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Principled Fairness and Regulatory Urgency

Harold Leventhal*

Focusing on the ever-increasing demands made upon regulatory agencies and the broad discretion granted by Congress to meet those demands, the author notes the pressures that lead to an administrative preoccupation with efficiency. There are, however, forces inherent in the processes of administrative law that temper such an approach: the role of Congress in defining an intelligible administrative policy and establishing standards of operation, the flexibility afforded by the administrative freedom to make individual adjustments within an administrative mandate, and the tendency of the administrative practitioner to advocate essential fairness in the resolution of administrative questions. The author concludes that it is necessary to approach individual controversies with a view towards the genuine objective of the practice of administrative law, the balancing of efficiency with principled decisionmaking.

THAT BRANCH of the Rule of Law which has come to be known as Administrative Law has staked out a doctrine of principled fairness in the regulatory process.¹ This is an area in which Professor Maurice Culp and I share a vital interest—jurisprudence that permits officials and agencies to address complex and often harrowing problems of government with dispatch and resourcefulness, with a sound combination of general principle and individual discretion, and yet retains the safeguards of fairness and accountability that distinguish responsible government from some unholy combination of petty bureaucracy and tyranny.

The march of events and the emergence of new and seemingly ever more complicated problems for governmental handling tax our diligence and resourcefulness. Rampant peacetime inflation, energy crises, and environmental degradation spring to mind. Whether these problems should be addressed with government programs that culminate in detailed regulatory controls presents an overarching question of policy that is not within the province of my remarks. But it may be helpful to set down a few reflections on the essential administrative law components of a sound regulatory fabric.

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I shall refer to the experience, which I shared with Maurice Culp, of the lawyers who carried out the Government's price stabilization efforts during World War II, or "price lawyers," as we were known.\textsuperscript{2} These were formative years for me and they have resonated in my professional life as a lawyer and a judge, and in the life of Maurice Culp, I am confident, as a professor of law.

It may be appropriate, at this juncture, to recall and reaffirm what I wrote in 1946 when I prepared one of the volumes of the history of the Office of Price Administration (OPA).\textsuperscript{3} After quoting from Justice Rutledge that war and emergencies compel "invention of legal... tools adequate for the times' necessity,"\textsuperscript{4} I observed:

The legal tools evolved and applied by the price lawyers as part of the Government's wartime fight against inflation will for most of them endure as their most satisfying experience as lawyers... They were doing legal work which was novel, absorbing, significant and, in the fullest sense of the term, rewarding.\textsuperscript{5}

I. REQUIREMENT OF INTELLIGIBLE ADMINISTRATIVE POLICY AS AVOIDING A "BLANK CHECK" TO THE EXECUTIVE

A. Broad Delegation by the Legislature

To discuss the requirement of principled fairness in administrative law, one must begin at the beginning, with the statutes under which the regulatory process must operate. Statutory mandates frequently—and in the case of grave new problems, typically—vest enormous discretion in executive authority. For example, when in August 1970, Congress concluded that "inflation is still on a rampage in our economy," it empowered the President to "issue such orders and regulations as he may deem appropriate to stabilize prices, rents, [Footnotes]

\textsuperscript{2} We overlapped for more than a year in our service with the Office of Price Administration during World War II, Mr. Culp serving in the field as a Regional Price Attorney and I at Headquarters as an Assistant General Counsel. By the time of the Korean price stabilization, I had been Chief Counsel of what had then become the Office of Price Stabilization, and the field charts showed Mr. Culp as Regional Counsel. However, neither of us was concerned directly with enforcement programs or with such wartime programs as rationing. In both stabilization programs, we served as "price lawyers."

\textsuperscript{3} Leventhal, The Role of Price Lawyers, in PROBLEMS IN PRICE CONTROL: LEGAL PHASES 49 (OPA Historical Reports on War Administration 1947).

\textsuperscript{4} Yakus v. United States, 321 U.S. 414, 461 (1944) (dissenting opinion).

\textsuperscript{5} Leventhal, supra note 3, at 49.
On August 15, 1971, the President established a 90-day freeze of prices, rents, wages, and salaries, thereby ushering in a stabilization program marked by an array of retreats, advances, and skirmishes, and giving rise to a variety of approaches to particular problems.

A similar pattern emerged from the Congressional response to the "energy crisis." On April 30, 1973, Congress authorized the President to "provide . . . for the establishment of priorities of use and for systematic allocation of supplies of petroleum . . . to meet the essential needs of various sections of the nation and to prevent anti-competitive effects resulting from shortages of such products." The following November Congress directed the President to "promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product . . . ." The statute empowered the President to control distribution and to set prices.

The general economic stabilization laws contained limits, but these did not derogate the huge discretion conferred on the President—to issue orders "as he deems appropriate" to stabilize prices, and to determine allocation of a scarce resource "to meet the essential needs of various sections of the nation." The limitation forbidding the President from stabilizing prices at a level less than that prevailing in May 1970, was academic, as a practical matter, even when the law was passed in August 1970, and certainly when the price freeze was issued in 1971.

The Emergency Petroleum Act purported to require the President to promulgate an allocative oil regulation, but the broad discretion that was conferred permitted extensive reliance on the market mechanism for allocation, a policy approximating nonintervention. A long list of considerations to be taken into account by the Executive

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in prescribing the allocation was set forth in the Petroleum Act. This was of the kind frequently encountered in congressional legislation—a number of objectives, typically broadly-drawn, often competing, with a soulful inscription that the Executive establish order and harmony, promoting each objective “to the maximum extent practicable.” But such a listing of factors does nothing to limit the broad grant of authority provided at the outset. Professor Davis captures the spirit of statutes of this kind when he characterizes them as saying to the Executive: “Here is the problem. Deal with it.”

Broad congressional delegation to the Executive is unremarkable, even at a time like the present, when there is much criticism and self-criticism to the effect that Congress has given the Executive too much latitude. The pattern is one we have come to recognize and tolerate as well-nigh inevitable. Yet the reality that executive power comes to be exercised by subordinate officials, responsible to the electorate only indirectly, is vaguely disquieting, for accountability is attenuated by the low visibility of many of the decisions that make up the administrative effort. Judge Friendly has noted that lodging broad discretionary power in such officials is at odds with the spirit of—though there are now few instances in which it would be said to violate—the Constitution's vesting of legislative power in Congress. Broad legislative delegation of power raises the specter of officials exercising “purely personal and arbitrary power,” in conflict with our basic principles of law and liberty, of government and sovereignty. It raises the specter of “regulatory inconsistency,” of “un-


13. Id.


When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom
equal treatment of like cases.”

These concerns once found expression in the decisions holding statutes unconstitutional as delegations of legislative power. But the doctrine embodied in these decisions made a distinction between “legislative” and “executive” functions that was artificial, and its sanction of invalidating the statutory grant of power was viewed as too unwieldy an instrument of control.

The contemporary approach is one not of invalidating even the broadest statutory delegations of power, but of assuring that they are accompanied by adequate controls on subsequent administrative behavior. This approach takes account of the structure within which decisions or rules will be made, the degree to which considerations involved will be disclosed, and the incentives that will work toward equal treatment of those similarly situated.

When the Supreme Court upheld the broad delegations in the 1942 price stabilization law, it focused on whether Congress had sufficiently identified the field entrusted to the administrator for action “so that it may be known whether he has kept within it in compliance with the legislative will.” And when I came to author *Amalgamated Meat Cutters v. Connally*, which became the leading opinion upholding the Economic Stabilization Act of 1970 against a challenge of excessive delegation, the judicial lens focused on the dynamics of the ongoing exercise of executive authority:

and for whom all government exists and acts. And the law is the definition and limitation of power. . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

*Id.*


A number of defects of regulation are related to the vagueness of the regulatory mandate: unequal treatment of like cases, additional uncertainty introduced by regulatory inconsistency, elaborate legal procedures since each case is essentially a new law, and a much heavier case load since a past adverse decision does not adequately deter raising an issue again.


19. Professor Davis has advocated this approach as a substitute for the delegation doctrine, see Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713 (1969).


Concepts of control and accountability define the constitutional requirement. The principle permitting a delegation of legislative power, if there has been sufficient demarcation of the field to permit a judgment whether the agency has kept within the legislative will, establishes a principle of accountability under which compatibility with the legislative design may be ascertained not only by Congress but by the courts and the public.22

Turning aside a hard-pressed contention that the 1970 Act gave the Executive a "blank check," the court construed that Act in the context of prior stabilization laws, as denying authority to be unfair and inequitable.23 The opinion stressed the role of ongoing administrative standards:

Another feature that blunts the "blank check" rhetoric is the requirement that any action taken by the Executive under the law, subsequent to the freeze, must be in accordance with further standards as developed by the Executive. This requirement, inherent in the Rule of Law and implicit in the Act, means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action.

The requirement of subsidiary administrative policy, enabling Congress, the courts and the public to assess the Executive's adherence to the ultimate legislative standard, is in furtherance of the purpose of the constitutional objective of accountability. This 1970 Act gives broadest latitude to the Executive. Certainly there is no requirement of formal findings. But there is an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective.24

B. Disclosure of Underlying Administrative Policy in Emergency Conditions

As Greater Boston Television Corp. v. FCC,25 a recent opinion surveying significant aspects of the Rule of Administrative Law, points out, "the applicable doctrine that has evolved with the enormous growth and significance of administrative determination in the past forty or fifty years has insisted on reasoned decision-making."26
This requirement goes beyond the preliminary obligation that determinations shall be public and the threshold need for reasonable procedure. The additional constraint of disclosure of the policies and reasons underlying the Executive’s determination provides important strengths to the regulatory process and assurances against abuse:

[It] tends to assure that the agency’s policies effectuate general standards, applied without unreasonable incrimination.

. . . .

. . . [I]t rather underlines . . . the need for conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal. Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice. It furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers.27

These basic principles were voiced in the requirements associated with adjudicatory determinations, after full panoplied hearings cast in a judicial mold.28 The same principles, though reconciled with administrative convenience, are still applicable in informal rule-making, where the only procedure is that of notice of the proposed rule and opportunity to interested persons to submit written comments.29

Informal notice-and-comment rule-making has been described as “one of the greatest inventions of modern government.”30 It strikes a new balance—providing fewer individual safeguards, and stressing expedition flexibility, and economy of governmental resources. But the new balance retains the requirement of reasoned determination, for while an agency need not provide the formal findings that Congress requires be made in the record of adjudications, the agency is instructed that it “shall incorporate in the rules adopted a concise general statement of their basis and purpose.”31 As Judge McGowan

27. Id. at 851-52 (footnotes omitted).
has noted in Automotive Parts & Accessories Association v. Boyd,\textsuperscript{32} despite the significant divergence from the adjudicatory model, the retention of disclosure of reasons for action permits retention of a "searching and strict" review of whether the action is arbitrary, capricious, or contrary to law.\textsuperscript{33} He observes: "The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."\textsuperscript{34} Even in the case of low-visibility informal agency action, which is neither rule-making nor adjudication and for which contemporaneous public explanation is either lacking or minimal, a lawsuit challenging the action as arbitrary and contrary to law opens the door for the court to obtain further explanations from the officials involved, with provision for trial appearance or deposition if necessary.\textsuperscript{35}

Should the key ingredient of reasoned appraisal be dropped when an official or agency is concerned with emergency problems and the need for novel solutions? Thus far, at least, the answer is in the negative. One hesitates to speak in absolutes; even habeas corpus may be suspended in case of invasion. But at least in conditions where ongoing crises demand that the Government undertake social welfare activities, rather than employ military forces, our nation's law has preserved the essential elements of the reasoned decision making requirement as a bulwark for its citizens.

Even the process of accommodating the nation's economy to the exigencies of war production embodied the essence of reasoned decision. Section 2(a) of the Emergency Price Control Act of 1942 required that every maximum price regulation or order "shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order."\textsuperscript{36} This provision for statements of considerations was in my first draft as initial draftsman of the price control legislation. It was derived from Justice Stone's then-recent opinion in Opp Cotton Mills v. Administrator of the Wage and Hour Division of the Department of Labor,\textsuperscript{37} and it was in due course relied on in Chief Justice Stone's opinion upholding the law in Yakus

\begin{itemize}
\item 32. 407 F.2d 330 (D.C. Cir. 1968).
\item 33. \textit{id.} at 338.
\item 34. \textit{id.}
\item 37. 312 U.S. 126, 144 (1941).
\end{itemize}
In his dissent, however, Justice Roberts dismissed the requirement for statements of considerations as a mere advice of the Price Administrator's reasons for action, which lacked the quality of a finding of fact, and which left such broad discretion "that this Act creates personal government by a petty tyrant instead of government by law."

In fact, the Statements of Considerations called for effort and resources. They were printed and disseminated to the public and filed in the Federal Register. Their content reflected a continuing process of adjustment within the agency. In the absence of a notice and comment procedure there was, of necessity, a heavy reliance on consultations with industry advisory committees. At least in the earliest days, the lawyers were typically pressing for programs to obtain and disclose more factual data. An early memorandum for collection of extensive data was developed on the basis of price control experience in the mining and manufacturing industries, but it proved less workable in the food industries where the principal crises of 1942 developed. There was a major shift of emphasis during 1942 as the OPA moved from regulations for specific industries to general maximum price regulation.

The process of reasoned disposition accompanied amendments and requests for amendments of price regulations. Statements of considerations were of course required when maximum price regulations were amended, and groups seeking changes could be called on to support their claims. There was also provision for reasoned disposition when requests were denied. The Act provided that a party challenging a regulation as invalid, and not merely appealing to agency discretion, could file a "protest," and on any denial could litigate validity in the Emergency Court of Appeals. The denial of a protest was accompanied by an opinion, leading the Emergency Court of Appeals to characterize the protest proceeding as "judicial in character." More accurately, the administrative consideration of a "protest" had a dual character. There was an administrative process to consider whether the protest should be granted in whole or in

39. Id. at 452-53.
41. The urging of the OPA lawyers that they be reprinted in the Federal Register was not accepted prior to the Administrative Procedure Act of 1946.
part; if the protest were to be granted, how and for what reasons
had to be set forth in the accompanying statement of considerations.
And then there was preparation for court review, with the lawyers
specifically assigned to that litigation concerned that in the event of
denial of the protest, the administrative record should be adequate to
pass court muster. The non-lawyer administrators who manned
OPA's various commodity branches were more concerned with cur-
cent operations and once it was determined to deny these protests,
were not eager to commit their time and energies to what seemed
essentially a vindication of the past rather than a coping with the
present. The price lawyers, who served as their staff legal advisors,
acted as intermediaries.

The program for statements of considerations was uneven in its
development and application. But in broad outline it served the pur-
pose of assuring a nation faced with new, pervasive, vexing, and awe-
some economic controls that the several actions of the Washington
bureaucrats reflected an effort to grapple with the hard problems.
Furthermore, the program illustrated that even under emergency
conditions, the fundamental principle of reasoned decision-making did
not have to be abandoned.

II. INDIVIDUAL ADJUSTMENTS AND EXCEPTIONS

Although the Emergency Price Control Act of 1942 validated
regulations that were "generally fair and equitable," Congress also
provided in section 2(c) that any price regulation could embody
"adjustments and reasonable exceptions." An increasingly large
part of OPA's resources had to be devoted to individual requests for
relief, usually on the ground of hardship. This practice proceeded
pace after the General Maximum Price Regulation was issued in
April 1942, especially since the controls on wage and labor costs,
grounded in statute in October 1942, were not as tight as price con-
trol measures.

These provisions were a necessary adjunct to the regulatory proc-
cess. The initial price regulations were often "first cuts" at a problem,
resolving an uncertainty and staking out how the agency would exer-
cise its powers. Businesses were grouped according to a few similari-
ties, and a single policy was made applicable. Exceptions and ad-
justments were the safety valve by which salient differences between
parties initially treated alike could be exposed and evaluated.

The most obvious ground for adjustments, and the one which first appeared, was an inordinately high production cost faced by a firm whose output was essential for war production. Granting adjustment to the high-cost producer at the margin enabled the OPA to avoid the difficulties that had beset price control during World War I, when the Government's effort to cover costs of necessary marginal producers allowed enormous profits for the intramarginal (lower-cost) producers. Allowing these excess profits would have undercut public willingness to accept constraints and limitations in the larger interest of stabilization.

A related but distinct adjustment came later, when an expansion of production was vital to the war effort. A price adjustment frequently had to cover "costs plus" the profit needed as incentive to induce new production. Later adjustments were provided where valid regulations did not allow recouping the costs of a newly-introduced commodity. Adjustment was usually allowed where the novelty of the product was substantial, and it was not simply an effort to evade price control by "repackaging." Hardship with respect to a substantially new product occasioned relief, even where the product was not vital to the war effort, when greater austerity might have led to collapse of the entire enterprise.

The wartime experience provided a salutary lesson on the importance of adjustment machinery as a necessary component of a sound, effective, and just general regulatory program. In a 1964 article on the Federal Power Commission's area natural gas price program, written after the hearing examiner proposed his decision in the lead proceeding on the Permian Basin rates, I noted the absence of any mechanism for relief to high-cost producers, an omission especially startling if these producers were required, under public utility concepts, to continue service. I proposed an adjustment provision, which could be given "relatively limited scope. . . . But the adjustment would still be there as a safety valve."

In its final Permian Basin area gas order, the Federal Power Commission adopted an adjustment provision, declaring that a producer should be permitted "appropriate relief" if it established that "out-of-pocket expenses in connection with the operation of a particular well" would exceed revenue for that well under the applicable area price. This relief provision was prominent in the Supreme

45. 34 F.P.C. 159, 226 (1965).
Court opinion in the *Permian Basin Area Rate Cases*,\(^4\) which upheld the concept of area rate regulation for natural gas. Disagreeing with the conclusion of the court of appeals that the adjustment was vague and elusive, Justice Harlan declared:

> It would doubtless be desirable if the Commission provided, as quickly as may be prudent, a more precise summary of its conditions for special relief, but it was not obliged to delay area regulation until such guidelines could be properly drawn. The Commission quite reasonably believed that the terms of any exceptional relief should be developed as its experience with area regulation lengthens. Moreover, area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences. ... \(^4\)

The possibility of adjustments or exceptions in cases of special hardship, or unforeseen circumstances, has come to be viewed as an essential safety valve of the regulatory process. General rules, which may stress simplicity and administrative convenience, cannot take into account all of the varieties and complexities of individual instances. Rules will be upheld as generally reasonable even though in some applications they may "grind with a rough edge," and "hardship" adjustments will not be granted, at least where the enterprise as a whole is not plunged into chaos or ruin.\(^4\) But provision for adjustments and exceptions keeps regulation from becoming procrustean. As Judge Wright has written, "A tyranny of petty bureaucrats who lack the power to change the rules even an iota in order to do justice is at least as bad as a tyranny of petty bureaucrats who make up the rules as they go along."\(^4\)

The legal significance of the complementary roles of general rules and individual adjustments was developed in *WAIT Radio v. FCC*.\(^5\)

This was the case of a broadcaster, limited to daytime broadcasting by the FCC's "clear channel" rule, who sought an exception on grounds of enhancement of service. The FCC denied exemption with a perfunctory opinion and the broadcaster sought review. In remanding for a more thorough statement of the reasons for denying exemption, the court stated:

\(^4\) *Id.* at 771-72.
\(^4\) Gulf Oil Corp. v. Hickel, 435 F.2d 440, 447-48 (D.C. Cir. 1970). ("We think the Board did not abuse its discretion when it sought to reserve the 'exceptional hardship' provision for cases of financial distress, so as to assure that the adjustment would not swallow up the program.")
\(^5\) 418 F.2d 1153 (D.C. Cir. 1969).
[A] rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis. The limited safety valve permits a more rigorous adherence to an effective regulation. The court concluded that the FCC's waiver procedure was not "a step-child, but . . . an important member of the family of administrative procedures, one that helps the family stay together." A related theme appears in a contemporary context, the Clean Air Act's limitation of automobile emissions. The Act mandates emission standards for 1975 and 1976 model cars, but permits the Administrator of the Environmental Protection Agency to grant an exemption for 1975 models, after making requisite findings. Reviewing the Administrator's denial of a suspension in May 1972, the court of appeals examined the congressional purpose in providing for suspension and concluded that it had the character of an "escape hatch" . . . establishing a context supportive of the rigor and firmness of the basic standards slated for no later than 1976. The court perceived that the Administrator had not been sensitive to this role of the exemption:

In our view the overall legislative firmness does not necessarily require a "hard-nosed" approach to the application for suspension, as the Administrator apparently supposed, and may indeed be furthered by our more moderate view of the suspension issue, particularly in assigning to the Administrator the burden of producing a reasoned presentation of the reliability of his methodology. This is not a matter of clemency, but rather a benign approach that moderates the "shock treatment" so as to obviate excessive and unnecessary risk of harm.

Care must be taken that the rule be proved and not swallowed by the exception—or suspension, exemption, or adjustment. A safety valve is one thing, a dissipation of all force another. Care must also be taken lest exemptions and adjustments be granted waywardly and willy-nilly, justified by little more than the exigencies or protests of the day.

51. Id. at 1159.
52. Id.
55. Id.
The problem, though vexing, is one vigorous administrators can usually be expected to bear well in mind, but evenhandedness in the dispensation of hardship relief is elusive. Words like "waiver" (and "exemption" and "exception") raise the hackles of those who suspect favoritism. Their influence in the direction of moderation and overall fairness in the administrative process presupposes that relief will be dispensed pursuant to a standard of appropriate generality and neutrality.

In the OPA the price lawyers sought to prevent individual adjustments from degenerating into a system of favors for special pleaders by insisting on a firm rule: the basis for relief in exceptions and adjustment orders had to be embodied in a general standard. No applicant received relief from a price regulation unless a general provision in the regulation authorized it; alternatively, one who met the general conditions specified was entitled to relief as a matter of right, not of administrative privilege. This principle had its cost—delay of meritorious cases until the particular application could be molded into an adjustment principle of neutral application—but was well worth it. An agency whose success consisted of delaying, and hence moderating, inflationary pressures could not help but generate resentments, but faithful adherence to a requirement of general adjustment provisions served to avoid any climate of discriminatory treatment and instilled in the public the confidence necessary to the agency's function. As I observed in writing for the OPA's history:

... In August 1945 the National Retail Dry Goods Association attempted to discredit OPA's operations with the claim that OPA was providing more generous pricing to new manufacturers than to established producers. It made a vigorous campaign and called the attention of congressional committees to a "chamber of horrors" exhibit. Yet even this organization, hostile to OPA and alert for evidence to discredit it, did not claim that the unduly high prices allegedly granted to new manufacturers were the product of favoritism, or that the denials of adjustments were attributable to individual oppression. The adjustment principle tended to prevent the agency from drifting into the handling of general price problems on a piecemeal basis.

Generalized procedures for adjustment or other hardship relief avoid the risk of a public perception, whether or not well founded,

56. This position was later upheld in Armour & Co. v. Brown, 137 F.2d 233 (Emer. Ct. App. 1943).
57. Leventhal, supra note 3, at 102.
that relief is given only to those with clamor and clout. With such a perception, voices grow ever more clamorous, and the appeal to a grin-and-bear-it citizen philosophy is weakened.

In a related movement in the law, the courts have called on agencies, though they have refrained from mandates, to enlarge the use of rule-making procedures rather than to rely on case by case adjudication to develop standards and policies. There are various reasons for these suggestions, including the advantage that the procedure will admit many interested parties rather than limit participation in the evolution of regulatory principles. Another significant advantage of the rule-making course is this, that "... an excessively individuated approach may be a seed bed that is too favorable to the rank weed of discrimination."58 Announcement of general, neutral rules to govern access even to an escape hatch alerts all entitled to its use to its availability and instills in those denied egress the confidence that such passage has not arbitrarily been blocked. The need for such confidence stands high even, or perhaps especially, when government intervenes on problems of urgency. Cries of "crisis" and appeals to patriotism and sacrifice do not still the desire for equal treatment and guarantees against arbitrary action.

III. THE ROLE OF LAWYERS

In October 1971, I delivered a lecture on "The Lawyer in Government." It was one of the Fiftieth Anniversary Lectures of the General Accounting Office on "Improving Management for More Effective Government."59 I drew on my experience as a judge, as a practicing lawyer, and as a lawyer within the Government, including my days at OPA. In conclusion, I voiced the thought that attention to principles of standards and evenhanded administration improves effectiveness even in the narrow sense of the term:

. . . [If] you work with standards you work faster than if you work without. . . . [If] you just handle each individual case as it comes, you will find yourself scratching around with so many contradictions and uncertainties that you will have lost time. Also, if you work with standards, you perhaps have some positions to put forward at annual grilling time.60

60. Id. at 114. The "grilling time" referred to appearances before legislative committees. I should also add the not inconsiderable grilling experienced by officials of the Bureau of the Budget (now the Office of Management and Budget) on submission of a proposed budget.
More important is the need of a larger perspective. The doctrine of separation of powers may be inefficient in the short run, but as Chief Justice Burger well stated, "Efficiency must never be the primary objective of a free people."\textsuperscript{61} The lawyer in government who devotes his skills to assuring reasoned and evenhanded dispositions assures higher values, a protection against concentration of power. "In the last analysis, that assures greater ability in the society to adapt to changing conditions, with a free spirit and interchange among the elements of society."\textsuperscript{62}

"The Government lawyer has a continuing, constructive, creative role."\textsuperscript{63} Indeed, government lawyers have many roles, calling on their training, honed analytical powers, word precision, and feel for structure and procedures. These embrace drafting and interpreting statutes, implementing regulations, and proposing and resisting amendments. These skills help the Executive and the Congress to cope effectively with problems and prepare for changes. But perhaps their most important function, derived from skills, background, and tradition, lies in rendering service like that of the chancellor, also known as the king's conscience. Less drained by the pace of day-to-day administration and more attuned to the need for underlying general standards, the lawyer has an institutional role to play, as advocate of the principled fairness that must be taken into account in governmental determinations. Others may espouse the urgency of other considerations government action may serve—efficient allocation of a scarce resource, guaranteeing continued production, avoiding a sudden employment dislocation. The lawyer must be attuned as well to the overarching interest in principled fairness, an interest more diffused and lacking a persistent clientele whose voices could offset those clamoring for action.

In times of crisis, there are manifold pressures for shortcuts. These cannot be ignored, and they may call for modifications of ideal but time-consuming procedures. What remains as an imperative, in the face of urgencies and emergencies, is the need for principled regulation.


\textsuperscript{62} Leventhal, \textit{supra} note 59, at 114.

\textsuperscript{63} \textit{Id.} at 110.