TRANSPARENCY AND GOOD DECISION-MAKING: IRRECONCILABLE DIFFERENCES OR HAPPY BEDFELLOWS?

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“My job as regulator is to successfully feign ignorance without actually being so”

-Charles Stalon
Nature of Regulatory Agencies

- **Quasi Judicial**
  - *ex post* evaluations
  - resolution of disputes binding participating parties

- **Quasi Legislative**
  - decisions for prospective application
  - decisions binding on all, not just participating parties

- **Executive**
  - makes administrative decisions like any executive agency
Constraints and Discretion in Decision-Making: Judicial

Constraints:
- exclusive reliance on “record” evidence
- ban on *ex parte* communications (scope of applicability?)
- filtered flow of information, e.g.
  - Rules of Evidence
  - Evidence parties choose to present
  - Lawyering skills
- Articulated reasoning

Discretion:
- Closed meetings
- Judicial notice
- Bench inquiries and questions
Constraints and Discretion in Decision-Making:

**Legislative**

**Constraints:**
- Open Meeting (Sunshine) requirements
- Judicial review
- Making of legislative record

**Discretion:**
- Ability to speak with anyone (private or public)
- Unlimited opportunity for information gathering
- Use of staff
- No requirement to make formal record
## Constraints and Discretion in Decision-Making: Executive

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<td>Legislative oversight</td>
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Where Do Regulators Stand?

Constraints:
- All Judicial Constraints Apply
- All Legislative Constraints Apply
- All Executive Constraints Apply

Discretion:
- Some Judicial (Administrative Notice, Bench Inquiries) – not closed meetings
- Little Legislative (Some Staff Use Permitted)
- Little Executive (Some Staff Use Permitted)
Summary: Regulator Status in Regard to Constraints and Discretion in Decision-Making

- All Constraints of All Branches Applicable
- Very Little of the Discretion of All Branches Applicable
Practical Adverse Effects of Key Constraints

Sunshine:
- Less Effective Communication Between Commissioners
- Greater Empowerment of Staff
- Constrained Flow of Information
  - Slows Down Flow (Effect of EPSA decision) – Not in Real Time
  - Less Information and Analysis May Actually Flow
- Slows Process Down
- Reduces Availability and Use of Resources (e.g. Talk With market Monitor)
- Who Benefits from Sunshine?
Practical Adverse Effects of Key Constraints (con’t)

Ex Parte:
- Constrains Flow of Information
- Restricts Interface With Public Depending on Breadth of Application (EPSA Decision is Expansive of Definition)
- Slows Process Down
Practical Adverse Effects of Key Constraints (con’t)

Freedom of Information:
- Constrains Flow of Information
- Ties Up Resources

Judicial Review:
- Can Elevate Form Over Substance
- Over Judicialization of Decision-Making Process
Practical Salutary Effects of Key Constraints

Sunshine:
- Allows for Public Debate (Cannot Require It)
- Contributes to Public Understanding (Dependent on Media Coverage)
- Can Provide Regulated Entities Added Perspective
- Can Discourage Arbitrariness and Expose Bias
Practical Salutary Effects of Key Constraints (con’t)

*Ex Parte:*
- Contributes to a Level Playing Field in Decision-Making Process
- Inhibits Use of Untested Information
- Contributes to Openness of Process
Practical Salutary Effects of Key Constraints (con’t)

Freedom of Information:
- Contributes to Openness of Process
- Inhibits Use of Untested Information
- Contributes to Public understanding (Dependent on Media Coverage)
Practical Salutary Effects of Key Constraints (con’t)

Judicial Review:
- Essential Element of Maintaining Regulatory Accountability
- Enforces Legal Requirements
- Contributes to Procedural Fairness
So, What’s the Right Balance?

Regulatory Agencies are *Sui Generis*

- One Set of Constraints and Discretion Cannot Fit All Tasks
- Constraints and Discretion Should be Consistent With Task at hand
  - Legislative (e.g. Rate Cases, Rule Making)
  - Judicial (e.g. Dispute Resolution, Enforcement Actions)
  - Executive (e.g. Personnel, Procurement, Management)
  - Recognition of Need for Meaningful Flow of Information
  - Recognition of Real Time Nature of Markets
Transparency and Effective Decision-Making Must Be Balanced in Context of Market Realities and Nature of the Regulatory Task