ADMINISTRATIVE AGENCIES AND THE RULE OF LAW:

A Case Study in the Need to Limit Congressional Delegation of Authority to the "Fourth Branch" of the Federal Government

Michael C. Kendall*

Introduction

Professor of Political Science Theodore S. Lowi, a former speech writer for the late Senator Robert F. Kennedy, has isolated the decadent core of American Liberalism and the political process it has dominated since 1932:

> Interest-group liberalism has little place for law because laws interfere with the political process . . . Laws make government an institution apart; a government of laws is not a simple expression of the political process. A good clear statute puts the government on one side as opposed to other sides, it redistributes advantages and disadvantages, it slants and redefines the terms of bargaining. It can even eliminate bargaining.

Professor Lowi's analysis is supported by this case study. It traces the evolution of an essentially parochial administrative decision and political problem into an amendment to the *Department of Defense Appropriation Authorization Act of 1976*. The problems highlighted by this study are symptomatic of Congress' abdication of legislative responsibility, the unresponsiveness of administrative agencies whose decisions permeate our daily lives, and the concomitant problem of Congressional offices engulfed with ombudsmans' chores rather than legislative ones.

The Supreme Court and Delegation of Legislative Authority

Since 1892, various U.S. Supreme Court decisions have upheld ever broader and increasingly unrestricted delegations of legislative authority to the executive branch, beginning with granting the President power to raise tariff schedules when he found that a foreign country imposed an unequal or unreasonable duty on American products. However, there were certain exceptions. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), invalidated one provision of the *National Industrial Recovery Act of 1933* as an unconstitutional delegation of legislative authority because of a lack of standards. In addition *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935), was decided under similar reasoning. However, since *Schechter*, the U.S. Supreme Court has struck down no similar congressional delegation. Illustrative of this is *Arizona* v. *California*, 373 U.S. 742 (1948), where a delegation to the Secretary of the Interior to allocate water from the Colorado River without any guideline at all was upheld. [3]

The public policy consequences of such broad delegation were debated with increasing frequency during the late 1960's and early 1970's. This has largely been the result of the increasingly omnipresent administrative involvement in the cumulative

*B.A., 1970, J.D., 1973, M.A., 1974, University of Notre Dame. Attorney-at-Law, Jasper, Indiana; Adjunct Professor of Criminal Law, Vincennes University. Staff counsel and legislative assistant to U.S.Representative Philip H. Hayes (D-Ind.), 1974-1975.

1. Theodore J. Lowi,*The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: W.W. Norton & Company, Inc.,1969), p. 125.
2. *Field* v. *Clark*, 143 U.S. 649 (1892), *Cf.*, *U.S.* v. *Grimaud*, 220 U.S. 506 (1911), *Buttfield* v. *Stranahan*, 192 U.S. 470 (1904), and *J.W. Hampton & Co* v. *U.S.*, 276 U.S. 394 (1928).
3. See *Lichter* v. *U.S.*, 334 U.S. 742 (1948), regarding recovery of "excess profits" from war contracts where such profits were undefined.

wakes of the New Deal, Fair Deal, New Frontier and Great Society programs. The relatively provincial political problem treated herein illustrates the consequences of such delegation.

Civilian Manpower Ceilings: A Case Study

The problem surfaced with the August 5, 1974 passage of Public Law 93-365, the *Department of Defense Appropriation Authorization Act of 1974*. Title V, "Civilian Personnel," implemented a program known as "Civilian Manpower Ceilings" by setting "end of fiscal year strengths" for civilian personnel in the various branches of the Department of Defense. [4] The total number of civilian jobs to be eliminated by June 30, 1975 was 32,327. [5] The statutory authority for such ceilings rested with Public Law 93-155, which passed the previous session of Congress on November 16, 1973. It granted Congress the authority to set such ceilings and prohibited the appropriation of funds to unauthorized personnel. [6]

Although on the surface this may seem a reassumption of legislative responsibility rather than further delegation, a closer examination of the text of Public Law 93-365 and its legislative history reveals that it was not. Section 501(2)(b) stated that "all direct-hire civilian personnel . . . whether permanent or temporary" were to be used in *computing* the authorized end strength. (Emphasis mine.) (The arguable implication that they were to be among the ones eliminated was contradicted repeatedly in committee reports and floor debate, as noted infra.) In addition, the Secretary of Defense was granted broad discretionary authority under subparagraph (c) of the same section to vary the totals by as much as one half of one percent when "in the national interest." Finally, Sec. 502 indicated the "sense of Congress that the Department of Defense shall use the least costly form of manpower . . . [7]

Contrast this language with the report of Senate Armed Services Committee issued with their mirror image section of the bill: "The full committee reduction should be accomplished by not filling new job vacancies and by normal attrition, rather than any layoffs." [8] The Senate Report continued by voicing "expectations" that the Secretary of Defense would manage these reductions in a manner which would avoid large scale layoffs. The Report placed special emphasis on reductions of headquarters' staffs as a means of meeting quotas. [9]

Even more muddled was the report of the House Armed Services Committee which admitted the committee itself was not convinced that "end of fiscal year strength manpower ceilings" were the best way to control civilian employment in the Department of Defense. (The report, in fact, indicated preference for another method.) As did their brethren in the Senate, the House Armed Services Committee advised that the personnel reductions should come from the elimination of excess personnel in headquarters' staffs. [10]

4. Pub. Law 93-365 (1975), Sec. 501 *et. seq.* This is for the fiscal year beginning July 1, 1974 and ending June 30, 1975. In particular, Sec. 501(a)(1) of that Public Law established the following end-of-fiscal-year manpower strengths for the Department of Defense: (a) Department of the Army, 358,717; (b) Department of the Navy, including the Marine Corps, 323,529; (c) Department of the Air Force, 269,709; (d) activities and agencies of the Defense Department other than the various service departments, 75,327. The Secretary of Defense was given authority to apportion reductions with each branch according to the numbers indicated under Sec. 501(a)(2).
5. *Department of Defense Appropriation Authorization Act of 1974, 10 U.S.C.A. Sect. 138(c)(2), states that: end of each fiscal year for civilian personnel for each component of the Department of Defense. No funds may be appropriated for any fiscal year to or for the use of the civilian personnel of any component of the Department of Defense unless the end strength for civilian personnel of that component for the fiscal year has been authorized by law."*
6. 10 U.S.C.A. Sect. 138.
7. U.S. Rep. No. 884, 93rd Cong., 2d Sess. 153 (1974).
8. *Ibid.* at 155.
9. H.R. Rep. No. 1035, 93rd Cong., 2d Sess. 78-79 (1974).
10. Conf. Rep 1038, 93rd Cong., 2d Sess. 42 (1974).

Nonetheless, the final Conference Report of the House and Senate was quite explicit on the subject of where the cuts were to come in order to meet the ceilings imposed by both houses.

Because the reduction includes many unfilled spaces and because over 200,000 new civilian employees are expected to be hired in fiscal year 1975, the Department of Defense should be able to accomplish the *full reduction by normal attrition without layoffs of present employees.* [11] (Emphasis mine.)

The stage for confrontation was clearly set. The realistic management of personnel was about to collide with Congressional delegation of responsibility that was frosted with rhetorical political gestures to "the folks back home."

The elimination of some 32,327 jobs under Sec. 501 was accordingly subdivided by various branches of DOD. The Navy received its share of cuts and subsequently passed a portion to the Naval Sea Systems Command. That command had, among other facilities, three Naval Ammunition Depots: first, Hawthorne, Nevada, a state which sported two Pentagon-supporting Senators; second, McAlester, Oklahoma, in the home district of Democratic House Speaker Carl Albert, and third, Crane, Indiana in the home district of a freshman Congressman, Philip H. Hayes, a liberal Democrat who had unseated a conservative Republican, Roger Zion. The Navy handed out fewer than 100 cuts to the first two Naval Ammunition Depots, but targeted Congressman Crane's district for about 600. [12]

Although official notice of the 'RIF' (reduction in force) did not go out until April, 1975, the Naval Sea Systems Command, civilian management and labor leaders were aware of the impending cut as early as the last half of 1974. [13] By January, 1975, Washington staff members for newly elected Eighth District Congressman Philip H. Hayes, and Indiana Senators Birch Bayh and Vance Hartke, were besieged with personal pleas for help by local labor leaders from Crane's American Federation of Government Employees (AFGE), who journeyed to the Capital to make their case. What followed over the next five month period was increasingly intensive and higher level meetings that involved local political leaders from Indiana's Eighth Congressional District, members of the Civilian Management Association at Crane, labor leaders, Congressman Hayes and the Senators, their staffs and, ultimately, the Secretary of the Navy. The culmination was a meeting chaired by Rep. Hayes in early May, 1975, which was attended by staffs of other less-affected Congressmen, Senators Bayh and Hartke, local labor, management and political leaders, the national president and chief counsel for the American Federation of Government Employees (AFGE), and Secretary of the Navy J. William Middendorf II (accompanied by a courtier of admirals, captains and advisors). [14]

On May 12, 1975, six days after the mini-summit, where Secretary Middendorf was advised by Representative Hayes' staff counsel, with appropriate statutory and legislative citations, that the proposed RIF was illegal, the Secretary sent a letter cancelling the RIF without conceding the lack of statutory authority. It stated that a re-

11. *Case Study: The 30 June 1975 Reduction-In-Force at NAD Crane.* American Federation of Government Employees and Crane Management Association, Crane, Indiana, April 1, 1975.
12. Letter from Capt. R. L. McCarthy, commanding officer, Naval Ammunition Depot, Crane, Indiana, to Commander, Naval Sea Systems Command, Dec. 20, 1974. The defense facility is named "Naval Weapon Research Center Crane," but the name at the time of this event was "Naval Ammunition Depot."
13. Since the author of this article was present all all these meetings and Rep. Hayes' office spearheaded the Congressional effort, citations to the voluminous written records of these meetings have been omitted except where specific reference is made to a salient incident. Cf., *Case Study: The 30 June 1975 Reduction-In-Force at NAD Crane,* infra at note 11.
14. Letter from Secretary of the Navy J. William Middendorf II to Rep. Philip H. Hayes, May 12, 1975.

examination of the work load at Crane revealed a higher level than previously calculated, although less than projected by Crane officials. In addition, according to Secretary Middendorf, more billets had been freed by the evacuation of Saigon. These combined factors, he said, would allow a cancellation of the 'RIF' planned for June 30, 1975. [15]

Prior to its decision to rescind the RIF, however, the Department of the Navy had clearly stated its reasons in letters rejecting written requests for cancellations from Rep. Hayes. Recognizing that Congress had arbitrarily imposed ceiling constraints which the Department of Defense (DOD) had opposed, the Navy Department had responded that the work load at Crane was insufficient to support the number of personnel on board because of reduced ammunition needs. And the only way to bring Crane's total down to match work load was by eliminating permanent civilian personnel. [16] This was clearly inconsistent with the ultimate reason given by the Navy for rescinding the RIF. The only logical conclusion, in light of subsequently verified work load levels at Crane that supported all personnel on board, and the great amount of non-ordinance production there, [17] was that the numbers were chosen arbitrarily and politically.

Paralleling the lobbying of Congress and the administrative agency, however, was Rep. Hayes' effort to further amend the 1976 defense bill, H.R. 6674, in order permanently to forestall unmerited RIF's. He introduced an amendment to remove "industrially funded facilities," such as Crane, Indiana, from civilian manpower ceilings. [18] The campaign for the amendment began only days before the vote on the defense bill. There were, however, several factors working for the amendment's passage. Of great significance was the Congressman's legislative expertise. When the May 15th debate arrived, sandwiched between debates about new weapons systems and troop reductions in Europe, and amidst headlines about Cambodia and Saigon, the freshman legislator had managed to garner the support of the subcommittee and committee chairmen who had rejected such an amendment in committee! [19]

Of equal importance were the hundreds of industrially-funded activities, similar to Crane, in Congressional districts across the nation. In the Navy alone, such bases employed some 47,460 workers. And with all branches included, the total was about 100,000. An intensive phone blitz to each Congressional office, politely alerting them to the existence of such a base in their district, and accompained by a door-to-door campaign on Capitol Hill by union and management officials from Crane, proved decisive. The amendment passed the House with almost no opposition. [20]

Unfortunately, the amendment did not fare as well on the Senate side where it was defeated by a vote of 50-40. The sponsors on the Senate side, Senators Hartke and

15. Letter from Secretary of the Navy J. William Middendorf II to Rep. Philip H. Hayes, March 7, 1975.
16. Letter from Secretary of the Navy J. William Middendorf II to Rep. Philip H. Hayes, May 12, 1975. This letter refers to a joint conference ultimately held between Crane Management and Department of the Navy officials which lasted for two days and encompassed a thorough review of the work load at Crane. The result supported the position asserted by Crane that there was enough work at hand for existing personnel.
17. 121 Cong. Rec. 4116 (daily ed. May 15, 1975). An "industrially funded activity" is a revolving fund used to finance the operations of designated industrial and commercial activities. It is designed to be self-sustaining by reimbursing the fund for costs incurred with customer money which pays for the service or goods rendered. This situation is accomplished in steps. Initially, a contractual relationship is established between the customer and the producer. Then the costs of a particular job are identified. Finally, a revolving fund is established as seed money to begin the initial operation. 10 U.S.C.A. Sec. 2202 *et seq.* The system is analogous to starting a small business in the private sector of the economy. Cf. also, *Statement of Congressman Philip H. Hayes on the Congressionally Imposed Civilian Manpower Ceilings on the Department of Defense and its Impact on Defense Production and NAD Crane, Indiana* submitted to the Subcommittee on Military Personnel, House Armed Services Committee, March 13, 1975.
18. 121 Cong. Rec. 4116 (daily ed., May 15, 1975). See also Testimony of Rep. Hayes cited *infra* at note 17.
19. 121 Cong Rec. 4116 (daily ed. May 15, 1975).
20. 121 Cong Rec. 9926 (daily ed. June 6, 1975).

Bayh, faced several problems. One was that the debate was poorly attended that morning. Another was the parliamentary separation of the debate from the vote, with the latter being held that afternoon. Related to that was the defection of several actual cosponsors (such as Senator John Tunney of California), many of whom did not appear to realize they were voting against their own amendment! And in all fairness to the Senate sponsors of the Hayes amendment, it snould be noted that Senatorial opposition centered in Chairman Stennis' Armed Forces Committee and staff. Senator Stennis issued a strong letter denouncing the amendment on the eve of the vote, and took to the floor against it. [21]

At this point it would be instructive to ask ourselves why the legislative route was chosen in the first place. Certainly a legal solution was potentially available. A wide body of data, both admitted by the Navy and garnered by Congressman Hayes under a Freedom of Information request pursuant to 5 U.S.C.A. Sec. 522, 32 C.F.R. Sec. 286.5, 297.1 et seq., evidenced arbitrary and capricious action by the Department of the Navy and DOD actionable under 5 U.S.C.A. 501 et seq. In addition, as discussed *infra,* the statute taken as a whole was ambiguous on its face. The existing legislative history at that time arguably barred such reductions in force of *permanent* civilian personnel. Even stronger though, was the specific mandate of 10 U.S.C.A. Sec. 138 for the use of the least costly form of manpower. End-of-fiscal-year civilian manpower ceilings were clearly incompatible with this requirement and could be so demonstrated by sound actuarial methods. [22]

In answer this writer would suggest that the legislative route was chosen for several reasons. The most predominant one expressed was the fear of confrontation coupled with the chances of a long and perhaps unsuccessful litigation. By giving ambiguous authority in the statute and taking it away in committee reports and debates, the outcome for either side's legal position was unclear. Nevertheless, this was the pragmatic reason for the course chosen.

The Rule of Law: An Alternative to Interest Group Pluralism

The foregoing answer, however, begs the larger public policy issues. This case study demonstrates three interrelated weaknesses of the American liberal political system and its administrative extensions: first, the delegation of legislative authority and responsibility by Congress, without clear guidelines to administrative agencies, resulting in a rule through interest-group accommodation rather than a Rule of Law; second, the irresponsible exercise of such authority by administrative agencies, and third, a related imbalance in Congressional offices' acting as ombudsman-like quasi-administrators rather than as legislators drafting taut enabling statutes for administrative agencies. This is the chronological order in which these problems developed. Today they function in a vicious circle, seemingly without beginning or end.

Perhaps the best course is to descend backwards into this Maelstrom and examine the last element of the critique first. In a practical sense, the immediate harms are evident. Some 75% of a Congressman's staff is devoted to fencing with administative agenices on behalf of constituents, receptionists mailing pictures, secretaries answering constituent requests for this and that from the government, case workers dealing with individual problems (such as social security claims or military discharges), administrative assistants dealing with the public relations side of agency related problems,

21. Views of Manpower Subcommittee, House Post Office and Civil Service Committee, as reported in H. R. Rep. No. 1035, 93rd Cong. 2d Sess. 79-81 (1974).
22. See letter from Secretary of the Navy J. William Middendorf II to Rep. Philip H. Hayes, May 12, 1975, and information in note 14.

legislative aides bucking complaints to administrative agencies instead of drafting or diagnosing new legislation, and staff counsels straddling committee assignments and district problems intertwined with administrative agency decisions, etc. Although there are exceptions, that is the tenor of most congressional offices on Capital Hill.

The second critique stems from the unwillingness of administrative agencies to operate in a responsible fashion. One can understand the contradictory circumstances in which the DOD was placed by Congress at once requiring sizeable job cuts and eliminating the largest potential pool for such cuts (permanent civilian employees) in the name of political expediency. What is less easy to accept, however, is the arbitrary and capricious way in which the Department of the Navy parceled out the RIF's. In this case, one naval installation in the district of a freshman Democrat and with diversified work load was selected in preference to two others devoted solely to ordnance production and in politically more powerful or friendly districts and states. Additionally, as the subsequent figures demonstrated, either no attempt was made to correlate the reduction to work load or it was a careless attempt. [23]

But, in a deeper sense, the third and final critique is the delegation of legislative authority, and hence responsibility, to administrative agencies. Congress has failed to provide specific guidelines because that would require laws offensive to various interest groups. Instead, liberal democracy has preferred the absence of a rule of law and substituted pluralistic interest group accommodation before administrative agencies. As a result the agencies have become the focal point for domination by these interests. And the rules that emanate from them tend both to vary with the temporarily dominant interest group and conversely, fail to impose a policy because of the general dilution that occurs. In practice the agencies are given a general area mandate ("Civilian Personnel") and certain broad goals (reduce employees by about 32,000). And just to be safe, statutory ambiguity is further obscured by contradictory committee reports and floor debate. In short the buck is passed to the agency to make a choice Congress dares not make because it would cut across interest groups needed by individual Congressmen. And in turn, the goal of the interest group, originally formed around one issue (save the jobs), becomes attuned to preserving the interest group per se (to continue to deal in the arena of interest group pluralism filling the vacuous absence of a rule of law).

In this case, the Congress failed to indicate clearly that permanent civilian personnel were to be cut. In addition, it failed to formulate standards for selecting which facility was to be chosen and for what reason. The statute merely required a general rationale be submitted by the Secretary of Defense, a rationale that DOD would develop and present to Congress ex post facto and a rationale lacking specificity (e.g., Crane did not appear in the report). As a result, the United States Congress was sidetracked in the midst of the defense bill for 1976 with a floor debate on a relatively minor correction of administrative policy that should have been clarified in the original statute.

What is needed is a change of Congressional policy. But in light of the symbiotic relationships between the plethora of interest groups in both parties and the individual Congressmen and Senators, such an *internal* change is unlikely. A more likely *external* source of change is the Supreme Court. It is they who conceded the broad parameters to congressional delegation of legislative authority in *Lichter* v. *U.S.*, 334 U.S. 742 (1948), for example. There the court upheld an act allowing the federal government to

23. 10 U.S.C.A. Sec. 138.

recover "excess profits," with the sweeping assertion that " . . . a constitutional power implies a power of delegation of authority under it sufficient to effect its purposes . . ." This writer would argue that the problems uncovered in this Crane case study are the progeny of *Lichter,* and other such broad delegations of authority.

The trend has continued with decisions such as *Amalgamated Meat Cutters* v. *Connally,* 337 F. Supp. 737 (1972), upholding the Economic Stabilization Act of 1970's delegation to the President of the authority to issue orders to stabilize wages and prices where needed to prevent "gross inequities." With the acquiesence of most jurisprudential thinkers and jurists to the thrust of these decisions, the emphasis has instead shifted to procedural safeguards before administrative bodies, e.g., *Holmes* v. *New York City Housing Authority,* 398 F.2d 262, or at a state level, for example, the extensive concern with procedural due process, necessitated by such sweeping administrative powers, generated in the *Indiana Administrative Adjudication Act,* IC 1971, 4-22-1-1 et seq.

Nevertheless, in light of the awesome and essentially unresponsive and irresponsible power (in a democratic sense) of the administrative agencies, the inevitable conclusion is a return to the rational of *Panama Refining.* A reaffirmation of the constitutional prohibition upon the delegation of legislative authority would hail a return to a rule of law, provide a framework for sound and predictable administrative decisions, and free Congressional offices from adding ad hoc political pressure to ad hoc rulings. Or, to paraphrase Professor Lowi, laws will make Congress and administrative agencies institutions apart and capable of governing by law.

"It is
a
shameful thing
that
copyright
should expire.

It ought to be
freehold,
like land."

—Sir William Schwenck Gilbert
[1836-1919]

English librettist, dramatist
and poet; barrister-at-law.