

THE FIFTH ESTATE

By James Russell Wiggins

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"The Fifth Estate" is a term I have chosen to describe an institution entitled by its great power and its pervasive influence to rank among the estates that have historically comprised government. I refer to "bureaucracy," which, though it is nowhere mentioned in our constitution, possesses power equal to that of many of our traditional estates. It has become so authoritative and pervasive that it touches the lives of more citizens more frequently and more decisively than the conventional estates that preceded it.

Eighteenth century Englishmen spoke of the "three estates" of their government - "Kings, Lords, and Commons." The term "Fourth Estate" added to the traditional Kings, Lords, and Commons, began to appear in English literature and politics as a description of the press in the 19th century. Many credit Brougham with first using it in the House in 1806. Carlyle thought Edmund Burke was the first to use it, in a speech made in 1823. The great historian himself used it in 1837. It came into the language as a humorous, half-deprecatory statement about newspapers, but it gradually gained currency as an apt description:

And now we have a "Fifth Estate" - the bureaucracy.

Each of the earlier estates jostled the others in struggles for power. In our day, three of the great nations of the world, the United States, the Soviet Union, and China, all are involved in difficulties with the Fifth Estate. Mikhail Gorbachev, the chairman of the Communist Party, is engaged in an assault upon the bureaucracy of the Soviet Union, attempting to rescue that society from the stalemate imposed upon it by an inflexible, immovable, intractable bureaucracy which has stalled the growth of his nation, hampered its scientific progress, slowed its intellectual life, and blocked a rise in the standard of living. He has called his great campaign Perestroika, or "Restructuring." It may be the most decisive struggle in the Communist state since the revolution. The outcome of Perestroika, the re-structure of the Soviet Union, will have a profound effect on life in the United States, and the rest of the world.

China's new rulers are causing that country to revert to an agricultural policy with more local self government and private ownership. They are attempting the decentralization of the industrial economy by the massive restoration of power to factory units. But they are having troubles with the reluctance of the party bureaucracy to give up control.

The United States is engaged in a struggle of the same sort; but in this country, in my opinion, the power of the Fifth Estate still rises, although its increasing control of policy and administration is hardly perceived by a citizenry still enthralled with the contests for political offices the power of which slowly erodes.

This development in modern society was foreseen by Max Weber, the great German sociologist of the pre-war years.

It is difficult to even hint at Weber's views in a few paragraphs. His great work Economy and Society published in 1922, is almost 1500 pages long and his other elaborations are also extended analysis of capitalism and democracy.

Democracy Against Bureaucracy and Socialism, edited by Ronald M. Glassman, William Swatos and Paul L. Rosen and published last year, catches his spirit in its introduction. They say Weber warned of bureaucracy's inherent authoritarian nature, that he found it antagonistic to collegial authority (a council of equals) and to the individualism central to democratic institutions. Bureaucratic rules and regulations which govern all official actions, he emphasized, are not debateable or subject to amendment. They do not guarantee the rights of those who work within bureaucracies, nor do they limit the power of bureaucratic leaders - they are not subject to open discussion or to constitutional interpretation.

Bureaucratic authority with its rules and regulations, is rational, but its rationality is totally different from that emanating from legal authority. Weber saw bureaucracy as "a new form of despotic domination - subtle in that it controls decision-making and negates civil liberties without a secret police or a conquering army. The hallmarks of democratic government - citizens participation in decision making and leadership choice, the limitation of the power and tenure of leaders, and lawful procedures for rule making and rule enforcement - are replaced by an administrative megamachine controlled from the top down and insensitive to individual needs."

If Weber's work is the classic examination of bureaucracy in democracy and under capitalizm, one of the earliest and most penetrating examinations of bureaucracy functioning under communism is a slender volume written by Milovan Djilas in 1957. Djilas was the vice president of Yugoslavia and was removed and sent to prison for his criticisms of communism. He wrote: "The communist party, including the professional party bureaucracy, stands above the regulations and behind every single one of the state's acts. It is the bureaucracy which formally uses, administers and controls both nationalized and socialized property as well as the entire life of society." He saw "careerism and an ever

expanding bureaucracy" as the "incurable diseases of communism." In a prophetic sentence, Djilas predicted: "When the new class leaves the historical scene - and this must happen - there will be less sorrow over its passing than there was for any other class before it. Smothering everything except what suited its ego, it has condemned itself to failure and shameful ruin." Another comment of Djilas: "under constant pressure to be primarily, and, when necessary, an organ of violence, the Communist state has been a bureaucratic state since the beginning. Maintained by the despotism of a handful of power wielders, the Communist state wields more power than any other state organization does with the aid of diverse laws and regulations. Soon after its establishment the Communist state becomes replete with so many regulations that even judges and lawyers have difficulty finding their way through them."

We find echoes of Djilas in Mikhail Gorbachev's "Perestroika." Of the Soviet economy, he says: "The braking mechanism in the economy, with all its social and ideological consequences, led to bureaucracy-ridden public structures and to expansion at every level of bureaucracy. And this bureaucracy acquired too great an influence in all state, administrative and even public affairs." Gorbachev says bluntly: "The political economy of socialism is stuck with

outdated concepts and no longer is in tune with the dialectics of life. Philosophy and sociology, too, are lagging behind the requirements of practice. Historical science must undergo a major revision." Gorbachev blames "bureaucratic attitudes" for under-using the talents of the people.

It is an odd thing that the bureaucratic impulses of the old monarchical tradition migrated from the Czars to the Bolsheviks intact. One is reminded of the pathetic complaint of the village intendent in Gogol's novel The Inspector General. He urged a visitor to see the minister in Moscow about his pension which he had written the government about 30 years before. One of the most exciting political struggles of our time is taking place in the Soviet Union in Gorbachev's efforts to diminish bureaucratic power. It will not be easy. From 12 to 18 million Soviet citizens are in the bureaucracy. Gorbachev aims at cutting the ministries from 30 to 40 percent. Some have said his plans would remove 18,000 from the bloated bureaucracy in Moscow alone. This is an assault on an entrenched and privileged establishment that has arrested the growth of the Soviet Union and lowered the standard of living in the country. The tenacity of bureaucrats and bureaucracy is reflected in the Soviet reaction to the disaster at Chernobyl. Jerry Hough, in his Russia and the West, cites the reaction of

the bureaucrats to the nuclear explosion. He says: "Anyone familiar with bureaucrats around the world should have expected the Chernobyl officials to try to cover up the disaster while they thought they might conceal the situation. (The officials at Three Mile Island nuclear plant in the United States were not all that forthcoming.) If the Soviet Union had a traditional free press some newspaper correspondent would have filed a story as soon as the first explosion occurred." But Gorbachev's "Glasnost" or "openness" could not surmount the almost incurable bureaucratic impulse toward secrecy. Our bureaucrats are brothers under the skin.

The Fifth Estate bureaucracy began its rise to power very early in the development of this country. Thomas Jefferson roused James Madison to resist what he called the "Quandom Consolidationists" in the Adams administration. When he became President he ordered an annual publication of the names of those employed in the federal government and their salaries as one means of checking bureaucracy. He was even then worried about the centralization of power.

Alexis de Toqueville, in 1835, found the dispersal of power in this country a saving element. He said that America would survive because it was a country that was governed centrally but had a government that was not centrally

administered. He hoped it would not be in the future. de Toqueville had another reason for optimism about America and I am moved to remind those here tonight of that reason. He praised Americans for the trust they put in the legal profession. He said that profession would offset dangers arising from democratic excesses. I must quote him here, because in your profession, to this day, lies our best hope of surviving the excesses of bureaucracy. I quote: "Men who have made a special study of the laws derive from this occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude - They naturally constitute a body not by any previous understanding, or by an agreement that directs them to a common end; but the analogy of their studies and the uniformity of their methods connect their minds as a common interest might unite their endeavors."

The turn of the century ushered in an explosive growth of America's Fifth Estate. The necessities of World War One lent an enormous impulse to its expansion. Moreover, President Woodrow Wilson had laid some of the philosophic foundations for its expansion in his scholarly work on Congressional Government in which he built a case for the

delegation of power by Congress to independent boards, bureaus and commissions which, ever since, have continued to proliferate.

I think the Roosevelt administration ushered in a real change in American bureaucracy, by endowing it with more complete power and greater independence from elected government officials. The whole establishment was folded into the civil service, endowed with life tenure, and rendered more independent of politicians. (Hitherto we had trusted scarcely any public servants with life tenure but those in the judiciary.) Slowly, the vastly expanded civil service bureaucracy became more secure, more immune to political protest, more irremovable to any practical extent.

And the bureaucracy expanded in numbers. The National Law Journal in its issue of April 18 pointed out that this still is going on - between 1970 and 1980 twenty new agencies were formed, and the number of federal regulatory statutes jumped from around 55 to 130.

The American society in the 18th century was permeated with some political faiths we have all but abandoned. It believed in annual elections profoundly. It was leary of continuous service - limiting members of the Federation Congress to two continuous one year terms.

Samuel Livermore in the first Congress under the new government in 1789 discussed tenure of officials. "I do not admit that any man has an estate in his office," the doughty old Federalist said. Senator Fisher Ames addressed the same issue in these words: "The only bond between him (the president) and those he employs is the confidence he has in their integrity and talent; when that confidence ceases the president ought to have the power to remove those he can no longer trust with safety." We have come a long way from these precepts.

Our numerous bureaucracies, federal, state and local bear more directly and more frequently upon the lives of citizens than any elected government in our history. Abuses inevitably arose and in 1946 Congress attempted to address them. Congress found that rules of evidence were ignored, ex parte proceedings excluding all but a single party were prevalent, abuses of procedure were frequent, and latitude for corruption, fraud, and favoritism were found. The Administrative Procedures Act addressed these flaws, but it has by no means wholly eliminated them. The right of appeal to the courts was made more secure, but not so secure that agencies could not find ways to avoid this end. Not the least of the erosion of such an appeal (I hesitate to say to this audience) has been the increasing costs of taking

advantage of appeal rights. The best advice that a lawyer can give many citizens confronted by an allegation of regulatory evasion is the advice to settle.

Federal and state bureaus and agencies are set up to meet some current crisis and often staffed by laymen and governmental amateurs not very familiar with due process. I recall an example of bureaucracy at work in the Office of Price Administration in December 1951. That agency's Washington office announced it had found nine Washington grocery stores guilty of violating ceiling prices, and disclosed that the stores had made payments to the government from \$25 to \$136 apiece. On inquiry, we found that the action was in conformity with the OPS manual on Enforcement (Paragraph 5-3, Section A 2). In April 1952 the OPA scrapped its manual rule. What was wrong with their procedure is what is wrong with a lot of bureaucratic enforcement of this kind:

1. It subjected the accused citizen to blackmail or extortion.
2. The business places submitted to penalties that they may have found unfair or unjust.
3. Patrons of the stores never learned of the offenses charged.

4. If the regulations were unreasonable society never learned of it or could move to correct them.

5. Power was lodged in enforcement officers or policemen to make charges, try them and punish them - a combination unsafe in any society.

6. Business as a whole was unfairly stigmatized by the OPA announcement.

The expanding institutions of the welfare state have increased bureaucratic operations of this kind. The agencies administering these programs function with even less formality than the earlier bureaus that dealt more with economic matters and less with human affairs. Ira Glasser has ably discussed how these bureaus typically deal with their clients. He points out that "vast discretionary power came to be vested in an army of civil servants, appointed by examination and organized into huge service bureaucracies, which began quietly and silently to trespass upon the private lives and rights of millions of citizens." He contends that a tradition grew up acknowledging that "the Bill of Rights existed, but asserting it did not apply to 'service' institutions." The social workers and others engaged in administering welfare programs of various kinds defended their discretionary power, he recalls, with variations on the following argument:

"1. I provide an essential and benevolent service. I am a helping professional: I teach, I heal. I rehabilitate. I provide shelter.

"2. In order to provide my service well, it is necessary that I be allowed wide discretion. I am an expert. I know how to run schools, hospitals, children's shelters, housing programs, and I must be left alone to apply my special knowlege.

"3. The adversary process is inappropriate to the service I provide. They lack my expertise and don't know how to run a specialized institution. The very notion of 'legal rights' hampers my ability to provide my service effectively. The Bill of Rights is disruptive."

He summarized the situation eloquently by saying: "Thus we have traditionally been seduced into supposing that because they historically represented charity, service professionals could speak for the best interest of their clients. By now we should know better. Power is the natural antagonist of liberty, even if those who exercise power are filled with good intentions."

This philosophy is encountered here in Maine most notably in the Human Rights bureaucracy. Some of the Maine modern bureaucracy is obedient to the dictates of due process and

they proceed with appropriate deference to the necessities imposed by formality - recording proceedings, holding open hearings, swearing in witnesses, limiting testimony by relevancy and treating complainants and respondents with neutral respect. Much is said by lawyers and litigants of the way the Unemployment Insurance officials do business. Worker Compensation Law administrators also seem aware of due process.

The Office of Safety and Health Administration started out with an annoying practice of combining the functions of arrest, trial, and punishment in single officers, but it has greatly improved.

The Maine Human Rights Commission bureaucracy is reminiscent of the bureaucracy described by Glasser, according to many reports. Hearings are not always recorded (their own regulations say only that they 'may' be recorded). The atmosphere of "conferences" between parties is informal. Witnesses are not always sworn. Testimony is not held to rules of relevance or pertinence. What would be thrown out as heresay is invited and welcome. Many of their transactions are reminiscent of the old OPA proceedings referred to earlier. Most of its cases are disposed of without going before the commission by the same sort of process the OPA used. Respondents are permitted to settle situations by

payments that are undisclosed. Secrecy is imposed upon discussion. This informality runs the risk of depriving complainants of their rights, of keeping secret practices that are offensive to social justice, of divesting persons accused of an appropriate remedy, of permitting accused companies to impose silence on their illegal or anti-social treatment of employees. A respondent, confronted by the opportunity to avoid painful publicity, is likely to submit to a kind of blackmail to escape disagreeable public proceedings and costs of legal counsel. The history of the Human Rights bureaucracy in Maine will show that this often happens and that relatively few complaints are not settled out of court.

There are complaints that have come to my attention of ex parte hearings on the enforcement of child support claims by the Human Services Department where the defendants got short shrift if they plead inability to pay. These are difficult matters. The statutes invite a confusion of enforcement and judicial functions and it would be hard to prove injustices without protracted investigation. But it is an area in which the right to appeal to the courts is too expensive for most of the accused persons involved to constitute an available alternative.

The public frequently is assured that the boards, bureaus and commissions need not be feared because litigants can always appeal to the courts. Such appeals are sufficiently expensive to make them unavailable to many litigants. It must be noted that some members of the Fifth Estate are quite unhappy with the very existence of this alternative. Daniel D. Koshland, Jr., editor of SCIENCE, in the March 11 issue of that distinguished journal spoke for many of the technical bureaucrats when he said: "Society can no longer afford this kind (judicial proceedings) of second guessing and the lengthy progression of appeals to higher and higher courts." He grants that "commissions should never have absolute power," but he thinks "a general acceptance that commission rulings are hard to overturn would place more of a spotlight on these commissions and increase the quality of their judgments."

The bar better take note of this rising discontent or the "right of appeal" to the courts may be curtailed.

So what is to be done? The Fifth Estate surely is here to stay. Congress today can no more function without the right to delegate its powers that it could 50 years ago. Nor can Legislatures escape existing and future delegation of authority. There seems no other way to carry on our complex government.

We need the services of the competent and able members of the Fifth Estate. But it might be well to take another look at the federal Administrative Procedures Act and at state laws of the same kind. We need firmer assurance that boards, bureaus and commissions will adhere to the rule of law.

We need to look to the old devices for restraining the excesses of government. Among some old practices we need to reinforce I would include these:

Appointments to boards, bureaus and commissions ought to be for fixed renewable terms. Life tenure once was limited to judicial appointments.

Administrators should have the power to terminate appointments by means less onerous than existing laws which make removal almost impossible.

Relations between government agencies and the public are public relations and should be open to public scrutiny at every stage.

Government complaint of wrong doing should be made by formal legal notice.

Response to allegations should be filed with appropriate officers and made public.

Conversations, negotiations, deliberations or mediation between agency representatives and complainant and respondent should be recorded and should be disclosed to the public, whether or not they are called "hearings".

Disposition of every complaint - whether by settlement or appeal ought to be recorded and disclosed.

Opportunity to escape publicity should not be used to induce respondents to settle controversies without appeal to the courts.

The rules and regulations of all bureaus, boards and commissions ought to be subjected to review by the legislative body creating the agency so that these directives get the same sort of scrutiny that the public is able to give to the statutes (since they are equally binding).

Some such precautions would help the Fifth Estate to conform to accepted legal procedures.

Americans, at the turn of the century, found themselves in a free country - free as any in the history of the world's organized societies. Americans today find that they are increasingly guided, influenced, regulated, and controlled by a vast Fifth Estate of bureaucrats, appointed to offices as powerful as the legislatures of a generation ago, not elected to their high positions, nor, for the most part,

even appointed by persons elected by popular vote. The ordinary citizen, in 1900, usually knew only one federal employee - the postmaster, who incidentally was usually chosen for the office by the congressman the citizen had picked at the last election. The ordinary citizen today, finds that his life involves almost continuous contact with a Fifth Estate whose rulers reside in distant capitals, prescribing the day to day conduct of millions of citizens. The founding fathers who set up the government under which we live 200 years ago this year had had a long experience with the bungling bureaucracy of the distant English Board of Trade which for 85 years harrassed colonial life. So they took pains to create a government the powers of which were limited and most of the authority of which was exerted through local self governing institutions.

We are not likely ever to return to government wholly conforming to those sound and simple principles.

Still, the great edifice they created remains. The genius of the profession whose representative are gathered here tonight needs to be applied to making the new Fifth Estate conform to the Constitution instead of letting the Constitution be twisted to conform to the dictates of the Fifth Estate's expanding power. Alexis de Tocqueville saw

lawyers as the chief defenders of our democratic society in 1835. You are today, more than ever, the defenders of government by due process of law.

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