

DEAN JAMES O. FREEDMAN:
A PERSONAL TRIBUTE

JERRE S. WILLIAMS †

In the late fall of 1967, I began the agreeable task of organizing the permanent Administrative Conference of the United States.¹ The Conference was created to make recommendations for the improvement of administrative procedures and processes throughout the executive branch of the federal government. It was essential that the recommendations developed grow on a solid foundation of scholarly yet pragmatic analysis of problems in the administrative process and solutions to those problems. One of the first persons I hired as a consultant to the Conference to do the kind of thorough and effective research and evaluation which was needed was James O. Freedman, then Associate Professor of Law at the University of Pennsylvania. He was then about thirty-three years old, but he had already built a solid reputation among administrative lawyers and scholars. There has been an exceptional synergetic relationship between Dean Freedman and the Administrative Conference ever since. I think particularly of his study of summary administrative action which grew out of research he undertook as consultant to the Administrative Conference and which occupies four effective chapters of his book, *Crisis and Legitimacy*.²

Because I have known Dean Freedman largely through his exceptionally thorough work in administrative law, I should focus these few words upon his contributions to the knowledge, understanding, and improvement of the administrative process. But no personal tribute can be complete without referring to his talents as Dean of the Law School, University Ombudsman, and particularly to the rewarding cordiality and sympathetic understanding which have exemplified his personal relationships with other people. James Freedman is a warm and friendly person. Because of this, the effectiveness of his keen and creative intelligence is markedly enhanced. All facets of his remarkable career prove this to be so.

† Circuit Judge, United States Court of Appeals for the Fifth Circuit. A.B. 1938, University of Denver; LL.B. 1941, Columbia University.

¹ 5 U.S.C. §§ 571-576 (1976).

² J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 207-55 (1978).

A particular way to recognize Dean Freedman's personal qualities is found in his service as University Ombudsman for about three years in the middle 1970's. He was ideal for this position. The original development of the Ombudsman concept called for someone who would be a careful, knowledgeable, intelligent, and highly respected person who immediately commanded the trust of the people and never failed that trust. Freedman fit this mold with precision. Although further development of the Ombudsman concept is certainly desirable, those who have evaluated it recognize that the Ombudsman tends to lose the attributes which are so important to the office when the task becomes so large that those personal qualities are lost in what becomes the creation of another government bureau. When that burgeoning development takes place, we then have the same issues of crisis and legitimacy in the office of the Ombudsman that we have elsewhere in the administrative process. But at the level that Dean Freedman operated as Ombudsman, his personal qualities shone, and the total trust was there.

And now back to Freedman and Administrative Process. No one has better described the constant turmoil in administrative law than Freedman did in his words, "crisis" and "legitimacy." He gives us, in the conclusion of his book, the challenge of developing "an effective theory of the legitimacy of the administrative process" by candidly facing the "recurrent sense of crisis" to guide us to effective procedures which will "give promise of being fair, efficient, and responsive to democratic values and constitutional restraints."³ This is a beautifully and succinctly stated goal. But if I understand the pragmatic side of Jim Freedman, he knows, as I know, that the goal will never be wholly achieved. I can never envisage a day when there will be no crisis and no doubts as to legitimacy with respect to administrative processes. And I am sure he does not either.

New challenges will create new needs and new needs in turn will demand new administrative processes. Today we hear much of "deregulation," which constitutes no more than a substantive goal of withdrawing from regulation certain aspects of our society which have been regulated in the past. Deregulation is not the abolition of administrative process where administrative process is needed. Anyone who knows the breadth and range of an accurate definition of administrative process knows there is no way the administrative process can be eliminated in government.

³ *Id.* 266.

We shall always continue to be faced, then, with the issues of what should be regulated and how should we do it. There is no conceivable way that the search for methods of regulation can eliminate administrative process as we know it. In fact, one of the encouraging developments of the later years in the administrative law field has been the development of regularized and effective administrative procedures in the various states. As we undertake a national goal of trying to return more government to the states, we stimulate, at the same time, more use of administrative process in the states.

I think the passage I like best in Freedman's book refers to the desirability of developing in the administrative process "an expertise in the art of skepticism about expertise, a competence in the worldly art of the politically acceptable and socially wise."⁴ He then goes on to say that this is the kind of expertise that should be sought in those who are named to positions of responsibility in the administrative process. This is a key observation. Those who are sophisticated in the administrative process know that the work of the administrator is not the technical responsibility of being able to follow precisely a mandate that has emanated from higher sources. Quite the contrary, the administrative process is inescapably a policymaking process, and we need exactly the kind of policymakers that Dean Freedman describes in these penetrating words.

Legislative bodies sometimes abdicate their responsibilities for policymaking to administrative bodies. Even if they do not abdicate, the practical answer is that there is no way in the complexities of today's world for the legislative bodies to deal with all the policy issues that demand attention. In many instances, legislatures can only set up guideposts of varying effectiveness and leave implementation and precise regulation to others. To the wistful and sincere cries that this sounds undemocratic and authoritarian, it can only be replied that there is no way the government can govern without it, no matter how much it genuinely desires to, and succeed at the same time in implementing human freedom. My excessive freedom is someone else's oppression. Only government can keep the balance true.

Keeping the balance true calls for experts in "the worldly art of the politically acceptable and socially wise" who are skeptical of those who are arrogantly sure that because of their own training

⁴ *Id.* 54.

and background, they know the only true way to resolve a social problem.

Finally, I offer a personal word which is also related to James Freedman and his work. For many years as a fulltime teacher of law, I taught the administrative process. I now find myself an appellate judge, often called upon to evaluate that process through judicial review. I believe that I see the administrative process today very much as I saw it earlier when I was teaching it and criticizing the courts for what they did. Obviously, there are some changes in my attitude. But I thumbed through Dean Freedman's references in his book. Almost all the administrative law he cites is either rules or *court* decisions. Very few administrative decisions are cited. This is not unusual; it is par for the course.

What it does show is that judicial review has a great deal to do with legitimating the administrative process. Only a small percentage of reviewable administrative decisions ever reach the courts, yet the fact that the possibility of review exists is an integral aspect of the quality of the administrative process. I believed it before, but my belief has been reinforced. There are two messages. The first is that nothing about the importance of judicial review should turn us away from trying to achieve the best possible results at the administrative level. But second, as we turn more and more attention to informal and summary administrative action where judicial review as a practical matter is difficult or impossible, we need to develop more fully analogous methods of review within the process itself. These methods must command public knowledge and respect.

James Freedman knows all of these things. We can be confident that he will continue his outstanding creative contributions to the administrative process and to the broader demand of reconciling the essential legal controls of a society with human liberty. I am honored to have worked with him and to call him my friend.