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Sax: Defending the Environment--A Strategy for Civil Action

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BOOK REVIEW

DEFENDING THE ENVIRONMENT—A STRATEGY FOR CITIZEN ACTION. By Joseph L. Sax.¹ New York: Knopf. 1971. Pp. 252. \$6.95.

Defending the Environment is a depressing book. It is, in the words of the author "a book about the game of government and how it is played to the detriment of the ordinary citizen" (p. 245). It is not a story of corruption or dishonesty as this characterization of the recurring theme might suggest. That is what makes it all the more depressing. The author's assertion is that "the villains of the piece were persons of more than ordinary competence and integrity" (p. 52) whose personal inclinations and the mission of the agency in which they held important posts were in consonance with the values they betrayed. It is inevitable that our electoral and appointive process will from time to time put men in high places of public trust, men who place self above service. We have traditional means of dealing with this situation. We as a citizenry are less prepared to cope with the evil of which Professor Sax would have us aware. It is not the individual governmental official, although more than one officeholder is, in not very subtle fashion, described as being less than equal to his trust. It is the bureaucratic system that is to be faulted. The issue raised in bold relief is simply stated: Can we as private citizens do that which, to this writing, the Department of the Interior has struggled in vain to accomplish? Can we defend the environment? To the extent one believes the citizenry can be awakened and the legislatures can be persuaded to provide appropriate enabling legislation, the answer is in the affirmative: "If every state were to pass a law making clear that courts should consider the merits of citizen-initiated environmental cases . . ." (p. 149). There is, of course, more to the answer, but without this beginning we need no further detail.

As the title clearly indicates, *Defending the Environment* responds to the public's new found interest in ecology. It articulates for both the layman and professional an ancient right in contemporary terms, the right of each of us to a decent environment. For one who has developed any sense of cynicism, however, the backdrop could as easily have been any other subject touched by governmental regulation or control. The subtitle might well be "The Public be Damned." And so the Public is, even by the author in the *Foreword*. He writes:

We are a peculiar people. Though committed to the idea of democracy, as private citizens we have withdrawn from the governmental process and sent in our place a surrogate to implement the public interest. This substitute—the administrative agency—stands between the people and those whose daily business is the devouring of natural environments for private gain. (P. xvii).

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I had supposed the mission of the public agency was indeed to act as a surrogate to define and thereafter take such action as was deemed necessary to protect the public interest, a task that requires the most delicate balance between the interests of all of us and the special interest of some of us. Subscribing to such a form of government does not strike me as peculiar. Nor do I believe having faith in a given cabinet officer's domain means I have withdrawn from the governmental process. But, my former colleague of many years now tells me I have been betrayed. That is depressing; the more so because of the documentation provided.

Chapter I describes what has become known as the Hunting Creek fiasco in terms that must have various then governmental officials aghast at the investigation accomplished by Professor Sax. This project involved a plan to dredge and fill a tract on the Potomac River, the purpose being to create a peninsula of land with a magnificent vista of the Washington skyline. For procedural reasons on which it is not necessary here to dwell, it was incumbent upon the United States Department of the Interior to make recommendations to the Corps of Engineers as to whether the landfill in question would be consistent with intelligent planning for the Potomac River Basin. In June of 1964 a detailed statement of opposition was prepared by the Fish and Wildlife Service of the Department. Some three years later, Professor Sax reports, the then Assistant Secretary withdrew the Department's objections, basing his decision "first on political considerations and second on the feeling that the values were not great in the area to be filled" (p. 35). The decision was made without any additional studies of the fish and wildlife values. The reader is left to conclude that once the "political considerations" were placed on the scales weighing the public's interest in a national environment and the developer's special interest in the projects "improvement," little room was left for ecological values.

Another several months were to lead to a reinstatement of opposition by the Assistant Secretary, the reversal of the reversal being made in the words of the Assistant Secretary, "on the unanimous advice of my staff for non-scientific, non technical reasons" (p. 27). The Assistant Secretary was thereafter to disavow his reversal of his reversal when before a congressional committee in hearings described by one Interior Department official's later observations as "an emotional shocker for us all" (p. 33). The author uses the statements, the letters, and the comments of a *Who's Who* list of Washington officialdom to provide the background of intrigue that apparently prompted the seemingly endless reversals of reversals without any discernible regard for evidence relevant to intelligent planning for the Potomac River Basin.

There is, of course, more to this case study approach so effectively used to demonstrate the futility of the private citizen relying upon his government to fight the good fight against the special interest forces. "[T]he fact is," Professor Sax maintains, "that the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. He is perfectly capable of fighting his own battles—if only he is given the tools with which to do the job" (p. 56).

What tools does the citizen need? The author is clear. It is the right of

the individual citizen to maintain an action in the courts for the protection of the environment. In this forum the private citizen stands not as a "supplicant" before an administrative agency, but one who claims a right to which he and his fellow man are entitled, even as one has the right to file an action against another who has taken or damaged that which may be the subject of private ownership. It is only in this way that we can repudiate our traditional reliance on professional bureaucrats.

Would the citizen's reliance on the judicial process, rather than the legislative or administrative, do away with a branch of government, creating in its stead a judicial arbiter of that which is best as truth evolves from the adversary process? The author says "No." "Indeed, if there is a single theme in this book, it is that citizen litigation is designed to promote and protect the authority of legislatures to make public policy and to make it more responsive to the interest of their constituents than is presently the case" (p. 61).

Although the administrative agency or department is described more often as foe than as friend of the citizen, the author concedes it has its place. The citizen's right to maintain an action will simply help the agency to know its place as the right of the citizen to maintain a public service lawsuit provides a means of stripping away the current insulation that now, more often than not, envelops the planning and regulatory functions.

An imaginative law teacher can lead each of us concerned with the preservation of the environment to the courthouse door. What happens there will determine whether the Sax strategy for action is real or illusory. My guess is the President of the United States would be willing to testify it is real. In spite of the Florida Department of Natural Resources waiver of its permit requirements for a landfill project, "There isn't going to be a federally financed beach behind President Nixon's Key Biscayne Florida, vacation home. His neighbors complained too much. They said it could harm the ecology of Biscayne Bay and would violate state landfill law."²

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2. Gainesville Sun (Fla.), March 27, 1971, at 2, col. 5.

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