

BOOK REVIEW

CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT. By James O. Freedman. Cambridge University Press, 1978. Pp. xi, 324. Price \$15.95

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Dean Freedman has written an important and timely book. *Crisis and Legitimacy*¹ presents a carefully constructed framework for evaluating administrative performance, at a time when some administrative law scholars are questioning the existence of any unifying theory of administrative law.² Freedman's book is the culmination of more than ten years of writing in the field. Its organizing principle—the alternating currents of crisis and legitimacy in the administrative process—enables the author to show how the traditional components of the administrative law course, such as delegation, procedure, and judicial review, are themselves parts of the problem and sources for its solution. Dean Freedman asserts “the necessity of developing a theory of the legitimacy of the administrative process.”³ I, for one, am convinced of the correctness of his inquiry.

Administrative law is a field fraught with self-doubt, its theoretical foundations shaken in recent years by a rapid expansion. Freedman reminds us of our intellectual debts to the field's major figures⁴ and then sets about to explain the relationship of their work to the galaxy of current issues that dazzle and confuse even the scholarly observer. It is a measure of the author's success that his book demands scrutiny in its own terms.

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¹ J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978).

² See, e.g., Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975); Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120 (1977). These scholars have expressed substantial dissatisfaction with the focus of traditional theory, particularly its case law orientation and the underlying notion that the administrative branch of government can be penetrated by means of its formal opinions and procedures. They question whether any analysis beyond that of particular agency functions is possible.

³ J. FREEDMAN, *supra* note 1, at ix.

⁴ Felix Frankfurter, Walter Gellhorn, Louis Jaffe, Kenneth Culp Davis, and Henry Friendly are prominently mentioned.

The first part of the book identifies a series of causes for the asserted crisis of the administrative process. Although the early chapters contain no real surprises, they are written in a fresh and convincing fashion. Freedman deals initially with the uneasy relationship between the administrative process and the doctrine of separation of powers. An examination of the Framers' theory and of the Supreme Court's interpretation leads Freedman to a view of separation of powers as a flexible doctrine, meant to sustain a living constitutional balance, and not designed to eternally fix upon the three branches of government a sterile distribution of functions. According to Freedman, the administrative process has been unfairly stigmatized as the "headless fourth branch" on the basis of a popular but "simplistic version" of the separation of powers doctrine.⁵ This is a conclusion with which it is hard to disagree.

Chapter 3 describes the departure from judicial norms as another cause of discontent with the administrative process. A carefully reasoned chapter which could easily stand alone, its thesis is that administrative procedural alternatives to the judicial trial or adversary system have undercut public support for administrative agencies. Certainly there has been a tension between the adversary process and administrative decisionmaking since the turn of the century. As Freedman points out, although early administrative agencies were created by those who recognized the value of judicial procedures, some aspects of the judicial trial, most notably the jury system, had to be jettisoned in the agency context. It was not until scholars such as Roscoe Pound and Felix Frankfurter turned their attention to the administrative process that a rationale for these administrative variations on judicial procedures began to emerge.⁶

The movement away from the judicial model was an uneasy one, however, and when the New Deal came along, the pace slowed. Nowhere is this better illustrated than in the writings of Roscoe Pound, to which Freedman refers. In 1906, Pound attacked the adversary system and lawyers for advocating a "sporting theory of justice."⁷ But by 1938 he was warning of the degeneration of administrative justice into "administrative absolutism," "a Marxian

⁵ J. FREEDMAN, *supra* note 1, at 19-20.

⁶ In Frankfurter's academic writings he referred to the need to create "a flexible, appropriate and economical procedure." Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927). Once on the bench he amplified these views. For a discussion by the Justice of the dissimilarity in origin and function of courts and administrative tribunals, see *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940).

⁷ J. FREEDMAN, *supra* note 1, at 22.

idea much in vogue now.”⁸ Freedman paints such views “as little more than disguised assaults upon the economic and social philosophy of the New Deal itself.”⁹

I think Freedman is exactly right. Although one is reluctant to include so great a personage as Roscoe Pound in the company of unreflective political conservatives, it is startling to see the shift over the years in his views about administrative procedure. Pound’s about-face may reflect a largely unexamined premise of administrative law—that the subject necessarily implies both substantive and procedural “intervention” into our unregulated society. The adversary system can be viewed as the procedural analogue of the free market: both concepts embody the philosophical belief that the best result will be attained by the clash of competing forces. Efforts substantively to abridge the market mechanism seem naturally connected then to procedures which likewise restrain the adversary model.¹⁰ This relationship may prove frustrating for those, like Pound, whose enthusiasm for administrative procedural reform is dampened by disagreement with the goals of social and economic programs.

Freedman points out a further irony emerging from a variation on the procedural/substantive theme. The fears about the non-judicial nature of the administrative process which abated after the New Deal recently have been revived. This latest call for judicialization of administrative procedures is especially dramatic because it is led by the beneficiaries of many of the social and economic programs born of the process now under attack.¹¹ Freedman attributes this return to judicial procedures in administrative law to a variety of causes: heightened focus on individual rights in the 1960’s; a distrust of government during the Vietnam War period; and a general concern with the increasing influence of bureaucracy on daily life.¹² Each of these factors seems plausible. What they create, however, is a frustrating contradiction that Freedman touches on but does not fully exploit. By turning to

⁸ *Id.* 25.

⁹ *Id.*

¹⁰ See Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 264-74 (1978), for an expanded discussion of this viewpoint.

¹¹ Central to this discussion is *Goldberg v. Kelly*, 397 U.S. 254 (1970), which found summary termination of welfare benefits to violate due process and prescribed elaborate safeguards for pretermination hearings. Freedman recognizes that *Goldberg* may have been the high-water mark in the recent movement to judicialize the administrative process, and observes that the Supreme Court’s more recent decisions indicate a retreat from the requirement of full hearings prior to government action. J. FREEDMAN, *supra* note 1, at 227-31.

¹² J. FREEDMAN, *supra* note 1, at 27-28.

adversary procedures as a means of controlling the administrative process, those who benefit from economic and social intervention may be jeopardizing the continued viability of the very programs they seek to improve.

It is no coincidence that calls for deregulation are loudest when regulation is cumbersome, costly, and time-consuming. Reintroduction of the adversary model into the administrative process can only weigh it down and further compromise its effectiveness. As Freedman notes, this trend toward adversary procedures comes

at a time when students of judicial administration have been advocating that whole classes of litigation—for example, automobile accident claims, wage-earner bankruptcies, divorces, adoption of children, and traffic offenses—should be removed from the courts and placed in administrative agencies precisely because trial-type hearings threaten by their procedural complexity to overwhelm the capacity of courts to act at all.¹³

Freedman also focuses upon some non-adversary procedural alternatives that might be employed to make the administrative process more effective. Prominent here is the institution of the ombudsman. The question Freedman is eminently qualified to shed light upon,¹⁴ and which he did not reach in this book, is whether and how the ombudsman concept will allay fears of bureaucratic oppressiveness if it becomes an alternative to adversary decision-making.

The discussion of the crisis in administrative law assumes, in Chapter 4, a social science perspective. At the outset Freedman identifies public ambivalence toward economic regulation as a major cause of disaffection with the administrative process. He attributes much of the problem to the fact that debate on complex policy questions has been transferred from the legislative to the administrative arena.¹⁵ Agencies have been left to resolve questions that Congress either could not or chose not to answer. That agencies operating without adequate congressional directives have failed to develop coherent policies is by no means surprising. Nor is it surprising that such agency failures have cost the administrative process much in terms of legitimacy. Freedman also cites

¹³ *Id.* 28.

¹⁴ Freedman served as University Ombudsman at the University of Pennsylvania from 1973 to 1976.

¹⁵ J. FREEDMAN, *supra* note 1, at 34-35.

public concern with bureaucratization as a cause of disaffection with the administrative process, an observation for which, again, one can find much support. Freedman nominates as a representative witness to this phenomenon William O. Douglas, who went from New Deal bureaucrat to protector of the individual from the bureaucracy.¹⁶ There may be truth to Douglas's purported disillusionment, but I do not believe Freedman has made his case on the authorities cited.¹⁷ It seems to me entirely consistent for someone of Douglas's sensibilities to view bureaucratization of traditional economic regulation as a continuously positive trend while at the same time decrying the increasing bureaucratization of the individual beneficiary in the welfare state. Douglas's earlier and later opinions can be reconciled along these lines. For example, at no point did Douglas repudiate his opinion in *FPC v. Hope Natural Gas Co.*,¹⁸ the case that gave administrative agencies and the bureaucracy virtually final say in the determination of utility rates.¹⁹

Freedman concludes the chapter with a good discussion of administrative expertise and the role it plays in public perceptions of administrative crisis. He properly notes that faith in experts was a tenet of New Deal philosophy that has largely been repudiated in the post-Vietnam era. He further suggests that expertise is more often found in the permanent staff of an agency than in department heads and commissioners. The task, as Freedman poses it, is to "devise effective institutional means for placing the staff's expert contributions in the perspective of a broader set of social experiences and political values."²⁰ I think this states the problem well. One path to a solution—moderating the exercise of adminis-

¹⁶ *Id.* 40.

¹⁷ Justice Douglas's opinion in *Wyman v. James*, 400 U.S. 309 (1971), is cited as a prime example of his disaffection with the bureaucracy. See also the citations collected in J. FREEDMAN, *supra* note 1, at 284 nn.29 & 30.

¹⁸ 320 U.S. 591 (1944).

¹⁹ It is possible to read Douglas's dissent in the Permian Basin Area Rate Cases, 390 U.S. 747 (1968), as rejecting his earlier opinion in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). In *Permian* he objected to the use of area rates based on averages to determine an individual producer's costs and argued that *Hope* required the FPC to look at a producer's actual costs in determining whether a rate is just and reasonable. Moreover, in *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), Douglas dissented because he read the Court's opinion to permit ratemaking determinations on the basis of informal rulemaking rather than adjudicative procedures. These opinions indicate a dissatisfaction with procedural innovation in economic regulation, but they stop short of the kind of disenchantment with the bureaucracy that Douglas expressed in the social benefit area.

²⁰ J. FREEDMAN, *supra* note 1, at 56.

trative expertise by means of increased public participation—is suggested by Freedman, but not explored in sufficient depth.²¹

There is, however, one thought which I find entirely compelling: Freedman urges us to direct our attention “to the desirability of an expertise of a different kind—an expertise in the art of skepticism about expertise, a competence in the worldly art of the politically acceptable and socially wise.”²² If presidents were to seek this kind of expertise in their agency appointments, most observers of the administrative scene would be gratified. Yet, as with the earlier suggestions, little is offered to aid in the implementation of this high ideal. An example of an attempt to do exactly this, which I suspect Freedman would applaud, as I do, is a recent suggestion that the bar screen agency appointments in the same manner that it screens judicial ones.²³ Perhaps in the screening process, individuals possessing the relevant qualities of expertise can be identified and brought to the President’s attention in greater numbers.

Continuing with his survey of possible causes of the crisis in administrative law, Freedman focuses next on the relationship between agency independence and political accountability. He asserts that the concept of agency independence grew up before and during the New Deal period as a means of allaying fears about the objectivity of the administrative process.²⁴ The question for today, however, is whether that independence has become a fatal barrier to executive responsibility and policy making. Freedman concludes that it has not,²⁵ but he neglects some important arguments to the contrary.

In a seminal article on executive responsibility, Lloyd Cutler and David Johnson argued for “a system for continuous political monitoring of all government regulation.”²⁶ They advocated presidential oversight of agency actions subject to review by Congress in the form of a one-house veto. As they explained it:

The premise that underlies the proposal is that some increase in the President’s ability to intervene openly when

²¹ *Id.* 54-55.

²² *Id.* 54.

²³ See Gellhorn & Freer, Jr., *Assuring Competence in Federal Agency Appointments*, 65 A.B.A. J. 218 (1979).

²⁴ J. FREEDMAN, *supra* note 1, at 60. Freedman views agency independence as an aspect of the judicialization of the administrative process.

²⁵ *Id.* 69-71.

²⁶ Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1397 (1975) (emphasis omitted).

he deems the issue sufficiently important will make him chargeable with political responsibility for the agency's action, and will make him more accountable for not intervening when the electorate thinks he should.²⁷

I think this proposal deserves more complete treatment in any discussion of agency accountability. While the one-house veto provision has raised constitutional questions,²⁸ the idea of executive accountability for administrative performance is gaining increasing attention.²⁹ Sunset legislation, which renders agency programs subject to mandatory, periodic review, is another solution to the problem of assuring accountability of the administrative to the political process, and one which warrants more than the brief mention that Freedman gives it.³⁰

The non-delegation doctrine, the final entry in Freedman's catalogue of the causes of the crisis in administrative law is the subject of a stimulating and original analysis in Chapter 6. The chapter reviews the historical concerns with delegation of legislative power to administrative agencies and offers a structure for dealing with the problem in the future. It proposes that considerations of "institutional competence" guide determinations of the constitutionality of specific delegations of legislative power, an approach that "focuses on the tension between the nature of the particular power delegated and the character of the particular institution chosen to exercise it."³¹ Any delegation of Congress's power to tax, its power to impeach and convict the President, or the President's power to grant pardons, would be unconstitutional according to Dean Freedman's theory, because these powers, unlike most others, are dependent for their proper exercise on the unique

²⁷ *Id.* 1417.

²⁸ See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1373-75 (1977).

²⁹ See, e.g., Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979).

³⁰ The ABA Commission on Law and the Economy recently issued its exposure draft, *Federal Regulation: Roads to Reform* (Aug. 5, 1978), containing a recommendation of a limited sunset provision. *Id.* 140-41. This provision would delegate to the President, subject to approval by both houses of Congress, the authority to designate federal agencies for automatic termination unless reauthorized by new legislation.

Freedman alludes to the sunset legislation idea in a footnote mentioning Theodore Lowi's proposal of a tenure of statutes act. J. FREEDMAN, *supra* note 1, at 292 n.9.

³¹ J. FREEDMAN, *supra* note 1, at 93.

qualities of the legislative and executive branches. Even though this analysis has not received extensive Supreme Court treatment,³² I believe it is one that could well guide the courts in the future.

Freedman narrows his focus in the next chapters. Having identified the sources of the crisis, he now attempts to isolate the factors that account for differences in agency performance. Few new cornerstones are laid here. The SEC and the FTC, the traditional favorite son and whipping boy, are used to demonstrate differing public perceptions of agency performance. Freedman identifies the Equal Employment Opportunity Commission (EEOC) as an agency hampered by the absence of a general consensus in support of its mission. Its failures are attributable, he believes, to this public ambivalence and the resultant unwillingness of Congress to equip the Commission with adequate enforcement powers. In Chapter 9 Freedman argues that protection of the elderly can be best obtained by creating a new administrative agency rather than by relying on established agencies. The points made in favor of the new agency approach include avoidance of the bureaucratic ossification that allegedly sets in during later stages of agency development. The positive example of the EPA is offered as support.³³ This preference for newness is not without qualification, however, for the author worries about the new agency's lack of expertise and susceptibility to industry capture. Since the question of new agency creation versus old agency absorption is frequently faced (the Department of Energy being a most recent example), Freedman's conclusions deserve close attention.

I am troubled by the assertion that newness somehow ensures liveliness. The life cycle theory of administrative agencies does not seem convincing even in terms of Freedman's own examples. While it may be true that EPA has worked well as a new agency, EEOC had a spotty record in its early years. Moreover, Freedman admits that the SEC, one of the classic "old" agencies, continues to rate high marks. I believe the importance of the choice between old and new to be overstated and this goes as well for the negative aspects of newness that Freedman recites. The lack of expertise among staff can quickly and perhaps more effectively be

³² *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), is the major precedent around which the chapter's argument is convincingly constructed. In that case the Court gave a statute a narrow construction in order to avoid constitutional problems that would have arisen if the statute were construed as delegating Congress's power to tax to a federal agency. Freedman interprets the decision as suggesting the nondelegability of the power to levy taxes.

³³ J. FREEDMAN, *supra* note 1, at 120.

met in new agencies by transfers and new hirings.³⁴ (The EPA should be a model here.) As for susceptibility to industry capture, I question the data Freedman relies upon. Since their performance will be watched closely by Congress and the public, new agencies may be *less* likely to succumb to industry pressure. Young agencies operate much more in the glare of sunlight than in the comfortable twilight of established relationships. Moreover, a new agency's pressure points are less well known, making it more difficult for the regulated industry to assert control. It strikes me that the case for or against newness must be made on the kind of mission undertaken, the existence of related activity in established agencies, and the desire to attract or avoid political attention. These are but a few of the factors that should be decisive, rather than an abstract analysis of the advantages or disadvantages of newness itself.

Chapter 10 introduces the second part of *Crisis and Legitimacy* which addresses the relevance of procedure to the question of administrative legitimacy. Freedman makes an important statement at the outset:

Those who regret that administrative agencies represent a departure from the judicial norm ignore the possibility, long understood by European nations, that modes of procedure other than trial-type hearings are sometimes better suited to the achievement of governmental policies. They ignore as well the fact that the rights of the individual can be protected in such proceedings at least as effectively as they are protected in more traditional adversary hearings.³⁵

This insight is a major theme of the book. Freedman recognizes the value of the Administrative Procedure Act (APA)³⁶ in imposing procedural regularity upon the administrative process, but notes that the Act's inflexibility in defining adjudicatory procedures and its inapplicability to the informal decisionmaking process create difficulties.

The next chapters deal with various aspects of the formal administrative process. The great amount of material here is presented very well, largely through the effective technique of using a

³⁴ There is a danger that new agencies will become a dumping ground for untalented employees of older agencies, but that phenomenon can be offset by an awareness of the problem and careful staff selection at the outset.

³⁵ J. FREEDMAN, *supra* note 1, at 125.

³⁶ 5 U.S.C. §§ 551-559, 701-706 (1976).

single agency's particular problems as a window on the general issues. The agency Freedman has selected for discussion is the Office of Foreign Direct Investments (OFDI), created by President Johnson in 1968 and located in the Department of Commerce. Freedman has studied this agency carefully and his analysis of the major obstacles it faced is written with special confidence and thoroughness. The subjects covered are: the definitions of agency; the status of enforcement proceedings under the APA; the requirement of an impartial hearing officer; the separation of functions requirement; and the problem of decisionmaker bias. Freedman's technique of approaching these topics, through study of the range of problems confronting OFDI, illuminates the larger issues and provides a unity of subject matter often thought to be lacking in courses on administrative law. The student and professor would do well to read each chapter in conjunction with casebook discussion of the corresponding subjects.

The heart of the book for me is the last portion, which treats the informal administrative process. Freedman has done much original work here. One of the major deficiencies of the APA has been its failure to provide procedures to govern the broad range of government decisions, frequently labeled summary actions, which fall outside its formal adjudication provisions.³⁷ For many years this deficiency went unnoticed because relatively few informal decisions were thought to require procedures. But with the advent of *Goldberg v. Kelly*³⁸ and the due process revolution in administrative law, more and more government decisions came under the liberty and property rubric of the fifth and fourteenth amendments, and agencies and courts were forced to develop informal administrative procedures. Since then, greater attention has been given to the task of devising efficient procedures for a plethora of government decisions.³⁹ In this environment, the limitations of the APA have become more glaring and suggestions for its revision more vocal.

In Chapter 18, Freedman indicates that research on the actual workings of summary procedures must be undertaken before general statements can be made about the need for greater fairness.⁴⁰

³⁷ While Freedman focuses upon the need for procedures to govern summary action in advance of an administrative hearing, much of what he writes is relevant to the question of the need for any hearing at all.

³⁸ 397 U.S. 254 (1970). See note 11 *supra*.

³⁹ See generally Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

⁴⁰ J. FREEDMAN, *supra* note 1, at 242.

Fortunately, in Chapter 19, he chooses not to heed that cautious advice and goes on to speculate about the kind of procedural safeguards that would be valuable. Freedman first suggests that agencies comply with the APA⁴¹ by promulgating rules for the exercise of summary authority. This is a necessary precondition to framing standards in this often chaotic field. Freedman adds this helpful insight:

Even when an administrative agency is reluctant to formalize its criteria for summary action in published rules, a useful purpose could still be served by making these criteria available in other forms, such as summaries of prior practices, illustrations of real or hypothetical situations at the extremes of enforcement and nonenforcement, digests of prior decisions to take summary action, and advisory interpretations.⁴²

The author next suggests that agencies provide a statement of reasons whenever they take summary action. This reasons requirement is of fundamental importance since, as Freedman notes, it can form the basis for deciding whether an agency has acted arbitrarily, especially when used in connection with a published-rule requirement. I believe Freedman is entirely correct when he states that a reasons requirement is more important when an agency acts informally than when it uses a formal hearing process.⁴³ My only quarrel with Freedman's espousal of the reasons requirement is that he does not go far enough. He declares that a reasons requirement for informal action is not required by the APA or the Constitution.⁴⁴ On the first score, I have my doubts. Section 555 (e) of the APA,⁴⁵ not mentioned by the author, has the potential to become a broad-based reasons requirement. Although it has

⁴¹ Section 552(a)(1) of the APA provides: "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency . . ." 5 U.S.C. § 552(a)(1) (1976).

⁴² J. FREEDMAN, *supra* note 1, at 247.

⁴³ *Id.*

⁴⁴ *Id.* Freedman relies for this conclusion on *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

⁴⁵ It provides:

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C. § 555(e) (1976).

not yet been so interpreted, cases such as *Dunlop v. Bachowski*⁴⁶ and *Childs v. United States Board of Parole*⁴⁷ suggest that it may be revived. I have advanced that argument in greater detail elsewhere⁴⁸ and would have welcomed Dean Freedman's views on the matter. As to whether the Constitution might require a statement of reasons as a due process minimum ingredient, I think there are straws in the wind indicating a positive answer.⁴⁹

Even with these reservations, however, Freedman's approach to the reasons requirement remains significant and he closes that discussion well:

By promulgating rules describing generally the criteria that guide its discretion in taking summary action and by providing an informative statement of reasons whenever it does act summarily, an administrative agency could make one of its most significant informal processes more visible. These reforms would be an important step toward strengthening the fairness of the process by which summary action is taken. Sunlight, as Justice Brandeis said, is the best of disinfectants.⁵⁰

Freedman also considers the addition of a requirement of prior informal discussions before summary action is undertaken.⁵¹ Here, as he notes, the questions are so many (*e.g.*, how detailed the discussions should be; when they should be required), that the case for a general requirement is dubious. Nevertheless, the "informal give and take" standard of *Goss v. Lopez*⁵² may become more generally relevant to this kind of summary action problem.⁵³ Certainly Freedman's suggestions on this aspect of formalizing summary action are in keeping with the Court's enhanced concern about due process in the informal setting.

The final chapter draws together themes raised throughout the book and reaches several noteworthy conclusions. The first is that

⁴⁶ 421 U.S. 560 (1975).

⁴⁷ 511 F.2d 1270 (D.C. Cir. 1974).

⁴⁸ See Verkuil, *supra* note 10, at 315-17.

⁴⁹ My "straw" candidates are *Goss v. Lopez*, 419 U.S. 565 (1975), and *Childs v. United States Bd. of Parole*, 511 F.2d 1270 (D.C. Cir. 1974).

⁵⁰ J. FREEDMAN, *supra* note 1, at 249.

⁵¹ *Id.* 249-51.

⁵² 419 U.S. 565, 584 (1975).

⁵³ As Freedman recognizes, informal discussion may in some cases frustrate government action, as in the prosecution of tax fraud cases where there is a need not to put taxpayers on notice. This same limitation applies in certain circumstances to the requirement of notice; for example, where inspections are used as a method of assuring compliance with government programs.

the systematic exploration of the administrative process is a distinctive development of American law that began and matured in this century. The publication of *Crisis and Legitimacy*, it is fair to add, marks a significant advance in the continuing effort to arrive at a comprehensive theory. Freedman's second conclusion is that it is now time to devise administrative procedures for the informal as well as the formal process. This is a major step, but one that must address a question Freedman only introduces: how to devise informal procedures that "give promise of being fair, efficient, and responsive to democratic values and constitutional restraints."⁵⁴ On this subject there is much research yet to be done and many books still to be written. My guess is that Dean Freedman will figure prominently in that development, a thought I find reassuring after reading *Crisis and Legitimacy*.

⁵⁴J. FREEDMAN, *supra* note 1, at 266.