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THE FOURTH BRANCH AT WORK

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The views expressed herein are those of Commissioner Fleischman and do not represent those of the Commission, other Commissioners or the staff.

More than half a century ago President Franklin Roosevelt, in transmitting to Congress the report of a special commission on administrative management, used the phrase "a 'fourth branch' of the Government". The report he sent up to Capitol Hill in January 1937 (the Brownlow Committee report) included this summary paragraph:

These independent [regulatory] commissions have been given broad powers to explore, formulate, and administer policies of regulation; they have been given the task of investigating and prosecuting business misconduct; they have been given powers, similar to those exercised by courts of law, to pass in concrete cases upon the rights and liabilities of individuals under the statutes. They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers....The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.

Despite that (and subsequent) indictments, today -- 53 years later -- the independent regulatory agencies have not only survived but have proliferated. In fact they sometimes seem to be the instrumentality of choice whenever the decision is taken to establish a new arm of the federal government, perhaps because of (rather than in spite of) their autonomous nature.

I've now spent five years as a commissioner of one such agency, with a strong staff interacting with three quite different chairmen, and, while knowing full well that I'm talking only from a single Commissioner's experience at the S.E.C. (in other words, very much a blind-man-and-the-elephant story) and then only from the perspective you might expect of a Reagan appointee, let me bend your ear for a bit on the subject of how I see the workings of the "fourth branch", and why I choose to talk particularly to you about it.

It should come as no surprise to any of you that the true life force of a fourth branch agency is expressed in a commandment that failed, presumably only through secretarial haste, to survive the cut for the original decalogue: Thou shalt expand thy jurisdiction with all thy heart, with all thy soul and with all thy might. (After all, you see, you don't have to covet your neighbor's ox if you've succeeded in bringing that ox into your own barnyard.) This élan vital of an independent agency expresses itself not too subtly in much of the work the agency does:

Is there a statutory provision, new or overlooked, in the agency's fundamental statute that is susceptible of interpretation to expand the scope of the persons or conduct or activities subject to the agency's regulation? Expand it.

Is there a legislative opportunity, arising from the pendency of other broadly-accepted legislation, to add to the agency's discretionary authority or, whether directly or by the silence of implied ratification, to procure confirmation of authority previously questioned? Seize it.

Is there a judicial decision, in some federal district, that responded to a local scandal by finding the slick villains guilty, among other matters, of a federal offense through violation of a technical provision of the agency's fundamental statute? Build on it.

Is there a "sister" federal bureau whose mandate to oversee an adjacent area of private-sector activity causes its administrative activities to approach the agency's sphere of authority? Stomp on it.

Is there a private sector activity that, conducted in a certain way, could fit within the description (drafted, of course, with quite a different purpose in mind) of activities subject to compliance with any rule or interpretation by the agency? Envelop it.

Is there a Congressional response to some other societal problem creating new authority for some other arm of the federal government that the agency doesn't have? Go after it.

Does any of this sound familiar? I don't wonder that it does.

There is a wide spectrum of possible corollaries to the basic commandment. Let me highlight my ten favorites for you.

First: Hide the agency's weaknesses.

Is there a question about the validity of a rule or an action under agency consideration? Never reveal that that line of attack is possible because there may be some folks out there who have overlooked the soft spot, and, in any event, defending validity will be easier if there's no trace that the agency itself had doubts.

Second: Leverage the agency's strengths.

Is there a potential for authority in the agency whose exercise (or non-exercise) would effectively trump the policies pursued by some other arm of the federal government? Now, there's a situation where the mere threat of exercise -- not to speak of the actual exercise -- of authority will magnify the perception of the agency's role in the greater governmental co-prosperity sphere -- and perception is often the precursor of reality in Washington.

Third: Leave no agency authority unattended.

Is there a footnote in a Congressional Committee Report (drafted in-house, of course, with every effort directed to override such limitations on the agency as cautious legislators may perversely have inserted into the statutory language itself) implying jurisdiction that the agency has simply not found the appropriate occasion to exercise? Hurry to use it, for jurisdiction unexercised is likely to be jurisdiction lost.

Fourth: Insist on the agency's Chevron deference.

(To a lawyer, this is perhaps the most frightening of the corollaries.)

Is there a semi-respectable argument being advanced by evil folk (probably malefactors of medium if not great wealth) that the agency's exercise of authority is beyond the wildest dream of the legislators, not to speak of the broadest meaning even a medieval etymologist could ascribe to the statutory words? Demand the deference to administrative expertise that the Supreme Court has said is every agency's due. Shy of true constitutional violations, Chevron will carry the battle nearly every time.

Fifth: Take advantage of agency stare decisis.

Is there a two- or five- or (even better) a ten- or twenty-year train of uncontested agency action to which the caboose carrying a proposal presently under agency consideration can be coupled? Climb aboard quickly, and don't ever let anyone question whether this particular train is moving on tracks that sit on rotted crossties and are sinking into the marshlands.

Sixth: Deny prior agency errors.

Is there a suggestion, perhaps even within the agency, that some rule has been counterproductive from the beginning, some enforcement prosecution was misguided, some case should not have been taken to the Supreme Court, some interpretive position is building nothing but resentment? Accommodate to the minimum extent necessary to release the excess steam pressure that has built up, but always explain that recently-changed circumstances elicit a modulation of policy. (Lord forbid that the American public should ever think a government regulatory agency could conceivably have made a mistake!)

Seventh: Beware of the agency's regulatory collaborators.

Is there another bureau in government with a legitimate interest of its own in part of the agency's current agenda? Since all these corollaries apply equally to other fraternal regulatory agencies, bury policy initiatives deep in the grey anonymity of the Federal Register or in the screened obscurity of late-night legislative mark-up sessions. Other regulatory perspectives may provide support for actions different from those pursued by the agency, and premature communication to others in government has been known to derail, or even to result in lateral transfer of, agency projects.

Eighth: Inoculate the agency against empirical analysis.

Is there a professional or academic community whose modus operandi is to examine the validity of policy hypotheses in the light of subsequent broad-based data rather than to cull prior events in support of the agency's policy convictions? Distinguish their methodology, disparage their assumptions, and ignore their results to the greatest extent possible; for only those convinced a priori of the institutional correctness of the agency's insights can be relied on to avoid casting doubt on the agency's chosen means.

Ninth: Nurture the image of agency unanimity.

Is there an opportunity for public airing of views, from within the agency, that differ from the agency's institutional stance? Except to the extent mandated by law, eschew it. The appearance of bland unanimity is the best shield against external attack

on an agency position, even though the very blandness of consistent concurrence either implies abdication of individual analysis or depreciates the credibility of the image purveyed.

Last: Preserve the agency's governmental privileges and immunities.

Is there a reasonable basis for outside inquiry into the conduct of agency affairs? Never mind. Would the agency itself be served in a particular case if certain disclosures were made? Don't be seduced by the immediate gain. It is a far, far more important matter for the agency to be able to surround its proceedings with the cloak of secrecy against prying outside eyes than to protect from an enemy any mere bagatelle of a Defense Department strategy for campaigning in the Iraqi desert.

Perhaps my several corollaries can be encapsulated into one: Suffuse the agency's interest with the aura properly attributable only to the public interest, and immerse that identification deep in a theology of ex cathedra infallibility. Then all the agency's carping critics will be shown for what they truly are: heretics, aliens, betrayers, whose very motivations can thus be commonly accepted as fundamentally evil.

How very far away all this is from my idiosyncratic conception of the dynamics that should motivate the policies and actions of a government agency of whatever branch!! Vindication of the particular public interest confided to the agency's protection, reflecting the fundamental purposes of Congress and the President in enacting the agency's governing statutes, must of course be the overarching mandate. But in my paradigm the dynamics (reduced to bare bones, since that's really a subject for another day) motivating the methods for implementation of that mandate would be

- concentration on the task assigned -- when that task has in fact been effectively discharged, then there will be reason to ask for broader scope and wider authority;
- inter-agency coordination -- no arm of the government functions in a void, and the policies of each bureau, board and agency should interlock in a coherent whole;
- emphasis on remedial correction -- to someone weaned on federal securities law with its classic dependence on injunctive relief, the remedial approach naturally commends itself as more effective in most cases for civil regulatory purposes than the retributive;
- responsibility for citizens' rights -- safeguarding the privileges of the regulated, and even of the accused,

equally preserves the rights of the individual members of the statutorily-protected public;

- continuing self-skepticism -- the Bill of Rights ever reminds us of the danger from governmental organs so convinced of the rectitude of their purpose that they lose sight of their only-human capacity for error;
- receptiveness to public observation -- despite its inconveniences, the very possibility of sunlight is as potent a preventative as sunlight itself is a disinfectant; and
- above all, accountability to the public -- for regulators do serve the public, not vice versa, and appointed officials performing an executive function enjoy at best a delegated legitimacy from the public's elected Chief Executive.

Not that there are not individual fourth branch officials who subscribe to some part of this strange conception; there are, but, subjected to the pressures of the agency's institutional group psychology, they become far between -- or at least well screened from me.

Why do I take up a perfectly pleasant lunchtime with this cynical recitation?

Because seeing one fourth branch agency at work, close up, frequently frightens the living daylights out of me, as a citizen.

Because since 1937 at least three equally critical government-sponsored reports have written scathingly of the defects of the fourth branch agencies -- and these agencies have survived and prospered nevertheless.

Because I share with you the belief about our basic governmental structure that Winston Churchill once expressed in the thought that "democracy is the worst possible form of government -- except all the others," and I share the understanding that the complexities of our late-20th-Century American society require flexibility in the structure and responsive capability of Government -- within the basic framework of accountability to the citizenry on which democracy and the Constitution are grounded.

Because deep down, despite advancing age and accompanying crotchiness, I am ever optimistic that constructive change -- particularly of the "emperor's new clothes" variety -- should be demanded and can be accomplished in our country if the public can be made aware of the need for that change.

Because the root problems as I see them are insulation from accountability to the public, via the President and the ballot box, and a type of non-responsibility (or rather responsibility to the agency's institutional self alone) that tends to accompany semi-autonomous baronies whether in medieval Europe, between-the-wars-China or late 20th Century Washington.

And because the only route to a solution that I can find is to ask, as a senior Congressman asked in a different context two years ago and as has been asked in administrative law materials for near-60 years, "Quis custodiet custodiet?" Who guards the guards?

Well, I don't doubt that the Congress can guard the guards -- by Committee hearings, heat and public embarrassment -- but it is obviously not in any Congressional Committee's interest to change the accretion of discretion in the guards so long as they publicly acknowledge the Committee's suzerainty.

Nor do I doubt that the Supreme Court can guard the guards, as the high court is wont to do in the criminal law arena, if it can be persuaded that its precedents of fourth branch deference contribute less to consistency in administrative regulatory policy than to avoidance of accountability by administrative regulators.

And I don't doubt that the President can guard the guards -- or at least change the guards' commanders -- over a period of years, to the extent that the pressures of directing all the foreign and domestic affairs of this nation, and the institutional self-protection of the legislative branch, allow any President to become personally involved in the manner in which federal regulatory policy is implemented. In the final analysis, the President does get the blame, when the public becomes aroused, for what the lay public perceives to be a presidential responsibility.

But, if asked to nominate the groups that daily interact with the fourth branch agencies, that daily feel some benefit from the authority those agencies have accumulated and daily also work the sting of that authority out of their own and their legal or government relations clients' hides, I would unhesitatingly name groups like your own -- groups of savvy inside-Washingtonians who have ongoing contact with influential government, media and private-sector-business individuals and associations throughout this wide country. In truth I see you, and others like you, as first-hand witnesses to what has developed into a real fourth branch of Government -- and as first-tier beneficiaries of what I see as a most-needed reform.

It is not that I have the reform solution at hand; that would be too simplistic when so many others have proposed without success and when so much of the machinery of our modern-day administrative state is fourth branch machinery. I do, however, have the

conviction that excessive discretionary authority ultimately isolates and undermines itself in a democratic society, and that, if I can persuade the likes of you to wipe off your glasses and take another look at this set of emperor's clothes, yours will be among the voices that echo the more-than-half-century-old call for more considered and more specific delegation in Congressional legislation, more intrusive review by the Courts, and above all more direct control by the President, in respect of the policies and actions of fourth branch agencies like the one in which I am privileged to serve, all in the name of more open and direct accountability to the public for whose benefit -- and not for their own -- the various fourth branch agencies were created.