BOOK REVIEW

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

*Reviewed by J. Patrick Green***

The central motif of Freedman's book is the argument that the administrative process has been plagued by the recurrence of crisis. Each crisis is characterized by the sense that the process is fundamentally flawed, because of a series of unresolved questions about whether or not the process plays a legitimate role in the political and economic scheme of American life. In the first half of the book, Freedman outlines each of these recurring doubts as to the legitimacy of the administrative process. He attempts to set each doubt to rest. In the second half of the book, he turns to questions of procedure. The union between the questions of procedure and the crisis of legitimacy is built out of the thesis that the administrative process, though neither constitutionally established nor directly responsive to the electorate, may be legitimated by the fairness of its decisional processes.

Freedman's first source of crisis is the departure of the independent administrative agencies from the separation of powers system of the Constitution. Here Freedman juxtaposes a simplistic civics-book model of the separation of powers with the more flexible model that he attributes to the constitutional draftsman. The simplistic model sees a rigid structure of separation, while the more sophisticated model is based less upon structural design than upon a principle "that caution[s] against excessive and unwise concentrations of power but [does] not preclude one branch of government from participating in functions assigned primarily to another."[1] Within the more sophisticated model, doubts about the legitimacy of independent agencies would dissolve. They do not threaten the excessive concentration of power that would violate the separation principle, though they may not conform to an organizational chart model of the doctrine. In other words, this doubt as to the legitimacy of the administrative process arises less from any true departure from constitutional norm than from a pop-

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1. J. FREEDMAN, CRISIS AND LEGITIMACY 18 (1978).

ular oversimplification of what the constitutional norm is. Presumably, then, the doubts of legitimacy would be dissolved by the recognition of the true constitutional norm.

Freedman does find significant separation of powers problems in the current structure of the administrative process. He lays these problems, however, not upon the process itself but upon Congress and the courts. He notes that as "a result of society's ambivalence toward economic regulation and of the delegation doctrine that permits Congress to make the administrative process the focus of that ambivalence,"[2] Congress has been able to delegate "to the respective administrative agencies the essential tasks of resolving the fundamental political and social questions that it has not been able to resolve itself."[3]

Separation of powers difficulties emerge when agencies make policy decisions at a level of generality that would more appropriately have been solved in the legislative process. The resulting illegitimacy of the decisional process may appropriately be charged to Congress. Nevertheless, its impact is felt by the agencies. To remedy these difficulties, Freedman has two solutions. The first is the reassumption by Congess of the task of making these basic policy decisions.[4] Unfortunately, as Freedman has already demonstrated, the failure of Congress to make these essential decisions arises out of the underlying public division as to the appropriate role of government in the economy.[5] With the public division, Congress protects itself politically by creating the agency without making a specific determination as to what its task will be. Then friends of regulation are satisfied by the legislation, and will blame failure on the agency, while enemies of regulation will see a bureaucratic excess in the action that the agency has taken rather than congressional error in creating the agency in the first place. Given this situation, which guarantees political victory for Congress, it is difficult to see why Congress would change its ways. The hope for stronger congressional guidance of the agency appears to be just that—a hope.

Freedman's second suggested answer to this problem is a revivified delegation doctrine. Such a doctrine, as he suggests, would rest upon "the normative premise that Congress, in the act delegating legislative power, may not abdicate its constitutional responsibility for making the nation's basic decisions of policy.[6] On

2. *Id.* at 263.
3. *Id.*
4. *Id.* at 57.
5. *Id.* at 33-35.
6. *Id.* at 93.

the other hand, Freedman concedes that "[t]here will of course be occasions when Congress cannot make decisions because experience with substantive areas under consideration is too limited and the policy questions that must be answered are still too indistinct to permit responsible lawmaking."[7] The ability to formulate a revivified delegation doctrine, which would be capable of selecting as between those instances where Congress had abdicated its responsibility and those instances where Congress had been vague because of the complexity of the substantive area, seems at least questionable. As with the hope of a more responsible Congress, a more active judicial role again seems to be just a hope. We are probably condemned to limp along with a Congress that tells agencies to do good, while not defining what the good is, and with agencies which are "exposed to the conflicting political forces that led Congress to shrink from a decisive response in the first instance,"[8] and which, for that reason, could "hardly be expected to do better."[9]

Freedman's second doubt as to the legitimacy of the administrative process arises from the departure in administrative proceedings from the trial norm. Here, Freedman enters the answer that many of the questions that administrative agencies are required to address are not suitable to resolution within an adversarial process. As he notes,

> when an administrative hearing involves issues essentially legislative in nature . . . the special virtues of trial-type proceedings are not only less suitable than other forms of procedure, they also distort the administrative process by which the agency is trying to reach a sound result, substituting the passive impartiality of judicial procedures for a vigorous administrative exploration of the public interest.[10]

Here, Freedman has rolled together two relatively diverse critiques of the trial process. The first critique involves the unsuitability of the trial process for resolution of legislative-type issues, while the second criticism concerns the bump-on-a-log tradition of trial-judging, whereby the trial judge leaves total control of the development of the record to the parties.

Clearly, Freedman's second element is not an indispensable part of a trial-type process, although it may be a traditional element of our adversary system. As to the first difficulty, I think

7. *Id.*
8. *Id.* at 34.
9. *Id.*
10. *Id.* at 29.

Freedman is on sound ground. The ability of the traditional trial to bring into sharp focus disputed factual issues is probably dependent upon the existence of a certain type of decisional standard to be applied. The central control of the admission of evidence is the requirement of relevance. Relevance is substance-dependent: What is relevant to the resolution of a question depends on the question to be resolved. As decisional standards become more amorphous, more and more evidence becomes potentially relevant. It may be that the traditional common-law trial requires fairly clear cut rules of decision if it is to work effectively. Without such standards, the traditional trial probably tends to become unmanageable. Clearly, well-focused standards are not the hallmark of decisions of broad policy questions.

The claim that a nontrial process is better suited for resolution of broad policy questions is a good response to criticisms of traditional regulatory processes which have departed from the judicial norm. However, as Freedman points out, recent criticism of the nonjudicial character of the administrative process has come in areas where this defense is probably not available.[11] Cases such as *Goldberg v. Kelly*,[12] which have judicialized the administrative process, have involved adjudicative facts of the type typically thought suitable for judicial resolution.[13] Here some argument other than the unsuitability of the problem to a trial-type process must be offered. The answer which Freedman gives is spread thoughout the book. In the second half of the book, where he deals with problems of process, Freedman discusses the summary action cases. He notes the Supreme Court's current tendency, evidenced by cases like *Mathews v. Eldrige*,[14] to allow the government to act, at least on a preliminary basis, with something less than a trial-type hearing. The Court "may have to come to believe that reliance upon procedures less burdensome than prior trial-type hearings is necessary if the administrative process is to retain its effectiveness."[15] Freedman then goes on to sketch the shape which such procedures might take in traditional areas of summary action, seizure of impure drugs and the like, where the press of time makes prior trial process impossible. He points to the utilization of prior rulemaking to define standards of summary action, the giving of reasons, or informal processes like negotiation, as possible forms of process which might increase the fairness of

11. *Id.* at 27-28.
12. 397 U.S. 254 (1970).
13. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).
14. 424 U.S. 319 (1976).
15. J. FREEDMAN, *supra* note 1, at 232.

governmental decisions to take summary action without burdening them with the full panoply of a trial-type hearing.[16]

The broader defense of the departure from the trial-type norm is thus phrased in terms of the suitability of alternative processes for reaching fair answers. Despite "the uncritical faith that Americans have traditionally placed in trial-type proceedings of the kind employed by the courts,"[17] such procedures are not the only way of arriving at fair and just answers.[18] The fact that "most of the European nations and most of the world's great intellectual disciplines do not follow trial procedures"[19] does indicate that other methods of resolution of factual disputes may be at least as fair and as workable as the traditional trial.[20] Departures from the norm of the trial are not an indictment of the administrative process. Rather, each such departure raises the question of whether the procedure being used is fair and adequate given the issues to be resolved. Neither the trial as a norm nor some alternative norm of appropriate procedure adquately recognizes the varieties of questions to be resolved or the considerations of efficiency that compete against the time-burdening trial process.

Professor Freedman's next source of crisis is a collection of public attitudes which have produced hostility towards the administrative process. He describes three such attitudes as: public ambivalence towards economic regulation, public concern with bureaucratization, and public skepticism of administrative expertise. For example, he traces the public attitude towards expertise from the initial New Deal faith—which largely saw the solution of social and economic problems as the twin task of politically defining a goal and then turning over the job of selecting the means to achieve that goal to experts—to the current skepticism toward expertise.[21] The new skepticism is the product of a number of elements: the recognition that expertise does not guarantee the formulation of sound policy, doubts that mere possession of expertise guarantees the benign exercise of power, and the traditional American hostility toward experts.[22]

While Freedman sees each of these elements—ambivalence about regulation, doubt about bureaucracy, and doubt about expertise—as disjunct, there is a central unity to these public atti-

16. *Id.* at 245-51.
17. *Id.* at 261.
18. *Id.*
19. *Id.* at 30.
20. *Id.*
21. *Id.* at 44-48.
22. *Id.*

tudes toward the administrative process. Governmental programs are established when the public develops a sense that nongovernmental means are incapable of solving a problem. For example, economic regulation is typically justified in terms of some form of market failure, such as monopoly or externalities. The assumption is that the market has not reached an optimal solution. The justification for governmental intervention is that an optimum can be reached through appropriate planning. As experience with governmental intervention increases, it becomes clear that it does not in fact produce optimal solutions. Then disillusion sets in. Instead of examining the governmental solution to see whether it is better than the market solution, the governmental solution is judged by its own original pretension to reach an optimal answer. Judged by this pretension, most governmental programs are probably failures.

What Freedman is offering as an anwer to hostile public attitudes is a dose of realism. Bureaucracy is a reality we have to live with. It is neither an unmixed blessing nor a uniform curse. Expertise does not guarantee solutions, but particular problems may be better solved by experts than by others. A public with realistic assumptions as to what government can do will not be plagued by the sense that government is a failure because it does not produce totally satisfactory answers.

This realism about government requires that specific programs, rather than the administrative process as a whole, be examined for success or failure. The record of the administrative process is neither a record of total success nor total failure. Rather, some agencies have been more successful in achieving there charges than others. From these varied rates of success, lessons can be drawn as to the strengths and weaknesses of administrative solutions; then administrative processes can be more perfectly fitted to problems. Freedman offers precisely this kind of particularization in his studies of the relatively greater success of the SEC than of the FTC in achieving their respective statutory missions. The SEC, charged with relatively narrow goals in a particular industry and armed with broad public support, has been more successful than the Trade Commission with its more amorphous charge and disunited constituency.[23] Similarly, the EEOC, charged with great responsibility and armed with paltry tools, has been less than successful.[24] In the case of the EEOC, the creation of the agency was "a symbolic affirmation of political functions

23. *Id.* at 97-105.
24. *Id.* at 105-15.

which are supported widely, but ambivalently."[25] Since the agency did not have depth of public support, a high level of success was not to be expected. From these multiple agency studies, Freedman draws the general lesson that "there are limits to the effective uses of the administrative process, and these limits tend to coincide with the bounds of social consensus on an agency's statutory responsibilities."[26]

Freedman's final doubt arises from the administrative process's inability to display the traditional hallmarks of legitimacy, constitutional creation, or direct election. Here Freedman again offers the counsel of realism against an idealized vision of the governmental process. While the administrative agencies are not directly elected, they are responsive in considerable degree either to presidential or congressional control.[27] Moreover, our political system is a mix of majoritarian and nonmajoritarian institutions, so that a departure from the electoral norm is not definitive of illegitimacy.[28] The legitimacy of the administrative process arises not from elections, but out of the conjuration of the delegation doctrine, which attempts to assure that agency decisions may be measured by some politically agreed standard, the necessity of justifying decisions by providing reasons related to that standard, and judicial review to assure that the connections exist between the publicly defined standard and the reasons given.[29] More generally, as Freedman later suggests, "the legitimacy of the administrative process must finally rest in an important part upon its dedication to decision-making procedures that are just—what Alexander M. Bickel called 'the morality of process.' "[30]

The final portion of the book is devoted to the question of legitimation through process. It is composed of two parts: A study of the interaction of the Administrative Procedure Act (APA) with the work of the Office of Direct Foreign Investment, which existed in the Department of Commerce in the late 1960s and early 1970s, and a study of summary administrative action. The broader burden of these two studies is that questions of procedure are best solved in the context of studies of particular agency function. While the APA has given a generalized outline of appropriate formal process, it has left room for flexible adjustment to the variety of agency tasks. The informal process, not embodied in the APA,

25. *Id.* at 115.
26. *Id.* at 264.
27. *Id.* at 65-68.
28. *Id.* at 74-76.
29. *Id.* at 72-73.
30. *Id.* at 129-30.

is not yet ready for procedural codification. "The task of devising procedural safeguards for the informal administrative process such as summary action must begin with particularized studies of how these processes actually work in practice.[31]

The ultimate thrust of Freedman's study is toward a realistic appraisal of the administrative process. If that process is not measured against an idealized vision of the constitutional system, an unrealistic appraisal of governmental, or a stylized definition of political legitimacy, then the current performance of the administrative process is defensible. In the course of making this defense, Freedman pulls the subject of administrative law into a central vision of the administrative process. That vision, however, is not a novel one. Essentially the book is an exposition and defense of administrative law similar to that espoused by the courts and by teachers of the subject.

As an exposition of administrative law, Freedman's book is masterful. The macaronic stream of cases that give administrative law casebooks their capacity to confuse become an ordered set of solutions to a specific problem. The problem is the legitimation of administrative decisions. The solution is the traditional family of doctrines—the delegation doctrine, rationality review, and due process. Taken together they assure that a limited bureaucracy, after fair process, offers reasonable solutions to the problems it is to solve. If there is any failure, it is not in the process itself, but in a political system that sets agencies to solve problems without agreement as to what counts as a solution or whether government ought to be the problem-solver in the first place.

Freedman's book is a work of guarded optimism. The world is not all that bad. It can be made somewhat better. Reasonable people trying to be fair can make it better. If one believes with him, then Freedman's book is a Gothic cathedral, a beautifully ordered and interrelated structure. Those who do not share the faith will see only an intellectual construct.

I have expressed some of my doubts about Freedman's vision. I doubt his hope of a more reasonable congressional practice with regard to delegation. I doubt that agencies will stand tall when Congress has ducked. I think the emphasis on procedure as a source of legitimation is overblown. Good, fair procedures are not a substitute for good results. The political tensions that produce administrative failures to formulate and carry through on coherent policies are not removed when procedures are changed. Nevertheless, I believe that Freedman has made a strong case in defense of

31. *Id.* at 242.

the administrative process, a case that says if government is going to perform a task, the administrative method is generally a good way of performing it.