Buffalo Law Review

Volume 20 | Number 1 Article 14

10-1-1970

The Administrative Agency and Environmental Control

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COMMENTARY

THE ADMINISTRATIVE AGENCY AND ENVIRONMENTAL CONTROL

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The great movement for environmental control has reactivated the long-standing controversy concerning the efficacy of administration as the central organ for reform. I say "administration" rather than the "independent" administrative agency. There has been a time when the argument centered on the independent agency. But I am convinced that that form of the argument is obsolete. The independent agency may add a dimension to the controversy but it does not go to the heart of it, not at least, in the debate as it runs today.[1]

It has been a truism now for some time—and it is as misleading and false as most truisms—that a regulatory agency is "captured" by the elements it is supposed to regulate. The proposition appears to be not that it can be captured but that by its very nature it will be captured. Of course, it *can* be captured and has been captured. So too, have courts, legislatures and presidents. Arguably what is meant is that an agency is more likely to be captured than other organs of government. That no doubt is the contention of the current proponents of the theory who, as is typical of Americans, are completely innocent of history. They look to the courts for salvation. They have either forgotten or have never known that for many years it was gospel truth supported by a massive record that the judiciary is inherently reactionary.

There is however evidence for the proposition that the comparative degrees of liberal zeal of the various organs of government is cyclical. There can be no doubt that in the last two or three decades the judges have been in the vanguard of liberal innovation. But even if it be granted that the agencies have been conservative or lethargic either because they have been captured or for other reasons, nothing in our history teaches us that they cannot

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1. Commissioner Elman has recently spoken out against the independent administrative agency with combined prosecuting and judging functions. He would transfer the judging functions to courts and place the administrative (policy-making) functions in single-headed administrations. I am not addressing myself here to that range of problems.

once more be effective organs for reform, and much in our history teaches us that they can be.

The capture theory is a reaction to the overvaluation of the administrative agency by the lawyers of the New Deal. It was argued by them that the administrative agency, particularly the so-called "independent" version, would be a body of experts who would constitute an organ of continuous reform free from political pressure. This pipe dream was just one more instance of American optimism and superficiality. The enormous success of the National Labor Relations Board in reforming labor relations and the similar success of the Securities and Exchange Commission in reforming the securities market enabled the proponents of the independent agency to foster these illusions. They were correct, I believe, in their estimate of the potential of the independent agency for streamlined, high-powered action. But they did not realize that the successful exploitation of the mechanism depends on a favorable parallelogram of forces. In the early New Deal days industry and capital were momentarily discredited and on the defensive; labor, and the investor in the ascendant.

The defect of the capture theory as a general theory is that it is based on an essentially Marxian analysis of social forces. It assumes that industry and finance run the country and call the tunes. A quick inventory of the agencies and departmental bureaus reveals the naiveté of this assumption. The capture theory would come much nearer the truth if it allowed for the variety of forces which operate in a society so vast and complex as ours. The SEC, for example, has a record of continuous innovation in investor protection. It would be possible to attribute this to the power of the investing public though there is no way to prove that proposition. Similarly the Labor Board has, for the most part, innovated continuously over the years, but it has been more responsive to the unions than to the employers. The Department of Agriculture is notoriously partial to farmers. In other words an agency may indeed become unduly responsive to particular interests which however may or may not be "big business."

The Interstate Commerce Commission provides the ultimate note of irony. The capture theory, in fact, was first propounded on the supposed evidence that the ICC was dominated by the railroads. Writing in rebuttal to this view some years ago, I think I

was able to show that at the very time when the thesis was being propounded the ICC was disabling the railroads from competing effectively with the motor trucks.[2] It has been following the same line ever since. It might indeed be said that the railroad-dominated ICC has led the railroads into bankruptcy. It might also be said that the ICC represents no one in particular unless it be itself. It *is* perhaps a "captive"—a captive of its obsolete theories, of its enormous and unwieldy technique, of its long and glorious past. It is like one of Toynbee's fossil cultures living on because at bottom no one knows what to do about the problems with which it is supposed to deal. I hasten to add, however, that it has taken more than the ICC to produce the present state of the railroads. There has been a massive failure of our government to devise a positive and coherent transportation policy. What can an agency do with a legislature and an executive—or if you will a society—which is unable to develop a policy or is actively promoting policies of confusion? The so-called failure of the agencies is only incidentally their failure. It is the failure of the society itself and more particularly the dominant centers of government—the legislature and the executive, the federal government and the states. In the 1950's the Federal Communications Commission did indeed do a poor job. But its performance in the last few years has been very respectable and far more creditable than that of Congress which has only passed the buck or put obstacles in the path of FCC initiatives. The critics of the FCC have never been able to devise a program acceptable to either Congress or the country. The FCC has been a convenient scapegoat of their quixotic impotence.

And now we are faced with an environmental crisis. It is the thesis of many environmentalists that the administrative agencies and bureaus have failed and that we must look to the courts for action. The theory of course is that the reason for the failure is the power of industry, and that the courts alone can be trusted to cope with that power. But industry's power is a function of all the other sources of power in the country. That has already been proved as I have noted by the record of the NLRB and the SEC. Until recently there has been no organized pressure for environmental control. The political situation has now changed radically. Every politician

2. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954).

is now sounding the call for pure air and pure water. The legislative activity is tremendous. There are new mandates and new calls to action. The stage is being set for the real battle to take place. It would be self-defeating to assume that the administrative organs cannot be effective participants in the drama. It would be self-defeating because there are many tasks which courts are not equipped to perform.

The clue to the role of the agencies and bureaus is an analysis of the jobs to be done. Such an analysis will reveal that some of the jobs can be best performed by the courts and some by the agencies with the backing and guidance of the courts—and some by the legislature itself. The distribution of jobs will be determined primarily by a correspondence of form to the task, but other considerations will be important as well—prestige, for example, where "clout" is needed. And, though I have attempted to deflate or at least modulate the capture theory, we can still suppose that there will be situations where even though an agency may be in form the best instrument it may in fact be too responsive to reactionary forces.

One way of approaching environmental problems is in terms of simple problems and complex problems. The problem of dumping mercury into lakes and streams is simple—relatively at least. Mercury is a deadly poison, to fish in very small amounts and to humans in larger amounts. Even here there are questions of "more or less" but they are not too complex. On the other side of the equation, to wit the cost of elimination, it appears that we are not faced with staggering aggregates. The upshot? The Department of Justice can bring a few quick criminal or equity proceedings and—so it would seem—there is a very quick and effective response. In such situations then, we must have available the direct and immediate appeal to the courts with their prestige and high potential for enforcement.

At the other end of the scale is, for example, the problem of controlling the general pollution of water systems serving densely populated industrial and commercial areas. Once we have eliminated deadly pollutants (which may be by direct action in the courts) we have then to deal with the great complex of pollutants of an industrial and domestic character (sewage). A flowing stream under normal conditions carries a sufficient amount of dissolved

oxygen to break down and assimilate a given quantity of such pollutants. Beyond that amount additional pollutants threaten (depending on the amount involved) fish, birds, and swimmers. Even here we do not deal with all or none. A given degree of pollution may destroy a certain percentage of anadromous fish (fish ascending rivers to spawn); some pollution may do no damage. In a given water system (*e.g.*, the Delaware River Basin) various levels of pollution will involve certain loss and gain effects in terms of commerce and sports and—on the other side of the equation—varying costs will be associated with the reduction of pollution to levels regarded as desirable. It may not be worthwhile to spend an additional $50,000,000 to save $5,000,000 worth of fish. Nor will it be likely that the most economical method of treating the pollutants would require each polluter (be it a city sewage system or an industrial plant) completely to eliminate its own wastes. Thus, injunctions or nuisance actions against individual firms or polluters may be costly and inefficient. What will be required is a process which all the concerned communities under the auspices of an administrative machinery develop acceptable standards in terms of a cost-benefit analysis and devise a system of controls which is the most economical. The Delaware River Basin Commission, an interstate authority, has recently completed the initial process of promulgating standards and is now engaged in implementing them. It should not require much argument to demonstrate that the judicial process is not well-suited to such a task.

Even when the task is primarily administrative the courts have demonstrated that they can make significant contributions. They have succeeded in opening up the administrative process both at the hearing and the appellate stages to citizens and citizen groups. This is indeed the single most important development in recent administrative law. Either because they are unduly responsive to special interests or have become insulated from their constituencies, the agencies in many cases do not adequately reflect the interests of unrepresented or unorganized groups. Beginning with the famous *Scenic Hudson*[3] case the courts have begun to guarantee standing to such interests both in the administrative hearing and judicial review, and the opening once made the courts have gone further and further in supporting their participation

3. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

and their initiatives. *Scenic Hudson* also interpreted the legislative mandate of the Federal Power Commission to empower and require the Commission to consider conservation aspects of its licensing activities. This is an example of a significant judicial contribution not only to the relevant procedure but to substantive considerations. This has led some observers to hope that the courts can exercise a major function in the actual decision making at least to the point of building up a body of conservation "principles."[4] This hope may be justified if we have in mind attitudes, burdens of persuasion, etc., but I am afraid that the hard problems of "how much to pay for what" can only be solved by the more political, democratic processes of administration and legislation. The Supreme Court has recently, for example, refused to adjudicate similar problems in the fields of education[5] and welfare payments.[6]

There is beginning to evolve a type of general legislation which would do two things: (a) establish the competence of citizens to bring original judicial actions as well as participate in the administrative process, and (b) establish a kind of judicial jurisdiction in which the court could itself adjudicate or could call on the appropriate administrative bodies to participate. In one version this legislation would allow a court to substitute its own judgment for that of an administrative agency which had already exercised its statutory jurisdiction. There is of course a question whether such legislation is constitutional. Courts in the past have refused to perform certain kinds of "administrative" tasks, particularly in the rule-making and licensing fields. It may be argued that the nuisance jurisdiction of the courts is such a jurisdiction and, indeed, many pollution problems can be treated as individual nuisance problems even though, as we have indicated in connection with the treatment of a river basin, the problem should not be so treated. Perhaps the courts can be trusted not to intervene where they are not equipped to do so,[7] although a few of our judges are not notable for their self-restraint. Some of the environ-

4. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 *passim* (1970).

5. McInnis v. Ogilvie, 394 U.S. 322 (1969).

6. Dandridge v. Williams, 397 U.S. 471 (1970).

7. *See* Boomer v. Atlantic Cement, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). The Court of Appeals did not believe that it was competent to deal with the control of cement dust emissions in the Albany area and thus refused an injunction though it did grant damages.

mentalists are fanatical in their single-minded devotion to an aboriginally-pure environment. It has been more than once noted that many of them are well-to-do individuals who can easily pay the cost of rigorous conservation standards in terms either of initial outlay or the purchase of substitutes. The less well-situated may not in the end be prepared to make the sacrifices required. We are seeing now how difficult it is for the New York Consolidated Edison to find ways of increasing its power supply in the face of environmental protests. As delay accumulates so does cost and so may the discomforts of those who depend on air-conditioning and cannot retreat to their country places. There is a risk then of too much opportunity for obstruction. I do not, however, think that this *is* a serious problem. If the environmentalists overplay their hand they will be checked. And all of us—the have-nots as well—will probably have to learn the lesson that it is to our mutual advantage to protect the atmosphere even if it means reduced per capita production. In working out the compromises that are inevitable the legislatures (state and federal), the administrations, and the courts will all have important roles.