



Do the Ends Justify the Means*

Raymond Natter

June, 2014

When policymakers determine that a particular social goal is good for the American public, they have several ways to achieve that end. Traditionally, in the United States, the public policy goals are effectuated through legislation, or through agency rulemakings that carry forward specific authority provided in legislation. This process ensures, to the extent possible, that important policy decisions are made by legislative bodies or by agencies carrying out statutory requirements, and that these actions are subject to the protections afforded by judicial review and Constitutional requirements.

Currently, we have a deeply divided Congress, making it difficult to enact changes in the law. As a consequence, the Executive Branch has sought to effect policy changes through non-legislative means. Some of the banking agencies, and even the Department of Justice, have also taken this route. Thus, where an important policy goal cannot be accomplished due to lack of statutory authority, attempts are being made to achieve policy goals by limiting bank funding to companies that provide lawful products or services that are viewed as abusive to consumers. This is a laudable goal. However, the means used to achieve this goal, using pressure to restrict access to capital, raises troubling questions about the potential for abuse.

When Congress determines that a particular activity is not in the public interest, it may condition or restrict the activity by enacting a statute. If the statute is found to be Constitutional, those engaging in the activity outside of the statutory restrictions are violating the law. Clearly, banks should not provide funds for illegal activities. When an activity is proscribed by agency regulation, the regulation must comply with the procedural protections of the APA, and thereafter is subject to judicial review to determine if it complies with the intent of Congress and the Constitution. A bank should not intentionally provide funds to a company that is acting in violation of a validly promulgated regulation, since that regulation has the full force and effect of Federal law.

However, when a company is engaged in a lawful activity, Executive Branch pressure to reduce or prevent bank funding of the activity creates a more problematic situation. Despite the views of individual agencies that the activity is morally or socially inappropriate, the activity is legal. Informal agency action

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

to pressure financial institutions to cut off funding to such companies is not clearly subject to judicial review, and is not informed by the due process protections of the APA. Rather, the policy to pressure banks to “choke off” credit to a particular type of business may reflect the particular views of the agency head as to what is “in the public interest.” Of course, those agreeing with these views are likely to support the decision. But the precedent is dangerous. A future Administration may determine that other businesses are not in the public interest, and use the same informal measures, for example, to choke off funding for clinics performing abortions, for firms that manufacture contraceptives, or for businesses that produce adult films. While this may sound far-fetched, no one can predict what a future Administration may find to be “against the public interest.” And once the precedent of using the informal power of regulatory agencies to limit credit to lawful businesses is set, there is no obvious way to control how this power will be used in the future.

I am *not* arguing that banks should fund businesses engaged in marginal activities that are viewed by many as abusive to consumers. As a personal matter, I would prefer that bank resources be put to other uses. But I am concerned that using Governmental pressure to “choke off” funding to lawful businesses establishes a precedent that can result in untoward abuses of power in the future. The ends do not always justify the means. The proper way to prevent abusive lending is for Congress and the States to adopt laws that restrict such activities, and for the agencies to promulgate regulations implementing such laws, all subject to judicial review to ensure that Constitutional and procedural protections are in place, and that public policy is being made by elected officials.

Raymond Natter is a partner with the law firm of Barnett Sivon & Natter, P.C.