

# A COMMON LAWYER LOOKS AT ADMINISTRATIVE LAW

by Honorable Morris S. Arnold

To a common lawyer, especially one who has spent much of his time, as I have, trying to understand the early history of the common law, the ways of the modern bureaucratic state can sometimes be bewildering. The early English state, to be sure, though the twin ideas of contract and property gave it much of its shape and character, was by no means devoted to the ideals of *laissez faire*. Prohibitions on usury, the existence of a large class of unfree persons in its very early days (sometimes a majority of the population), and the extremely important place afforded custom and status, all these lie in the way of any claim to libertarianism that the early English state might make. There was for instance, believe it or not, some regulation of urban landlord-tenant relationships even in the Middle Ages. Much of that kind of thinking about the nature of law and the purpose of government accompanied immigrants to this continent in the seventeenth century.

Of course we are taught to think that the values that inform and animate our Constitution are of the eighteenth century Enlightenment, squarely in the Rights of Man tradition that helped to create, or at least validate, the capitalist system. No doubt there is a great deal of truth in all this, but I have recently come to think what this account leaves out is the purely indigenous character of American Whiggish thought. My thoughts on this matter, though not entirely formed, are influenced by Frederick Jackson Turner's early attacks on what he called the "germ" theory of American history, by which he meant the tendency of historians to see antecedents to every American institution in some seed brought from Europe that later, more or less inevitably, grew into something in North America. Turner, quite rightly I think, saw this as false in a number of important ways: For one thing, it sees a fundamentally wrong pattern of continuity in a series of segregated adaptations; and for another, it ignores altogether what was different and special about the American experience.

**Valuing Liberty.** I do believe that the Constitution is a profoundly Whiggish document in the sense that it was formed against a background that put high value on certain kinds of liberty that the modern bureaucratic state has in large measure been designed to frustrate. But I think that this jurisprudential background is best explained as a product not of the persuasive force of *philosophes* but rather of the liberating impact of experience. In other words, the sense of self that still allows for the election of members of the Libertarian Party to the state legislature in Alaska was much more general in eighteenth century America. Why the loss of the frontier and the industrialization of the country have caused so catastrophic a loss of

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confidence in the private ordering of the world is a question that I do not feel qualified to answer. But that nevertheless seems to be the case.

**Current Wisdom False.** Certainly the politics of despair and the impotence of the individual in what is supposed to be an insanely complex and hostile world are part of the regular fare served up by those who seek to justify the existence of the modern bureaucratic state. Someday, and I hope that it is soon, when the history of the abandonment of the classical liberal tradition by our universities is written, an abandonment that, by now, is all but complete, I shall be very much surprised if its first beginnings are not traceable to the influence of professors enamored with the New Deal, some of whom, by the way, moved in and out of government rather easily. To take but one example of current academic wisdom, it is routinely asserted in the universities these days that the New Deal regulatory scheme was responsible for pulling the country out of the Great Depression, and this, despite overwhelming evidence to the contrary. It is quite commonly claimed that the Securities and Exchange Commission is absolutely necessary for the protection of the purchasers of stock, and that but for it (the commission) the market would be chaotic and beset by fraudulent trading and sharp practices. To give the lie to this assertion, one need only look to the efficient and effective workings of the world's commodities exchanges. Until very recently, they were virtually unregulated by the federal, or indeed any other, government, and among other things, operated with very low margin requirements, a condition that, for reasons I have never understood, is widely supposed to be a great evil in the case of stocks. The truth is that low margins allow larger numbers of people to engage in trade, increasing the liquidity of a market and enhancing its capacity to react quickly and correctly to the true fundamentals of supply and demand.

Of course I do not for a moment mean to suggest that all markets are always perfect or that there are not unscrupulous and dishonest people, who are bent on doing mischief. I do not, happily, have to make or prove so compendious and naive an assertion as this, for my point is a much simpler and modest one: that the transaction cost of providing cumbersome and expensive interventionist devices very frequently clearly exceeds any benefit that they might produce, especially when that supposed benefit is already diluted, if not entirely overborne, by bad substantive effects produced by the intervention itself. We need always to remember that the common law provided remedies for frauds and that it has not been demonstrated, indeed it is not demonstrable, that they were not adequate to the task of righting such wrongs as were committed. When one realizes that almost all stocks are sold on a secondary market, one comes to the realization that most brokers are only the equivalent of used car salesmen. The creation of a Used Car Commission (may we call it the UCC?) would probably startle most people, I think. But I had better not suggest that too loudly here in Washington, especially when one recalls that fairly recently Congress saw fit to provide a federal remedy for someone defrauded by an odometer rollback! Has anyone noticed, by the way, the number of the section of Title 15 of the U.S. Code that makes it a federal offense to install any device that will cause an odometer to register falsely? Well, I have and it's 1983! Now there's a concatenation of numbers calculated to drive a stake through a district judge's heart. Perhaps this statute, like the other 1983, will lie dormant for a century or so and then become a fertile mother of actions.

**Judging One's Own Case.** I would like today to discuss the kinds of ways in which the current structure of administrative law conflicts with some of the fundamental ordering ideas of the Constitution's framers. One of the gravest difficulties that litigants before agencies frequently face is created by the fact that agencies exercise all three of the powers into which we have traditionally divided the powers of government. As Madison noted in *Federalist 47*, this sort of combination is dangerous because it leads to tyranny. To take but one example, in a case with which I was obliged recently to deal, a lawyer was trying to make the argument that a regulation was invalid because it was short of the statutory right on which it was based. To urge this point before the agency was, of course, an exercise in futility. Quite naturally, the agency is not inclined to believe that it has failed to do its job properly, and this is in no way intended to be an indictment of the motives of any particular individual. It merely reflects a cold, hard fact of nature that has been recognized by Anglo-American law as a bedrock precept of due process for at least 800 years, embodied in the maxim that no one can be a judge in his own case.

Furthermore, when called upon to decide when and whether to enforce a regulation, agencies are likely to overreact because they are the ones that have invested so much time and so many resources in its creation. To put this in a familiar context, if a prosecutor had been a member of a state legislature that passed a law, he would be inclined to exercise his prosecutorial discretion in favor of a defendant less frequently than he might otherwise be. We need to recall that a proposal for a Council of Revision was rejected at the Constitutional Convention because it was recognized that judges could not be expected to deal impartially with laws which they had a hand in formulating.

**Unreconcilable Goals.** There is a second fundamental way in which congressional delegation of regulatory authority offends traditional eighteenth century ideas about the proper functioning of government, namely the need for a stable background against which contracts can be entered into and property acquired. Many agency charters contain a hodgepodge of policy goals that cannot possibly be reconciled with each other. This leaves to unelected and therefore ultimately irresponsible officials the choice of which goal to pursue at what time. The temptations for Congress to do this are obvious: They can point to something for all their constituents and claim credit for it. It is surprising how successful this simple stratagem has proved to be; perhaps its success is partly attributable to the natural human tendency to hear what you want to hear. But in any case, what results is a very real instability in the law as personnel changes or as the inclination of personnel changes. Instability, of course, was an evil against which both Madison (in *Federalist 62*) and Hamilton (in *Federalist 73*) had warned us. Thomas Jefferson, in 1787, even suggested that constitutions ought to contain a provision for a period of twelve months between engrossing a bill and passing it, unless two-thirds of the legislature approved it.

Laws that have some retroactive application, as regulations sometimes do, are especially difficult to square with traditional notions of fairness, especially when one recalls that the prohibition against *ex post facto* laws was originally intended to apply to civil regulations as much as to criminal laws. To change the rules even prospectively may upset expectations and vested interests; but to do so

retrospectively is especially arbitrary and onerous. Take, for example, the case of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), in which it was held that it was not a violation of due process to make mine operators responsible for black lung payments to former employees. For me, perhaps the most intriguing aspect of the case is the off-handed manner in which the court has come to treat what it called "legislative acts adjusting the burdens and benefits of economic life." This is just a euphemism for totally unexpected redistributions of wealth--takings of property, in other words--from one person to another. The justification offered for the statute in question is, at bottom, only a restatement of the result. And it is a version of the discredited "enterprise liability" idea, namely, in the words of the court, the statute was a "rational measure to spread the costs of the employees' disabilities to those who have profited from their labor--the operators and the coal consumers." The laborers were, after all, paid money for their labor, and I have never understood why it is not self-evident that the laborers also profited from their labor. If they did, why does it not make just as much sense to leave the loss where it is found?

**Not an Easy Case.** As a justification for the retroactive feature of this law, this explanation especially fails to satisfy. If the idea is that it is a rational thing always to spread from the few to the many, then the argument proves too much, for it would always under that theory be justifiable to pick out a large group of people, say all those whose names begin with "A," and have them bear the costs of black lung disease. Surely this would be arbitrary, and thus unconstitutional, but why the fortuitous proximity between employer and employee or maker and consumer furnishes a more rationally defensible link to justify the imposition of liability I cannot say. If I work to get money and exchange that money for a good, I have exchanged my work for the good. The person who makes the good is therefore "profiting from my labor." Does that make a rational case for imposing on him a liability for difficulties occurring to me in the course of my labor? It is not an easy case to make.

Another very troublesome aspect of the current structure of administrative law, from the benighted point of view of a common lawyer, is that the courts have taken a "hands off" approach to the validity of regulations in cases where "Congress has not directly addressed the precise question at issue." This is troublesome in a number of ways. First, because the question for the court, in these kinds of cases, is only whether the agency's construction of the statute is "permissible," not whether it is "correct," an agency is given considerable power to change directions by filling in the congressional lacunae in different ways. Obviously this kind of uncertainty retards the flow of capital to those enterprises that are likely to be subject to it. Secondly, sometimes this attitude of judicial capitulation is laid at the door of "agency expertise," an idea that frequently has been discredited and probably has genuine force only in procedural, not substantive, areas. Thirdly, the probably most intriguing, are the possibilities for judicial manipulation when applying this so-called rule. To put it bluntly, who can tell when Congress has "directly addressed the precise question at issue" or when it is "silent or ambiguous with respect to the specific issue?" Like the old parole evidence rule, a predicate for the application of which is a determination of whether an ambiguity is "patent" or "latent," the current judicial attitude toward agency regulations gives rise to much uncertainty because its precise character is impossible to predict in many given cases.

This is a sufficiently important point, I think, that I want to spend some time now on a closely related one. I recently had my attention drawn to a pair of quite interesting Supreme Court cases decided last term. The first, *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, No. 84-1274 (U.S. Jan. 22, 1986), involved the question of whether certain Federal Reserve regulations were void because the Board did not act within its statutory authority in defining banks as it did. I shall confine my remarks to only a portion of the challenged regulation in order to make my point more clearly.

**Expressed Interest.** The Bank Holding Company Act of 1956 defines a bank as any institution that "accepts deposits that the depositor has a legal right to withdraw on demand." Many so-called nonbank banks have of late begun to offer customers the equivalent of checking accounts through the device of NOW accounts. Since these institutions retain the right to demand notice of withdrawal (though this right is almost never insisted upon), they are not banks, the argument runs, and thus not subject to the regulatory powers of the Federal Reserve. To remedy this, the FRB held hearings and amended its "Regulation Y" to define as a bank any institution that "accepts deposits that as a matter of course are payable on demand." In holding this regulation void, the Supreme Court of the United States alluded to the rule that "if the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'...The traditional deference courts pay to agency interpretation is not to be applied to alter the expressed intent of the Congress."

These seem salutary principles indeed, but a case decided only four months later indicates how elusive they can be. In *Federal Deposit Insurance Corp. v. Philadelphia Gear Corp.*, No. 84-1972 (U.S. May 27, 1986), the question presented was the proper interpretation to be given the term "promissory note" in a federal statute defining deposits for the purpose of determining their insurability. In this case, though the majority opinion is difficult to characterize, the Court referred to "the 'considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" A remarkable feature of this case is the Court's total failure to refer to the so-called plain meaning rule even though one would think that the term "promissory note" would have about as plain a meaning as anything could. The court then held that the instrument in question did not qualify as a "promissory note" within the meaning of the relevant statute, and this, despite the fact that the agency expertise to which it was deferring was not even embodied in a regulation but existed only in agency practice in related matters.

These cases might be almost endlessly commented on, but let me say just a few things about them that will have to occur to anyone concerned with the separation of powers. First of all, I think that it will lend clarity to the discussion here if we define the precise issue involved in these cases in ordinary eighteenth century legal terms. Is not the question here, properly conceived, whether the agency has attempted to amend the statute involved and thus attempted to legislate, something that the Executive Department cannot do? If that is the question, and I submit that it is, then the Court is being asked essentially to decide a fairly ordinary question, even though it be one of a constitutional variety.

**Violating Separation of Powers.** Having thus framed the issue, we are then directly driven to ask whether it makes any sense at all for the judiciary to defer to the very agency whose action is challenged in resolving a lawsuit. Indeed, it is never proper for the judiciary to refer a judicial question to the Executive Department. But to refer that question to it when it is a party violates not only the principle of the separation of powers but also the precept to which we referred earlier, namely, that a man may not be a judge in his own case. Surely we have lost our way somewhere. Of course the Executive not only may, but of necessity must, in the performance of its duties interpret and apply statutes. But it may not amend them, and the question of whether it has tried to do so is an ordinary legal one that, when it is in a judicial context, must be decided by judges. It is emphatically the province of the judiciary, in the context of a case, to decide what the law is. It is more than a little curious to me that in this context the Court has developed a rule that is at odds with the establishment cant that a Supreme Court decision is "the law of the land." I suggest that it is time to jettison the notion of agency expertise as an aid in deciding cases, not simply because it has dubious substantive validity, but because it violates important constitutional assumptions.

I think that what I have thus far had to offer can serve as the basis for some concluding thoughts. Frequently, a reason advanced for allowing Congress the luxury of loosing upon the world agencies with enormous powers and vague and Delphic charters is the complexity of the modern world. Congress cannot, the argument runs, foresee all the difficulties that enforcers are going to face. It cannot deal with all the possible fact situations because it does not have the time. Therefore, it must, of necessity, leave it to others to fill the gaps.

No doubt the modern world is complex, but much of the complexity is caused by the regulators, not alleviated by them. Furthermore, if it is impossible to foresee all of the future difficulties that enforcers may face, might this not counsel doing nothing in the short term, rather than setting on a more or less uncontrolled course an agency of government that is frequently not accountable for policy choices that it may make in the future? I am afraid that frequently Congress has deliberately insulated itself from having to make the hard, tough choices between competing social policies by transferring their resolution to persons who are beyond effective political control. This prevents, or makes unnecessary, the formation of those political coalitions that the framers were so keen on fostering. The law in this country is supposed to be the point at which accountable republican vectors find their equilibrium. Because of the present relationship between the courts, Congress, and administrative agencies, we are entitled to wonder whether the framers' struggle to contain and frustrate human nature was successful after all.

