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# Arbitrary Administrative Decisions: The Need for Clearer Congressional and Administrative Policies

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# THE ADMINISTRATIVE PROCESS

## A SYMPOSIUM

# ARBITRARY ADMINISTRATIVE DECISIONS: THE NEED FOR CLEARER CONGRESSIONAL AND ADMINISTRATIVE POLICIES

*Senator Edward V. Long**

## INTRODUCTION

There are basically three types of arbitrary decisions. One type is a decision characterized by the lack of any determining principle. The decision-maker has complete and total discretion in the exercise of his authority which affects substantive rights, duties or obligations of others.[1]

The second type of arbitrary decision is characterized not so much by the lack of a determining principle, as by the broad or generalized nature of the principles which do exist. The latter type is much more prevalent in the modern day administrative process, and at the same time much more difficult to remedy.

The third type of arbitrary decisions results from factors which are extrinsic to, but inextricably intertwined with and having a great influence on the decision which is rendered.

Obviously, to avoid a decision based on the sole discretion of a single authority, all that is necessary is to provide the standards which limit or circumscribe the exercise of the discretion of the decision-maker. It is not so simple in the second case.

In the second category of cases, the decisions are based on standards too broad or generalized to provide meaningful direction to the person or agency responsible for making a decision in a particular case. The result is that the same generalized standards are often applied differently in cases which do not involve significant factual disparities.

In the third category of cases, the ex parte influence may be intentional in which case, if discovered, a remedy is provided by way of judicial review or other such action. If the ex parte influence goes undiscovered, of course, the injustice is greater because the victim has been deprived of all means of redress by normal legitimate processes.

It is much easier to find workable solutions to the first and third category of cases than it is for the second category. Hence,

* LL.B. 1932, University of Missouri; United States Senator from Missouri; Chairman, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary.

1 Fox Film Corp. v. Trumbull, 7 F.2d 715, 727 (D. Conn. 1925).

the remainder of the article will deal with only those decisions based on determining principles which are too general to serve as a meaningful indication of Congressional intent and which therefore lead to results inconsistent with the advancement of an efficient and fair administrative process.

As an example of a broad standard, many agencies are told by Congress in one way or another to regulate in the "public interest."[2] Too often, Congress fails to provide any indication of what it would consider to be the public interest in an individual case or in a category of cases. The problem becomes more complex, because too often, after a program of regulation is begun, no one is sure just what the public interest is at the time or what it will be a few years in the future. A major factor here is the fact that the agencies are faced with so many new problems which are so complex and numerous that the judgment and sagacity of the Olympian Gods would be taxed.[3] The problems do not readily admit of definition, and any decision made without the problem properly defined most likely deserves the criticism that it is arbitrary. Moreover, the very complexity of the problems often causes delay in formulating policies to deal with them and this delay also plays its role in the formulation of arbitrary decisions.

The problem of delay in administrative proceedings has been considered by the best experts on administrative law. Yet, there is no sign that any thing is or could be done to reduce delay in administrative decision-making. A decision, rendered one, two, five or ten years[4] after a proceeding was instituted, can be considered arbitrary. Regardless of the adherence to procedural regularity a decision so long delayed is arbitrary if for no other reason than the fact that the results of a decision so long delayed are often the same as had no decision been made, or if made, made in ignorance or disregard for the law, the facts or binding precedents. For example, one agency did not render its decision until the business concern involved had become defunct after incurring the legal and other fees associated with the presentation of its case.[5] Regardless

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2 *E.g.*, Communications Act of 1934, 47 U.S.C. § 151 (1964).

3 For example in the field of communications, the Federal Communications Commission is confronted with the difficult problem of increasing congestion in the frequency spectrum; the various agencies dealing with transportation face the crisis of urban commuter snarls; the Civil Aeronautics Board must unravel the multitudinous factors of both private and public interests in establishing efficient and sufficient air routes.

4 Long, *Proposed Changes in Administrative Law*, 19 Sw. L.J. 203 (1965); FDA Papers (1968).

5 Evis Mfg. Co. v. FTC, 287 F.2d 831 (9th Cir. 1961), cert. denied, 368 U.S. 824 (1961).

of the fact that no procedural or other irregularities had occurred, the delay and concomitant expense associated therewith, adversely affected this private citizen just as if the administrator had capriciously and whimsically condemned his property.

All of these factors (the generalized standard, the complexity and number of the problems and the delay in finding solutions) are involved in those decisions which may today be criticized as arbitrary. They represent a serious problem for the growth of the administrative process and admit of no easy solution.

## CLEARER STANDARDS—CONGRESS' TASK

Agencies exercise only those powers delegated to them by Congress.[6] Too often, however, Congress delegates powers without adequately defining how, when, or if these powers are to be used in a given situation. Congress usually contents itself with commanding agencies to regulate in the "public interest" but either fails to define what the public interest is or should be or to provide adequate guidelines to be used in determining what the public interest is in individual cases.

Obviously, attempts in 1952 to define with great exactitude what the public interest in communications, transportation, or housing will be for 1968 or 1975 may result in rigid, inflexible, unresponsive administration to the current, constantly changing problems inherent in areas so basically intertwined with the needs of the public. Admitting this criticism is valid, it is submitted that Congress can maintain flexibility in administration, and yet establish with greater clarity the nature of the public interest in the particular area of concern.

For example, Congress established a policy that the use of the public airwaves is limited to those individuals which can establish in a licensing proceeding that the "public convenience, interest, or necessity will be served"[7] by that individual's proposed use of a particular portion of the frequency spectrum as defined by channel designations. The Federal Communications Commission has run into serious difficulties in administering its duties under this standard in recent years due to the rapidly increasing congestion of available frequency space. The standard of the public interest is no

[6] CAB v. Delta Airlines, Inc., 367 U.S. 316 (1961); Regents of the University System of Georgia v. Carroll, 338 U.S. 586 (1950); Trans-Pacific Freight Conf. of Japan v. Federal Maritime Bd., 302 F.2d 875 (D.C. Cir. 1962); Federal Power Comm'n v. Panhandle Eastern Pipeline Co., 337 U.S. 498 (1949).

[7] 47 U.S.C. § 307(a) (1964).

longer sufficient to resolve this problem because the use to which the competing interests (whose increasing demands for more and more frequency space have caused the frequency shortage) wish to put the frequencies they seek are all vested with some degree of the public interest. The commission is therefore placed in a quandry. Its job is to regulate in the public interest, not to decide which of two or more legitimate and equally important interests of the public is to be emphasized to the detriment of the other. This is Congress' job as direct representatives of the people.

Congress, however, has not enunciated any new standards for the direction of the commission since 1934. Hence, the commission, left to its own devices, must either decide an issue it is not meant to decide or vacillate, stall and delay until Congress provides the means to solve the problem. In either case, the decision of the commission if it acts, or if it refuses to act, is arbitrary in that it must act without a *meaningful* determining principle.[8]

It is Congress' duty to examine the experience of experts in this area, and then decide which future course of regulation will best serve the communication needs of this nation. Similarly Congress' duty is clear in other areas where there is need for a review of standards enunciated when the causes for some of the most complex problems facing the agencies today were not even in existence.

## CLEARER STANDARDS—AGENCIES' TASK

The major function of an expert administrative agency is to develop policy to guide the future course of conduct of the general public and those particular members directly subject to its jurisdiction. However agencies have long vacillated in making, or neglected or refused to make, policy decisions in their particular areas of expertise.[9] Ths lack of policy formulation by administrative agencies has been cited time and again as the outstanding example of the cause of many other ills plaguing a more efficient and effective administrative process.[10] The Administrative Conference made a specific recommendation in order to encourage greater devotion of time and effort to policy making. Yet the root cause for the problem remains.

In the view of this author, as well as others, most agencies still prefer to proceed on a case-by-case basis in developing policy.[11]

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[8] BLACKS LAW DICTIONARY 134 (4th ed. 1957).

[9] STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960); Long, *Proposed Changes in Administrative Law*, 19 SW. L.J. 203 (1965).

[10] S. Doc. No. 24, 88th Cong., 1st Sess. 153, 158 (1963).

This procedure, while easier in terms of keeping the complexities of the issues involved to a minimum, usually delays the formulation of a cohesive, intelligible policy generally applicable to all concerned. In addition it creates confusion and often contradictory results in the application of, what can at best be considered, only an interim policy.[12]

Decisions based on policies still in their developmental stages cause many decisions to be arbitrary; because of both the lack of adequate determining principles and the delay in reaching solutions which is engendered by the ad hoc treatment of cases involving issues generally applicable to others subject to the jurisdiction of the agency.

## CURRENT LEGISLATIVE ENACTMENTS AND PROPOSALS FOR AVOIDANCE AND CORRECTION

Proposals for avoidance of arbitrary decisions are easier to develop than those for correction. In the latter case, the obvious courses of judicial review, administrative reconsideration or amendatory legislation are available to parties aggrieved by administrative action.[13] However, while procedures are available to obtain relief against an arbitrary decision,[14] usually much time and expense is involved. Furthermore, unless the decision is particularly egregious or one which affects basic policy concerning vital interests of the public, the factors of success all too often mitigate in favor of the status quo. It is much more difficult to overturn a decision once made than it is to try to prevent the causes which contribute to the rendering of an arbitrary decision.

There are two recent developments which may offer a solution to the problem. Congress has enacted a law setting up the Admin-

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11 *See Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 88th Cong., 2d Sess. (1964); *Hearings on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. (1965); and *Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess., (1967). In all of these hearings not one agency expressed the opinion that it wanted or needed more time in order to develop more comprehensive policies.

12 As a most recent example is the Federal Communications Commission, which, perplexed with the problems of the burgeoning community antenna television industry, has specifically adopted the policy of proceeding on a case-by-case basis, SECOND REPORT AND ORDER, 2 F.C.C. 2d 725, 6 P & F RADIO REG. 2d 1717 (1966); and *see* 47 C.F.R. § § 74.1101-09 (1966).

13 *E.g.* 5 U.S.C.A. § § 701-06 (1967).

14 INT. REV. CODE OF 1954, § 6334(a) (5).

istrative Conference of the United States.[15] The task of this body, composed mainly of government attorneys and administrators, is to keep the administrative process under close scrutiny on a continuing basis. It should therefore be able to devote at least some of its efforts toward finding means which would facilitate equitable settlements of controveries between agencies and those it regulates in cases where due to the lack of definite guidelines or the complexities of the issues involved, the decision rendered necessarily involves the exercise of discretion which is not totally within the standards or guidelines set forth. This is not to indicate that the conference would engage in the negotiations of individual cases, but would rather explore new ideas and methods which could be adopted by several of the agencies to lessen the impact in individual cases involving decisions adopting new policies or revising old ones.

The other possibility is the creation of an Ombudsman to handle the complaints of citizens who believe they have been dealt with unfairly by their government. This topic has been explored at some depth by Congress[16] and numerous articles have been written in regard to the feasibility and desirability of instituting such an office.[17] The reader is referred to these materials as it would be beyond the scope of the present article to deal at length with this topic. However, it can be said that this office if instituted, unlike the Administrative Conference, would deal directly with cases in which a party or parties allege they have been victims of an arbitrary decision. The vast majority of cases that would be handled by such an office as the Ombudsman would undoubtedly involve those cases in which the aggrieved party lacks the resources to pursue the traditional procedures available for redress of injuries inflicted by unfair or arbitrary administrative decisions. The opportunity presented by this office for correcting arbitrary decisions in cases in which there is now no possibility of relief is in this author's view too promising to be ignored by those truly interested in improving the administrative process.

Many alternatives present themselves when considering how to avoid arbitrary decisions. In this area the main responsibility lies with Congress.

As already indicated, the root cause of arbitrariness must ultimately be traced to the lack of sufficient guidelines for implementa-

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15 Administrative Conference Act, 5 U.S.C.A. § § 571-76 (1967).

16 *Hearings Pursuant to S. Res. 190 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2nd Sess. (1966).

17 *E.g.*, Kass, *We Can, Indeed, Fight City Hall: the Office and Concept of Ombudsman*, 53 A.B.A.J. 231 (1967).

tion of the public policies enacted into law by the Congress. In order to meet the new and changing problems confronting the administrative agencies today, the organic acts of each agency should be reviewed and amended if necessary to clarify and update the duties and responsibilities of those exercising the delegated authority of Congress. As a matter of fact, Congress and the agencies do devote considerable time to this very effort. Yet, more could, and must, be done, if we are to keep pace with the changes occurring in the nature and direction of our national interests.

In addition to redefining basic policy directions, Congress must also develop new procedural tools for the administrative process. Unfortunately, as with so many administrative reforms, this effort has been the victim of excessive delay. Back in the 88th Congress,[18] a bill was introduced which was designed to update the Administrative Procedure Act of 1946.[19] This bill and its successors[20] were subject to extensive comment and testimony by the leading practitioners and experts in administrative law. Yet, the proposal which itself originated from a detailed study in 1955 has yet to be enacted though it has undergone extensive substantive revisions in response to criticisms and suggestions of the agencies subject to its provisions.[21]

Section 557 of the present bill, contains detailed decisional procedures designed to assist agencies in making policy decisions.[22] The bill invests greater decisional authority in the hearing examiner. It also establishes specific appellate procedures designed to relieve the chief policy makers of the agencies from decisional duties in the vast number of routine adjudications which do not involve issues of major significance with respect to the creation or revision of major policy matters.

The appellate structure established by this bill should help avoid arbitrary decisions in three ways. First, by vesting greater decisional authority in the hearing examiner, there is less chance that those cases in which factual issues are decisive will be ultimately decided by someone unfamiliar with demeanor of witnesses, the relevancy of exhibits, and so forth,—in short, by one who must of

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18 S. 1663, 88th Cong., 1st Sess. (1963).

19 The Administrative Procedure Act of 1946 no longer exists due to its recent codification, 5 U.S.C.A. §§ 551-59 and §§ 701-06 (1967).

20 S. 1336, 89th Cong., 1st Sess. (1965); S. 518, 90th Cong., 1st Sess. (1967); the current proposal is S. 2771, 90th Cong., 1st Sess. (1967).

21 All 106 Federal agencies are technically subject to the provisions of 5 U.S.C.A. §§ 551-59 (1967), however, due to the various functions performed by different agencies and various exemptions in the act, many are exempt totally or partially from its application.

22 *See* Long, *The Proposed New Administrative Procedure Act*, 55 GEO. L.J. 761 (1967).

necessity review a "cold" record. Hence, the bill would minimize the defects of any institutional decisions, create greater confidence in the fairness of the agency and help to avoid frivolous or nit-picking appeals.

Second, if the benefits just described are achieved through enactment of the proposed procedural revisions, the authors of the legislation believe that the agency heads will be freer to devote more of their valuable time to the broader range matters of adopting, perfecting, revising and clarifying the agencies' major policies. This in turn should make the task of the agency's other decisional authorities, the examiners, review boards, and so forth, less onerous by facilitating the application of general policies to particular cases.

Finally, the agency heads confronted with new problems for which there is inadequate precedent, would be able to devote more time to obtaining clarification of Congress' position on particular policy matters or in justifying the needs for additional manpower and funds when seeking appropriations from Congress.

It should also be noted, that now that the Administrative Conference has been established,[23] a promising opportunity is presented for a continuous ongoing study of methods to improve the overall decisional quality, and hence reduce both actual arbitrary decisions and complaints of arbitrary decisions.

The agencies task in eliminating arbitrary decision is secondary to the responsibility of Congress, but by no means less important. Regardless of the clarity with which Congress states its policies, administrative action may totally ignore, avoid or defeat the goals sought to be obtained by the legislative mandate.

For example, Congress in 1949 enacted the Truth-In-Negotiating Act[24] designed to avoid the misuse of the billions of dollars of the taxpayer's money in procuring the materials and services necessary to the maintenance of the national defense. Yet, on April 20, 1967, an account was given on the floor of the Senate that revealed that the General Accounting Office had saved taxpayers more than

[23] On Oct. 19, 1967, President Johnson appointed Jerre S. Williams Professor from the University of Texas, as Chairman of the Administrative Conference. The council which is to assist Mr. Williams includes Assistant Attorney General Frank M. Wozencraft, who will serve as Assistant Chairman, FCC Chairman Rosel H. Hyde, SEC Chairman Manuel F. Cohen, ICC Commissioner Willard Deason and USIA Director Leonard Marks as the government members. Non-government members include Columbia University Law School Professor Walter Gellhorn, business executive Frank Pace, Jr. and attorneys Whitney North Seymour and Harold L. Russell.

[24] 41 U.S.C. § § 251-60 (1949).

seventy-two million dollars over a period of a few years through scattered spot checking for violations of the Truth-In-Negotiating Act.[25] Actual violations totaled 130 million dollars, but according to the statement made on the Senate floor only seventy-two million dollars had been recovered.[26]

The agencies task in avoiding arbitrary decisions is therefore clear. Where definite standards are promulgated by Congress to govern specific agency action, those standards must be adhered to with the utmost assiduity, and always with a view towards the most effective implementation of the policies underlying the published standards.

In addition, the agencies should strive for the most meaningful participation possible in the Administrative Conference. This author has previously cautioned that a danger exists that the conference without proper leadership or cooperation from its participants could debilitate into an ineffective debating society.[27] Too often, it is easier to discuss problems, until they disappear due to age or because the harm resulting therefrom has already been sustained, than it is to conscientiously work to find solutions which may necessitate immediate and couragous action.[28] Experience has shown that agencies are reluctant to change the methods that are familiar from long use.[29] The conference will be a dismal failure

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25 113 CONG. REC. 5620 (daily ed. April 20, 1967).

26 It is more than passing interest to note that the Pentagon raised similar objections to the enactment of the Truth-In-Negotiating Act, as were raised to the revision of Section 553 of Title 5 (at the time Section 4 of S. 518, 90th Cong., 1st Sess. (1967), now section 553 of S. 2771, 90th Cong., 1st Sess. (1967) which would provide for public notice and participation in making rules to govern government procurement, viz., that the legislation is unnecessary and would deprive procurement officials of the flexibility needed to negotiate contracts.

27 Long, *Proposed Changes in Administrative Law,* 19 SW. L.J. 203, 227 (1965).

28 For a breakdown of how the major regulatory agencies responded to the recommendations of the last temporary Administrative Conference, *see* STAFF OF SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMMITTEE ON THE JUDICIARY, 90th Cong., 1st Sess., SURVEY OF SELECTED AGENCIES' COMPLIANCE WITH RECOMMENDATIONS OF THE TEMPORARY ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Comm. Print 1967).

29 Through all of the hearings on the various bills to amend the Administrative Procedure Act of 1946, there was a singular lack of any positive recommendations from the agencies which offered significant revisions of present procedures. At the same time, the agencies vociferously protested that the changes proposed by the draftsman would seriously affect their current operations in an adverse manner. *See Hearings, supra* note 11.

and the public will suffer a disservice if academic discussions take the place of carefully considered action.[30]

## CONCLUSION

The means to *correct* arbitrary decisions are now available. In this regard, the problem lies not in knowing what remedy to pursue after the fact, but in the time and expense related thereto.

The more meaningful remedy is to prevent the causes which result in arbitrary decisions. But here, it is the knowledge of what to do that is troublesome.

This article expresses the view that avoidance of most arbitrary exercises of the decisional function in administrative proceedings can best be achieved by the clearer definition of both the congressional policies to be administered and the administrative policies adopted in response thereto. The task is far from simple, but if accomplished holds great promise for elimination of most of the factors which lie at the root of arbitrary decisions.

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[30] Every confidence is reposed in Chairman William's ability to direct the efforts of the conference to more fruitful labors. But the chairman, more than anyone, also realizes that to accomplish significant improvements the sincere dedication and cooperation of the other members are essential.