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CONSTITUTIONALISM AND ADMINISTRATIVE GOVERNMENT IN THE UNITED STATES: A SKETCH

One of the classic tasks of constitutionalism in all its many forms(1), and of modern constitutional law specifically in the American federal governments, is that of legal and constitutional control of the administrative system.

In the American system the task is two-fold. It is that of preventing administrative injustice to individuals. It also is that of assuring that the powers, necessarily broad, of the administrative are properly used. It is often said that „the bureaucracy is the core of modern government"(2). This vital core must be managed with alert care, and with attentive good judgment, wisdom, and consistency by the polity in general if these great powers are to do their work and to avoid derangement and loss of effectiveness, let alone actual abuse. Constitutionalism is usually an important means to this end. Certainly it is always an appropriate one particularly when it is coupled with appropriate politics and policy. This paper is a brief account of some central elements of American arrangements and American experience.

Constitutionalism and constitutional law are of course much used on problems of every kind throughout the whole of the American political order, including the problems of the constitutionalization of the bureaucracy — the administrative system.

A few words about an episode in American experience and thought may be illuminating(3).

The United States came late to being a fully industrialized and social-service state and hence late to the necessity of having a set of exten-

(1) See Graham Maddox, „A Note on the Meaning of 'Constitution,'" 76, Amer. Pol. Sci. Review, pp. 805—810, Dec. 1982; and Harvey Wheeler, „Constitutionalism," in Fred L. Greenstein and Nelson W. Polsby, eds. *Governmental Institutions and Processes* (Reading, Mass.: Addison-Wesley, 1975).

(2) This familiar phrase apparently originated with Professor Carl J. Friedrich. See his *Constitutional Government and Democracy — Theory and Practice in Europe and America* (4th ed., Waltham, Mass: Blaisdell Publishing Company, 1963).

(3) There is no general history of American administrative law, but the periodical literature immense; see the *Index to Legal Periodicals.*

sive bureaucracies, a system of administrative government, and administrative Leviathan, so to speak. A fairly good date for the emergence of such a system would be not earlier then the years just before the First World War, and the system was not really completed (if it ever has been) until afrer the Second World War(4).

Throughout this time there was nearly continuous opposition to this development, and to government regulation in virtually any form, by industry, business, financial interests, and generally by the conservative wing of American politics. Administrative regulation was especially attacked, in part no doubt because it was quite effective. The attack fluctuated over time but reached crescendo with the coming of the New Deal.

In a substantial degree the attack was led by the powerful American Bar Association (a national association of influential lawyers), and it was a decisive event when the Association representatives and the New Deal lawyers were able at least to compose their differences to the extent of essentially agreeing upon a federal statute to state some major part of the law of federal administrative procedure. This became the Administrative Procedure Act of 1946(5).

The „APA" was expected to be a preliminary, partial, measure, soon to be amended or replaced. But the statute turned out to be a fortunate — and very artful — political settlement. It survives to this day, much interpreted and much criticised but little amended, and it seems likely to go on and on. It nearly dominates the current federal scene. However, by now it needs some reappraisal and reform, particularly in the direction of constitutionalization.

The APA provides a useful conceptual framework for a survey of American administrative law and procedure as revealed in this process of its being further constitutionalized. The APA also is a useful picture of a major American statute, and of American constitutionalism and constitutional law, at work on a complex and highly important group of constitutional and administrative problems. One goal of the process is to foster any necessary further constitutionalization.

A general point on which the American experience may be useful can be set forth at the outset. It is that administrative law is more than just a body of law (like the law of contracts or torts). It is a system of justice, and is based on fundamental views of the nature of the law and of government as an organic entitö and a unified intellectual construct. This is very familiar as to constitutional law. It is much less familiar as to administrative law. Closer relations between the two must be developed here as elsewhere since they both are working on problems, and with ideas and scholarly techniques, that overlap and interact.

This can be done. But the size and difficulty of the undertaking must be recognized; many people and many things are involved. Statistics are an inadequate measure, though helpful; these matters must be sensed and

(4) However, development has been very uneve and confused, and of course much affected by ideology and politics. For the law there is Professor Kenneth Culp Davis's magnificent and indispensable work, *Administrative Law Treatise* (2nd ed., 4 vols., San Diego, CA.: K. C. Davis, Publisher, 1983).

(5) 60 Stat. 237 (1946) as amended; 5 U.S.C., Secs. 551 ff. See also the *Legislative History, Administrative* Procedure Act, 79th Congress, 2nd Session Senate Document 248 (1946).

felt And so must other things; an example is the extent, complexity, and importance of cross-flows and active interconnections the system. Certainly the difficulties are vast in the American system, and one project of the law is to rationalize them. The administrative process is not a one-way street. Indeed it is closer to being the familiar „seamless web."

Separation of powers, federalism, decentralization make matters more complicated, both generally and in specific instances. So do other American principles and institutions, such as public opinion, the interest group system,legality, the broad jurisdictions of the courts, and so on. The administrative must deal with them all.

The system and its law are currently very much entangled in problems of recognition, approval, and reform. It is therefore especially important to get a picture of it as it stands now. We will go section by section through the APA, probably the best means of access th the system, both its law and its politics.

The first relevant section (Section 2 of the Act in the original 1946 numbering, Section 551 in the new codifilation in the U. S. Code Title 5) is composed of most of the important definitions used in the Act — „rule," „order", rulemaking", etc.

These definitions are carefully considered and adroitly drafted. Examples may illuminate this, thus the draftsmen silently omit any reference to the Presidency, perhaps not wishing to try at the moment to bell that ferocious constitutional cat. They say nothing directly about one of their most radical deeds, that of dividing up all „formal" proceedings into two, and just two, categories: i.e., rules and orders, these being created by „rulemaking" and „adjudication," and saying nothing about informal adjudicatory proceedings, though these must make up at least ninety percent of what government does. The draftsmen may well have decided that what htey had done would be a start, with some things necessarly left to a later time when more consensus had developed on both problems and remedies. They were largely right in this very temperate daring. But surely something could have been done about informal adjucation.

The next section, (Section 3 in the old numbering, Section 552 in the new, that of Title 5 of the U.S. Code) embodies several Congressional attempts to cope with an intractable problem, that of government policies about information, a problem whics cuts across the whole administrative process.

It would be generally agreed that considerable citizen access to many kinds of information which the government holds is a right essential to democratic free government, and certainly essential to operating a properly constitutionalized administrative system. But what kinds, and how? The statutes are drastic, startlingly so. In essence they provide that any person may obtain access to any document any government agency possesses unless the document can be brought under one or another of eight rather limited exceptions, and in the face of a very potent scheme of judicial remedies.

This is the Freedom of Information Act, „FOIA", completed in 1974(6). It was followed by the Privacy Act(7). Basically, this latter act limits the powers of agencies to collect or disseminate certain types of information about private individuals and organizations.

(6) See Pub. L. 93—502 (1974).
(7) See Pub. L. 93—579 (1974), 88 Stat. 1897 (1974).

The two statutes interact, and have required considerable interpretation. But a considerable jurisprudence is growing up which seems likely to endure and to provide some good policy for the subject even though strongly opposed by much of the bureaucracy.

Sections 4 and 5 (5 U. S. C. Cections 553 and 554) should be read together; Section 4 deals with what is called „rule making" and Section 5 with what is called „adjudication," and these are related.

With these and the definitions, we can begin to see some of the system's great structral members, or principles, functioning. Specifically we can see some of the great dichotomies, and some of the great analogies, that are used by the APA and are fundamental to much of administrative law.

One such dichotomy is that between rules and orders. This is based on a radical distinction between legislative and judicial functions and powers. Another such dichotomy is the related one, which follows along with the first; it is that between the two processes of rule-making and adjudication. This in turns leads to the separation between formal and informal proceedings.

Section 4 is about rulemaking, the legislative process of the agency, and about that characteristic product of the agency, rules. Rules are defined (more or less) as agency pronouncements of „general . . . applicability and future effect." In contrast, an order is „a final disposition . . . of an agency in a matter other than rule making . . ." On the face of it, the two groups comprise the whole of agency action. This of course is not quite accurate but it is in a sense fairly close.

A rule, properly made and within the jurisdiction of the agency, can have the force of law. So can an order.

Rule making is of two kinds, procedurally. One is „informal," or „notice and comment," rule making. This procedure can be relatively uncomplicated and informal. The agency (1) must simply give proper notice that it is going to „engage in rulemaking," — is going to decide whether it wants to make a rule, (2) must give interested persons an opportunity to be heard, and (3) must publich any rules adopted together with „a concise general statement of their basis and purpose." These are numerous qualifications and conditions but this is the essence. It has proved to be a very effective device though frequently agencies do not make enough use of it.

Formal rule-making is typically more complex, particularly in that it brings in the device, of formal procedure. Formal procedure is provided for by the APA, both in rule making and in adjudication. (Adjudication, again, is the process under the APA whereby the agency formulates an order. An order in turn is defined by the APA as „. . . a final disposition of an agency . . . in a matter other than rule making . . .")

Formal procedure, „formal rule-making" is not very common in rule-making but it is very much alive and more than occasionally is important. It may be granted, or required, by Congress or by constitutional right. If by Congress, the magic words which trigger the use of formal procedure in rule-making are the following, when appearing in a statute: „when rules are required by statute to be made on the record after oportunity for an agency hearing, Sections 7 (556) and Section 8 (557) . . . apply. . ." And 4, 5, 7 and 8 set forth the elements of formal procedure. Briefly, formal procedure in adjudication and in rule-making is rather similar to legal, or ju

dicial, procedure. Also there are a considerable number of experimental „hybrid procedures" lying somewhere between the pure formal and pure informal.

As to adjudication. There is no pattern of framework provisions for informal adjudication as there is for informal rule making, and there is only a scattering of relevant arrangements; it would be difficult to devise a statute even if policies could be agreed upon. However this is an inevitable further step in the development of administrative law, and will come sooner or later.

Formal adjudication is to the contrary; there is a great amount indeed of materials in the literature about it, and the law is well-developed.

The basic analogy behind formality is to the judicial trial, or hearing, and this is drawn on extensively. In fact a typical criticism of many reform proposals is that they are said to „over-judicialize" the agencies' processes.

Certainly, much of administration procedure is in truth drawn from the judicial experience. But one partial answer to the complaint about over-judicializing is that the judicial process, appropriately adapted, is in its own way and when it is used for its own proper purposes, a very effective instrument of government.

Finally, aff the foregoing leads us to a final APA topic, judicial review — the judicial control of administrative action. Here many ideas and problems come together.

Problems of relationship between the traditional three branches, the legislative, the executive, and the judicial, have existed at least as long as the separation of powers system itself(8). Any consideration of the constitutionalizing of the administrative needs to take these problems into account, both because the administrative is currently one of the main areas of interaction and also because the issues are there usually clear.

When the APA was developed and enacted, controversy over the function and value of judicial review was fundamental and intense, and it sharpened as matters went on, so it is an interesting area not only for the historian of administrative government and law but also for the student today and the reformer of law.

The APA itself had finally wound up attempting to do little more than restate the existing law with some more or less agreed-upon improvements. There were however, two more drastic lines of thought. One was that the courts and the judicial power should be kept to as narrow a field as possible, and especially that they be kept away from any power over social reform, over positive meliorist government, and over „liberal" governmental action generally. This on the grounds, not unreasonable ones at the time and under circumstances, that the courts seemed, especially to the New Deal liberalism of the time, to be both reactionary and activist, much as the Old Regime courts had seemed to the statesmen of the French Revolution.

The other line of thought was that the courts were nearly the sole defense against the constitutional dangers and the destructive economic, social, and political policies being urged from the left.

(8) M. J. C. Vile, *Constitutionalism and the Separation of Powers*, (Oxford: Clarendon Press, 1967).

The draftsmen (Section 10 in the old numbering and Sections 702—706 in the new) steer between the two extremes, dexterously limiting themselves closely to procedure, where they did much real good, and avoiding as much as possible any direct impact on substantive matters.

The logically first problem is the old conundrum of standing to sue *(locus standi)* called in Section 702, the „right of review"). It was left largely as it was but was equipped some footholds for future judicial or congressional efforts in the shape of familiar formulas to clear things up. The concept of standing is explosive. By expanding it the courts can create new classes of litigants and new causes of action; it could if so used nearly revolutionize the legal order.

Second, the Act (Section 701) largely clears up some of the troublesome problems of „form and venue" (i. e., the legal form in which an action for judicial review can be brought and where it can be filed).

Third, having now gotten the petitioner into court, the Act (Section 10, old numbering and Section 704 new) extends its reach to virtually any action the agency takes or has taken in the matter, sweeping away a good deal of complicated law in the name of simplicity and rationality.

Fourtht, in Section 10 (old numbering) and Section 706 (new), the Act addresses the great problem of „scope of review." That is to say, what can a reviewing court review; how far does its authority over the administrative extend; what issues may the reviewing court consider; what tests is it to apply; what relief can it give; in short, how serious is the Act about separation of powers, due process, and judicially-enforced constitutionalism in general? Section 10 and cases under it suggest that the most important formula is that of Section 706 (2) (A): the reviewing court is to set aside any agency action found to be „arbitrary, capricious, an abuse of discretion or otherwise contrary to law." This formulation is not magical, but it can in truth „enter into a system of jurisprudence," and be useful for doing so.

These questions arise, in American administrative and constitutional law, of course and are asked and answered in a special setting, the American polity and American experience and political thought. But at least in some degree the questions and the answers may be illuminating in other scenes as other systems struggle with the problem of constitutional control of their own administrative Leviathans.

When American constitutionalism and constitutional law are working in their creative mode (for example, reforming the administrative system and that system's law) they tend to function by small increments, case by case, step by slow social and doctrinal step, in good common-law style, and only occasionally by sudden gulps, sudden rushes of released energy. There are instances of something more drastic and radical, when many such steps fall together; the New Deal of the 1930s is often rightly cited as one. But these instances are rare.

These steps usually involve currents of change in ideas about the law generally, leading by stages to concrete changes in the actual law itself. Thus, the development and enactment of the APA waited upon the completion of a sufficient number of effective small steps in both doctrine and organization and also, as was pointed out above, the development of sufficient consensus.

This may be called the classical style of development. It certainly can include the reform of the administrative. Most development and reform takes place in this very commonplace and obvious way. The natural end is some form of codification, such as the APA. Or, indeed, the Uniform Commercial Code, or the Federal Code of Civil Procedure.

But things do not always work in that fashion. Indeed, they usually stop well short of at least any real codification. Examples of attempts from our field of administrative law are the extensive and ultimately unsuccessful reforms of various committees, first, committees of the American Bar Association (1955—83) and, later, (1975—1981) of committees of the U.S. House and Senate. The ABA and, largely, the congressional groups were attempting to do a second round on the APA, to carry it forward, to further revise it, largely with rather minor and specific changes, but also with some changes in general tone and with an owerall improvement in legal quality. This is the underlying thrust of this present paper, that being the most central and general line hence the most convenient one for arranging the others around.

It is clear from even our extremely brief survey of the APA that it contains many small things which might well be revised (e.g. the looseness of „notice and comment" procedure) and some broad aspects of a general or fundamental nature that might well be reformed or redirected in some identifiable ways (e.g. the scope of judicial review). There is much work here for constitutional criticism.

However, all these are largely applications of the classical style, so we should also look at some of the more drastic, more radical, approaches to widen our horizons.

One of these approaches finds important implications and potentialities in the concept of *standing*, the right to sue, mentined above. If broadly conceived and rigidly applied, standing reduces access to official recognition by the legal system (including its administrative as well as its regular system), Narrowly conceived and readily granted, it widens the legal — judicial system to allow participation to many more applicants. Like property, it is a grand principle of order(9).

Another approach(10), after an exhaustive review of the law and the politics, concludes, somewhat reluctantly, that the constitutional future of administrative law lies in its moving toward being a kind of „surrogate political process". Its task would become that of receiving essentially political representations in the guise of legal argument and evidence, of appraising their legitimacy, and of weighing their societal merits, not that of judging in accordance with any body of rules claiming itself to be law and as law binding on the citizenry.

A much less drastic but very influential view is that of Nonet and Selznick (11). They see a three-fold structure in law generally (not just in administrative law) which they think would, if adopted, clear the air of much confusion. They see law as being of three kinds. The first is repressive law; this is law defending an existing order. The second is autonomous

(9) Joseph Vining, *Legal Identity: The Coming of Age of Public Law* (New Haven: Yale U. P., 1978), p. 1, quoting Professor Frank H. Knight.

(10) Richard B. Stewart, „The Reformation of American Administrative Law," 88 Harv. L. Rev., 1671—1813 (1975).

(11) Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Octagon Books, 1978).

law; this is law off by itself, pursuing its own ends. The third is responsive law, law in the service of social reform.

There is another view(12). Scholarship in the leading American law schools assuredly has in general important and challenging views and analyses to offer on the uses of law in dealing with public affairs. An approach which is much discussed currently is usually called „critical legal scholarship." It is living up to its name. One of its themes is that the methodologies of the school of legal realism have lost much of their usefulness and should be succeeded by others more effective in a period of profound changes in society and social thought. The approach has set out, bloody, bold, and resolute, to remedy this, including producing examples of how things should be done. It has gotten some striking results.

Finally(13) there is the group of events and ideas identified by the phrases „Law is Dead," or „Is Law Dead?" It can be taken to represent a great deal of the critical social theory and the political turbulences experienced by law, including administrative law, in the troubled times of the late 1960s and the 1970s.

The great political and scholarly clashes then were mainly between the group writing from the far left, evolving from revolutionary viewpoints, and the groups defending modern liberalism as an adequate set of remedies even for grave social turmoil. Most of the groups united in denouncing „bureaucracy," often rightly. Constitutionalism in the administration has the capacity to foster there meaningluf politics and significant change.

РЕЗИМЕ

УСТАВНОСТ И УПРАВНА ВЛАСТ У СЈЕДИЊЕНИМ ДРЖАВАМА: ЈЕДНА СКИЦА

Један од задатака уставности и уставнога права је успостављање надзора над управом. Проблем америчкога уставног права је избио у први ред у доба политике новога договора. Представници Америчке адвокатске коморе ((American Bar Association), као заступници противника политике новога договора и правници који су ту политику подржавали успели су да постигну компромис о изради савезног закона о управноме поступку (Administrative Procedure Act — APA) 1946. г.

Писац је анализирао неколико најважнијих одредаба APA. Делатност управе се, према томе закону, разврстава на доношење општих и појединачних аката управе (чл. 4. и 5. APA). Чл. 4. закона одређује општи акт управе као норму „опште примене и будућег дејства", а појединачни као „коначну одлуку у материји која се не односи на стварање општих аката".

Посебан је проблем судскога надзора над управом. На томе питању се је старије и конзервативније правно мишљење сукобило са ста-

(12) See Note, „Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship," 95 Harv. L. Rev. 1669—1690 (1982).

(13) See the thoughtful review by Professor Lester Mazor, „The Crisis of Liberal Legalism," 81 Yale L. J. 1032 (1972), of two of the basic books in the movement, Eugene V. Rostow (Ed.) *Is Law Dead?*, (New York: Simon and Schuster, 1971) and Robert P. Wolff, (ed.) *The Rule of Law* (New York: Simon and Schuster, 1971).

вовима присталица тзв. либерализма новога договора, којима је мисао о судском надзору над управом изгледала реакционарна. APA је у чл. 10. покушао да помири обе тежње.

У закључном делу писац је приказао и основне мисли о развитку права у учењу појединих праваца америчке науке, осврћући се посебно на радикалнија мишљења. Међу овима је врло утицајно мишљење Нанета (Nonet) и Селзника (Selznik) о троделној структури права у којој постоје репресивно, аутономно и респонсивно право. Школа критичких студија пак, полазећи од критике правног реализма, предлаже измену права како би се ово прилагодило друштвеним променама. Најзад, јавила се је и мисао која се је још током шездесетих година запитала: „није ли право мртво?"

RÉSUMÉ

LE CONSTITUTIONNALISME ET L'ADMINISTRATION AUX ETATS-UNIS UNE ESQUISSE

Une des tâches du constitutionnalisme et du droit constitutionnel est l'institution du contrôle de l'administation. Le problème du droit administratif américain s'est érigé au premier rang au temps de la politique de New Deal. Les représentants de l'Association Américaine des avocats (American Bar Association) en tant qu'adversaires de la politique de New Deal et les juristes ayant soutenu cette politique ont reussi à faire un compromis sur l'élaboration d'une loi fédérale concernant la procédure administrtive (Administrative Procedure Act — APA) en 1946.

L'auteur fait l'analyse de quelques dispositions parmi les plus importantes de l'APA. L'activité de l'administration consiste, d'après cette loi, à edicter deux catégories d'actes administratifs: les règlements administratifs et les décisions individuelles (art. 4. et 5. de l'APA). L'article 4. de l'APA définit l'acte général de l'administration comme une norme de „l'aplication générale ayant un effet dans l'avenir" et la décision individuelle comme „décision finale en matière ne se rapportant pas à la crèation d'actes administratifs de caractère général".

Le contrôle judiciaire de l'administrtion pose un problème particulier. C'est bien le terrain où les idées juridiques plus anciennes et plus conservatives devaient se heurter aux attitudes des partisans du „libéralisme" de New Deal, auxquels l'idée du contrôle judiciaire de l'administrtion paraissait réactionaire. Par son art. 10. l'APA a essayé de concilier ces deux tendences.

Dans sa conclusion l'auteur expose aussi les idées principales relatives à l'évolution du droit dans la doctrine américaine, en insistant particulièrement sur les opinions radicales. Parmi ces dernières spécialement influente est l'opinion de Nonet et de Selznick concernant la structure tripartite du droit dans laquelle nous constatons l'existence du droit répressif, autonome et „responsive". L'école d'études critiques, partant de la critique du réalisme juridiques, propose la réforme du droit afin de l'adapter aux transformations sociales. Finalement, durant les années soixantes, a vu jour aussi une pensée qui s'est posée la question: „le droit ne soit-il pas mort?"