



11-1-1925

# Government by Bureaucrats

Samuel B. Pettengill

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

## Recommended Citation

Samuel B. Pettengill, *Government by Bureaucrats*, 1 Notre Dame L. Rev. 24 (1925).

Available at: <http://scholarship.law.nd.edu/ndlr/vol1/iss1/5>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

ing, have practically abdicated their functions in that respect, and turned the field of education over to secular control. The Catholics, on the contrary, have retained and strengthened their interest in the education of their children in Christian faith and morality, while at the same time maintaining a proper and adequate enterprise in the domain of intellectual culture and secular concerns. They believe in and are practicing a policy that fears no conflict between science and religion, for they are governed by the rule laid down by Newman: "It will not satisfy me, as it satisfies so many, to have two independent systems, intellectual and religious, going at once side by side, by a sort of division of labor, and only accidentally brought together. It will not satisfy me, if religion is here and science there, and young men converse with science all day, and lodge with religion in the evening. I wish the intellect to range with the utmost freedom, and religion to enjoy an equal freedom, but what I am stipulating is, that they should be found in one and the same place, and exemplified by the same persons." In no other way can the body politic and the spirit politic of this country coordinate in harmonious union, as was contemplated by the fathers of American government.

---

## GOVERNMENT BY BUREAUCRATS

*By* SAMUEL B. PETTENGILL, LL. B.

A noteworthy tendency in the development of the law is that of investing administrative officers with judicial or quasijudicial and legislative power. Impatient, perhaps, with the expense and delay of legal processes the legislatures are giving all sorts of bureaucrats the power to regulate one's business, or to condemn one's property, frequently in advance of, or even without, a hearing. For example, trade commissions and rate making bodies have the power to decide what practices are unfair and what rates unreasonable; boards of health are authorized to seize and destroy alleged contaminated meat, diseased cattle, fruit and grain infected with smut, weevils, etc.; administrative officers may order school houses and other public and private buildings torn down for alleged unsanitary conditions; police heads and hirelings are invested with similar

authority to destroy buildings alleged to contain public nuisances such as blind tigers, gambling paraphernalia and other things of ill-repute; fire marshals, generals and corporals sitting at the State Capitol are clothed with power to raze buildings alleged to be fire hazards, and so forth and so on.

A typical example is the fire marshal law. This is one of the latest enthusiasms to sweep over the state legislatures during whose sessions "the liberties of the people are always in danger." These laws raise all sorts of constitutional questions, such as separating the powers of government into three departments, —legislative, executive (including the administrative) and the judicial, and forbidding a person charged with official duties under one of these departments from exercising any of the functions of another; the delegation of judicial power; the declaration of an act or thing to be a nuisance by the fiat of the legislature or the *ipse dixit* of an administrative officer or his deputy; the deprivation of a person of his property without a hearing; taking property without just compensation; giving a fire marshal power to act, uncontrolled by any fixed standards, and the whole general question of "government by men" as opposed to "government by law".

The Indiana statute, which is closely similar to that of many other states and is illustrative of this whole type of legislation, provides, for example, that the "state fire marshal, his deputies or assistants, upon the complaints of any person, shall inspect all buildings or premises within their jurisdiction; whenever any of said officers shall find any building or other structure which for want of repairs, lack of sufficient fire escapes, automatic or other fire alarm apparatus, or fire extinguishing equipment, or by reason of age or dilapidated condition, or any other cause, is especially liable to fire; or whenever such officer shall find in any building combustible or explosive matter, or inflammable contents, he or they shall order the same to be removed or remedied, and such order shall forthwith be complied with by the owner of the building. If such order is made by a deputy, such owner within five days may appeal to the state fire marshal who shall review such order and unless revoked or modified it shall remain in full force and be complied with within the time fixed in such order or decision of the state fire marshal; provided, how-

ever, that any such owner who finds himself aggrieved may within five days after the making of such order, file his petition with the Circuit Court of the proper county, praying a review, and such parties so appealing shall file with said court within two days a bond conditioned to pay all the costs of such appeal. If any person fails to comply with the order of any officer, or such order as modified, then such officer is authorized to cause such building to be torn down, etc., at the expense of the owner or occupant, who must within thirty days thereafter pay the costs of such demolition, and failing so to do, the same is entered on the tax duplicate as a special tax against the real estate on which the building stood. Any owner failing to comply with such order within thirty days after the service of said order, shall be liable to a penalty of from ten to fifty dollars for each day's neglect. The service of any such order shall be made upon the occupant personally, or by either delivering a true copy to such occupant personally, or by leaving it with any person in charge of the premises; or in case no person is found, by affixing a copy on the door at the entrance of the premises, or by mailing a copy to the occupant's last known post office address. *Burns' Ann. Ind. Stat., 7441 g. et seq.*

It is obvious that under this statute the fire marshal or his deputy, on his own view, for any cause named in the statute, or "from any other cause" may condemn a building in advance of notice to or hearing granted the owner. This is a final decree unless modified or reviewed. On review, however, the aggrieved owner is the moving party, must give a bond for costs and apparently has the burden of overcoming the validity of the decree already entered. If the building is unoccupied and the owner fails to see the notice tacked on the door, or fails to get a copy of the order through the United States mail, he is apt to return and find his building down and a bill for the expense of demolition, together with a 25% penalty on his tax duplicate, all without his day in court or any chance for redress.

To such an extent has the regulation of other people's business gone.

It is interesting to note how the courts have viewed such encroachments by the legislature upon the constitutional rights of property owners.

A similar statute was declared unconstitutional by the Supreme Court of Illinois in the case of *People vs. Sholem*, 128 N. E. 377. Here, the court in discussing the failure of the statute to fix standards governing the action of the marshal, but conferring on him the arbitrary power to determine whether a building for reasons named in the statute or "for any other cause" is especially liable to fire and therefore in his sole judgment subject to be destroyed, says:

"Any law that compels a man to hold any material rights essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails. Arbitrary power cannot be delegated by the legislature. . . . A statute which subjects any person's rights to the discretion of an officer without any rule or provisions of law to control the officer, violates constitutional provisions. In the present instance, the section in question lays down no rule by which the fire marshal is to determine when a building is especially liable to fire. It may be for want of proper repair. What is "proper repair" is entirely within the discretion of the fire marshal. It may be by reason of age and dilapidated condition. What shall constitute "age and dilapidated condition" is wholly within the discretion of the fire marshal. It may be for any other cause, leaving to the fire marshal complete arbitrary power to nominate the cause and determine its effect on any building. All buildings are to a greater or less degree subject to be destroyed by fire. Some are especially liable to fire while others are almost fireproof. Therefore until the fire marshal has spoken it cannot be known what the law is with relation to the maintenance of said building."

And the court concluded that by reason of the delegation of arbitrary discretion the statute was without the power of the legislature to enact.

The danger of legislation of this type is well illustrated by this case. It arises from the inability of the legislature in advance to fix standards with sufficient certainty in respect to all buildings, however situated, to determine whether they are a hazard to the lives and property of other citizens. Such legislative acts are wholesale judgments without a view of any particular property except by an administrative officer who is authorized to "nominate the cause and determine its effect". What, for example, are "sufficient" fire escapes? In *Glendale Coal Com-*

*pany vs. Douglas*, 137 N. E. 615, a statute was held invalid because it required in the operation of a mine a "sufficient number of practical experienced miners." When is a building "especially liable to fire"? In *Cook vs. State*, 26 Ind. App. 278, a statute imposing a penalty for cutting up highways by "narrow tired wagons" was held invalid. What is "for any other reason"? In *Standard Chemical & Metals Corporation vs. Waugh Chemical Corporation*, 131 N. E. 566, the Court of Appeals of New York was dealing with the Lever Act of Congress forbidding making "any unjust or unreasonable rate or charge in handling or dealing in any necessities". Judge Cardozo, who never speaks except with authority and with the added charm of language, says:

"The act rejects all objective standards or determinate or determinable criteria, the tests of practice or precedent, or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The arbitrium boni viri, unrestrained and undirected, becomes the test of right and wrong, and men are viewed as malefactors for failure to consent to the unknown and unknowable."

Legislation of this sort is subject to many other criticisms from the standpoint of constitutional law, which space does not permit me to discuss. I will, however, mention one and that is, condemnation before hearing, and a trial after judgment:—a judgment which is *ex parte* and absolutely final unless the party against whom it is directed within the time limited by statute, takes steps to avoid it. The courts have uniformly held that the due process of law requirement of the 14th amendment of the Federal Constitution, makes it necessary that notice first be given, and that service of such notice be given in such a way as is reasonably calculated to advise the person affected of a day and place at which an opportunity will be afforded him to be heard in defense of his property rights, before there can be a valid order or judgment.

It was for this reason largely that the fire marshal law was declared unconstitutional by the Supreme Court of Nebraska, in *State vs. Keller*, 189 N. W. 374, holding that an order made by a fire marshal based upon his individual judgment and without the necessity of notice to or hearing by the parties who are to be charged, is unconstitutional as lacking in due process of law.

Due process of law is "the general law, a law which hears before it condemns, proceeds on inquiry and renders judgment only after trial."

For a similar reason a Texas statute was declared unconstitutional in *Stockwell vs. Texas*, 221 S. W. 932. This statute clothed the Commissioner of Agriculture with power to determine that insects found on trees are injurious, or that conditions found constitute a contagious plant disease and to order destruction of trees. The court held that the determination whether any particular thing is a public nuisance, or is or is not permitted by the law of the state, will always be a judicial question which it is not competent to delegate to a local administrative board and that the owner of a citrus hedge was entitled to a hearing upon the question whether his trees were affected with a contagious disease, before a valid order could be entered for their destruction.

Of course, all rules of law are subject to modification in the face of great public emergencies; for example, a statute giving the fire chief of a city the power to dynamite buildings to check a great conflagration would probably be held valid by the same courts which have determined the provisions of the fire marshal law unconstitutional. A conflagration will not wait for court to meet.

Fundamentally, after all, the questions here are not constitutional questions because constitutions, federal and state, can be changed by the will of the people, or a vociferous minority thereof. Ultimately the people must decide whether they prefer general and necessarily vague definitions by legislative bodies supplemented by the individual judgment of a single officer, appointed for political reasons by the executive sitting at the capitol, to determine what conditions are inimical to public health and safety or whether they prefer property rights to rest upon the judgment of judicial tribunals sitting in the vicinage, which act only after an inquiry into the particular subject matter at hand and upon an open and fair hearing to both sides.