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Unwritten, and Irrational, Constitution of Regulatory Government in the United States

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THE UNWRITTEN, AND IRRATIONAL, CONSTITUTION OF REGULATORY GOVERNMENT IN THE UNITED STATES [1]

For some years now, we have been embarked in this country upon various programs for improving the administration of justice. In the field of administrative law, a series of improvements have been initiated with the adoption of the Administrative Procedure Act. That statute was indeed but the beginning of a number of steps designed to improve and publicize the actual mechanics of administrative justice and judicial review.

Those matters are of the highest importance, and it is essential that the legal profession carry them forward to intelligent conclusion. But now is also the time to probe deeper into the general problem of regulatory government. We must do that, lest we become deluded into thinking that what we have done, or are now doing, marks the end of the road to which there is, in truth, no end. As a matter of fact, what we have done so far is to get the by-laws in order, as it were. I propose that we now also begin to look into the unwritten, and irrational, constitution of regulatory government.

We Americans rightly cherish our written constitutions, state and national. They embody what Rufus Choate called "the glittering and sounding generalities of natural right." They fix for us certain ideals respecting government and justice. But they leave much unsaid, particularly with respect to new governmental ventures which our times have forced upon us. What is thus left unsaid may be properly regarded in its fundamentals as our own unwritten constitution, and that is the topic of this discussion.

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[1] Originally delivered as an address before the Section of Administrative Law of the 71st four-day meeting of the American Bar Association at Seattle on September 7, 1948.

In basic matters of governmental organization and operation, we have been careless architects. We have added, trimmed, and remodeled, without much thought or design. So far as we have reflected upon these broad aspects of government at all, we have only nibbled at the subject, or we have left it to the schoolmen. In the realm of practical affairs many of us have been misled by Alexander Pope's famous couplet:

> *For forms of government let fools contest;*
> *Whate'er is best administer'd is best.*

Misled, I respectfully submit, because even good administration cannot surmount a governmental framework which is irrational to the point of being unworkable. Modern government is too large for mere good will, expertness, and vision of the individual administrator to overcome the drag of size and complexity. There are not enough saints, demigods, or heroes to staff today's machine of state.

To illustrate on a small scale both what I have in mind and what might be done about it, I should like to center this discussion about three examples. They are more than examples. Put together for purposes of contrast, they demonstrate the nature of our problem. Take, if you will, the idea that there should be a division of functions and labors in government. Division of functions is more than an idea, for it is as necessary in government as in a great factory or organized scientific enterprise. In government I have one example for you in which there is not enough division, another in which there is too much, and a third in which we think there is a fundamental division but it is dissolving without our appearing to know about it.

I.

Lawyers are quite familiar with the idea that there should be a division of functions between the prosecutor and the

judge. We take that division for granted in our courts, but often find it lacking in administrative tribunals which exercise judicial powers. So much has been said on the theoretical aspects of that situation that I shall not dwell upon it here. But I do wish to touch briefly upon that aspect of the same situation which bears upon governmental efficiency and the best utilization of governmental manpower.

Most of you are familiar with the well-known report of the so-called Attorney General's Committee on Administrative Procedure. Its members differed on the theoretical aspects of the division of prosecuting and judicial functions. But there was no difference of opinion on the practical aspects of the subject. The committee found that, without any reason whatever, the heads of important federal agencies were spending their time selecting employees, passing on expense accounts, approving routine matters, and attempting to clear the entire business of a far-flung organization and its thousands of operatives.

As a matter of fact, the situation is not as simple as that. The so-called "independent" agencies or commissions—that is, those which are not in any department headed by a cabinet officer or equivalent—are prone to spend too much time on such managerial and routine functions. But in departmental agencies something more than the reverse obtains, in which subordinates perform all functions and the head of the agency tends to become little more than an authenticating official. In the language of the day, decisions are necessarily "institutional decisions" rather than the conclusions of the officer named by statute to make the ultimate decision.

Such a situation in either instance is not merely poor business but poor justice. The agency head who is overwhelmed with routine necessarily has little time for study and reflection upon important questions of fact and law involved in specific cases. The assembly line brings all mat-

ters to the top, and in that process all becomes routine, except that in the Federal Government they are called "channels" rather than assembly lines. In this state of affairs we are entitled to ask ourselves the question put by Disraeli, "A government of statesmen or clerks?" We have the latter in our regulatory agencies all too often and we know it.

This situation exists because we have allowed regulatory government to deteriorate into that kind of a machine. We have done it so long that it has become accepted, and is at least dangerously near becoming a part of our unwritten constitution. Ten years ago the President of the United States, upon receiving the report of the President's Committee on Administrative Management, put the matter squarely up to the Congress. Nothing was done about it, although the problem has been since recognized to the extent of temporizing about it in connection with a few specific administrative agencies.

II.

The example I have just stated concerns the lack of division of labors within a single agency. Now let us look at a situation in which there is an unreasonable duplication or multiplication of functions by several agencies dealing with the same subject matter. A simple example is the regulation of advertising in connection with drug store preparations. Three agencies have jurisdiction. The Federal Trade Commission has statutory authority over unfair and misleading advertising where interstate commerce or the mails are concerned, the Post Office duplicates that authority where the mails are concerned, and the Food and Drug Administration covers the whole field again so far as the labels or accompanying literature are concerned.

There is, of course, either no difference, or no rational difference, between the jurisdiction of these several federal

regulatory agencies. If one believes in regulation for the sake of regulation, or for purposes of oppression, there may be no objection to this multiplicity of authority. But from the standpoint of both governmental efficiency and fair regulation, such duplication is indefensible.

On the score of inefficiency, we thus have three sets of investigators, three sets of public prosecutors, three sets of field officies, three sets of rules and regulations, three sets of files, three budgets, three appropriation acts, and so on. Also, where more than one agency has its finger in the regulatory pie, there are inevitable jurisdictional squabbles which cost time and money. In the rivalry between agencies, public policy and public good are likely to come off second best.

On the score of simple justice, the situation becomes even worse confounded. It would be bad enough if the distributor of a product were subject to regulation by three agencies instead of one. But he is also likely to find himself the object of a race in which public officials see who can get to him first, or who can make the more extravagant charges, or who can demand the more drastic punishment. In this respect, the example I have given is peculiarly oppressive because, while the Federal Trade Commission and the Post Office may institute but one administrative proceeding at a time against any named respondent, the Food and Drug Administration merely works up the cases and then causes the United States Attorneys to institute multiple libel proceedings in the several judicial districts. A small business, of course, is completely defenseless against any such onslaught.

And the cure for this irrational situation is as simple as the present jurisdiction is complex. The Federal Trade Commission properly exercises jurisdiction over false or misleading advertising, but the Post Office Department should have no other function than to call the attention of the Federal Trade Commission to such advertising found in the mails. The Food and Drug Administration, as an organization with

laboratory facilities, should be confined to the scientific identification of drugs and the seizure of such as it may find dangerous to life or health. If that were done, public money would be conserved, justice would be served, and governmental energies could be directed to other things which wait to be done.

III.

Now let us turn to a third, and even more far-reaching, example. Our first example, as you will recall, dealt with the failure to divide labors within a single agency. The second dealt with repetitive functions by several agencies respecting the same subject matter. I now desire to direct your attention to the supposedly secure division of functions between the Federal Government and the states.

We are accustomed to assume that the states and local governments have a fixed sphere in which they remain supreme. We are also accustomed to think that the same is true of the Federal Government, with but occasional adjustment when the Congress and the Supreme Court enlarge the scope of federal activities. In short, we conceive our federal system as a grand division of governmental responsibilities given us by the Founding Fathers and perpetuated by our written Constitution. But the situation is not as simple as that, and our unwritten constitution silently day by day wears away the realm supposedly left to the states.

For years the Supreme Court has been holding that, because similar powers have been conferred upon some federal agency, this or that function of state or local governments has *by the very silence of the Congress* been impliedly rendered null and void. Now, that federal functions have grown with the expanded scope of the commerce clause, blind legislation of that kind must ultimately come close to obliterating effective state or local government. The very fact that in recent years it has been established that almost every

serious activity of the people of this land may be the subject of federal regulation, and that in the same time much has been brought into federal control that previously had not been, requires two things:

First, there is need for us to look back over legislation of this generation and make due provision that it shall not supersede state regulation where the latter does the job. An attempt to accomplish this is contained in my bill, S.1159, of the Eightieth Congress, in which it is proposed that,

> Except that nothing herein shall prevent agency action necessary to protect public health and safety or to remove substantial discriminations against actual interstate or foreign commerce, no agency shall have jurisdiction to act in any case to the extent that . . . a state or its duly empowered authorities, instrumentalities, or subdivisions have undertaken active regulation of the same subject to a similar purpose or effect.

Second, when new or expanded authority is proposed for any federal agency, members of Congress should ask themselves: "If this is done, will and should all state and local jurisdiction to the same effect automatically cease to be valid?"

The first of those things has not been done, the second rarely. As a result, our unwritten constitution now in effect provides that, every time we add federal regulatory authority, by the same token and without saying so we diminish the authority of all the states. In many, perhaps most, such situations, that result is unnecessary and may be unwise. In any event, whether or not necessary or wise, that effect comes about silently and thoughtlessly. Thus, moreover, have we blindly ignored Thomas Jefferson's admonition that state governments are "the most competent administrations for our domestic concerns, and the surest bulwarks" against anti-democratic tendencies.

IV.

In conclusion, I should like to remind you that my three examples are only examples. There are too many more

which might be cited, and there are undoubtedly better ones. But these should serve to illustrate the unwritten and irrational nature of our present form of regulatory government. I hope they also illustrate that the situation is not hopeless but merely waits diligent and intelligent treatment. In that effort, which I pray will be forthcoming, the bar should play an important part.

The legal profession may not have thought about these things, or may have thought about them in different terms. But surely lawyers' daily work has brought them in contact with the subject. And lawyers, who have not only felt these things but are members of the profession which deals with laws and governments in a free society, are the natural source for suggestions and aid in devising remedies.

I can conceive of no more important service on the part of the legal profession. Law, and government under law, is under attack in most parts of this world. Whether the idea of law and government to which we all subscribe will survive must depend on us. It will not suffice for us merely to have laws or to have a government. It will not suffice for us merely to hold the line. Our laws and our government must be made adequate to the challenge of this revolutionary age, just as our written Constitution so well met the challenge of an earlier day. The legal profession is more than the custodian of our legal institutions. It is the guardian and trustee, charged with something more than complacently sitting by while our heritage is undermined and our trust dissipated.

Pat McCarran.