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CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT.* By *James O. Freedman*. New York: Cambridge University Press. 1978. Pp. xi, 324. \$15.95.

The role of administrative agencies in our political process has troubled Americans for generations. The government creates more and more agencies to counter new social problems, while periodically the country rises to attack the bureaucratic behemoth that has developed. Professor James Freedman, in his book *Crisis and Legitimacy*, analyzes these contradictory impulses. His central thesis is that the recurrent crises over administrative law are not isolated phenomena, but evidence of a deeper lack of agency legitimacy. As the title suggests and Freedman confirms in the Preface, *Crisis and Legitimacy* has two interrelated themes: (1) "understanding the recurrent sense of crisis attending the federal administrative agencies," and (2) "developing a theory of the legitimacy of the administrative process" (p. ix). Freedman divides his study along these lines. Part I successfully distills the common elements in the administrative crisis, but Part II only incompletely uses this understanding to develop an affirmative theory of legitimacy.

In Part I, Freedman surveys the historical reaction to administrative agencies. Ever since Congress created a tariff office in 1789, scholars, lawyers, and laymen have disparaged administrative agencies. The attacks have been sharp, bitter, and constant. And unlike critics of Congress or the courts, agency critics challenge the very legitimacy of administrative agencies — their right to exist in a democratic society. Because agencies cannot point to the Constitution to justify their existence, they must provide another *raison d'être*.

Each generation of critics, asserts Freedman, brands a different aspect of administrative structure as the central crisis. Freedman identifies five major concerns that have been lightning rods for agency criticism. The three attacks that he thinks most serious all state that administrative agencies do not conform to ideals of American political structure: (1) agencies violate the separation-of-powers ideal by combining legislative, judicial, and executive functions in a single agency, or even a single person; (2) agencies violate the judicial norm that trial-like inquiries must precede the government's alteration of individual rights; and (3) agencies violate the principle of direct accountability of the governors to the governed. Additional crises have accompanied (4) delegations of power by legitimate authorities to the illegitimate agencies; and (5) public ambivalence toward economic regulation, public concern with bureaucratization,

* This book review was prepared by an Editor of the *Michigan Law Review* — Ed.

and public skepticism of administrative expertise. Discussing each crisis in a separate chapter, Freedman concludes that none, taken alone, properly expresses the problem of agency legitimacy.

Freedman argues that the "popular version" of the separation-of-powers ideal, with its rigid compartmentalization of functions, is hopelessly naïve and clashes with the Founders' sophisticated grounding of separation of powers on "a psychological understanding of the nature of man" (p. 17). The Founders felt that power should be distributed so that "ambition be made to counteract ambition" (p. 16).¹ As long as unchecked power does not accumulate in one agency, or even in several agencies taken together, Freedman says, the Founders would approve of combining functions to meet practical needs. The popular version, however, sees only that agencies combine powers, and, without understanding the reasons, unfairly attacks agencies as illegitimate.

Freedman likewise finds naïve the American faith in the ability of courts and their procedures to solve society's problems, a second "fixed star in the constellation of American values" (p. 21). Judicial procedures are simply not adequate for tasks "more legislative, supervisory, or 'polycentric' in nature" (p. 22). Yet agencies are attacked when they turn to other, more efficient procedures. Freedman conjectures that the recent trend toward imposing trial-type procedures upon administrative agencies reflects societal tensions in the 1960s and 1970s; as social conflict increasingly polarized society, the country turned to procedural formality to ensure that the government was fairly exercising its power to favor certain groups at the expense of others. It is unfortunate that Freedman could not comment on the Supreme Court's 1978 *Vermont Yankee* decision,² which abruptly halted this trend toward borrowing trial procedures.

Freedman also minimizes the alleged administrative nonconformity with the third ideal of political structure — political accountability. The New Dealers emphasized the need for agency independence to protect agency integrity, although Freedman points out antecedent Progressive-Era reformers with similar beliefs. More recently, however, critics have bemoaned that same independence, saying that it allows an uncontrolled bureaucracy to tyrannize the majority of citizens. Freedman argues that, in fact, the political process does significantly control agency behavior and that the independence of agencies may properly stabilize more politically responsive institutions. He points to such widely accepted non-majoritarian institutions as the cabinet, the congressional committee system, the political parties, and the Supreme Court.

1. Quoting THE FEDERALIST No. 51 (J. Madison).

2. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

The delegation problem commands more of Freedman's respect. He urges courts to insist that Congress, rather than the agencies, resolve basic policy questions. Freedman rightly perceives that standardless congressional delegations force agencies to make controversial political decisions and diminish the legitimacy of the administrative process. But Freedman, like the Supreme Court, is unable to articulate a practical test for impermissible delegations. He recognizes that Congress sometimes can do no more than create an agency to tackle a problem "in the public interest," and cites the creation of the Civil Aeronautics Board in 1938 as an example. Thus admitting that standardless delegations are sometimes necessary and permissible, Freedman can only say that the nondelegation doctrine should prohibit Congress from transferring its power "[w]hen . . . the Framers regarded the proper exercise of less specific legislative power as closely dependent upon the unique institutional competence of Congress" (p. 93). The only examples he gives of nondelegable powers under his test are Congress's impeachment power and the President's pardoning power, hardly examples with which to reinvigorate the nondelegation doctrine.

Unlike the preceding chapters' concern with structural theories of government, the final chapter on sources of crisis deals with public attitudes. Freedman feels that much agency criticism stems from "public ambivalence toward economic regulation" (p. 31). Heavy reliance on agencies to guide the economy began with the New Deal, but it "was not the result of any well-thought-out philosophy of governmental action" (p. 33). Ever since the New Deal, society has generally accepted moderate economic regulation, and administrative agencies have been the means for carrying out that regulation. Unfortunately, says Freedman, this made agencies, as symbols of economic regulation, a focal point in debates over the proper amount of regulation. These debates often lead to attacks on agency legitimacy, although the underlying issue is not the role of agencies in the regulatory process, but the extent of regulation itself.

Public concern with bureaucratization has fostered another crisis of agency legitimacy. Freedman describes the life-history of an agency as tending toward greater routine and conformity with precedent. As many of our largest agencies are now "mature," Freedman states that "Americans are confronted by bureaucracies . . . at virtually every turn" (p. 37). Attacks on agency legitimacy — both directly from legal scholarship and indirectly from novels like *Catch-22* — can be seen as revolts of the individual against bureaucracy. Freedman sympathizes with such attacks, and endorses programs such as Scandinavia's Ombudsman to reduce bureaucracy's "egregious aspects and regressive faults" (p. 43).

Skepticism of administrative expertise is the final public attitude

leading to administrative crisis. Freedman argues that this criticism misses the mark. Agency members are rarely expert, but the staffs often do have a detailed and perceptive understanding of the problems they deal with. Rather than faulting the agency members as inept, critics should recognize that members (like judges) serve the role of generalists in guiding the narrow expertise of the staff. Energy should be devoted, says Freedman, not to demeaning expertise but to "developing institutional methods of placing the expert contributions of an agency's staff in the broader social and political perspective of the agency's members" (p. 57).

Freedman then examines public attitudes toward selected agencies. He contrasts the highly regarded Securities and Exchange Commission (SEC) with "perhaps the most consistently and severely criticized" agency, the Federal Trade Commission (FTC) (p. 97). The SEC's legitimacy derives from society's agreement with the SEC's basic goals — integrity and openness in the stock markets. Furthermore, the SEC regulates a single industry and avoids licensing and rate-making, tasks where private and social goals often conflict. In comparison, the FTC, because of its wide jurisdiction, has had enormous difficulties in devising clear and forceful standards of conduct and in mobilizing public support for its programs. Further, its jurisdictional overlap with the Department of Justice's Antitrust Division has lowered its budget and quality of appointments. These problems have led critics to question the FTC's legitimacy in regulating the economy.

In the next chapter, Freedman analyzes the mixed results of the Equal Employment Opportunity Commission (EEOC). The EEOC's limited success, says Freedman, stems from the public's ambivalence (a key word in Freedman's thinking) toward the Commission's goals. The public supports general statements about ending discrimination, but often objects to programs with teeth to implement those abstract goals. In the final chapter of Part I, Freedman briefly analyzes the myriad agency programs for the elderly, and suggests that Congress has often delegated tasks that are beyond the capabilities of a bureaucracy.

From Part I, Freedman concludes that each agency crisis expresses a broader malaise: dissatisfaction with the absence of a popular theory to justify the administrative agency. Although each crisis emphasizes a specific problem with agency structure, and each can be repulsed on its own terms, Freedman predicts that the attacks will continue until scholars develop, and the public accepts, an affirmative theory of agency legitimacy. In Part II, Freedman attempts to chart such a theory. Unfortunately, the attempt does not live up to the promise of Part I. Whereas Part I cohesively analyzes the source

of administrative crises, Part II only tentatively develops the affirmative theory, leaving many ideas unconnected to the main themes.

Freedman theorizes that the search for legitimacy should begin by examining the fairness of the procedural rules under which agencies operate. To do this, Freedman turns to the Administrative Procedure Act (APA), a charter he greatly admires. In the next five chapters, Freedman analyzes how the APA defines an agency, when it requires a hearing, how it ensures an impartial hearing officer and separates investigative and prosecutorial from adjudicative functions, and when it disqualifies a decisionmaker for bias. These chapters conclude that the APA's procedural fairness, tailored to individual agency needs, demonstrates the legitimacy of the administrative system.

Two factors weaken Freedman's exposition of this affirmative theory of legitimacy. First, Freedman inadequately incorporates into his theory the political-science literature on power and legitimacy. A major concern of political science is the interaction between legitimacy and governmental effectiveness. Incorporating ideas from this literature would have added sophistication and depth to Freedman's attempt to define the parameters of administrative legitimacy. Although Freedman at several points discusses the work of Max Weber, he merely footnotes important contemporary work.³ Freedman apparently knows the social-science literature — the twenty-five pages of end-notes and eight pages of bibliography are admirably wide-ranging — but he often contents himself with discussing Supreme Court decisions and scholarship more familiar to his legal audience, such as that of Alexander Bickel (to whom the book is dedicated).

The second weakness of Freedman's exposition also involves the scope of his presentation. Unlike Part I, where he sweepingly canvasses the general development of administrative law and scholarship to demonstrate his points, Part II presents Freedman's theory of legitimacy through a case study of the APA's relation to the Office of Foreign Direct Investments (OFDI). The choice is unfortunate. OFDI was "a relatively small administrative agency" (p. 189), created in 1968 by the Secretary of Commerce pursuant to President Johnson's executive order, and lasting only six and a half years before President Ford's administration abolished it. OFDI's origins thus differ from the major independent regulatory agencies, which were created by Congress and thereby lie more in the legislative-executive netherworld than the purely executive OFDI. Further, OFDI's internal structure differs even from that of other executive agencies, such as the old Post Office Department (one of the few agencies on which there has been litigation on the separation-of-

3. *E.g.*, S. LIPSET, *POLITICAL MAN: THE SOCIAL BASIS OF POLITICS* (1963).

functions question). Because of OFDI's unique character, Freedman's conclusions about legitimacy are of questionable generality. A larger, more "standard" independent agency may have made a better subject of investigation. Freedman's choice, I suspect, comes not from a desire to present his case most persuasively, but from the ease in transferring his *Pennsylvania Law Review* article on OFDI⁴ to his present work.

Freedman concludes Part II with five chapters on summary administrative action — the authority of agencies, without a prior hearing, to seize goods, take over banks, halt trade in securities, or suspend licenses, among other acts. Freedman persuasively argues that summary action, a heavy-handed use of governmental power, provides a critical test of agency legitimacy. After surveying the constitutional case law on summary action, including the recent *Snidach-Goldberg-Arnett*⁵ line of cases, and after discussing problems with administering summary action, Freedman suggests methods of controlling summary action to maximize the legitimacy of the agency. He gives no single prescription or even a new suggestion. Rather, he recounts procedures such as providing statutory standards, issuing rules and reasons, having prior informal discussions, expediting hearings, and allowing judicial review. The key ingredient for summary-action legitimacy, concludes Freedman, lies not in any specific structure, but with conscientious administrators. This throwing up of the hands is a disappointing conclusion, and clashes with Part II's general theme that fair procedural rules are the crucial ingredient for agency legitimacy.

Crisis and Legitimacy thus has flaws and insights. The most penetrating section of the book, Part I, gives a broad and thoughtful survey of the recurring sense of crisis in the administrative process. Each attack alone is not convincing, declares Freedman, but together they demonstrate society's feeling that administrative agencies are illegitimate. To change this feeling, scholars must provide an affirmative theory of administrative legitimacy. In Part II, Freedman builds the foundation for such a theory in the generally fair and impartial APA procedures. Although he fails to go beyond this simple foundation, he should be thanked for clearing away the underbrush of the separate attacks on the administrative process and for demonstrating the need for others to continue work on a theory of agency legitimacy.

4. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1 (1970).

5. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969).