and newly articulated standards of accountability, transparency, best practices and corporate responsibility. But the legislative process is not necessarily an easy or straight path. More than ever, legislation has complexities and heft that elude simplicity and alter expectations. Witness the various iterations of proposed health reform legislation that exceeded 2000 pages.

The realities of obstacles encountered in the legislative process may yield a new awareness of the power residing within the administrative agencies that are charged by enabling legislation to interpret and enforce existing laws. The presidential power of appointment can reshape administrative agencies so that decisions and outcome-determinative rules, regulations and procedures, calibrated to campaign policies and platforms, become more likely – without the need for change in enabling legislation. The more difficult road of new legislation, subject to lobbying efforts on multiple sides of many issues and debate in Congress, is thereby avoided.

Administrative agencies may be perceived by some as bureaucratic mainstays that preserve the status quo and initiate little, even as the leadership balance may shift in favour of the party of the president. Sometimes, that has been an accurate assessment; frequently, it is not, and the power to transform legislation, as never contemplated by its authors and sponsors, should not be underestimated. Empowerment varies by law and agency, though the model has common elements. While an administrative agency must give effect to the unambiguously expressed intent of legislation, the agency reasonably may fill gaps that are left, implicitly or explicitly, and its decisions are entitled to judicial deference if they represent a permissible, reasonable construction of the statute.

Agency contact is frequently the most common interaction that businesses, organisations and individuals have with the federal government and the laws that affect them. For many,

the contact is unexceptional and routine, often at the level of a local or regional office staffed in varying measure by career federal employees and others wanting to contribute and gain experience and exposure. But particularly when a new president has or perceives a mandate to change, leadership appointments at the administrative agency may work to convert otherwise mundane administration into an agenda of transforming established law through existing channels – with no change whatsoever in underlying legislation.

This has been seen time and again; precedents set by agencies perceptibly shift as circumstances allow a new administration to fill vacancies or exercise discretion to appoint decision-making board members, commissioners, directors, administrators and general counsel capable of reversing or countermanding the work of predecessors. Termed variously 'flip-flopping' or 'policy oscillations', those reversals can be significant. One major swing is underway. If adopted substantially as announced, a proposed rule of the National Mediation Board (NMB) is certain to impact the penetration of unions in the airline and rail industries. It would undo the established standard of determining whether a labour organisation has won majority support to become the collective bargaining representative of a unit of airline or rail workers. Since enactment some 75 years ago as part of New Deal initiatives facilitating collective bargaining, the Railway Labor Act has been construed consistently through terms of liberal and conservative leadership, and periods of robust and depressed economies, to allow union representation only if the petitioning union won majority support of those eligible to vote. A 28 October 2009 'proposed rule with request for comments' by two Democratic members of the NMB, over the dissent of the single Republican member, would abandon that standard and confer bargaining representative status on a union that wins a majority of the votes cast. A summary in the NMB's publication of notice of the proposed rule explains the significant departure from decades of practice as 'part of its ongoing efforts to further the statutory goals of the Railway Labor Act…'

Will the initiative of two NMB members outvoting the single member of the other party be a harbinger signalling that administrative sea change can be worked within the four corners of existing legislation, however time-honoured agency precedents may be? The answer remains to be seen, and many laws are so constructed that administrative action could not effect wholesale transformation. Nevertheless, administrative agencies have considerable power to control the types of matters that will receive priority by way of rulemaking, interpretation, enforcement and adjudication.

Of course, administrative agencies are necessarily constrained by their resources and the budgets proposed by the president and authorised by Congress. In some agencies, enforcement litigation has been focused on established priorities that in turn are dependent upon budget and staff resources. For example, since 2006, the Equal Employment Opportunity Commission has considered 'systemic' investigations and litigation – defined as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location" – a top priority supported by economic and talent resources.

In other instances, administrative agencies having adjudicative functions have been constrained by vacancies, operating without a full complement of members or commissioners. In the current administration, it is expected that the process of Senate confirmation of appointees will yield agencies with a majority from the Democratic party. But the process can be delayed by political considerations and distractions, as currently experienced with the National Labor Relations Board (NLRB), the primary federal agency responsible in the private sector for determining matters of union representation and adjudicating unfair labour practice complaints (outside of the airline and rail industries). Since the beginning of 2008, after the terms of three of its five members had lapsed, the NLRB has functioned by delegation of decision-making authority to the two members – one from each party – having unexpired terms. That has created legal challenges, reaching the US Supreme Court, to the validity of determinations by less than a quorum of a five-member board, and it has thwarted determinations in certain matters of consequence and precedential significance on which the sitting members cannot agree. There is widespread contemplation that a fully constituted NLRB having a majority of Democratic party members could take action to effectively achieve certain objectives of the proposed Employee Free Choice Act – irrespective of whether the controversial 'card check' reforms intended to facilitate the designation of labour organisations as bargaining representatives are enacted into law.

Because the party of the president is favoured in the selection of appointees to administrative agencies, shifts in rule-making, decision-making and enforcement priorities and efforts tend to reflect those political turns. It is not unusual to encounter major initiatives at the start or end of a president's term. For example, late in 2000, as the second term of the Clinton administration was about to conclude, the Occupational Safety and Health Administration announced rules that would have imposed significant ergonomics obligations throughout the American workplace. Before the rules became effective, a Republican-controlled Congress acted by joint resolution under authority of the Congressional Review Act of 1996 to reverse that administrative action.

Apart from superseding legislation, agency action remains subject to challenge in the courts on grounds of non-conformance with enabling legislation and non-compliance with appropriate administrative procedure. Nevertheless, if

unprecedented partisanship were to accelerate and drive substantive and procedural determinations, rulemaking and enforcement, the result could be a destabilising politicisation within some administrative agencies. In the place of desired predictability within an expected corridor of precedent, there may be more uncertainty as agendas and political considerations imbue decisions and as ephemera supplants accepted law.

Without breakthrough or reforming legislation, we may see newly constituted administrative agencies interpret and enforce laws already enacted by initiatives that push the envelope to expand and reshape their boundaries. If it is perceived that agencies doing so have overreached, there is recourse to the courts – and to the electoral process in a new term, first for a legislature capable of enacting laws that clarify earlier congressional intent, and in presidential election years for executive appointments in a new administration. After all, the constitutional system of checks and balances of three co-equal branches of government allows any branch to change contours and boundaries set by any of the others – until the next round.

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