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### James O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government*

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## BOOK REVIEW

*Crisis and Legitimacy: The Administrative Process and American Government*, by James O. Freedman. Cambridge (U.K.) and New York: Cambridge University Press, 1978. Pp. 266.

PAUL H. BRIETZKE

This is just the book to add flesh and blood to an administrative law course. It offers mainstream interpretations of the impact of law and public opinion on administration, the difficulties which arise in the course of economic regulation, claims to agency expertise and independence, the extent of genuine public participation in decision-making, practical aspects of the delegation of legislative powers, and the rational bases for administrative procedures, formal and informal. The book breaks down into three sections: an overview, "sources of crisis in the administrative process"; a brief but most informative assessment of the capacities and limitations of particular agencies, the SEC, EEOC and HEW; and a longer inquiry into bureaucratic procedures based primarily on the activities of the tiny Office of Direct Foreign Investment. While all of the salient issues make their appearance in the book, particular readers are bound to disagree with the prominence or lack thereof accorded to several of these issues, especially with regard to the sources of the anomalies Freedman identifies as administrative crises and the remedies he proposes. My criticisms touch on these matters in some detail, but they are based on an overall evaluation of the book as an excellent survey of the field.

Each generation, Freedman finds, has defined an administrative crisis in its own terms. Early fears that bureaucratic agencies would destroy a static separation of powers gave way to an early twentieth century debate over the propriety of administrative procedures and of the judicial review of administrative action. Next, vague administrative standards were criticized for leading to unpredictable decisions which are poorly understood by the public. More recently, the blight of *ex parte* communications and influence, the tendency for regulators to become the captives of the regulated, and bureaucratic failures to protect the public interest or to live up to claims of an extensive expertise have all been commented upon at great length. Each of these dominant concerns was displaced by

another, once theoretical explanations were fashioned and responsive legislation enacted.<sup>1</sup> Nevertheless, public uneasiness continues to be reflected in the strong and persistent challenges to administrative legitimacy that find their parallels elsewhere in national life:

Public skepticism of administrative expertise is part of a larger loss of faith in many traditional sources of public and social authority. And public concern with bureaucratization is part of a larger pattern of social uneasiness over the impact upon American life of large organizations, within both the public and private sectors.<sup>2</sup>

Assertions like these and, indeed, the title of the book itself, serve to transfer the crises into realms far larger than those addressed by Freedman, into areas of analysis which are currently in vogue among sociologists and political scientists worldwide. The best exposition of their approach is found in Jurgen Habermas's *Legitimation Crisis*,<sup>3</sup> a book which stimulates a great deal of interest on the continent but has caused scarcely a ripple here. Compared to the investigations of Habermas and others, Freedman's appear narrow and overly legalistic but not ethnocentric. While the causes and cures he postulates are unduly restrictive, he displays a sensitivity toward the specifically American dimension of a near universal collapse of reverence for traditional sources of authority.

Freedman does not use the contentious concept of legitimacy in a rigorous way. Early in the book we are told that legitimacy "is concerned with popular attitudes towards the exercise of governmental power"—determinations of whether power is "exercised in accor-

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1. J. FREEDMAN, *CRISIS AND LEGITIMACY* 7-9 (1978).

2. *Id.* at 262.

3. J. HABERMAS, *LEGITIMATION CRISIS* 49 (1976). Habermas summarizes his complex (and jargonistic) statement of the problem in four interrelated "crises" faced by all Western countries:

- the economic system does not produce the requisite quantity of consumable values, or;
- the administrative system does not produce the requisite quantity of rational decisions, or;
- the legitimation system does not provide the requisite quantity of generalized motivations, or;
- the socio-cultural system does not generate the requisite quantity of action-motivating meaning.

Freedman really only discusses the second of these crises and, while the others receive the briefest of mentions, he is presumably unaware of the degree of their inter-relatedness that is illustrated so adroitly by Habermas.

dance with a nation's laws, values, traditions and customs." When power is so exercised, it endows "institutional decisions with an inherent capacity to attract obedience and respect. . . ."4 The why and how of these processes5 are never explored convincingly, and subsequent analyses range vaguely around what are arguably theoretical rather than real problems of legitimacy. At the core of Freedman's commentaries are his rather unrealistic projections of public attitudes toward law, administration, the Constitution and government generally. Public perceptions are, Freedman concludes, "usually phrased in indiscriminantly general terms" and have entered the "conventional vocabulary of political discourse"6 in ways which impair administrative legitimacy, "yet these perceptions lack the substantive weight of a successful indictment. Many of them are misconceived as conclusions of historical fact or misinformed as judgments of administrative practice."7 These generalizations by the public are "quite impossible," given the wide variance in agency performance. "If the . . . administrative process is to be evaluated fairly, public expectations as to its institutional capacities must be informed and realistic."8 Freedman misses the mark here. Public attitudes *may*, from his idealist or theoretical perspective, be unfair, misconceived or misinformed yet have a decisive political impact simply because people tend to act on their beliefs when there is no risk in doing so. Given the numerous legal and administrative defects and weak-

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4. J. FREEDMAN, *supra* note 1, at 10.

5. In Western societies, the major sources of legitimacy encompass discursive justification and/or canny manipulation. To the extent that legitimacy exists, fewer of the other types of resources used to secure compliance with private and public decisions need be deployed. The legitimation process is a circular one, however: flows (rather than stocks) of legitimacy are augmented as well as depleted through the timely implementation of policies thought by the public to be sensible; and many of the resources used to secure compliance with political and administrative decisions, such as charisma, ideology, law, public participation, coercion and the wise exercise of an unfettered discretion, also serve as sources of legitimacy. See R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* 200 (1959); S. FINER, *COMPARATIVE GOVERNMENT* 29-30 (1970); L. FRIEDMAN, *THE LEGAL SYSTEM* 112 (1975); J. HABERMAS, *supra* note 3, at xiv, 7-8; R. JACKSON & M. STEIN, *ISSUES IN COMPARATIVE POLITICS* 206 (1971); G. LENSKI, *POWER AND PRIVILEGE* 57 (1966). *But cf.* J. FREEDMAN, *supra* note 1, at 126: Legitimation crises are fueled by the "belief" that, in a constitutional democracy, governmental power can only be legitimated if it is created by a constitution or exercised by persons directly accountable to the public. This narrow assertion may constitute another attempt at a definition of legitimacy, although Freedman notes that this belief does not "adequately reflect the more subtle realities, the more accommodating resiliencies of American constitutional practice."

6. J. FREEDMAN, *supra* note 1, at 116.

7. *Id.* at 125.

8. *Id.* at 264.

nesses he documents, public attitudes may also constitute appropriate responses to incompetence. Rather than simply deplore the state of public opinion, as Freedman does, it is more profitable to determine: who is resisting which bureaucratic actions and how? Whose interests are and are not served by particular laws and policies? Contra Freedman's perceptions of public opinion, there is evidence which suggests that individuals *and* groups do ask these kinds of questions, balancing rationally the sometimes irrationally-perceived losses (most often, of privacy, free enterprise, etc.—'rights' to be left alone) and gains from each administrative program or ploy.<sup>9</sup> In other words, attitudes toward the administrative process as a whole are more complex and rational than Freedman would have us believe.

His interpretations of public attitudes toward a constitutional separation of powers are particularly suspect. Admittedly, this concept marked a significant political innovation, but there is little evidence that, outside of some law schools and political science departments, it retains what Freedman terms "an enduring hold on the American imagination."<sup>10</sup> Such evidence as exists suggests, rather, that there is scant reverence for leading constitutional precepts.<sup>11</sup> While significant interest groups do prefer a government with limited capacities, they are not particularly concerned with the mechanics of segregating these narrow functions. Further, I would argue that Congress and the Supreme Court (and, for that matter, the Presidency) are not currently held in such high regard that the bulk of the populace would welcome their shouldering additional responsibilities concerning administration. If my contention has merit, it leads to the conclusion that most of Freedman's policy prescriptions would not serve to legitimate administrative processes significantly. Many of his proposals concern the practical basis for more careful delegations of legislative powers, an exacting supervision by "informed generalists who recognize the limitations of the claims of [administrative] expertise," an effective insulating of agencies from the malevolent influences of presidents and special in-

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9. See J. BUCHANAN & G. TULLOCH, *THE CALCULUS OF CONSENT* (1962); Meltzer & Vellrath, *The Effects of Economic Policies on Votes for the Presidency*, 18 J.L. & ECON. 781 (1975); Riker & Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25 (1968).

10. J. FREEDMAN, *supra* note 1, at 15-17. K.C. Davis is quoted for the proposition that separation of powers is the "principle doctrinal barrier to administrative development." *Id.* at 16.

11. See, e.g., the 1970 CBS poll discussed in B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 192-3 (1977).

terest groups, and additional assurances of procedural fairness—invariably through careful and searching judicial interpretations of the Constitution and the Administrative Procedure Act of 1946.<sup>12</sup>

These reforms would, of course, lay heavy additional burdens on Congress and the courts. If we accept Freedman's most general explanations of the crises in administration,<sup>13</sup> these organs would be unable to advance the cause of administrative legitimacy because they must labor under legitimization crises similar to those which afflict the bureaucracy. These include: a lack of expertise in administrative matters; perceived abuses of power, instances of Congressional venality and the lack of popular (or constitutional) sanction for the breadth of judicial power; and the absence of the genuine accountability which, under popular conceptions of participatory democracy, is seen to stem from the independence and tenure of judges and the subservience of Congress to pressure groups. While the implementation of Freedman's suggestions would presumably augment the formal elegance of administrative law, the erosion of governmental legitimacy would clearly continue; each branch must first set its own house firmly in order, and more deeply-working remedies are called for. Some of Freedman's precepts, the establishment of higher professional standards in administration and the maximum feasible participation in bureaucratic decision-making by an informed public, move in the right direction. There are many problematic elements in his extensive discussions of procedural reforms, however.

These discussions begin with an accurate thumbnail sketch of recent events:

As ennobling efforts were mounted to reverse deeply rooted patterns of discrimination and injustice, the rhetoric of the period encouraged individuals to identify themselves as members of separate groups (often racial, sexual or ethnic in nature) before they defined themselves as members of the larger American community. Faced with this situation, Americans did what societies often do when social conflict threatens to disturb an existing sense of stability and commonality: They turned to procedural formality to establish a degree of confidence that the government's authority, particularly to the extent that it

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12. 5 U.S.C. § 551 *et seq.* (1976). J. FREEDMAN, *supra* note 1, at 21, 46, 56, 94. See text accompanying note 18, *infra*.

13. See text accompanying note 2, *supra*.

had the capacity to favor one group at the expense of another, was exercised fairly.<sup>14</sup>

A widening and deepening of this formalization constitutes the major corrective Freedman would apply to administrative crises,<sup>15</sup> although he admits that the judicialization of administration which hinders efficiency and effectiveness would continue apace.<sup>16</sup> Here he takes refuge in formalism in an attempt to palliate disputes temporarily, a transparent attempt to paper over the lack of consensus concerning administrative goals which can only perpetuate the sense of crisis in administration.<sup>17</sup> Not since Roosevelt have clearcut bureaucratic goals commanded the political plurality required to defy activist opponents of a public bureaucratization.

14. J. FREEDMAN, *supra* note 1, at 27.

15. *Id.* at 125-37, 265. Much of Freedman's approach is summarized in a quotation from Frankfurter, J. (*Id.* at 125): "The history of American freedom is no small measure the history of procedure." Even as qualified ("in no small measure"), this assertion is restricted to the protection of settled expectations and "negative" individual rights (freedoms "from" rather than freedoms "to")—inherent limits on governmental power which are inadequate for analysis of the allocation of privileges through contemporary administration. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 7-8, 13 (1978).

16. J. FREEDMAN, *supra* note 1, at 22: "The methods of a trial are not well-suited to tasks more legislative, supervisory, or "polycentric" in nature, such as the regulation of commercial competition . . . or the allocation of a limited resource to one or a few among many applicants." See *Id.* at 26-7. Judicialization is appropriate, however, where an individual's civil liberties are at stake (*Id.* at 29). This assertion all but negates the others, for virtually all objections to administration can be couched in terms of infringements of civil liberties.

17. See Learned Hand *quoted in* G. JACOBSON, *PRAGMATISM, STATESMANSHIP AND THE SUPREME COURT* 156 (1977):

This much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

An effective illustration of my assertion is provided by Freedman's evaluation of the Equal Employment Opportunities Commission. See FREEDMAN, *supra* note 1, at 105-13. The absence of a political consensus in this field has meant that the public support needed to fortify the Agency is lacking. A variety of reasons were given for combining the Commission's large task with very weak and limited powers: fears of unfair hearings and the imposition of quotas on employment, the anticipated resistance of subtle employment practices, formed over generations, to traditional regulatory techniques, the ability of civil rights groups to obtain a separate redress through the courts, and the need to experiment with an administrative informality. While some of these arguments may be attractive in theory, Freedman finds that they do little more than "make a virtue of necessity." I would argue that the same kinds of conclusions can be drawn with regard to the many other agencies where a consensus concerning their goals is lacking: e.g., the FTC, as compared with the SEC. See *id.* at 97-104.

Freedman's "existing sense of stability and commonality" has been difficult to discern in the administrative arena since World War II, as he acknowledges indirectly at several junctures:

The basic ambivalence of the American toward governmental intervention in the economy has prevented the development of a coherent philosophy of governmental regulation and has had disturbing consequences for the legitimacy of . . . administrative agencies.<sup>18</sup>

. . .

[There is] general agreement . . . that the appropriate extent of governmental activism . . . lies somewhere between the polarities defined by Adam Smith and Karl Marx, between the polemical positions, as it were, of Milton Friedman and John Kenneth Gailbraith. An ideology of such imprecision may befit a pragmatic people, but it is hardly adequate to delimit the perennial debate . . . on the proper role of government in regulating the economy.<sup>19</sup>

How, then, should we deal with this state of affairs? Freedman argues that gains in administrative legitimacy would result from "requiring that democratic practice conform more nearly to democratic theory":

If the courts were to insist more forcefully than they have . . . that Congress resolve the basic policy issues implicit in such legislation, the consequence might sometimes be no legislation. . . . But if legislation is supposed to be a democratic expression of the nation's will, that result would not always be untoward: sometimes a nation has no will sufficiently focused or widely shared to permit present expression through a majority.<sup>20</sup>

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18. *Id.* at 56-7.

19. *Id.* at 33. Freedman also quotes Robert Dahl, *id.* at 75, for a proposition which is best expressed in R. DAHL & C. LINDBLOOM, *POLITICS, ECONOMICS AND WELFARE* 231 (1976).

We in this country have had to embrace two unreconciled ideologies, one for public declamation, the other for private use. The one is radically egalitarian and if pursued would demand a revolutionary transformation in the whole structure of our society; the other is radically hierarchical and its pursuit has in fact led to a revolutionary transformation of the whole agrarian structure of society. . . . Jefferson in 1800 or Jackson in 1830 would have said [that this hierarchical ideology is] . . . irreconcilable with democracy and hardly distinguishable from tyranny.

20. J. FREEDMAN, *supra* note 1, at 94.

This somewhat hedged return to a minimal law and state, while perhaps conducive to a more coherent system of administrative law, would confer veto powers on the major pressure groups active in Congress—powers even greater than those they currently exercise. It is difficult to see which “democratic theory” Freedman has in mind, for few gains in representativeness would result, yet governmental paralysis would increase.<sup>21</sup> This would hardly be instrumental to an administrative legitimacy.

The most promising alternative would be to alter the terms of the ideological debate concerning the proper role of administration, as has been done by ideologues of the welfare state and social democracy in Britain and Germany. Roosevelt set a similar process in motion and gradually gained adherents, but prosperity, personal security and changes in the nature of Presidential politics prompted a return to an administrative *laissez faire*. While an insecure financial future has returned to haunt most of us, the tide is currently running in favor of still less government. To legitimate administrative processes in this climate of opinion would require, above all, a consistent statesmanship. This old-fashioned quality is in notoriously short supply at present.<sup>22</sup> It denotes the capable pursuit of a compelling personal vision of the public interest, whether or not this vision is the popular one. The legitimation of administration in

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21. Some of the problems associated with Freedman's “requiring that democratic practice conform more nearly to democratic theory” are suggested by R. DAHL & C. LINDBLOOM, note 17 *supra*, and W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 135 (1971):

A two-candidate election provides about as much information on the popular preferences as would the selection of a fixed diet for a several-year period from a menu which includes only two fixed diets, where the price and some of the elements of the diet are obscure, the capability of the chef is uncertain, a bar girl and a rock band are distracting one's attention, and there is only one place to eat in a very large region. Moreover, the process for selecting the two menus assures that they will be similar.

As even the best of legislation is “seriously incomplete,” courts could choose to nullify even a consensus legislative policy through a rigorous statutory interpretation. Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975).

22. And in the past, too. Perhaps we can recognize a contemporary politician or two in the words of John Dryden (“Absalom and Achitophel,” l:540):

A man so various that he seem'd to be  
Not one, but all mankind's epitome;  
Stiff in opinions, always in the wrong,  
Was everything by starts, and nothing long.  
But in the course of one revolving moon,  
Was chymist, fiddler, statesman, and buffoon.

America today is, in other words, an intensely political process with a gloomy future, one in which law can, at best, play only a subordinate role. While Freedman does take limited account of these kinds of arguments,<sup>23</sup> the prescriptions he offers are sufficiently unrealistic to provoke intense debate among public lawyers and political scientists, flowing logically as they do from his informed descriptions of administrative processes.

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23. See J. FREEDMAN, *supra* note 1, at 260:

That successive generations of lawyers, judges, political scientists, and citizens have failed to still the recurrent sense of crisis attending the federal administrative process, even though each has made important efforts to do so, suggests that the sources of the sense of crisis are more fundamental than the dominant concerns of our particular historical moment would indicate.

Edmund Burke (quoted in *Id.* at 255): "Constitute government how you please, infinitely the greater part of it must depend upon . . . the prudence and uprightness of ministers of State." James M. Landis. Quoted in *id.* at 121: "Good men can make poor laws workable [roughly, the history of English administrative law]; poor men will wreak havoc with good laws."

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