

CHAPTER XX

VIRTUES OF THE ADMINISTRATIVE PROCESS

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Most of the issues of human and social relationships are not of the black and white variety. Right and wrong, sound and unsound, are elusive in the complexities of modern business and finance. For the Congress to endeavor to provide definite and precise formulae to govern many of the complex and intricate activities of business and finance would be as difficult as to endeavor to state what is a reasonable rate of speed for an automobile under any and all conditions. There are two sides to most of these problems. Several divergent interests are always pressing at least ostensibly plausible claims. These various and diverse interests can seldom be neatly balanced against the standard of the common good by means of a precise and inflexible formula. If such an attempt were made, the Congress would be faced with the choice of a strait jacket of outright prohibition on the one hand, or a do-nothing policy on the other hand. Both of these are un-American in their philosophy. It is the American tradition to insist on keeping to an irreducible minimum regimentation in any form, particularly a "thou shalt not" regimentation. It is likewise the American tradition that our government be a responsive, as well as a responsible agency—ready, willing, and able to assume a position of leadership at those points where self-help would lead to chaos. For these reasons the Congress has merely isolated, not solved, many important problems. Their solution has been delegated to administrative agencies such as the S.E.C.

It is true that if the Congress did more than isolate these problems, business and finance would have certainty; but it would frequently be certainty so arbitrary as to be loathsome. But when the Congress isolates a problem and sets up standards for its solution, it leaves play for discretion. Discretion, tempered by fairness and reasonableness and protected by constitutional safeguards, permits elasticity and flexibility. Case by case, group by group, problems can be solved with particular reference to the merits of each. Property rights and—even more important—liberty and freedom can thus be more readily protected.

Take the case of the stock exchanges. Theoretically Congress might have provided in the Securities Exchange Act of 1934 prescriptions for every phase of their activities. That would have entailed spelling out the minutiae of regulation in the statute. But such a step would have been a legislative blight. To avoid that, Congress wisely left many important problems for future solution. It permitted the S.E.C. to deal with the problems of exchanges on an hourly or daily or weekly

basis; to move forward with speed where haste was necessary; to meet changing financial and economic conditions at whatever rate the exigencies of the situation demanded. The same philosophy persists under the Public Utility Holding Company Act of 1935, which empowers us to administer in detail the broad mandate laid down by Congress over utility holding companies and their subsidiaries; and under the Securities Act of 1933 which is aimed at requiring those who make public offerings of securities to tell the truth about their wares.

Much of the shirt-sleeve work of government is done by administrative agencies, such as the S.E.C. Much of the responsibilities of government is carried by them. Under democratic forms of government, they have been increasing in importance and dignity. They have become more and more the outposts of capitalism; they have been given increasingly larger patrol duties, lest capitalism by its own greed, avarice, or myopia destroy itself.

The virtue of the administrative process is its ability to deal with technical, debatable, undefinable, or imponderable matters in a discretionary manner. It provides a realistic and sound alternative to hard and inflexible rules which proceed on the false assumption that right or wrong, black or white constitute the only choice. But beyond that it permits of action not only case by case but by rules. A rule can be expanded, contracted, or repealed in light of changed conditions or new experience. A formula fixed by legislative act tends to become more difficult to dislodge. Furthermore, the power to make rules means the power to deal with emergency situations, directly and with dispatch, in terms of minutes or hours rather than months or years. In a dynamic, fast-moving economic system responsible government must have a reserve of such powers if it is to save capitalism from its own complexities.

Wise government exercises such powers hesitatingly; intelligent business makes a free exercise of such powers both unnecessary and undesirable. With the Old Guard philosophy dominating stock exchanges, a fulsome exercise of such powers under the Securities Exchange Act of 1934 was an imminent necessity. But with a new management recognizing by deed, as well as by word, that such exchanges are public institutions impressed with a public trust, a fulsome exercise of such powers would not be necessary. Likewise, with a utility industry quickening to the great possibilities for healthy and sound reconstruction under the Public Utility Holding Company Act of 1935, opportunities for individual initiative should and will be accorded first place; governmental propulsion second place. In the American way of life, individual initiative will always remain preeminent. But in the American way of life, governmental fiat plays its important role—where self-help breaks down or where inaction thwarts the popular will. Fulsome powers of administrative agencies are reserved for those occasions.

In all of this there is no specter of unbridled discretion, no element of dictatorship. Congress in all of these situations specifies the standards which are to be applied. The administrative agency has no powers but the powers granted in the statute. Its rule-making power is circumscribed by the law itself. And the action of these agencies is quite properly subject to review by the courts. Furthermore, these agencies are not only responsive to the Executive, they are responsible to the Congress from which comes not only their powers but their appropriations.

But administrative agencies have mandates as well as discretionary powers. Under the Securities Exchange Act of 1934, it is our bounden duty to stamp out pools and manipulation. That has been our constant endeavor. Under the Public Utility Holding Company Act of 1935, we have no discretion but to enforce what the President properly called not the "death sentence" but the "health sentence." That in effect says (1) that holding companies must be restricted geographically, thus permitting state or regional development; (2) that holding companies can have "children and grandchildren" but not more distant relatives. Our job is to administer these laws as they are written, not to nullify them by inaction nor to trade out at the conference table decisions made in legislative halls. This is the mandate required by the trusteeship of public office. The fact that I personally agree with the philosophy of the "health sentence" under the Holding Company Act is wholly immaterial. The task of the administrator is to offer fairness and reasonableness in fulfilling his oath of office. To ask for that should be unnecessary; to ask for more than that should be effrontery.

Administrative government is here to stay. It is democracy's way of dealing with the overcomplicated social and economic problems of today. The fact that it is here to stay presents two important challenges for the future. In the first place, it offers a challenge to business and finance to provide the progressive leadership which must go hand in hand with administrative government. For it is already clear that if these administrative powers are to be exercised sparingly, enlightened business need only take the lead. And if these powers are to be exercised wisely, enlightened business must work at the round table rather than in the courts. Some cartoonists to the contrary notwithstanding, these agencies are designed not to twist the tail of business but to aid business in assuming a new position of leadership. There is no reason why the men of action and idealism in business and in government may not jointly forge the destiny of our economic system on the anvils of reason and in the fires of national ambition. There is no reason why the heat of controversy cannot be taken out of the business-government relationship. Neither side can make the progress which the nation demands unless the task of creating issues is discarded and all energies are devoted to the solution of problems.

The permanency of administrative government presents secondly a challenge to America to place the public service high in its scale of values. For the character

and rate of our progress depend upon the quality of men in public service. It demands a development along the lines envisioned by President Roosevelt of a new American career service, reorganized along sound business lines and creating the profession of administrative government. A prominent businessman recently told me that his one fear was that the quality of these administrative agencies would be no better than the quality of business management. We all know the difficulty of keeping any institution—whether public or private—free of internal decay and institutional paralysis. For administrative agencies the need is a constant infiltration from the ranks of youth. America has the tradition of sending its sons into business and the professions. It does not have the tradition of sending its sons into government. Other countries can afford to take a few years of the lives of their sons for military purposes. Democratic government can afford to ask its sons, who by training and tradition can assume a position of leadership, to give at least a few years of their lives in times of peace for the task of preserving capitalism and democracy.