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Recent Developments in Social Welfare Law and the Doctrine of Separation of Powers

WILLIAM H. TAFT IV*

INTRODUCTION: THE EVOLVING CONCEPT OF A SEPARATION OF POWERS

In the past decade the federal government has dramatically increased both the volume and significance of its social welfare legislation and programs. In the protection of civil rights, the provision of educational and health services as well as the enormous expansion of its traditional income support programs, it has exerted an influence which has fundamentally changed the existing social structure of this country. The daily activities of individual citizens have been redetermined by this social legislation; deeply held, though often unpublicized, attitudes have been embodied in or repudiated by federal law, and economic opportunities in traditionally private fields have been both created for and denied to certain people by statute or implementing regulations.

Undoubtedly, these developments have revealed and, in some cases, created tensions in the society as a whole. The traditional relationship between federal, state and local governments and the private sector in the field of social welfare has been altered beyond recognition. Much less frequently noticed are the substantial strains which these developments have placed on the relationship between the three branches of the federal government. The doctrine of separation of powers, which is both the foundation and the goal of those relationships, has been correspondingly affected.

Separation of powers is inherent in the scheme of the first three articles of the Constitution. A distinction between legislative, executive and judicial power is presumed, and each power is vested in a separate branch. The concept of separation of powers was so familiar to the framers that it was incorporated in the Constitution without positive articulation; unless specific provision is made for coordinate action, as in the case of the veto or the appointment power, each branch is supreme within its sphere.

The most superficial consideration of the need to make distinctions between the legislative, executive and judicial functions is sufficient, however, to suggest that the separation of powers is not intended to isolate the different branches from each other. Indeed, each depends on the

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cooperation of the other two for its own actions to be effective, and each may command or restrain the conduct of the others as may be necessary to carry out its own responsibilities. Thus, Madison wrote that “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces — the legislative, executive, and judiciary.” In a later paper Madison acknowledged that the meaning of the doctrine of the separation of powers “can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.” That each branch will attempt to exercise control over and exert pressure on the others in carrying out its own responsibilities is clearly contemplated; it was sufficient for Madison that “none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.”

In a society where the role of government, though strong within its sphere, is limited and generally operates in the pursuit of widely accepted objectives, such as defense, law enforcement, management of public lands and the providing of essential public services, the lines between the legislative, executive and judicial powers can be perceived and applied in most cases without difficulty. Formulating the law is considerably facilitated when objectives are widely shared and well known. Legislation can accurately express, whether broadly or narrowly, the policy intended by Congress. The enforcement of the law, i.e. the application of that policy over time, is not likely to involve the resolution of subsidiary policy issues, and where it does, it will be relatively clear that those issues either are genuinely subsidiary to the major policy or are in fact committed to executive discretion. Thus, where policy can be clearly expressed and its implications are, if not clear, at least generally predictable, the need for the executive to make policy in applying laws is correspondingly diminished.

When government becomes responsible for the development and administration of policies to regulate the economy and to establish conditions for the conduct of commercial activity, as it has through antitrust law, collective bargaining legislation and regulations of commodity prices, distinguishing the roles of the legislative and executive branches becomes more difficult. The situations to which a given policy must be applied are so numerous and diverse that they cannot be predicted with either accuracy or completeness. The result of a broad, statutory delegation of legislative authority is that policy is made by the executive with only the most general guidance, whereas, if the statute is narrowly drawn the frequent occurrence of unforeseen circumstances requires con-

1THE FEDERALIST No. 37 (J. Madison).
2THE FEDERALIST No. 47 (J. Madison) (emphasis in original).
3THE FEDERALIST No. 48 (J. Madison).
tinual resort to additional legislation, and the actual enforcement or application of a policy, i.e. the executive function, comes to be carried out by the legislature through a series of ad hoc enactments. However, the source of most separation of powers difficulties in this field is more often an inability to articulate policy, rather than a failure to identify and concur with the objective of the policy. In this atmosphere close cooperation between the legislative and executive branches is necessary if either is to exercise its powers responsibly, and the distinction between the branches becomes blurred. However, because policy is clear, though its applications cannot be foreseen, and because the legislature's responsibility for making policy is unquestioned, cooperation rather than confrontation is more frequently the result of the blending of roles.

In developing and carrying out social welfare legislation and programs, the difficulties of articulating policies are compounded by the added difficulties of determining which policies will realize desirable goals and which goals are desirable. Since such legislation has not been directed at any objective more specific than the improvement of society as a whole, and since the value of particular aspects of social welfare has not been the subject of general agreement, social welfare legislation over the past decade has too frequently been a combination and compromise of inconsistent policies rather than a majority coalition of interests. Inasmuch as modern society is not a single ongoing project capable of improvement by any one program or policy, our failures in this connection should come as no surprise; society is the coexistence of many values, most of which can be more fully realized only at the cost of giving up others. Unless a policy is developed in awareness of the balance of the component values that make up society as a whole and as a conscious effort to alter that balance, it will quite likely contain latent inconsistencies. In short, social welfare legislation, like society, frequently represents a balance and compromise of values, not the isolated search for one value.

Policy is not easily agreed upon in such a context, and a common practice has been to ignore problems rather than face them. However,

4Two recent pieces of legislation serve to illustrate this practice. First, the Age Discrimination Act of 1975, 42 U.S.C. § 6101 et seq. (Supp. V 1975), prohibiting "unreasonable" discrimination on the basis of age in federally assisted programs, has a deferred effective date of January 1, 1979. Before that time, the Civil Rights Commission is required to make a study of the implications of the statute for different federal programs. 42 U.S.C. § 6101 (Supp. V 1975). One would think that these matters should have been considered prior to enacting legislation to address the problem.

Second, Amendments Relating to the Social Security Act § 208(a), 42 U.S.C. § 602(a)(26) (Supp. V 1975), provides that in certain circumstances the mother of a child receiving benefits under a state's welfare program need not cooperate with the state in establishing the child's paternity. Members of the Congress could not agree on what circumstances warrant a refusal to cooperate. See, e.g., Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975) (where Congress included in an earlier bill no exceptions to the requirement to cooperate). The result was to excuse non-cooperation where there was "good cause."
when a program is put into effect and a general policy with internal inconsistencies is applied to specific situations, those inconsistencies which have been submerged in the legislative process and forgotten amidst the smiles at the signing ceremony will inevitably come to the surface. Under those circumstances, the legislature, which has not only been unable to articulate its policy completely and accurately, but has also been unwilling to agree on what its policy is in a conceptually valid way, finds itself in a confrontation with the executive which it cannot constructively resolve. In this situation the doctrine of separation of powers is frequently invoked in a defensive way as one branch attempts to blame the other for flaws in an ill-conceived or poorly administered program; the doctrine appears as a justification for an abdication of responsibility rather than for the exercise of responsibility without improper interference. When the separation of powers is invoked as a resort for the weak instead of as a restraint on the strong, the dignity of the doctrine is diminished. Furthermore, its integrity is genuinely endangered when it is used to pass the buck.

The separation of judicial and executive power also becomes more difficult to maintain in a government engaged in the administration of social welfare programs. When a statement of policy is clear and the internal inconsistencies of a program are few, it is not only easier for the judiciary to interpret the law but also harder for it to do anything but that. However, when, as frequently occurs in social welfare legislation, policies are enacted in an incomplete fashion, the judiciary has the same problems in interpreting the law as the executive has in enforcing it; the questions which the legislature was able to avoid must inevitably be faced. The judiciary is thus also forced into making policy and with similarly unsatisfactory results. The only difference is that in the case of judicial policymaking, not only legislative but also executive authority is being encroached upon inasmuch as the executive may argue that authority to make policy was delegated to it. In the area of social welfare legislation, where congressional enactments are characteristically broad and often ambiguous, the courts are evolving a very high standard for the executive to meet in making policy. This standard has operated in the short run to give the courts more apparent authority over policy in social welfare programs than is proper or desirable. In the long run, the executive will likely be able to comply with the high standard set by the judiciary. Therefore, its application may mean a permanent shift in policymaking responsibility from the legislative to the executive branch sanctioned by the judiciary.

up to the Secretary of Health, Education and Welfare to determine what constitutes "good cause" by promulgating a regulation. See notice of proposed rulemaking on "Good Cause for Refusing to Cooperate," 41 Fed. Reg. 34,299 (1976) (rules to be codified in 45 C.F.R. § 232). Comments received on the proposed rule indicate that interested persons have merely transferred their dispute to a new forum, one less well prepared to resolve policy differences in a credible fashion.
The increasing complexity of social welfare program administration and the necessary growth of a large bureaucracy to carry out these programs has had a different effect on the relationship between the judiciary and the executive. The difficulties of managing a large bureaucracy, often involving several levels of government and coordination of a number of departments and agencies, are proverbial. Slowness, incompetence and outright opposition to the policy proposed to be carried out are the most frequently cited obstacles to the effective delivery of services, though there are many others. Nevertheless, no simple method exists to provide medical service to fifty million people or to assure that two hundred million people enjoy the exercise of their civil rights free from discrimination. When the bureaucracy rather than the individual bears the primary responsibility for the realization of either constitutional rights or statutory entitlements, the defects of the vehicle appear in a different perspective, one with serious implications for the separation of judicial and executive power. It is unquestionably the responsibility of the executive branch, not the judiciary, to administer the programs of the government. But in fashioning a remedy for a class deprived of its rights by the nature of the bureaucracy relied on to enforce them, little can be done unless the court is willing to assume the responsibility for running the bureaucracy on a daily basis. In sum, the increasingly frequent intervention of the courts in social welfare programs is to remedy wrongs which result from incapacity rather than misunderstanding or perversity. In those rare circumstances where a method exists to provide a remedy, the doctrine of separation of powers is invariably modified.

A Few Examples

At this point it is useful to examine more closely a number of specific incidents and developments in the area of social welfare legislation and program administration which involve the doctrine of separation of powers. This will serve to illustrate several of the ideas already presented and to provide concrete situations for consideration. These examples may also suggest some of the advantages and disadvantages in certain approaches to social welfare programs in a government concerned about separation of powers.

Two Different Approaches to Social Welfare Legislation: Health Insurance and Elementary and Secondary Education

The underlying conception of legislation is the single most critical element in determining the success of a program in the social welfare area. A program has made a promising start when its underlying policy is unambiguously understood and has the coherence which comes from addressing related problems consistently and distinct problems, if addressed at all, separately. The policy which the law is to embody, if expressed in an
intellectually coherent manner before legislative language is drafted, shines through the words of the statute and operates as a constructive, because consistent, guide to their meaning. But when legislation contains no policy, or where it embodies a compromise of several possibly inconsistent policies, drafting skill alone will not develop an easily administered program. Federal health insurance legislation, embodied in Titles XVIII and XIX of the Social Security Act, is illustrative of the first sort of lawmaking, and federal programs to promote elementary and secondary education programs reflect the second situation. It is no surprise that the operation of the doctrine of separation of powers is remarkably different in these two areas of federal activity, although the Department of Health, Education and Welfare is responsible for the administration of both sets of programs.

While it would be easy to exaggerate the simplicity and coherence of the Medicare and Medicaid statutes, Titles XVIII and XIX do enact a comprehensive health insurance program to address a discrete problem which can be rationally distinguished from other problems. The problem to which these programs are directed is the inability of elderly and low-income persons who are typically beneficiaries of social insurance or cash assistance programs to afford adequate health care. Title XVIII establishes several overriding principles for the operations of the health insurance program for the aged and the disabled. Title XIX establishes a comparable federal-state program to assure access to medical services for low-income persons.

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6See, e.g., statutes cited at notes 18-22 infra.

7The act prescribes a reimbursement pattern, 42 U.S.C. §§ 1395f, 1395g (1970); identifies eligible institutions, 42 U.S.C. §§ 1395x(e)-(j), 1395cc, 1395mm (Supp. V 1975); stipulates freedom of choice by patients of qualified providers, 42 U.S.C. § 1395a (1970); and prohibits interference with the practice of medicine by the program administrators, 42 U.S.C. § 1395 (1970). Additionally, the act empowers the Secretary to “prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this title.” 42 U.S.C. § 1395hh (1970). The act also authorizes appropriations adequate to support the program. 42 U.S.C. § 1395w (Supp. V 1975). Moreover, in just under one hundred pages of text Title XVIII completes the role of the legislative branch in the establishment of a program currently costing over $20 billion annually. See U.S. Office of Management & Budget, Budget of the United States Government for Fiscal Year 1978, at 156 (n.d.).

8A permanent appropriation is made for Title XIX in 42 U.S.C. § 1396 (1970), and the Secretary’s authority to “publish such rules and regulations, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [he] is charged under this Act,” 42 U.S.C. § 1302 (1970), is available to fill out the details of a generally stated policy. Beyond mandating certain services and establishing specific formulas for reimbursement rates, the law generally leaves to the Secretary the responsibility for imposing additional requirements on the states, and through them, on the providers of services and the beneficiaries. The principles of state administration and federal reimbursement, 42 U.S.C. §§ 1396a, 1396b (Supp. V 1975); of the priority of certain kinds of services, 42 U.S.C. § 1396a(a)(13) (Supp. V 1975); and of utilization review, 42 U.S.C. § 1396(a)(26), (30), (31) (Supp. V 1975), are set forth along with some others, but the legislature did not feel it was necessary
The Medicare and Medicaid legislation has not, of course, produced a trouble free program because the programs are too large and the problems they address are too diverse and complex. Fraud and abuse have plagued the administration of these programs, especially Medicaid, from the beginning, and the impact which such abuses have had on the cost of health care has been highly undesirable. Nevertheless, two things may be said in praise of these programs. First, they have unquestionably increased the availability of needed health care to the elderly and the low-income population. Second, the legislative and executive branches have generally cooperated over the ten year history of these programs, and each has understood its proper role in the program, as well as the limitations of that role. Because the objectives and principles governing the programs were clear and coherent, the Secretary, in exercising the broad authority delegated to him, has been able to perform his role with confidence that his performance is consistent with the overall policy of the programs. At the same time, Congress has had confidence that it dealt with a problem it wished to address in a way which, though not without disadvantages, was on the whole satisfactory; Congress has allowed the Secretary to administer the program within the broad guidelines it established.

It is no coincidence that in the decade of their operation, although some significant changes have been made in the programs by additional legislation, especially that involving utilization review requirements, no fundamental changes in the principles underlying Titles XVIII and XIX have been adopted by Congress.

On the other hand, federal legislation concerning elementary and secondary education over the past decade has been the source of continuing friction between the legislative and executive branches. A brief survey of this body of law indicates the nature of the difficulties which have attended its administration.

to go beyond that point. In less than thirty pages of text, Title XIX completes the role of the legislative branch in the establishment of a program currently costing nearly $10 billion annually. See U.S. Office of Management & Budget, U.S. Budget in Brief 1978, at 44 (n.d.).

9See, e.g., The Federal Health Care Programs: Medicare and Medicaid, 53 Cong. Dig. 164, 164-65 (1974) (for a discussion of congressional concern over fraud and abuse in the two health programs).

10See id. (for a discussion of rising costs).

A distinct exception to this pattern has been the experience of HEW in administering section 1903(g) of the Act, 42 U.S.C. § 1396b(g) (Supp. V 1975). In its narrow focus, complexity and rigid detail this section is not characteristic of Title XIX and might well have been the source of separation of powers problems in any circumstances. The intense interest of Congressman John E. Moss, who has his own peculiar views about the proper role of congressional oversight committees, in the administration of this section made some conflicts inevitable. The general spirit of cooperation which has attended the execution of the Medicare and Medicaid programs is evident from the absence of fundamental amendments enacted. Virtually no policies adopted by regulation have been subsequently reversed by legislation.

Unlike the federal health insurance legislation, federal legislation for elementary and secondary education programs is not directed towards any overriding objective. This legislation operates, of course, in a field where state and local government and private spending is larger than federal spending by a factor of ten and where local interest and control are traditionally strong. It is therefore not altogether surprising that with the exception of the antidiscrimination provisions of Title VI and Title IX, the federal government has quite simply failed to identify a broad problem which a consensus recognizes as its responsibility to address and remedy, much less a comprehensive solution. While the largest portion of federal dollars is directed at increasing educational opportunities for low-income and other disadvantaged persons, the role of the federal government in the overall national effort to further that goal is manifestly so small and the legislation reflects so many other priorities, that it is impossible to believe that such an objective is the touchstone of federal policy in this field.

The lack of coherence in federal education legislation is revealed by a review of its objectives and methods. Some laws are directed toward assisting in the education of certain groups of students, such as low-income, Indians and handicapped. Another set of programs is aimed at institutions to be assisted, such as state and local educational agencies, libraries and training centers. Yet a third group, two examples of which are the Bilingual Education Act and the Emergency School Aid Act, is directed towards ameliorating specific circumstances in which institutions or students find themselves. A fourth set is directed toward improving educational instruction in certain subjects, such as ethnic heritage, environmental education, mathematics and "other critical subjects."

The methods prescribed for administering these programs do not suggest any effort on the part of the legislature to develop a comprehensive policy. Some are administered through state or local educational agencies, some through other institutions and some directly by the Office of

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1See notes 30-42 infra & text accompanying.

2E.g., federal spending for schools in 1973-74 was $4.9 billion, as compared to a total of $58.2 billion spent. NATIONAL CENTER FOR EDUCATION STATISTICS (DEPT OF HEW). STATISTICS OF STATE SCHOOL SYSTEMS 1973-74, at 11 (1976).


6See notes 18-26 infra & text accompanying.


Education. Opportunities for public participation are provided at different points in different programs, in some not at all; advisory committees are required to be established and reports prepared on the performance of programs completely at random.

In short, there is a largely unrelated series of enactments, uninformed by any articulated policy, representing, it seems, no more than the fleeting preferences of senior members of Congress or the preoccupations of junior members. This legislation represents the failure of policymakers to formulate policy without any corresponding restraint in making law.

It might seem, without full consideration, that the enactment of specific programs rather than general policy would simplify the task of the executive branch in administering the law and would diminish the causes of friction between the branches. In fact, however, the opposite is the case. Lacking the conception of a general policy to guide the administrator in carrying out the provisions of its education legislation, Congress has sought to compensate by enacting detailed mandatory requirements and prohibitions which restrict executive discretion. Both because it is impossible to anticipate each potentially undesirable application of the statute and because in dealing with those situations which are but dimly perceived the rigidity of mandatory provisions is too frequently inadequate for the subtleties of life, this practice in itself has been unsatisfactory from all standpoints. Accordingly, Congress has felt it necessary to exercise control over the administration of education programs in other ways.


Compare, e.g., 20 U.S.C. § 887e (Supp. IV 1974), which requires local education agencies to hold public hearings before applying for assistance, with 20 U.S.C. § 900a-4 (Supp. IV 1974), which establishes a fifteen member National Advisory Council on Ethnic Heritage Studies, with 20 U.S.C. § 1864(g) (Supp. IV 1974), which calls for a National Advisory Council for Career Education with a partially predetermined membership and a highly specific description of responsibilities, with 20 U.S.C. §§ 1866(f), (g) (Supp. IV 1974), which establishes an Advisory Council on Women's Educational Programs and requires two annual reports to the Congress, one from the Commissioner and one from the Council, with 20 U.S.C. § 1867 (Supp. IV 1974), which sets up an Arts Education Program with neither an advisory council nor any required reports, with 20 U.S.C. § 1531 et seq. (1970), which authorizes the Environmental Education Program with an advisory council, calls for no reports but does require publication of a list of projects supported, such list to be distributed to "interested educational institutions, citizens groups, conservation organizations, and other organizations and individuals involved in enhancing environmental quality and maintaining ecological balance." 20 U.S.C. § 1535 (1970).

Detailed prescriptions for the operation of education programs are evident throughout the legislation thus far reviewed. Prohibitions on the Commissioner's discretion are collected at 20 U.S.C. § 1281 Supp. V 1975.

Among the methods by which the legislature attempts to control the executive in the administration of education programs, the most important is the review of regulations provided for in section 431 of the General Education Provisions Act.\(^2\) Significantly, such an elaborate provision for congressional review of administrative action has not been felt necessary in other social welfare programs where far broader discretion is delegated to the executive.\(^3\) Briefly, section 431 provides that any policy which the Commissioner of Education adopts in the administration of the education programs must be submitted to Congress prior to taking effect. The Commissioner's policy goes into effect unless Congress finds that it "is inconsistent with the Act from which it derives its authority," and disapproves it.\(^3\) In practice, over the two years of the section's existence no policy has been disapproved, although the constitutional validity of the section is an open question. The point to observe here, however, is the felt need for additional control over policymaking which section 431 represents. The need arises, it is evident, not because the executive branch perversely misinterprets the expressed policy of the legislative branch, but because, not having included policy in its legislation, the congressional responsibility to determine the effects of its actions can only be satisfied by legislative interference in program administration.

**Judicial Control of Policymaking for Social Welfare Programs in the Executive Branch**

Policymaking, of course, is properly the role of the legislative branch. In view of the growing complexity of social welfare programs and the diversity of circumstances which they must address, with the significant exception of education legislation, the legislature has tended over the past decade to express its policies ever more broadly and to leave to the executive branch the task of filling in the details.\(^3\) This practice of relying on the executive branch to develop the methods of applying general policies to specific situations was usefully adopted in the field of economic regulation;\(^3\) it has characteristically been carried out by rulemaking.

Within constitutional restraints, policymaking by legislative bodies in the social and economic fields is a loosely regulated process. The policy that is actually decided upon must be within the authority of the legislature


\(^{30}\) See, e.g., notes 7-12 supra & text accompanying. See also 42 U.S.C. § 1302 (1970).


\(^{32}\) Prominent among recent enactments in this regard are the provisions to forbid discrimination against the handicapped and the aged in federal programs. See 29 U.S.C. § 794 (Supp. III 1973); 42 U.S.C. § 6101 et seq. (Supp. V 1975).

to enact, and distinctions contained in legislation must be supportable, though not expressly supported, by a conceivable rational basis. However, it is the substance of the enactment, not the procedure through which it was derived, that is the measure of its validity. That no hearings may have been held, that all testimony received was opposed to a law as passed, that no explanation of the reasons supporting a law is available, that the explanation which does appear suggests misunderstanding or ignorance of the issues involved — none of these factors affects the validity of an enactment concededly within legislative authority.

When the legislature delegates the authority to make policy to the executive branch, the question of whether a policy or rule is within the authority delegated remains of central importance. In addition, procedural requirements must be met. In the field of social welfare programs, recent years have seen a significant increase in the importance which both administrators and courts have attached to following proper procedures in making policy in the executive branch. The result is that the executive branch now must make policy through a process which bears more resemblance to judicial proceedings than legislative ones. This has important implications for the timeliness with which policy can be made and also, potentially at least, for the degree of influence that the judiciary exercises over the outcome.

The Administrative Procedure Act does not by its terms apply to the executive branch rulemaking which involves grants and benefits. It is precisely this type of activity that is involved in the administration of social welfare programs. As a result of a recommendation made by the Administrative Conference of the United States, however, most agencies, including the Department of Health, Education and Welfare, began in 1971 to comply voluntarily with the Act's requirements for promulgation of rules affecting all their programs. The courts have also held the executive departments to the requirements they imposed on themselves, and it is at least arguable that a similar requirement might have been imposed by the courts in any event. The reasonableness of increasingly frequent public demands for an opportunity to participate effectively in policymaking in the executive branch has impressed executive officials no less than it has impressed judges, and both have responded.

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35For a discussion of the procedures which must be followed, see notes 54-68 infra & text accompanying.
37See, e.g., 36 Fed. Reg. 2532 (1971) (indicating that as a matter of policy, the Department of Health, Education and Welfare will use rulemaking procedures adopted from the APA where not required by law); 36 Fed. Reg. 13,804 (indicating the Department of Agriculture's voluntary adoption of APA rulemaking procedures).
38See Rodway v. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975).
The Administrative Procedure Act combined with existing executive branch practice provides that in making policy agencies shall proceed by rulemaking and that in making rules some record of the proceedings shall be established.\footnote{See \textit{5 U.S.C. § 553} (1970) (prescribing the form of rulemaking). For the requirements on the executive branch which bind it to the procedure outlined in \textit{5 U.S.C. § 553}, see note 37 \textit{supra}.} This record will normally include, at a minimum, notice of proposed rulemaking, comments received by the agency in response to the notice and a final rule which should be combined with a general statement of its “basis and purpose.”\footnote{\textit{Id. See also note 46 infra.}} Courts reviewing the rules made by agencies may set them aside where, among other things, they are found to be arbitrary or capricious, or beyond the agency’s authority.\footnote{\textit{Id.}} Courts review “the whole record” of the rulemaking proceedings in determining whether to set agency rules aside.\footnote{\textit{Id.}}

There are two major features in this scheme which establish a pattern of judicial review of policymaking in the executive branch that differs from the traditional role of the courts in reviewing legislative enactments. The first element is the requirement that the court determine the validity of agency action on “the whole record.”\footnote{\textit{Rodway v. United States Department of Agriculture}, 514 F.2d 809 (D.C. Cir. 1975). The highly critical approach taken in \textit{Rodway v. United States Dep’t of Agriculture}, 514 F.2d 809 (D.C. Cir. 1975), toward post hoc rationalizations grew out of \textit{Citizens to Preserve Overton Park v. Volpe}, 401 U.S. 402 (1971). In \textit{National Welfare Rights Organization v. Mathews}, 533 F.2d 637 (D.C. Cir. 1976), the court did review a post hoc rationalization and found it inadequate. In \textit{Alabama Ass’n of Ins. Agents v. Board of Governors of the Federal Reserve System}, 533 F.2d 224 (5th Cir. 1976), the court asserted that it had “every right to be suspicious” of such rationalizations, though not explicitly to ignore them. And in \textit{Exxon Corp. v. Federal Energy Administration}, 598 F. Supp. 865 (D.D.C. 1975), the court adhered to the \textit{Rodway} principle by not permitting the introduction of “new reasons” in support of a rule, though it did allow the agency to provide an explanation of “stated reasons.”} While policy made in the legislative branch is valid if based on a conceivable rationale which may be proposed long after enactment, a series of cases, of which \textit{Rodway v. United States Department of Agriculture} is the leading representative, has now held that the requirement that the court’s review be based on “the whole record” means that post hoc rationales are of next to no weight in support of policy made in the executive branch.\footnote{\textit{Id.}} The record which must support the rule is that which was developed and published contemporaneously with the rule. Potential authority, in short, is not in itself an adequate basis for making policy in the executive branch; it must be accompanied by positive justification at the time the policy is made.\footnote{\textit{See \textit{National Welfare Rights Organization v. Mathews}, 533 F.2d 637 (D.C. Cir. 1976).}}

The second element is the interpretation which courts have recently put on the requirement that agencies accompany their final rules with a statement of “basis and purpose.” Recently, courts have held that unless...
this "basis and purpose" statement responds to comments that have been made on the proposed rule and establishes, in light of the whole record that the final rule is "reasonable," the rule will be set aside as "arbitrary" and an "abuse of discretion." Thus, in Maryland v. Mathews, a court set aside as "arbitrarily established" tolerance levels for error rates in state administered AFDC programs. While it was conceded that a specific tolerance level could be established within the Secretary's authority under the Social Security Act, "the tolerance level set must be reasonable and supported by a factual basis . . ." Significantly, the burden of showing reasonableness is on the policymaker; the court referred to the absence of any "empirical study," rejected as inadequate other information relied upon by the Secretary, concluded that there remained no basis in the record for establishing the levels or evidence tending to indicate their reasonableness and set the rule aside.

Two serious implications for the doctrine of separation of powers arise from these developments:

First, there is the decisive role, albeit a negative one, which the judiciary has come to play in the policymaking process by introducing the requirement of a contemporaneous demonstration of a rule's "reasonableness" into its review of an agency's action. Inasmuch as the courts have not yet indicated what showing will meet the burden of demonstrating reasonableness, they have temporarily arrogated to themselves the authority to set aside virtually any rule that they find undesirable. This situation is inconsistent with the traditional role of the judiciary, and it is unlikely to persist. However, even when the standard of reasonableness is finally refined and the showing required to meet that standard is established, it is clear that the standard will be a high one and that the burden of meeting it will remain on the executive branch. These facts alone assure a continuing major role for the judiciary in policymaking for social welfare programs.

Second, even assuming that the role of the judiciary in executive policymaking is reduced from a decisive to merely a highly influential one, the character of policymaking in the executive branch will have been transformed from largely legislative to judicial in nature. Consequently, instead of policy determination as a matter of preference within a range of authority, policy must now be based on a material record. Facts, not philosophy, determine outcomes in those circumstances; genuine policy choices are replaced by requirements to determine the weight of the evidence.

50Id. at 1212.
Perhaps general policies enacted by the legislature will be better carried out when subsidiary questions are resolved by reference to facts rather than policy. This is a matter of opinion influenced by one's view of the legislature's original delegation of responsibility to the executive branch. If this delegation represents a genuine desire to share the job of policymaking, there is cause to regret the loss of efficiency and the diminished capacity to administer programs on the basis of hope as well as experience; if it represents an undesirable but inevitable outgrowth of an attempt to deal with the diverse and complex issues of social welfare, one may welcome the restraint which a formal process imposes on irresponsible bureaucrats. In any case, the transformation of policymaking into the structure of adjudication increases the control which the judiciary exercises over the outcome tremendously. If policy is truly being made, however, and this process is merely masqueraded as adjudication, the increased importance of the judiciary in the process resulting from the disguise seems at best inappropriate.

Judicial Control of Program Administration

Social welfare programs are, by their very nature, ongoing. Their administration involves continuous effort to improve certain conditions which persist in society as a whole and whose effect on individuals varies with time. The ability of the programs to improve the conditions to which they are addressed depends on, among other factors, their design, the dedication and skill of those charged with administering them, and the tractability of the problems. These programs also tend to be complex. The number and sort of institutions which deal with social welfare and the multiple circumstances in which the conditions to be remedied are found require flexibility in approach. Coordination with other levels of government and private institutions is essential.

Finally, it should be observed that social welfare programs touch upon the most fundamental rights of individual beneficiaries: health, financial resources, the right to be free from discrimination. Legislation operates typically to entitle certain persons to certain rights or assistance in certain circumstances. To secure those rights, a bureaucracy is established to interact with all the other elements in the social welfare universe; there is no alternative for administering social welfare programs in a country as large as the United States. The complexity of the programs requires that expertise be developed and preserved, and the size of the programs precludes their administration without considerable staffing.

When citizens are entitled, whether by statute or under the Constitution, to be treated in a certain way, it is the special function of the judiciary to determine citizens' rights where they are in doubt and to fashion a remedy that will secure them. As the number of rights or benefits
to which people are legally entitled has increased dramatically in the social welfare area and the method of securing them has come to rely on the performance of a bureaucracy, the courts have experienced new difficulties in fulfilling their traditional responsibility.\textsuperscript{51} Class action lawsuits have compounded these difficulties. Courts have reacted to these developments in different ways, none without its disadvantages. One case in the civil rights area and a series of cases in the welfare field have significant implications for the doctrine of separation of powers and are illustrative of the difficulties which the courts and the executive branch have experienced.

\textit{Adams v. Richardson}\textsuperscript{52} involved a class action brought to compel the Secretary of Health, Education and Welfare to alter his manner of enforcing Title VI of the Civil Rights Act\textsuperscript{53} in a number of states which had previously maintained dual school systems. The statute authorized, indeed required, the Secretary to seek to achieve a series of integrated school systems by voluntary means wherever possible. It also specifically contemplated that where voluntary methods were unsuccessful he would initiate formal proceedings leading to the termination of federal financial assistance to non-complying school districts or states.\textsuperscript{54} The court found that the Secretary's practice, as demonstrated in the record, of seeking compliance with the statute exclusively through voluntary means was inconsistent with the scheme of enforcement contemplated by the statute; that segregation or vestiges of the dual system of education persisted as a result; and that plaintiffs, minority residents of the relevant states, were thereby being deprived of their rights under Title VI.

It was, of course, the basic responsibility of the Secretary of Health, Education and Welfare and his Office of Civil Rights to enforce Title VI. The court in this case could have concluded that the Secretary erroneously believed that he had discretion to decline to initiate formal proceedings to cut off funds, as he argued, and that since the court had corrected his misunderstanding of his obligations under the law, an order in general terms requiring him to proceed formally where voluntary negotiations had broken down would be adequate to correct the situation. For a variety of reasons, the court decided not to adopt this approach.

Instead, the court issued a multifaceted order establishing detailed guidelines for the Office of Civil Rights' enforcement program regarding Title VI in seventeen states and hundreds of school districts. The order, among other things, established fixed time periods for pursuing efforts at voluntary compliance in specific school districts where a violation of Title

\textsuperscript{51}See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973); notes 52-63 infra & text accompanying.

\textsuperscript{52}480 F.2d 1159 (D.C. Cir. 1973).


VI had been found, after which enforcement proceedings were required to be initiated. Different timetables were established for dealing with other institutions. The Office was required to report to the court semiannually on its progress, as well as on its treatment of new complaints of discrimination received from the geographical area covered in the order. Where the Office had failed to act on a complaint within a specified period of time, an explanation was required by the order.55

The court reviewed the Office of Civil Rights' compliance with the order on a continuing basis. The specific administrative proceedings that were ordered to be undertaken either took place or the cases were settled satisfactorily. However, other aspects of the Office's enforcement program, among them the treatment of complaints, failed to meet the expectations of the plaintiffs or the court, and further relief was ordered two years later.56

Formal proceedings were initiated in more cases as a result of that order,57 but the most interesting aspect of the order for the purposes of this discussion was its provision regulating the Office's complaint processing procedures. The court ordered that the Office, within 180 days of receipt of a complaint of racial discrimination within the seventeen state area involved in the case, either determine the complaint to be without merit, secure voluntary compliance where the complaint has merit or commence enforcement proceedings.58 The court evidently felt compelled to take over the administration of the complaint processing program in order to secure for plaintiffs the rights to which they were entitled. It perceived that the best way to do this was to control the timeframes for the performance of specified functions. However, the very essence of an executive decision is the allocation of limited resources in the most effective manner. The most recent development in Adams v. Richardson59 illustrates the identity of judge and administrator even more strikingly.

It will be remembered that Adams dealt only with racial discrimination, in only one type of government program, educational, and in fewer than half the states of the union. The Office of Civil Rights, at the same time, has a limited staff which is required to enforce many other antidiscrimination statutes on a nationwide basis for most social welfare programs. As it developed, the staff of the Office was not large enough to deal with all the complaints it received on the same basis as that ordered by the court in 1975. A large backlog of complaints accumulated in other program areas and from states not covered by the order. Two facts became

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57See id. (for a listing of cases).
58Id. at 273.
59See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).
obvious to the Director of the Office of Civil Rights early in 1976. First, compliance with the Adams order was preventing him from adopting a balanced enforcement program which would focus limited staff on problems of the greatest magnitude and significance. Second, as the resources he could devote to non-Adams complaints diminished, he became increasingly vulnerable to other suits which would result in orders of similar relief involving other aspects of his responsibility. This situation could not long persist.

The role of the Adams court in the development of the operating plan was critical; it is not conceivable that the Office of Civil Rights would have developed the same plan without the Adams suit. A factor illustrated in the Adams case which is at least as interesting as the changing attitude of the Office of Civil Rights, however, is the changing role of the court over time. The court recognized in its first order that to secure plaintiffs' rights in a class action suit of this kind, specific control of executive branch actions over a period of time was required. In its specificity and rigidity, however, the original order was traditionally judicial in nature. The court's order of June, 1976, is something quite different. The court has essentially secured the plaintiffs' rights by ordering the Office of Civil Rights to pursue the most effective plan it can develop toward carrying out its responsibilities, and it has tacitly conceded that plaintiffs' rights, at least as a class, are measured by what can be achieved by the best efforts of the executive branch given the available resources. In ordering the plan into effect, the court has determined what can instead of what should be done; it has exchanged the judicial role for an executive one.

The Director's solution was to develop a comprehensive enforcement plan that would establish timeframes for treating complaints in all programs and in all states on the same schedule, a schedule which was specifically related to the number of staff members he anticipated would be available to him. This is, of course, typical and sound administrative practice. This plan was submitted to the court in Adams and adopted in substance by that court in a modification of its order in June, 1976. What the court ordered the Office of Civil Rights to do in Title VI cases in the seventeen states involved in Adams was essentially what the Office's operating plan now calls for in the absence of an order, and what it does in other cases as a matter of course.

Courts have faced similar issues in a number of recent cases in which plaintiffs, usually as a class, have complained that the Social Security Administration has not expeditiously granted their request for a hearing,
after an initial denial, to determine their rights to benefits under Title II, the Old Age, Survivors and Disability Insurance Program, or Title XVI, the Supplemental Security Income Program, of the Social Security Act. Because the number of administrative law judges who can hold such hearings is limited, some applicants have recently had to wait a year or more for a hearing. The question in the cases that have been brought is typically what period of delay is reasonable and what is the judge to do when he finds that an unreasonable amount of time has been taken. The statute does not specifically establish any time within which a hearing must be held. With regard to Title XVI, however, it does require, except in disability cases, that a decision be made within ninety days of the time when the hearing is requested, manifestly, the hearing on which the decision is to be based should also take place within that time.

Inasmuch as the backlog of cases awaiting hearings in the Social Security Administration was 113,000 in April, 1975, and the average waiting period over the year previous to that time between a request for a hearing and a decision was slightly over six months, there have been more than a few court cases seeking equitable relief for deprivation of the right to a hearing given by the statute. The executive branch and the legislative branch have both been acutely aware of the backlog and long delays. Legislation specifically responsive to these problems within the program was passed in January, 1976; it is significant that Congress, while adopting a number of reforms in the program, did not approve any of the proposals before it at that time requiring a hearing to be held within a fixed time period, precisely the relief sought by class action plaintiffs in the courts. Within the limits of the resources made available by law, which have themselves been increased, great efforts have been made to speed the process; these efforts have yielded considerable improvement, but the delays have remained long enough to provoke a number of lawsuits.

Putting aside jurisdictional issues and class action certification questions — when the class if not certified even these cases become moot — in most cases where plaintiffs have been the class of applicants requesting hearings within a state, court rulings have differed. The two cases which found a violation of plaintiffs' rights have also differed in the relief ordered. Blankenship v. Mathews resulted in an order that the agency hold hearings for all Kentucky cases within ninety days of the request but

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deferred the time when this must be done until February 1, 1977. The reason for the court's holding was that "in light of the defendant's statement made to this court, that he hopes to be able to schedule all hearings within 90 days after application (by February 1, 1977), we hold that he should be compelled to adhere to that statement." In other words, as in Adams, the relief granted was the best the executive branch could offer under the supervision of the court. At the same time the court considered and rejected two other possible remedial courses. First, it declined to order immediate application of the ninety day rule because, in view of the nationwide backlog and the finite resources of the program, to do so either would have prolonged the process outside Kentucky if the agency reassigned finite staff to Kentucky in response to the order or, if it did not, would have diminished the quality of decisions within the state. Second, it declined to follow the policy of Santos v. Weinberger, which dealt with another aspect of the Supplemental Security Income program and ordered the agency to pay those applicants benefits after the ninety day period if a decision had not been reached. Indeed, the court in Blankenship ordered only that hearings be held, not that decisions be made, and it seems not to have contemplated the possibility that its order could not be complied with.

White v. Mathews illustrates a more vigorous approach, though with less discussion of its rationale. In White, the court ordered that decisions are to be rendered within 180 days of an application for a hearing, starting July 1, 1977; within 150 days, by December 31, 1977; and within 120 days, by July 1, 1978. An applicant whose case is not decided within these time limitations, and who is a citizen of Connecticut, will be entitled to benefits. The opinion states that there are ways of improving the performance of the agency, but it does not identify the connection between the improvements and the standards for performance that were in fact set. Nor was the court concerned with the impact its order would have on applicants not represented in the case before it. It may be that the court

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71Id. slip op. at 8.
72Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).
73Blankenship v. Mathews, No. 75-185, slip op. at 8-9 (W.D. Ky. May 6, 1976).
76Blankenship v. Mathews, No. 75-185, slip op. at 9 (W.D. Ky. May 6, 1976). This attitude is in striking contrast to that of the court in Solberg v. Mathews, No. 75-W-993 (D. Colo. March 26, 1976) (unreported), where the court noted: "If I were to order them to get the job done, they might as well come forward and plead guilty to contempt when the order is entered, because there is no way they can do it."
78Id. slip op. at 16-17. The standard applied in Rodway v. United Stated Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975), requiring demonstration of a rule's reasonableness
will yet discover, as the Adams court has and the drafters of education legislation in Congress have not, that it is important to address problems comprehensively as well as vigorously. That, of course, is a lesson that is driven home hardest to those who actually do carry out policies and administer programs on a daily basis. As the judiciary becomes more familiar with fashioning orders to the bureaucracy charged with the execution of social welfare programs, its awareness of the problems involved will undoubtedly increase.

There seems no reason to doubt, unless the class action form of litigation to secure statutory and constitutional rights is severely restricted, that courts will be increasingly drawn into the need to oversee the quality of bureaucratic performance in delivery of those services to which the public is entitled. There is one especially significant aspect of this recent addition to the traditional functions of the judiciary. The courts in Adams and Blankenship have established the measure of plaintiff's rights as those that the best administered program could provide. In White the court ordered better administration while explicitly contemplating that it might not be possible in practice. Neither of these situations is completely satisfactory. These rights should not be subject to variation on a daily basis or contingent on such a fragile factor as the competence or staffing levels of a bureaucracy. Compliance with court orders should be not only possible but also fully expected. Courts in their traditional role have done much to establish both rights and court orders as objects of the greatest respect, and that respect has been, in turn, a source of the judiciary's peculiar power and effectiveness. Though it may be consistent with the laws of physics, it will be a costly lesson indeed to learn that the judiciary's expanded responsibilities are accompanied in the long run by an attenuation of its authority to carry them out.

**Conclusion**

Social welfare programs provide an interesting lens through which to observe the variable operation of the doctrine of separation of powers. As Madison foresaw, the doctrine is not new and should not become rigid if governmental efforts to deliver social services are to be successful. More than any others, social welfare programs require an environment in which there is cooperation by each participant and respect for the considerable obstacles which confront all those engaged in the venture.

and a "factual basis" supporting it, were evidently not applicable, in the opinion of the court, to "judicial rulemaking."

At the same time, social welfare law is young as the life of legislation is measured, and it is evident that no clear patterns have been established for the function of the different branches in the ten years during which the government's efforts in this field have grown so dramatically. For every law that rigidly defines and constricts administrative discretion, there is another which confers extraordinary authority, and for each court that is impelled to control the details of program administration to secure a plaintiff's rights, another declines to interfere with matters committed to the executive branch. While this article has examined certain approaches to the persistent questions raised by the separation of powers doctrine in the context of recently enacted programs and has identified certain hazards which they involve, it cannot be maintained that other approaches are demonstrably preferable. It is likely that we will succeed in avoiding old problems in this area only at the expense of creating new ones.

In this developing situation, the temptation to prescribe general principles must be resisted. The history of the doctrine of separation of powers has been one of accommodation to changing circumstances, and in the emerging area of social welfare law this modest attitude is especially appropriate. It bears emphasis that the achievement of the objectives of most social welfare legislation is every bit as difficult as it is important. The cooperation of all the branches of government and an understanding of the exigencies that constrain their actions are essential. With that understanding should come better performance by each branch of the responsibilities that are properly its own.

The source of separation of powers problems in the social welfare area is more frequently the failure of one branch to assume its responsibilities and carry them out than an attempt to usurp the functions of others. Since there is no further forum to which it can refer difficult problems, the judiciary has not been reticent in this regard; Congress, however, has too often abdicated its responsibility to make policy in a comprehensive and coherent fashion, and the executive branch, in a number of instances and for a variety of reasons, has failed to fully carry out the law. The performance of its own responsibilities by each branch would greatly contribute toward more effective social welfare programs and would also avoid conflicts with the separation of powers doctrine. At present, executive branch policy-making infringes the role of the legislature, and court orders to bureaucracies directing the deployment of limited resources usurp the role of the executive branch. Moreover, the executive branch is not as experienced in making policy as the legislature, and the courts are not as well prepared or skilled at administering programs as the executive. Finally, the proper performance by each branch of its own role facilitates the exercise of responsibility by the others. This is especially true of the administration and interpretation of statutes, where a well conceived and professionally drafted piece of legislation is of such immense importance to the overall
success of a program. What is needed, in short, more than anything else if separation of powers problems are to be avoided in social welfare programs, is the confident exercise of responsibility by each branch of its own functions. If that result is achieved, the outlook for social welfare legislation is bright. But until it is achieved, it is doubtful that makeshift adjustments in roles will produce effective programs over the long run.

The doctrine of separation of powers will continue to affect the administration of social welfare programs and be affected itself for many years. At the moment, the beginning of an evolutionary process has been observed; the resolution of the particular problems that have been identified is well into the future. The purpose of this article will have been served if it has attracted notice to significant developments as an important area of public law interacts with a fundamental principle of our government.