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ADMINISTRATIVE REGULATION

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ADMINISTRATIVE REGULATION

A Study in Representation of Interests

*

By AVERY LEISERSON

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To My Father

PREFATORY NOTE

THE writer wishes to make a belated public acknowledgment to the Social Science Research Council for creating the opportunity of a year's field investigation in 1937–38 and to the many persons, necessarily nameless here, who indicated their interest in the subject of inquiry by giving him so much of their time in conversation and interview.

Gratifying as it is to make acknowledgments of a personal character, it is, after all, primarily an honor to the person expressing them. It was my privilege to work for two years in the University of Chicago community under Professor Charles E. Merriam, whose influence is an ineffable part of the education of all members of his seminar and the denizens of Room 305. Professor Leonard D. White's sympathetic criticism and unflagging encouragement are directly responsible for the completion of this study, but my sense of warm gratitude and obligation to him goes far deeper than that. Finally, this book is an inadequate expression of my father's emphasis on the central importance of problems of administrative judgment involved in integrating "interests" with "expert" views of public policy.

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CHAPTER I

INTRODUCTION

THE phrase "interest representation in administrative regulation" is used in the present inquiry to refer to the process of integrating conflicts of economic groups with the exercise of public authority, in so far as such authority affects their respective interests. So conceived, the entire range of government activities involves some form of interest representation.[1] We shall limit our observations to the operation of legislative provisions and to administrative organizations in which either (1) persons are designated to act in the name of specified economic groups or (2) the group or groups themselves select their delegate or agent to act for them in positions of responsibility for planning and determining administrative policy. The scope of this study is further limited to administrative agencies performing functions of regulation as distinguished from direct rendering of services.[2]

INTEREST REPRESENTATION: A PHASE OF THE POLITICAL PROCESS

As a "process of integration," interest representation has been extensively described with respect to the organization and techniques of economic, religious, professional, and other groups which focus pressure upon legislative bodies and administrative officials in order to promote or protect their particular objectives.[3] So far as the writer is aware, however, no

[1] A. F. Bentley, *The Process of Government* (Chicago: University of Chicago Press, 1908), p. 305.

[2] Ernst Freund, *Administrative Powers over Persons and Property* (Chicago: University of Chicago Press, 1928), pp. 7–9; Jean Cahen-Salvador, *La Représentation des intérêts et les services publics* (Paris: Librairie des Recueil Sirey, 1935).

[3] P. A. Odegard, *Pressure Politics* (New York: Columbia University Press, 1928) and *The American Public Mind* (New York: Columbia University Press,

recent systematic attempt has been made, first, to examine the methods by which representatives of private economic groups have been authorized to perform functions of public office carrying some measure of official responsibility and, second, to analyze qualitatively the kinds of representation which result from such authorization.

The term "interest" was restricted above to the activities of economic groups. The selection of the economic factor for emphasis herein arises largely from the writer's experience as a public servant with some of the problems involved in dealing with private economic organizations as a rival control group to the political-administrative hierarchy.[4] Other students have stated the problem of orientation in less subjective terms. From the viewpoint of an anthropologist, Robert S. Lynd points out: ". . . . The several functional areas of social organization (earning a living, training the young, recreation, religion, art, and so on) are constantly interacting, and if one area is strongly organized and another weakly, this situation invites the riding-down of the weaker by the stronger."[5] In modern society the economic and industrial activities of earning a living

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1930); E. P. Herring, *Group Representation before Congress* (Washington: Brookings Institution, 1929) and *Public Administration and the Public Interest* (New York: McGraw-Hill, 1936); H. L. Childs, *Labor and Capital in National Politics* (Columbus: Ohio State University, 1930) and (ed.), "Pressure Groups and Propaganda," *Annals of the American Academy of Political and Social Science*, March, 1935; H. D. Lasswell, R. D. Casey, and B. L. Smith, *Propaganda and Promotional Activities: An Annotated Bibliography* (Minneapolis: University of Minnesota Press, 1935), *passim*, esp. pp. 102–29, 174–84; B. Zeller, *Pressure Politics in New York* (New York: Prentice-Hall, 1936); K. Crawford, *The Pressure Boys* (New York: J. Messner, 1939).

[4] The interrelations of the "economic" and the "political" are analyzed with differing methods by C. E. Merriam (*Political Power* [New York: McGraw-Hill, 1934], pp. 65–75, and *The Role of Politics in Social Change* [New York: New York University Press, 1936], pp. 41–59), C. A. Beard (*An Economic Interpretation of the Constitution of the United States* [New York: Macmillan, 1913] and *The Economic Basis of Politics* [New York: A. A. Knopf, 1922], p. 69), and Lincoln Steffens (*Autobiography* [New York: Harcourt, Brace, 1931], pp. 357–627).

[5] *Knowledge for What?* (Princeton: Princeton University Press, 1939), pp. 65–71.

have become far more highly organized than the other aspects of life.[6] Forms of rival economic association, with accompanying loyalties, have arisen to cut across and definitely imperil the unifying common purpose of living and adjustment in political association. Much of the legislative and administrative activity of the modern state is concerned with the regulation and amelioration of these conflicts. Political statesmanship is forced continually to emphasize, reinterpret, and reformulate the common purposes which must permeate these functional areas of organization if a fundamental unity of outlook is to be maintained among the members of the community. The democratic way assumes that the various group interests, through their voluntary or corporate associations, are capable of agreeing upon the conditions essential to the vital social cohesion.[7] This assumption is based on the faith that the adjustment of conflicting interests, although it involves power considerations and the potential application of coercion, is compatible with the autonomous existence and a considerable degree of self-determination on the part of group organizations in the process of making and changing public policy.

In this context the purpose of the present study is to inquire to what extent the endowment of representatives of economic groups with administrative responsibilities offers an effective means of solving economic conflicts, that is to say, in disposing of tension situations wherein the aid of government and the sanction of law is being sought (or fought) by each.[8]

[6] T. N. Whitehead, *Leadership in a Free Society* (Cambridge: Harvard University Press, 1936), pp. 78–80, 110–11, 165–69.

[7] C. E. Merriam, *The Making of Citizens* (Chicago: University of Chicago Press, 1931), chaps. ii–iii; National Planning Board, *Final Report* (Washington: Government Printing Office, 1934), pp. 30–34; *Recent Social Trends* (New York: McGraw-Hill, 1933), pp. xxx–xxxiii, lxx–lxxii; *Report of the Secretary of Agriculture* (Washington: Government Printing Office, 1937), pp. 1, 5–6; John Dickinson, *Hold Fast the Middle Way* (New York: Crowell, 1935), pp. 214–17; A. N. Holcombe, *Government in a Planned Democracy* (New York: Norton, 1935), pp. 140–53.

[8] John R. Commons, "Bargaining Power," *Encyclopaedia of the Social Sciences*, II, 459–62.

By "the process of integrating conflicts of economic groups" the writer means the attempt of such groups to bring public policy into conformity with their own particular demands. The question has been raised whether "integration" in this context means anything more than pressure activities culminating in one group or another's achieving its self-seeking partisan objectives.[9] It may be true that the most appropriate arena for the interaction between economic groups and public authority is the realm of politics and parliaments, in which some kind of adjustment is worked out between conflicting demands through the mediation of political parties, politicians, and legislators.[10] It is doubtful, however, whether politics in this sense is the only sphere in which these conflicts of interest occur. Moreover, to restrict the meaning of social integration to an idealized, rational conception of social harmony, particularly one which happens to be held by a particular student, administrator, or board, is to fail to take into account the realistic view of politics as a continuous process of introducing an uncertain stability into a constantly changing complex of nonrational social forces.[11] The purposes and results of public administration are a part of politics, defined in this sense, and it is one of the functions of public administration to aid in this stabilizing process. Hence, in the present study, "interest representation," or integration of group interests with the structure of official bureaucracy, is used in the generic sense of a never ending process of interadjustment between group concepts of group welfare and broader considerations of public (administrative) policy.

[9] J. M. Gaus and L. D. Wolcott, *Public Administration and the United States Department of Agriculture* (Chicago: Public Administration Service, 1940), p. 196 n.

[10] T. V. Smith, *The Promise of American Politics* (Chicago: University of Chicago Press, 1936), pp. 247–56.

[11] C. E. Merriam, *Political Power*, pp. 15–46; Karl Mannheim, *Ideology and Utopia* (New York: Harcourt, Brace, 1936), pp. 97–103; Carl Mayer, "The Irrational and the Rational in Society," *Social Research*, IV (November, 1937), 478 ff.; Talcott Parsons, *The Structure of Social Action* (New York: McGraw-Hill, 1937).

REPRESENTATION OF "CLASS" INTEREST

In its psychological usage "interest" means the object of the individual's attention.[12] In sociological terminology "interest" is used to denote the objective or goal of group activity and is usually associated with some conception of welfare or good from the standpoint of individuals' entertaining like or complementary ideas of the common objective.[13] The great problem faced by psychologists studying the social influences upon individual behavior, and sociologists trying to avoid personification and hypostatization of rational concepts which such students have imputed to the data (individuals in society) in order to explain collective behavior, has been their tendency to confuse the content, usually expressed as a goal, of a verbal generalization of group or class interest with the activity or methods by which the group life is sustained and carried on. This confusion has been heightened by the controversy between those who claim that all group concepts are personifications or fictions and that the only realistic or scientific way of studying social phenomena is to start with the individual and those who insist that an adequate explanation of the social behavior of individuals must be predicated upon the habitual patterns or customary reactions (folkways) to the stimulus problems of societal life.[14] These methodological battles have

[12] Douglas Fryer, *The Measurement of Interests* (New York: Holt, 1931); E. L. Thorndike, *The Psychology of Wants, Interests and Attitudes* (New York: Appleton, 1935).

[13] R. H. MacIver, "Interests," *Encyclopaedia of the Social Sciences*, VIII, 144.

[14] Outstanding advocates of the former approach are F. H. Allport, *Institutional Behavior* (Chapel Hill: University of North Carolina Press, 1933), pp. 3–27; D. Katz and R. L. Schanck, *Social Psychology* (New York: Wiley, 1938), p. 215. A straightforward exposition of the latter view is contained in C. H. Judd, *The Psychology of Social Institutions* (New York: Macmillan, 1926), pp. 2–4, 16–17, and chap. iv. The gap between them seems to be closing since the psychologists have developed the concept of the "social norm" in the psychology of perception (M. Sherif, *The Psychology of Social Norms* [New York: Harpers, 1936]). The sociologists' concept of "attitude" is defined as a predisposition to act induced by cultural influences (G. W. Allport, "Attitudes," in Carl Murchison (ed.), *A Handbook of Social Psychology* [Worcester: Clark University Press, 1935], pp. 798–844).

been avoided by such thinkers as John Dewey, Arthur F. Bentley, John R. Commons, and Karl Mannheim, who have pointed out that individuals' interests of enduring value are those which succeed in being embodied in some kind of institutional practices or ways of thinking and behaving. In this view interest cannot be separated from group activity, and they may be combined in a working definition of "group interest" as that activity or behavior whereby individuals, through their group organizations, seek to establish and perpetuate the conditions favorable to the existence of the distinctive group practices.[15]

To a great extent, particularly in a liberal, laissez faire society, the activities of group interests may be restricted to the nongovernmental economic sphere, but as one interest or another is favored by or begins to seek the protection and support of legal sanctions, *ipso facto* they are affected by and concerned with politics, and, in a significant sense, their demands become sources of public policy. In chapter ii an attempt is made to delineate in more detail this genetic relationship between group interests and public policy.

The word "group" has two connotations, both of which will concern us in this study but which have to be kept clearly distinct. One is the meaning of association or organization; the other is that of a category or class of persons presumed or observed by the investigator to possess attributes in common.[16] In the latter sense it may be said that interests are represented in administration without the affected groups selecting administrative officials or being consulted in their selection at all. The Interstate Commerce Commission, created in 1887, was established to protect the interests of shippers against carriers; the

[15] Unorganized groups and social classes undeniably have interests in the sense that goals of welfare may be formulated for them or by them. In the viewpoint here taken, in the absence of organization, such symbols or goals are formulated or manipulated by leaders or intellectuals, and the group is dissolved into a mass or collection of individuals who respond favorably to these symbols (cf. below, n. 17, p. 8).

[16] G. A. Lundberg, *Foundations of Sociology* (New York: Macmillan, 1939), pp. 339–42, 359–65.

Federal Trade Commission was set up in 1914 to protect businessmen against competitors using unfair methods or tactics tending toward the restraint or elimination of competition; the Securities and Exchange Commission of 1934 is presumed to protect investors against certain practices of promoters, dealers, and brokers of securities; the National Labor Relations Board was empowered in 1935 to act on behalf of employees wishing to join unions and bargain collectively against employers interfering with or restraining them in the exercise of such rights. In these examples, however, although the law recognized rights of a group category, the group does not select an agent or representative on the personnel of the administrative agency. Group representatives may initiate proceedings and appear before these tribunals in the capacity of parties-in-interest, and the tribunal's decisions are rooted in these conflicts because they grow out of them. The types and significance of interest representation in the procedure of administrative bodies are considered in chapter iii.

Also in this sense of category or class provision has been made in administration for group representation through statutory prescription of qualifications for membership on administrative boards. The degree to which such prescriptions modify and condition the discretionary power of the executive or appointing officials is considered in chapter iv.

There has been a great deal of influential and realistic thinking about the interests of groups in this sense of "class." Much of this thinking has resulted in systems of dogma and programs of broad social reconstruction based on presuppositions of class-interest relationships. There is a dangerous gap between some of this theorizing and intelligent social action. This gap arises from the fact that definitions of class and of desirable class aims arrived at in this manner are almost necessarily imputed to or imposed upon such groups either by the theorist or by other individuals or groups whose views and purposes may be, but are not necessarily, held or accepted by the group in

question.[17] The administrator who has to deal with group interests in the course of his duties uses the term "group" in the sense of an organization or association. He does so partly because the "pressures" to which he is subject are usually organized—applied through influential persons whose representative positions make their opinions important to him. Even more important than the pressures exerted by group organizations, however, is the consideration that the administrator cannot deal with an unorganized class interest. If he is in the position of searching for a reliable indigenous index of group interest, he finds himself compelled to reckon with group organizations whose leaders speak and behave from the standpoint of an institutional experience in whose validity its members have implicit faith and loyalty.[18] In the spheres of politics

[17] No matter how significant and important class conflicts are in their verbalized and intellectualized expressions, when it comes to establishing definite criteria of differentiation for purposes of action, the concept of class interest immediately becomes highly elusive (see, e.g., "How Many Class Struggles?" in *The Socialism of Our Times* [New York: Viking, 1928]; A. N. Holcombe, *The New Party Politics* [New York: Norton, 1933], chap. ii; P. M. Sweezy, "Interest Groupings in the National Economy," in National Resources Committee, *The Structure of the National Economy* [Washington: Government Printing Office, 1939], Appen. 13, pp. 308 ff.). Productive and scientifically valid results have been obtained by setting up various objective criteria distinguishing different economic classes or groupings (e.g., amount of property owned, source of income, amount of income, method of earning a living [cf. Beard, *op. cit.*]), on the basis of which observers have been able to infer very persuasive motivations to explain historical movements and events. There is no question of the importance of such studies in establishing and verifying the influence of economic stratification on social behavior, but in their political loyalties individuals who would be included in such categories often fail to conform to patterns expected by certain students or else do so only in the most general sense. Interests rationally imputed to such classes are distorted by conflicting attitudes and values held by the individual, who may be attracted or persuaded to support causes with which his interests thus imputed are in direct opposition. It is precisely in this area of values that propaganda—the art of manipulating controversial attitudes—and the study of public opinion have assumed such importance in explaining the apparently irrational character of political behavior (cf. Mannheim, *op. cit.*, chap. iii; A. Hitler, *Mein Kampf* [New York: Reynal & Hitchcock, 1939], Part I, chap. vi; Part II, chap. xii).

[18] M. P. Follett, *Creative Experience* (New York: Longmans, Green, 1924), pp. 232–37. This presumption is based upon the open and voluntary character of

or of ethics, representation of group interest by organization officials is perhaps no better than class representation by a leader possessing the ability to elicit favorable responses through direct appeal to effective symbols. But, in administration, which involves order-making, negotiation, responsibility, and immediate action, it is impracticable to take a vote or make a speech on every important problem requiring decision. The administration therefore tends to accord a practical validity to the views of leaders of group organizations whose common experience and similar vocational outlook with their members is supplemented by the probability of the latter's disciplined support.

In political theory and practical politics the difficulty of obtaining this reliability and responsibility of opinion when the constituency is large, internally divided by other issues, or defined on the basis of intellectual presuppositions of interest is well recognized. These considerations apply both to the economic class or to the territorial-population district. Upon analysis it appears that the representative position of the delegate or agent on most specific issues is either imputed or imposed;[19] that is to say, by virtue of an original constitutional act, the elected representative is assumed to reflect the views of his constituents, and, even though elected by them at intervals,

membership in the group organization. This simplified assumption requires many qualifications as group organizations develop and mature.

[19] In the theory of representation, it is necessary to distinguish between the historical "reflecting" functions of representative parliaments and the "control" or governing functions which such bodies gradually assumed from the thirteenth to the nineteenth centuries. The point is not whether the delegate adequately reflects but that he is empowered to reflect the opinions of his constituents (C. A. Beard and J. D. Lewis, "Representative Government in Evolution," *American Political Science Review*, XXVI [April, 1932], 228; A. B. White, *Self-government at the King's Command* [Minneapolis: University of Minnesota Press, 1933]; H. J. Ford, *Representative Government* [New York: Holt, 1924], Part I and Part II, chaps. i–iii; A. F. Pollard, *The Evolution of Parliament* [London: Macmillan, 1920], chap. iv; J. A. Fairlie, "The Nature of Political Representation," *American Political Science Review*, XXXIV [1940], 240–41, 464–66; E. M. Sait, *Political Institutions: A Preface* [New York: Appleton, 1939], pp. 476–78).

by accepted theory he is permitted a freedom of judgment and discretion to act as he deems necessary for the national or general public interest.[20] It has been discovered that society will cohere and social groups will acquiesce in representation by individuals without the literal principal-and-agent relationship that is supposed to exist on every question between representative and constituency. It is a truism, however, to say that the complexities and tensions of the twentieth century have given rise to political movements which challenge both the unit of representation and the standard of responsibility established under democratic constitutions in the nineteenth.[21]

The organized group as a unit of political representation for legislative bodies has certain definite disadvantages which, in the light of democratic presuppositions, probably make it less desirable than the population-geographic unit.[22] But, since economic groups, even under such presuppositions, may and do influence the workings of representative institutions, we may ask whether under proper controls there may be certain conditions under which, by bringing representatives of organized economic groups into the structure and processes of administrative bodies, it is possible to integrate specified areas of public and private jurisdiction.

REPRESENTATION OF GROUP ORGANIZATIONS

Group organizations possessing an independent institutional life are not necessarily in favor of accepting official govern-

[20] J. W. Garner, *Political Science and Government* (New York: American Book Co., 1928), pp. 665–75.

[21] F. W. Coker and C. C. Rodee, "Representation," *Encyclopaedia of the Social Sciences*, XIII, 311–13; W. A. Robson, "Functional Representation," *Encyclopaedia of the Social Sciences*, VI, 518–22; Garner, *op. cit.*, pp. 655–64.

[22] P. H. Douglas, "Proletarian Political Theory" in C. E. Merriam and A. E. Barnes, *Political Theory: Recent Times* (New York: Macmillan, 1924); "Occupational v. Proportional Representation," *American Journal of Sociology*, September, 1923; K. C. Hsaio, *Political Pluralism* (New York: Harcourt, Brace, 1927), chap. v, pp. 77–81; Walter Lippmann, *Public Opinion* (New York: Macmillan, 1922), pp. 304–9; W. Y. Elliott, *The Pragmatic Revolt in Politics* (New York: Macmillan, 1928), chap. iii.

mental responsibility in public administration. In chapter v the attitudes of several such organizations toward the assumption of legal responsibilities are discussed, together with some of the circumstances which in the past have modified or altered these attitudes.

The outstanding device whereby interest organizations have become recognized within the official structure of public regulation is the representative advisory board or council. While, technically speaking, such bodies do not usually exercise or possess direct administrative responsibility, in many jurisdictions they share no inconsiderable part of the policy-determining functions of administrative officials. The structure and operating problems of some of these representative advisory councils are discussed in chapter vi.

In the United States, particularly since 1933, there has been a tendency in regulatory legislation and administrative practice to recognize expressly a role which private group organizations may fill within the scope of the plan of regulation. In such cases certain fairly well-defined functions may be delegated to representatives of these groups, usually under the supervision of a public agency. The functions of these group representatives may be either legislative and policy-determining, executive in the ministerial sense of carrying out routine duties, or more rarely, judicial. Examples of such "functional devolution" are described in chapters vii and viii.

The idea of interest representation in administration runs counter to a legal tradition that public functions should be exercised by public officials—a salutary doctrine growing out of experience with the perversion of public powers and privileges to the self-seeking pecuniary advantages of minority groups and individuals. Specific methods of interest representation, indeed, are justified only if they can be organized under conditions which will insure their operation in the public interest.[23]

[23] As Professor Herring has pointed out in his book, *Public Administration and the Public Interest* (pp. 23–24), the public interest is an ideal standard, a verbal symbol, for the administrator's guidance. Its meaning in specific situations is

The conditions which have received legal sanction in certain judicial decisions are discussed in chapter ix.

A CRITERION OF PUBLIC INTEREST

In the prevailing current of thought in public administration the explicit endowment of private group representatives, responsible to private constituencies, with official responsibilities is prima facie suspect. The overwhelming trend of opinion favors the elimination of explicit interest representation in all forms but that of advice.[24] Even this function has been circumscribed and restricted by Professor Hart, who has said:

> Certain major points are perfectly clear; and the first is that the function of an advisory committee is to advise, and neither to share responsibility with the official nor to organize pressure upon him. The organization of pressure must be left to pressure groups in their political capacity and to the Opposition.[25]

In this view the representation of interests, with perhaps the exception of that of the "expert," is to be confined to the sphere of the legislature.

Ever since Professor Goodnow established his well-known distinction between politics as policy-determination and administration as execution of formulated policy, there has been a tendency to minimize the element of discretion in administration as no more than that necessary to enable expert officials to carry out pre-established policy. Even if this statement were true as an ideal of "proper" administration, it is misleading in its implications that the element of administrative dis-

---

expressed in the idea of integration between controlled official discretion and the demands of affected groups. This integration involves a realistic balancing of the power position of organized groups with a lively sense of the potential impact of the administrative decision upon the ideas of right and wrong held by the members of all the "publics" concerned with the decision.

[24] J. A. Fairlie, "Boards, Administrative," *Encyclopaedia of the Social Sciences*, II, 607–9.

[25] President's Committee on Administrative Management, *The Exercise of Rule-making Power* ("Special Study," No. V [Washington: Government Printing Office, 1937]), p. 29; see also H. J. Laski, *Grammar of Politics* (London: Allen & Unwin, 1925) pp. 384–87.

cretion is infinitesimal, or purely scientific and objective. A functional analysis of the duties of top administrative officials would recognize that it includes an influence not only upon the making of legislative policy but also on the quality of policy-execution. It is generally agreed that even before 1933 the scope of administrative discretion was tremendously expanded by regulatory legislation.[26] It would appear to follow that this has increased the area of possible controversy over the manner of exercising discretion. The administrator who conceives his task solely in terms of executing a legislative mandate has but a limited view of his public and social function. Such a view does not consider the opportunities for differential and discriminatory treatment of group interests—opportunities of which such groups are well aware and which they watch closely.[27] It fails to take account of the fact that the sources of so many administrative problems, as well as the considerations upon which administrative decisions have to be based, are primarily group customs and practices;[28] it neglects the evidence long since offered by students of the sociology of knowledge that it is impossible for the administrator to separate wholly his thought processes and objective techniques from social conditioning and economic-vocational background.[29] These factors are rightly considered by group interests to be quite as important in evaluating the quality of administrative policy as technical experience and expertness.

It does not follow that these considerations necessitate explicit representation of group organizations in administration. They do imply that the administrator recognize the ways in

[26] C. H. Wooddy, *The Growth of Governmental Functions* (New York: McGraw-Hill, 1932); Freund, *op. cit.*, chap. xi.

[27] J. P. Comer, *Legislative Functions of National Administrative Authorities* (New York: Columbia University Press, 1927), chaps. vii–viii.

[28] E. Ehrlich, *Principles of the Sociology of Law* (Cambridge: Harvard University Press, 1936), pp. 34–35; W. A. Robson, *Civilization and the Growth of Law* (New York: Macmillan, 1935), p. 168; C. K. Allen, *Law in the Making* (London: Oxford University Press, 1931), *passim;* E. Jenks, *Law and Politics in the Middle Ages* (New York: Holt, 1908), *passim.*

[29] See references cited in n. 17, p. 8, above.

which group interests impinge upon his techniques and decisions. The ultimate goal of the developing profession of administration is, probably, administration by an expert, but a socially adequate standard of expertness will then include a capacity or facility for judgment in which his policies and decisions are guided by the test of optimum satisfaction on the part of the groups affected by his administrative acts.[30]

Such a capacity on the part of the good administrator would be identical, if obtainable, with the pursuit of the public interest. Is there any objective working test of such a capacity? Hypothetically, we shall formulate this test as the acceptance of administrative decisions and policies by the group interests affected or concerned by them. This criterion is a corollary of the concept of administration as a process in which political formulas for solving controversial group conflicts are reduced to routine administrative policy and procedure. In other words, the political formula or agreement, expressed in legislative enactment, is a suspension of overt political conflict between group interests—a period in which administrators are given the opportunity to devise policies, under and within the law, which influential parties to the political conflict for the most part accept as a working *modus operandi*. These policies are exposed to public (multigroup) scrutiny and may be said to have become accepted if the affected groups no longer agitate before the legislature to obtain amendments or repeal of the law.

The test of ability to obtain acceptance of administrative action is not one which is wholly a question of the personal

[30] "Administration is the capacity of co-ordinating many, and often conflicting, energies in a single organism, so adroitly that they shall operate as a unity. This presupposes a power of recognizing a series of relations between numerous special social interests, with all of which no man can be intimately acquainted. Probably no very specialized class can be strong in this intellectual quality because of the intellectual isolation incident to specialization; yet administration or generalization is not the only faculty upon which social stability rests, but it is possibly the highest faculty of the human mind." I am indebted for this reference, which is taken from chap. vi of Brooks Adams' *The Theory of Social Revolutions*, to Professor John M. Gaus.

qualifications of the administrator. He is limited and controlled by his statutory powers, duties, and responsibilities, which cannot be compromised within his oath of office. But he is forced to remember that he will always be judged, in acting according to the interpretation of his powers of discretion that he deems appropriate, in a political context in which his decisions as to the meaning of the public interest in specific cases are exposed to an ultimate public test. Under democratic conditions it is also evident that, when group interests actively oppose the statutory basis of the administrator's authority, such action is not something which he can control; in other words, if they decide to alter or amend the formula of the original political agreement contained in the statute, they are free to try to do so. But the administrator can and does contribute to the enhanced social stability manifested in a general acceptance of his function and duties, a stability which is often achieved in spite of original opposition to the statute he administers on the part of some group interests.[31]

A TECHNIQUE OF ADMINISTRATION

Most administrators and students agree that one of the important tasks of administration is the maintenance of sound public relations, although they may differ on appropriate techniques. Interest representation is one aspect of public relations, defined as the problem of securing favorable group attitudes toward the work of the public agency. From this standpoint there are three elements into which interest representation may be analyzed. First, the administrator must recognize, define, and delimit the interests whose welfare is affected by the law he is administering. In the second place, the question arises as to the procedure of dealing with these interests. This may often in large part be decided by law, but the range of alternatives extends through the use of "information," education and

[31] Cf. John Dewey, *The Public and Its Problems* (New York: Macmillan, 1927), chap. ii.

publicity,[32] informal methods of consultation,[33] formalized procedures in which group representatives act as parties-in-interest,[34] to the explicit endowment of group interests with direct administrative responsibility in making decisions of policy. Assuming that either in the law or in the administrative discretion the principle is adopted of incorporating an explicit plan for joint discussion or negotiation between group representatives within the administrative structure, the vital problem then faces the administrator of working out its appropriate sphere of operation; that is to say, it is desirable to distinguish the function to which the principle of interest representation may be usefully applied from other phases or functions of administration for which it is best that public officials assume the sole responsibility.[35]

To sum up, the problem posed in the present inquiry is this: It is suggested that a satisfactory criterion of the public interest is the preponderant acceptance of administrative action by politically influential groups. Such acceptance is expressed through compliance on the part of such groups affected by administrative procedural requirements, regulations, and decisions, without seeking legislative revision, amendment, or repeal. To what extent, and through what forms, is it feasible to establish a degree of official participation in the formulation of administrative policy by group representatives, to the end that such participation will secure the assent to that policy of the members of the represented groups?

[32] J. L. McCamy, *Governmental Publicity* (Chicago: University of Chicago Press, 1939); L. D. White, *Introduction to the Study of Public Administration* (New York: Macmillan, 1939), pp. 477–82; E. D. Woolpert, *Municipal Public Relations* (Chicago: International City Managers Association, 1940).

[33] Herring, *op. cit.*, chap. xxi; Comer, *loc. cit.;* Hart, *op. cit.*

[34] U.S. Department of Justice, Attorney General's Committee on Administrative Procedure, *Final Report* (Washington: Government Printing Office, 1941), pp. 97–121.

[35] There may or may not be a fourth problem here, namely, the method of selection of the group representatives. The nature of the problem depends partly upon the willingness of the administration to recognize group representatives and partly upon the requirements of the law making official action of group representatives a condition of valid administrative action.

CHAPTER II

GROUP INTERESTS AS SOURCES OF PUBLIC POLICY

WHEN the question of a working definition of "group interest" was raised in the previous chapter, it was suggested that an appropriate concept might be found in those purposes common to individuals which have been embodied or objectified in collective rules and practices of established group organizations. It is now proposed to give content to this concept by analyzing the distinctive economic activities of four types of organized associations. By distinctive economic activities is meant behavior which modifies, conditions, or controls the processes of exchanging and marketing goods and services.[1] The types of association selected will be: (1) the capitalists' or businessmen's trade association or industrial institute, (2) the wage-earners' trade-union, (3) the farmers' bargaining co-operative, (4) the traders' stock and commodity exchange.

In each case the attempt will be made to show how the activities of each type of organization became the subject matter of political controversy which was later resolved (at least provisionally) by legislation embodying a public policy

[1] Under the laissez faire theory of the public welfare, any privately organized effort to interfere with, regulate, or control individual competition would conflict with the public interest. Under such a theory the proper role of public policy would be to promote conflicts of individual interests and to prevent private concerted action from influencing and controlling the automatic mechanisms of exchange. Actually, public policy is always influenced by other considerations (see Henry Simons, *A Positive Program for Laissez-Faire* ["Public Policy Pamphlet," No. 25 (Chicago: University of Chicago Press, 1935)]; A. H. Feller, "Public Policy of Industrial Control" in C. J. Friedrich and E. S. Mason, *Public Policy* [Cambridge: Harvard University Press, 1940], I, 130–43). The trend from laissez faire may be traced in A. V. Dicey, *The Relations of Law and Public Opinion in England in the 19th Century* (London: Macmillan, 1905), *passim*.

regulating the conflicts of economic interests. By way of comparison, the difficulties of an unorganized interest—the consumer—in getting its objectives implemented in public policy will be sketched briefly.

The significance of the relationship between group interests and public regulatory policy lies not only in delimiting the content of group interest but in locating that content with reference to trends of social and political change.[2] Group interests become the material of political issues because of the counteractivities of opposing groups. These conflicts sometimes can be solved by mutual adjustment and accommodation,[3] but, when the activities of one group seem to threaten or to upset the prerogatives and privileges of another established one, the former usually finds it necessary to secure the application of legal coercion in one form or another in order to make its efforts

[2] J. M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938), p. 16: "A survey of existing administrative agencies reveals how they were called into being when the political power of our democratic institutions found it necessary to exercise some control over the varying phases of our economic life." On the importance of a developmental perspective in evaluating public policy see Albert Salomon, "The Methodology of Max Weber," *Social Research*, I (1934), 147–68, and II (1935), 60–73, 368–84; H. D. Lasswell, *World Politics and Personal Insecurity* (New York: McGraw-Hill, 1935), chap. i.

[3] *Report of U.S. Commission on Industrial Relations: Sen. Doc. 415* (64th Cong., 1st sess.), I, 172: "One of the most important facts to be recognized is that governments cannot be looked to alone for remedying evil conditions. As soon as people come to look upon the coercive power of government as the only means of remedying abuses, then the struggle for control of government is substituted for private initiative through private associations, through which the real improvements must come. We must look for the greatest improvement to come through the co-operation with government of the many voluntary organizations that have sprung up to promote their own private interests. . . . . [T]he struggle between capital and labor, so far as we can now see, must be looked upon as a permanent struggle no matter what legislation is adopted. If this is not recognized, proposed remedies will miss the actual facts. But there are certain points at which the interests of capital and labor are harmonious or can be made more harmonious. In fact, this field where there is not real conflict between employers and employees is much wider than at first might be imagined. By recognizing these two facts of permanent opposition and progressive co-operation, it may be possible to devise methods of legislation . . . . that we can give voluntary organizations a greater share in working out their own remedies and in co-operating with government toward increasing the points of harmony."

effective. When an adjustment cannot be reached by the exercise of collective economic sanctions on a voluntary basis,[4] the dissatisfied group, under democratic conditions, tries to alter the existing body of law through the legislative process. This resort to politics is necessary in order to amend or revise legal precepts under which its methods and objectives are at present unlawful or to abolish existing legal privileges that nullify its collective efforts. If the challenging group succeeds in gaining a legislative redefinition of its rights and duties relative to those of opposing interests, the political process has effected a peaceful readjustment of a changed status of the power position of the respective groups. The established group may, on the other hand, be able to maintain its position of dominance and privilege or at least to delay the effectuation of legal changes through its own political tactics. Outstanding among such tactics in our time are the use of pecuniary incentives through financial contributions to office-seekers and political-party managers and the employment of experts in the manipulation of the symbols and channels of communication, whose job it is to identify the existing order of economic relationships with the prevailing stereotypes of the general welfare.[5]

Emphasis has been placed in this manner upon the political origin of public policy in order to counteract the distinctive contempt of the "bureaucratic mind" for politics. It has been frequently observed that this attitude tends to place the bureaucrat on the side of the established legal order, distrustful of exponents of change and resentful of the fact that his activities are always construed by affected interests in a po-

[4] The word "voluntary" is often construed to mean the absence of coercion of any kind. Since it is extremely rare in society for either an individual or a group to enjoy the luxury of making decisions or choices in the absence of any conditions or compulsions, a less misleading connotation of "voluntary" is "the absence of legal coercion." This usage is followed in the text.

[5] Varying viewpoints and estimates of the relative importance of political-party organizations in effectuating social changes in the status of groups in the "class" sense may be found in the well-known works on political parties of Bryce, Ostrogorski, Mosca, Pareto, Merriam and Gosnell, Brooks, Sait, and Odegard and Helms.

litical context of favoring one group or another.[6] His failure to realize his political position may prevent him from making an effective adjustment to the fact that not only his individual position but the law he administers may shift from a socially accepted to a passionately controversial political issue. Overemphasis upon the legalistic aspects of authority distorts a self-conscious comprehensive grasp of the administrator's function. On the other hand, it often is true that group demands are formulated according to group standards of justice and right rather than in the public interest or general welfare. These special, partial, group-centered interests, of which bureaucracy itself in its invidious sense is one, focus and, at the same time, make more difficult the problems of bringing law and governmental policy into intimate relation with the fabric of economic organization. They are the material from which methods of integrating law and policy to the community life must be devised. As Morris R. Cohen has said:

> . . . . While laws and government protection create legal rights, the effectiveness of this process depends on the recognition of previously existing psychic and social interests. . . . . Interests exist prior to and not as creatures of the laws which they call into being. The latter must justify themselves by the services which they render to these and other interests.[7]

Up to this point, we have been attempting to establish the fact that the responsibility of public administration is organically connected with and is not something on a remote moral level unsoiled or untouched by the activity of special interests.[8] We shall now proceed to a more specific description of our selected group interests and to trace the genetic relation-

[6] H. J. Laski, "Bureaucracy," *Encyclopaedia of the Social Sciences*, III, 70–73; W. A. Robson, "The Public Service," *Political Quarterly*, VII (April, 1936), 179, 184–86.

[7] *Reason and Nature* (New York: Harcourt, Brace, 1931), p. 405.

[8] Professor L. W. Lancaster has observed that "the public is coming to associate itself directly with the administration rather than through the mediation of a representative body" ("Private Associations and Public Associations," *Social Forces*, XIII [1934–35], 283 ff.).

ship between the functions of public regulatory agencies and the activities of economic groups, out of whose conflicts the public policy of regulation is born.

THE TRADE ASSOCIATION OR INDUSTRIAL INSTITUTE

"Trade associations" have been defined as "such organizations as are established to perform, upon a mutual basis, an industrial or trade function for the purpose of promoting and protecting the interests of the industry or trade represented by such association."[9] This definition fails to specify the meaning of "function," by which the "interests" promoted or protected by the function can be appraised. A student of industrial organization has defined a trade association in structural terms as "an organized group of producers of broadly similar commodities or services."[10] He goes on to point out, however, that "the importance of such associations depends upon the nature of their activities [and that] they are potential instruments for the administration of new price and production policies."

A more severely analytical definition is:

A voluntary organization of business competitors, usually in one branch of the industrial, trade or service fields, whose aim is to promote

[9] American Trade Association Executives, *Constitution and By-Laws*, Art. III, sec. 1 (January 1, 1938). The bylaws of the Chamber of Commerce of the United States, Art. II, provide: "Business and industrial associations not organized for principally private purposes shall be eligible for membership in the Chamber and shall be known as Organization Members. Such members shall be of three classes: First, local or state business and industrial organizations whose chief purpose is the general development of the business and industrial interests of a single state, city or locality; Second, state, interstate or national organizations whose membership is confined to one trade or group of trades; Third, such other bodies of similar purpose as may be elected by a three-fourths vote of the members of the Board of Directors at any duly called meeting of the Board. The first category provides for local chambers of commerce; the second includes trade associations. The National Industrial Conference Board (*Trade Associations: Their Economic Significance and Legal Status* [New York: National Industrial Conference Board, 1925], p. 7) defines a trade association as "an organization for mutual benefit composed of independent business concerns engaged in the same kind of industry or trade, and designed primarily to affect the conduct of that industry or trade."

[10] A. R. Burns, *The Decline of Competition* (New York: McGraw-Hill, 1936), p. 43.

that branch through co-operative activities in two or more of the following phases: accounting practices, arbitration, business standards, commercial research, industrial research, public relations, statistics and trade promotion.[11]

Although this statement simply lists by enumeration terms or usages which themselves need definition, it does reveal the services which the association performs and thereby brings the members of the industry or trade or branch thereof together to function as an entity.[12] The purposes of the association are not revealed, however, unless the uses to which the information gathered through statistics, business standards, commercial and industrial research, and so on, can be described. Not until the practices of "distributing or exchanging price information, data on orders received, purchases, production, stocks, cost of production, of merchandising, etc.,"[13] are known, can the group objectives be specified as the control or modification of competitor-members' price and production policies.[14] The less circuitous forms of organized co-operation, such as the cartel, consolidation, merger, or trust, bring the relationships between production and price control into sharper focus.[15]

[11] U.S. Department of Commerce, Bureau of Foreign and Domestic Commerce, *Selected Trade Associations of the United States, 1937*, p. 2. A statistical analysis of the functions of five hundred trade associations is contained in a 1935 publication of the Chamber of Commerce of the United States (*Trade Association Activities* [courtesy of Mr. F. A. Gott, director of the Trade Association Section of the Chamber]).

[12] Trade Association Activities (above, n. 11) found the ten most common activities of five hundred associations to be (1) statistics, (2) business standards, (3) elimination of unfair competition, (4) publicity, (5) legislation, (6) accounting, (7) standardization, (8) tariff, (9) public education, (10) technical research, The survey adds: "Special emphasis is also laid on industry education, information service and credit service."

[13] Federal Trade Commission, *Open-Price Trade Associations: Sen. Doc. 226* (70th Cong., 2d sess. [1929]), pp. 2, 36.

[14] C. A. Pearce, *Trade Association Survey* (Mono. 18, Temporary National Economic Committee [Washington: Superintendent of Documents, 1940]); Burns, *op. cit.*, chaps. iii–vii.

[15] *Hearings before the Temporary National Economic Committee*, Part I: *Economic Prologue* (75th Cong., 3d sess. [December, 1938]), pp. 93–119, 131–41; *Transcript of Testimony of Dr. T. J. Kreps on Cartels before the Temporary Na-*

A brief survey of the customary and accepted functions of voluntary associated groups of capitalists and businessmen cannot possibly convey even a sense of the complexity of the problems of regulating effectively the market for a given commodity. Certain economic problems suggest themselves as being beyond the control of voluntary association activity until the overwhelming majority of the productive units or volume of the trade or industry has been brought within the area of organization.[16] Such problems are the interrelated questions of capital investment or expansion, prices falling to unprofitable levels, and extreme fluctuations in production and employment. These long-run problems of industrial planning may be contrasted with the immediate organizational problems, which constitute the first steps toward either self-government or planned guidance of industrial development.

The first problem of organization that presents itself to the trade association is the nonco-operator, the individualist, the entrepreneur, who, for any of widely differing reasons—low capital costs, higher efficiency, financial necessities, or mere ignorance—insists on playing the game his own way. Such competitors, even though a tiny minority, may nullify co-operative efforts toward market control. They raise the question of whether to give a majority group, by number or output, the right of imposing their standards on the obstreperous few or perhaps the right of making the minority become members of the majority association. Either of these proposals immediately conflicts with a declared public policy of enforced

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tional Economic Committee, January 15, 1940 (printed excerpt); K. Pribram, *Cartel Problems* (Washington: Brookings Institution, 1935); H. von Beckerath, *Modern Industrial Organization* (New York: McGraw-Hill, 1933); D. H. MacGregor, *The Evolution of Industry* (London: Home University Library, 1906); M. N. Nelson, *Open-Price Associations* ("University of Illinois Studies in Political and Social Science" [Urbana: University of Illinois Press, 1922]); F. A. Fetter, *The Masquerade of Monopoly* (New York: Harcourt, Brace, 1931); G. C. Means, *Industrial Prices and Their Relative Stability: Sen. Doc. 13* (74th Cong., 1st sess. [1935]).

[16] E. L. Heermance, *Can Industry Govern Itself?* (New York: Harper, 1933), p. 155.

competition.[17] Either also raises the question of whether—in order to protect consumer groups, other manufacturers, and the public—government-supervised or imposed production and price schedules would not be necessary. Students of the problem in the United States generally have hesitated to espouse measures which would involve such consequences and have preferred the alternative of permitting experimentation with voluntary methods of co-operation subject to vigorous enforcement of the antitrust laws by the Federal Trade Commission, the Department of Justice, and the courts.[18] The scope of permissible activity derived from the cases under these laws is uncertain. It seems clear, however, that while the Court has not always followed the same line of policy in outlawing collusive agreements and contracts, mergers and consolidations, price and production arrangements,[19] it has definitely upheld

[17] 26 U.S. Stat. L. 209 (1890): "Every contract, combination in the form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both, in the discretion of the court." 38 U.S. Stat. L. 717 (1914): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships or corporations, except . . . . , from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" (sec. 5). 38 Stat. 730 (1914): "It shall be unlawful for any persons engaged in commerce . . . . either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption or resale . . . . , where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce . . . ." (amended by Pub. No. 692 [74th Cong., 2d sess. (1936)] known as the Robinson-Patman Act). These statutes are brought together by the Federal Trade Commission in its *Rules, Policy and Acts* (Washington: Government Printing Office, 1938). For a discussion of the legal aspects of the antitrust laws see B. S. Kirsh, *Trade Associations in Law and Business* (New York: Central Book Co., 1938).

[18] Heermance, *op. cit.*, pp. 231–34; *Hearings on Establishment of a National Economic Council* (72d Cong., 1st sess., on S. 6215 [1931]), pp. 300 ff., 480 ff., 536 ff.; Fetter, *op. cit., passim.*

[19] In *U.S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 212–24 (1940), the Court seems to have reverted to a more restrictive philosophy.

such forms of intra-industry planning and co-operation as standardization of trade terms, establishment of standard grades and classifications, interchange of statistics as to past selling prices and productive capacity, co-operative selling agencies, interchange of patents, co-operative research, advertising, and trade promotion.[20]

The question of what organized competitors can legally do leads directly to a consideration of the hypotheses or assumptions of group action which favor unity or disunity. If the assumption is made that joint action should be immediately directed toward the complete eradication of unfair or destructive competitive practices or at immediate results in the form of price or production control, both internal and external conflicts of interest arise. The internal conflicts arise from the sacrifices of business or cost increases suffered by competitors within the group. Unless the members of the association are practically unanimous in agreement and steadfast in supporting the legislative prohibitions or compulsions of group action, the group declaration of policy is little more than a pious wish. The injured competitor has the same opportunity as the injured customer of resorting to the Federal Trade Commission, the Department of Justice, or the courts. This practical requirement of substantial conformity with the group practices throughout the trade militates against too direct, completely comprehensive measures of market control. Further, except in the cases of unified ownership and management, or when the feeling in favor of co-operation has gone far enough to permit a specific sharing of the market through a cartel or selling-agency form of organization, experience indicates that an association built around a conscious attempt to evade the law tends to be both unstable and inefficient.[21] The trade associa-

[20] *Maple Flooring Assn.* v. *U.S.*, 268 U.S. 563; *Cement Mfrs. Protective Assn.* v. *U.S.*, 268 U.S. 588 (1925); *Appalachian Coals, Inc.* v. *U.S.*, 288 U.S. 344 (1933); *Sugar Institute* v. *U.S.*, 297 U.S. 553 (1936).

[21] Heermance, *op. cit.*, pp. 55–56; *Hearings on Establishment of a National Economic Council*, p. 552. The F.T.C. reported in 1929 that a study of 135 associations revealed a mortality rate of 16 per cent (Nelson, *op. cit.*, p. 308). The Department of Commerce has reported the number of trade associations as less

tion, therefore, faces the necessity of searching for a basis of service upon which the intercompetitor conflicts of interest can be brought within the group and their adjustments worked out inside the association. This seems to require, as Heermance

TABLE 1*

NUMBER OF NATIONAL AND REGIONAL TRADE ASSOCIATIONS CLASSIFIED BY INDUSTRIAL DIVISION AND PER CENT OF INDUSTRY COVERAGE BY NUMBER OF FIRMS: 1937–38

INDUSTRIAL DIVISION	ALL ASSOCIATIONS		PER CENT OF COVERAGE BY NUMBER OF FIRMS							
			25 and Under		26–50		51–75		Over 75	
	No.	%	No.	%	No.	%	No.	%	No.	%
All associations	917	100	188	20 5	264	28 8	275	30 0	190	20 7
Fishery	6	100	2	33.3	1	16 7	2	33 3	1	16 7
Mining, manufacturing, construction	674	100	119	17 7	192	28 5	213	31 6	150	22 2
Wholesale trade	88	100	15	17.1	20	22 7	34	38 6	19	21.6
Retail trade	63	100	24	38.1	23	36 5	14	22 2	2	3 2
Finance, real estate	13	100	4	30.7	1	7 7	3	23 1	5	38 5
Insurance	17	100	6	35 2	7	41 2	2	11 8	2	11 8
Transportation, communication, and P.U.	23	100	3	13 0	8	34.8	6	26.1	6	26 1
Personal, business, recreational services	33	100	15	45 5	12	36 4	1	3 0	5	15.1

*Source: *Trade Association Survey* (Mono. 18, Temporary National Economic Committee, Senate Committee Print [76th Cong., 3d sess. (1941)]), p. 360; see also pp. 3–7, 411–13. The 1,311 trade associations included in the survey cover 1,031 differently defined industries. Of 1,031 industries, 897 are represented by only 1 association.

has pointed out, "a long process of self-education, through which at least the leading competitors have developed the habit of thinking in terms of the trade as a whole, have built

than 50 in 1875; about 100 in 1900, over 1,000 in 1920, and approximately 2,400 in 1937. The Chamber of Commerce of the United States (see p. 22, n. 11) found a distribution of growth among 500 associations as follows:

Decade of Origin	Membership	Decade of Origin	Membership
Prior to 1880	13	1910–20	146
1880–90	27	1920–31	181
1890–1900	45	(Not indicated)	(16)
1900–1910	73		

up an efficient organization and a fair degree of unanimity in sentiment and practice."[22] Having achieved internal unity, the association will be more likely to survive any successful legal attacks upon its functions or activities by the external

TABLE 2*

NUMBER OF NATIONAL AND REGIONAL TRADE ASSOCIATIONS CLASSIFIED BY INDUSTRIAL DIVISION AND PER CENT OF INDUSTRY COVERAGE BY VOLUME OF BUSINESS: 1937–38

Industrial Division	All Associations		Per Cent of Coverage by Volume of Business							
			25 and Under		26–50		51–75		Over 75	
	No.	%	No	%	No	%	No.	%	No.	%
All associations..	895	100	34	3 8	111	12 4	315	35 2	435	48 6
Fishery	6	100	....	.. ..	2	33 3	1	16 7	3	50 0
Mining, manufacturing, construction	671	100	16	2 3	75	11 2	228	34 0	352	52.5
Wholesale trade	86	100	4	4 7	12	13.9	32	37 2	38	44.2
Retail trade..	55	100	9	16 4	11	20 0	23	41 8	12	21 8
Finance, real estate..	10	100	1	10 0	...	.....	2	20.0	7	70 0
Insurance.... . . .	16	100	....	.....	4	25 0	6	37.5	6	37 5
Transportation, communication, P.U...	24	100	1	4 2	1	4 2	9	37 5	13	54.1
Personal, business, recreational services ..	27	100	3	11 1	6	22 2	14	51 9	4	14 8

* *Source: Trade Association Survey* (Mono. 18, Temporary National Economic Committee Senate Committee Print [76th Cong., 3d sess. (1941)]), p. 361.

[22] *Op. cit.*, p. 214; see also W. J. Donald, *Trade Associations* (New York: McGraw-Hill, 1933), for an analysis of the problems of achieving group unity by the managing director of the National Electric Manufacturers Association. A critical study of the price-control activities in several industries is contained in S. N. Whitney, *Trade Associations and Public Policy* (New York: Central Book Co., 1934). No mention is made in the text of the concomitant problems of inter-association conflicts arising from overlapping definitions of industries, conflicting principles of industrial or trade classification, or multiple production of products covered by more than one industry or trade. These problems are of relatively minor importance until sanctions are applied to enforce the jurisdiction of associations (cf. L. S. Lyon *et al.*, *The National Recovery Administration* [Washington: Brookings Institution, 1935], pp. 149–96).

interests unable to cripple or destroy it by economic power or extra-legal means.

In appraising the group-limited aspects of trade association activities, it may be noted, first, that the group contains within itself the germs of conflicting individual and corporate interests. Public policy has been very largely devoted to maintaining and promoting these intercompetitor conflicts. Second, although trade associations have grown and spread as a movement around functional services, their very growth and activity operate toward price control.[23]

Except when the association's market is composed of a few highly integrated buyers with alternative sources of supply, opposing interests are rarely organized effectively to combat without the aid of government the regulative practices of the association. Hence, in the absence of what might be called "counterinterest" organizations, public regulation has taken the form of a government agency established to protect the opposing group or unorganized interest through its legal powers of investigation. The Department of Justice uses its investigatory powers to bring alleged violations of law before the courts for possible criminal and civil penalties. The Federal Trade Commission issues its complaint, makes its investigation and findings of fact, issues its cease-and-desist order, which may be reviewed by the courts. Both agencies utilize the consent stipu-

[23] A survey of trade association activity does not include what may well be a far more influential group interest—the unification and concentration of financial and management controls in the hands of a relatively small number of persons or concerns (A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* [New York: Harcourt, Brace, 1933], chap. ii; see references to n. 15, p. 23, above). It is with respect to this tendency that government competition, open-market operations in the credit markets, and publicly owned and controlled corporations are advocated as instruments of public economic power to offset the concentration of private economic power (see Bernard Ostrolenk, *Electricity: For Use or for Profit* [New York: Harpers, 1936]; M. E. Dimock, *British Utilities and National Development* [Chicago: University of Chicago Press, 1933]; L. Gordon, *The Public Corporation in Great Britain* [London: Oxford University Press, 1938]).

lation, decrees, or court order to achieve compliance with the law.[24]

The Federal Trade Commission assumes the entire responsibility for representing the injured competitor or consumer.[25] This policy may have been adopted because of the lack of effectively organized counterinterests, but its wording indicates that the Commission has little, if any, confidence that the public interest will be served by allowing either competitors or competitors and consumers to meet to settle their differences privately or publicly.[26] This attitude is probably well founded, in view of the uncertainty under the antitrust laws of the permissible content of intercompetitor agreements. However, it

[24] A concise statement of the Department of Justice and F.T.C. settlement procedures is contained in F. F. Blachly and M. E. Oatman, *Federal Regulatory Action and Control* (Washington: Brookings Institution, 1940), pp. 77–81. Generally, cf. G. C. Henderson, *The Federal Trade Commission* (Cambridge: Harvard University Press, 1924); T. C. Blaisdell, *The Federal Trade Commission* (New York: Columbia University Press, 1932); N. B. Gaskill, *Public Regulation of Competition* (New York: Harpers, 1936); Attorney General's Committee on Administrative Procedure, *The Federal Trade Commission* (Mono. 6 [Washington, 1940]).

[25] Federal Trade Commission, *Rules, Policy and Acts* (1938), pp. 22–23: "The so-called 'applicant' or complaining party has never been regarded as a party in the strict sense. The Commission acts only in the public interest. It has always been and now is the rule not to publish or divulge the name of an applicant or complaining party, and such party has no legal status before the Commission except where allowed to intervene as provided by the statute."

[26] Cf. J. H. Landis, *The Administrative Process* (1938), p. 28: ". . . . A measure of advance interpretation of regulatory requirements by opinions given by the legal staff or by specific regulatory action of the Commission was essential in the securities field. Such a policy, however, ran contrary to the very precise tradition which governed the Federal Trade Commission in its operations under the Federal Trade Commission Act, for it has consistently refused to elaborate to any degree upon the meaning of that Act." Compare the language of Adam Smith in *The Wealth of Nations*, Part II, chap. x: "People of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or on some contrivance to raise prices. It is impossible indeed to prevent such meetings by any law which either could be executed or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary."

is not surprising that this conflict between the objectives of associated activity and the present assumptions of public policy has operated as a factor to increase consolidation of, rather than co-operation between, independently owned private enterprises.[27]

To sum up, in this section we have attempted to isolate, by analyzing the functional activities of a continuing and growing trade association movement, the distinctive interests of such organizations. The internal as well as external conflicts of interest of the trade association have been reflected in and in turn conditioned by the public policy of the antitrust laws. A similar analysis will now successively be made of the institutional interests of the trade-union, the farmers' bargaining co-operative, and the mercantile exchanges.

THE TRADE-UNION

"The main purpose of trade-union activity is regulation and, if possible, control, by workers organized into a craft, trade, industry, plant or other classification, of their wages, hours and working conditions."[28] "The first fundamental step . . . . is organization of wage-earners into unions for the establishment of collective bargaining and the realization of specific goals through collective agreements."[29] "The essence of collective bargaining is the joint determination between employers and organized workers of the conditions of employment. This involves the making, interpreting and enforcing of agreements which run for a specified period."[30] Through organ-

[27] On this point see testimony of W. L. Thorp, *Hearings before Temporary National Economic Council*, Part I (December, 1938), p. 112.

[28] U.S. Department of Labor, Bureau of Labor Statistics, *Handbook of American Trade Unions* (Bull. 618), p. 17.

[29] William Green, president of the American Federation of Labor, "Problems of Organized Labor," *Annals of the American Academy of Political and Social Science*, March, 1936, p. 17.

[30] Twentieth Century Fund, *Labor and the Government* (New York: McGraw-Hill, 1935), pp. 46–48; J. R. Commons and J. B. Andrews, *Principles of Labor Legislation* (New York: Harpers, 1927), p. 129; R. F. Hoxie, *Trade Unionism in the United States* (New York: Appleton, 1918), p. 264; W. H. Hamilton, "Col-

ization, collective bargaining, and the establishment of agreements mutually binding upon itself and the employer, the trade-union aims at control of the particular section of the labor market over which it is organized by establishing itself as the sole bargaining agency for the workers in that particular section or unit.[31]

Unions arise through the attempt of workers to improve their conditions of employment by associated action when they discover that individual bargaining power is impotent in the face of the collective bargaining power of corporate and organized capital and management. As in the case of trade associations, not all the individuals affected by the imputed interest necessarily believe in the values of collective action. Unions also face problems of education, which they meet by publicizing the economic, recreational, and political services they render their members. Some such program is usually essential in order to convince wage-earners of the values of control and limitation of their hypothetical personal economic freedom by collective group-sanctioned rules. The unions' problems of education, however, is complicated by the opposi-

lective Bargaining," *Encyclopaedia of the Social Sciences;* National Labor Relations Board, *Written Trade Agreements in Collective Bargaining* (Washington: Government Printing Office, 1940). Cf. *Consolidated Edison Co. of N.Y.* v. *National Labor Relations Board*, 305 U.S. 197 at 236: "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." Also *Virginian Railway Co.* v. *U.S.*, 300 U.S. 515 (1937).

[31] Selig Perlman, *A Theory of the Labor Movement* (New York: Macmillan, 1928), chap. vii, and "Trade Agreements," *Encyclopaedia of the Social Sciences*, XIV, 667; W. M. Leiserson, *Right and Wrong in Labor Relations* (Berkeley: University of California Press, 1938), p. 37. The business character of a labor organization was denied by Commons and Andrews (*op. cit.*, p. 127), but the objective of unions as that of establishing one agency for the marketing of labor in a particular bargaining unit was finally established by the National Labor Relations Act, 49 Stat. 449, sec. 9(*a*) (1935): "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

tion of employers claiming undivided power over the right of the worker to his job. With the exception of a few industries in which unions had fought for and won an established status generally acquiesced in by employers, by far the greater part of industry prior to 1933 had maintained an antiunion, open-shop policy. This was implemented, on occasion, by a variety of coercive and discriminatory practices which were justified on the theory, upheld by the courts until 1930, that the property rights of employers included the right to discriminate against individual employees for union membership, to establish, dominate, and maintain puppet organizations, and to refuse to deal with representatives chosen by their employees for purposes of collective bargaining.[32] The Railway Labor Act of 1926 and the Norris–La Guardia Anti-injunction Act of 1932 first proclaimed the public policy with respect to the right of labor to organize and to select representatives of their own choosing for purposes of bargaining collectively with their employers. This right was reaffirmed by section 7(*a*) of the National Industrial Recovery Act. The widely varying interpretations placed upon this clause by employers resulted in the explicit interpretations by Congress of the right to organize contained in the National Labor Relations Act of 1935.

To insure the stability of their organizations, unions have attempted to secure contracts with employers making membership in the union a condition of employment or, failing certain variations of this principle, to maintain the right to refuse to work with nonunion labor. This position may undergo modification as a result of the establishment by the Railway Labor Act and the National Labor Relations Act as sole bargaining agent any union which represents a majority of

[32] The early cases of *Adair* v. *U.S.*, 208 U.S. 161 (1908) and *Coppage* v. *Kansas*, 236 U.S. 1 (1915), upheld the property-right doctrine against federal and state statutory protection of workers' right to organize. The reversal in trend was indicated in *Texas and New Orleans Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 584 (1930) and substantiated by a series of cases involving the National Labor Relations Act beginning with *N.L.R.B.* v. *Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937); cf. *Sen. Doc. 51* (75th Cong., 1st sess.).

employees in a unit appropriate for purposes of collective bargaining.[33] The Railway Labor Act already outlaws by implication the closed shop, and, while this probably will not be the immediate development in other industries, the establishment of the majority-rule principle, in the absence of unfair labor practices by the employer, indicates that strikes for exclusive recognition will be lessened in the future.[34]

Unions, as well as businessmen's organizations, have internal problems with respect to the basis of organization. They face competitive interests in the form of what is known as "dual unionism." This is not the peripheral jurisdictional dispute which arises between craft unions as to which shall perform the work on a particular job—a problem which has existed ever since the foundation of the American Federation of Labor in 1886. The competitive threat is the establishment of a rival federation of unions, organized on a different structural basis, striving to drive out the other. The A.F. of L. survived the challenge of the Knights of Labor in the 1880's, the Industrial Workers of the World in the 1900's, and the Trade Union Educational League and the Trade Union Unity League in the 1920's. Actually, many unions within the A.F. of L. are organized on an industrial basis, and it is generally agreed that the purely craft union within the A.F. of L. has been almost universally succeeded by the amalgamation of crafts and trades.[35] The organization and expulsion of the Committee (now Congress) of Industrial Organization from the A.F. of L. in 1935–36 set up two national organizations, each committed to a policy

[33] Pub. No. 442 (73d Cong. [1934]), sec. 2, Fourth; Pub. No. 198 (74th Cong. [1935]), sec. 9. These sections have been construed by the Supreme Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937); *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401 (1940).

[34] Railway Labor Act, sec. 2, Fifth: N.L.R.B., *Third Annual Report, 1938*, p. 286; testimony of Senator Robert F. Wagner, *Hearings before Senate Committee on Education and Labor on S. 1000, 1248, and Other Bills* (76th Cong., 1st sess. [1939]), pp. 3–26.

[35] Twentieth Century Fund, *op. cit.*, pp. 33–42; "A.F. of L. Plan Endangers Itself," *New York Times*, June 4, 1939.

of fighting the other, the more unfortunate in that several of the jurisdictions successfully established by the C.I.O. covered mass-production industries in which the A.F. of L. claims of jurisdiction were no more than theoretical.[36] The struggle not only has had bitter repercussions in state federations and local organizational work but endangers the present legal guaranties of the rights to self-organization embodied in the National Labor Relations Act.

Collective bargaining has broad implications in its social aspects,[37] and perhaps no other field in labor relations is subject to so many opposing evaluative judgments. Prior to the acceptance of the principle, it is wholly natural that capital and management should resist unions as a threat to their prerogatives. Up to the point of such acceptance, there is a tendency to assume that employees' welfare is dependent upon their employers' welfare, from which it follows that what the employer feels to be right policy is the appropriate index to the employees' best interests. It is not until after the acceptance of the principle of collective bargaining that the ensuing process reveals to both sides that there are large areas of function in which there is no essential conflict of organized or group interest. Conflict seems to be necessary and inevitable when the parties choose to narrow the issues to (1) a struggle for the control of management or (2) the principle by which the re-

[36] The International Ladies Garment Workers Union, *The Position of the I.L.G.W.U. in Relation to the A.F. of L. (1934–1938)* (published by the I.L.G.W.U. in New York, December, 1938). See Louis Stark, "The Labor Wars," *Yale Review*, autumn, 1939; Report of the Executive Council of the A.F. of L., *Proceedings: 59th Annual Convention of the American Federation of Labor (1939)*, pp. 75–91.

[37] "Collective bargaining . . . . is a technique whereby an inferior social class or group carries on a never-slackening pressure for a bigger share in the social sovereignty as well as for more welfare, security and liberty for its individual members. . . . . It derives its emotional impetus from a desire to bring one's own class abreast of the superior class; to gain equal rights and consideration for the members of that class with the members of the other class" (Selig Perlman, "The Principle of Collective Bargaining," *Annals of the American Academy of Political and Social Science*, March, 1936, p. 154).

spective shares of the income of the productive organization shall be apportioned in wages. Collective bargaining educates wage-earners as to the necessity for differentiating the functions of management and labor, and it usually convinces both

TABLE 3

ESTIMATED MEMBERSHIP OF TRADE-UNION ORGANIZATIONS: 1940

	Membership
American Federation of Labor*	
105 national and international unions	4,061,024
1,416 local trade- and federal labor unions	186,419
	4,247,443
Congress of Industrial Organizations†	
39 national and international unions	3,531,873
84 local industrial unions	18,627
	3,550,500
Unaffiliated unions‡ (1936–37)	402,120
Government unions§	183,624
	585,744
Grand total	8,383,687

* *Report of Proceedings: Sixtieth Annual Convention, American Federation of Labor* (1940), pp. 44–56 (per capita tax membership).

† *Daily Proceedings: Third Constitutional Convention, Congress of Industrial Organizations* (1940), pp. 21–30 (membership vote in convention).

‡ Taken from R. R. R. Brooks, *When Labor Organizes* (New Haven: Yale University Press, 1937), pp. 340–43 These figures check with those used in individual cases by H. Harris (*American Labor* [New Haven: Yale University Press, 1939], p. 249) and Leo Wolman (*Ebb and Flow in Trade Unionism* [New York: National Bureau of Economic Research, 1936], pp. 172–93). This figure of 402,120 is in all probability an underestimate. Brooks believes it should be in excess of 750,000

§ Brooks, *op. cit.* R. A. Lester (*Economics of Labor* [New York: Macmillan, 1941], pp. 550, 561) estimates a total union membership of 8,700,000 in 1940, a proportion of 22 per cent to total wage-earners in the United States.

sides of the advisability of restricting the overt struggle of outright conflict to as short a period as possible, ending with the joint determination of the method of distribution for a fixed period during which the productive process can go on for the benefit of all interests. Collective bargaining, in so far as it results in a realization on the part of both interests of the

values of joint participation in and responsibility for the welfare of the particular industry, trade, or branch thereof, is definitely an influence toward increasing the scope of voluntary collective action and lessening the need for direct government controls. Such tendencies have been called experiments in "industrial government."[38]

Practices constituting the foundations of industrial government are, on the employers' side, offering the union security of existence by making union membership a condition of employment, by agreeing to an impartial arbitration of grievances and disputes under a basic working agreement, and by recognizing workers' rights in their jobs. The unions' obligations consist of their accepting responsibility for preventing stoppages of work while the agreement is in force, co-operating in the establishment of standards of production or labor cost, abiding by the duly established methods of grievance procedure, and accepting standardized, reasonable tests of efficiency on the job. Many persons look upon the relatively inflexible features of such contractual arrangements, called "working rules," which are intended to give workers a greater degree of security of tenure, as incompatible with productive efficiency.[39] While it is true that many of these rules or practices have grown out of experiences with conditions which no longer prevail, it is not necessarily true that their abolition would result in savings to the consumer or in improved working conditions for the employees giving them up. In some cases working rules, particularly those involving jurisdictional disputes as to who should perform the work, are unnecessary and unreasonable, but in many others working rules involve increases in labor costs which are less expensive if made a part of the fixed costs

[38] *Ibid.*, p. 159; L. L. Lorwin, *The American Federation of Labor* (Washington: Brookings Institution, 1933), p. 315; J. R. Commons *et al.*, *Industrial Government* (New York: Macmillan, 1921).

[39] Henry Dennison, "Labor and the Goals of Industry," *Annals of the American Academy of Political and Social Science*, March, 1936, p. 49; Sumner Slichter, *Union Policies and Industrial Management* (Washington: Brookings Institution, 1940), *passim.*

of doing business than if they are thrown on to the government or made the subject of continuous haggling or open economic warfare with the attendant loss to employer, employee, and community.[40]

It has been suggested that the process of collective bargaining involves a mutual consideration of other interests and an ability on the part of capitalists and labor leaders to discriminate between necessarily conflicting interests and those which are not. This understanding is based upon the self-regarding interests of both groups. It is an enlightenment developed through a process of learning that the group's own self-interest is promoted by taking into account the demands of other interests. The union's ability to do so is limited by the fact that it must, in order to retain its members' loyalty, continue to improve their conditions of employment as well as establish organizational security and job control. Emphasis on the former objective heightens the impression of immediate conflict of interest with creditors, stockholders, or recipients of profit. Concessions by employers on the issue of organizational security help to break down the insistence by union officials upon immediate material gains. Such concessions sometimes result in the sharing of operating responsibilities between employer management and union management, and, although this is the area in which the general interests of employer and employee are least diverse, in all except the most advanced stages of labor relations, it is on this issue that the lines of emotional conflict are most sharply drawn. The psychological level of tension is heightened by the apparent threat to the prerogatives of management, and the consequent belligerency on that side tends to be countered by the unions' demand for a greater share in the control of management than they usually are prepared to assume responsibility for.[41]

[40] J. M. Clark, *Social Control of Business* (Chicago: University of Chicago Press, 1926), pp. 128–31.

[41] Carter Goodrich, *The Frontier of Control* (New York: Harcourt, Brace, 1920), and Sidney and Beatrice Webb, *Soviet Communism: A New Civilization?* (London: Longmans, 1935), chap. vii, contain suggestive examples of workers'

It is in the less advanced stages of collective bargaining that the law-enforcement functions of the National Labor Relations Board are necessary or important, that is, when the rights of union organization and the principle of the written collective agreement are actively contested by employers. The experience of the railroad industry, where unionism has the longest continuous history of development, is that when these principles are established the role of government regulation may be confined to three functions: the establishment of appropriate units for collective bargaining and conduct of elections therein, the intervention in a mediatory capacity to bring the parties together in order to effect a settlement of their differences, and the investigation and publicity of the issues in a dispute, with recommendations as to their solution, but without power to enforce them.[42] These functions, however, are based on certain preconditions: the absence of restraints on union membership, the limitation of the right to strike or to change conditions of employment while the statutory procedure is in operation, the acceptance by both sides of the principle of arbitration of disputes arising out of the interpretation or application of agreements. In the regulation of railroad labor relations, primary legislative powers are exercised by the representative organizations of the carrier and employee interests.

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failure to perform management and financial functions. See also Carl Schmidt, *The Corporate State in Action* (New York: Oxford University Press, 1939), chap. ii, for an account of the Italian workers' occupation of the factories in 1920.

[42] National Mediation Board, *First Annual Report (1935)*; *Investigation of the Executive Agencies of the Government: Sen. Doc. 1275* (75th Cong., 3d sess. [1937]), pp. 989–99. Under the Railway Labor Act amendments of 1934 a separate National Railroad Adjustment Board was established to perform the arbitration work under the agreements. District attorneys and the courts are charged with the duties of punishing violations of employees' rights of organization. For a survey of German experience from 1919 to 1933, suggesting that the function of arbitration by government officials be severely restricted and closely watched by union organizations, see the study of F. Wunderlich, *Post-war Regulation of Labor Relations in Germany* (New York: New School of Social Research, 1940).

THE FARMERS' BARGAINING CO-OPERATIVE

In turning from the marketing organizations of wage-earners to those of farmowners and enterprises, one is immediately impressed by the less universalized clash of interests. The interest conflicts of grower-producers and processor-distributors have not become entangled with and complicated by political movements reflecting changes in the power position and prestige of social classes to at all the same degree as in the labor movement. The interests of farmers and processors, perhaps because both groups are property-owners, are less confused with emotional symbols, and these interests can be located relatively quickly in their economic and legal aspects.

As in the case of trade associations, co-operative associations of farmers have assumed a variety of functions at different times and circumstances. Farmers have organized co-operative agencies not only for bargaining as to terms of the exchange of agricultural commodities with manufacturers, processors, and dealers but for the performance of processing and distributing functions as well.[43] The several types of marketing associations have been found to vary with the commodity dealt with, the purely bargaining associations having their greatest development in the marketing of milk and dairy products (Table 4).[44] This type of association has been defined as "an organization of producers who are under contract with the association and with each other to sell through the association to such buyers and distributors who will pay a price agreed upon as being a fair price based upon cost of production and conditions in the manufactured milk products markets at the time of bargain-

[43] U.S. Farm Credit Administration, *A Statistical Handbook of Farmers' Co-operatives* (Washington: Government Printing Office, 1938), pp. 38–39; W. W. Fetrow, *Co-operative Marketing of Agricultural Products* (Washington: Government Printing Office, 1936), p. 22; R. H. Elsworth (*Statistics of Farmers' Co-operative Business Organizations: 1920–1935* [Washington: Government Printing Office, 1935]) distinguishes bargaining associations from (1) local associations, (2) federations of local units, (3) terminal market sales agencies, (4) large-scale centralized associations, (5) service associations.

[44] Elsworth, *op. cit.*, pp. 6–9.

ing."[45] Purely bargaining associations perform no processing or marketing functions, and their members deliver the product directly from the farm to the processor or dealer.[46] The association negotiates with these buyers, individually or collectively, as to prices for quantities and grades to be delivered for specified periods.

The principal instrument conditioning the operations of agricultural co-operative marketing associations is the mem-

TABLE 4*

MEMBERSHIP AND VOLUME OF BUSINESS OF PRODUCER MARKETING ASSOCIATIONS BY COMMODITY GROUP: 1934–35

Commodity Group	Associations Listed with F.C.A.	Membership	Estimated Business ($1,000)
Dairy products	2,300	750,000	440,000
Grain	3,125	580,000	315,000
Livestock	1,197	410,000	175,000
Fruits and vegetables	1,082	158,000	200,000
Cotton and products	305	255,000	100,000
Purchasing	1,906	790,000	187,000
Others—wool, poultry, tobacco, and miscellaneous	785	337,000	112,900
Total	10,700	3,280,000	1,529,900

* *Source:* R. H. Elsworth, *Statistics of Farmers' Co-operative Business Organizations: 1920–1935*, p. 17.

bership contract between the individual producer and the association, whereby the producer either appoints the association his agent for the sale and marketing of his produce (agency contract) or he agrees to sell and the association agrees to buy his produce subject to specified conditions (purchase-and-sale

[45] Federal Trade Commission, *Co-operative Marketing: Sen. Doc. 95* (70th Cong., 1st sess. [1928]), p. 239.

[46] *Ibid.*, p. 27. The small number of bargaining co-operatives is somewhat offset by their larger membership and volume of business (see Fetrow, *op. cit.*, pp. 29–32).

contract).[47] The control of supply that the trade-union attempts to secure through the sole bargaining agency or union-shop contract with the employer, the agricultural co-operative approaches through these membership contracts.

The economic origin of bargaining associations for dairy products is generally attributed to a long-term trend toward the "segregation of the units of milk production from the units of milk distribution," with the concentration of the functions

TABLE 5*

NUMBER AND PERCENTAGE OF TOTAL VOLUME OF BUSINESS FARMERS' CO-OPERATIVE DAIRY ASSOCIATIONS, BY PRINCIPAL TYPE OF BUSINESS: 1934–35

Type of Business	Number	Per Cent of Total Estimated Volume of Business
Butter-manufacturing	1,388	38 0
Cheese-manufacturing	617	3 6
Milk-distributing	110	20.4
Milk-bargaining	87	33 9
Miscellaneous	98	4 1
Total	2,300	100.0

* *Source:* R. H. Elsworth, *Statistics of Farmers' Co-operative Business Organizations: 1920–1935*, p. 33.

of distribution (purchasing, transporting, processing, and retailing) in the hands of a relatively few distributors in any given marketing area.[48] Dairy farmers found themselves in the position of a large number of small, unorganized sellers facing a very few highly organized buyers with large capital investments. Milk-producers began to organize on the selling side of

[47] Federal Trade Commission, *Co-operative Marketing*, pp. 331–33; L. S. Hulbert, *Legal Phases of Cooperative Associations* (U.S. Department of Agriculture Bull. 1106 [Washington: Government Printing Office, 1929]), pp. 46–62.

[48] U.S. Department of Agriculture, Agricultural Adjustment Administration, E. W. Gaumnitz and O. M. Reed, *Some Problems Involved in Establishing Milk Prices* (Washington, 1927), pp. 20–25; C. L. King, *The Price of Milk* (1920).

the market to equalize the bargaining strength of the dealers on the buying side. The control of supply aimed at through co-operative organization was originally, as in the case of trade-unions, held to be in violation of the common-law prohibitions of combinations or conspiracies in restraint of trade,[49] but state and federal legislation has since legitimized farmer and labor organizations as appropriate forms of combination to control the process of marketing agricultural products and the services of labor, just as the corporate organization of capital does not of itself constitute a violation of the laws prohibiting restraints of trade.[50]

[49] Federal Trade Commission, *Co-operative Marketing*, pp. 336–43; Hulbert, *op. cit.*, pp. 78–92.

[50] *U.S.* v. *Rock Royal Co-op. Inc. et al.*, 59 Sup. Ct. Rep. 993, at 1008. Note 27 of the Court's opinion contains a lengthy citation of cases on this point (cf. I. Packel, *The Law of the Organization and Operation of Co-operatives* [Albany: M. Bender, 1940]; E. G. Nourse, *The Legal Status of Agricultural Co-operation* [Washington: Brookings Institution, 1927]). Pub. No. 212 (63d Cong. [1914]), sec. 6, provided: "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural and horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws." The Capper-Volstead Act of 1922 (42 Stat. 388) provided: "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate commerce such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; Provided, such associations are operated for the mutual benefit of the members thereof, ... and subject to the following requirements: (1) no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, and (2) the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum; (3) the association does not deal in the products of nonmembers to a greater amount in value than such as are handled by it for members."

Generally, for the background of restrictions upon voluntary organizations see F. W. Maitland, *Collected Papers*, III, 321–418; A. V. Dicey, *Lectures on the*

The effectiveness of bargaining co-operatives is often threatened by dealer-distributors who, by buying from nonmembers of the associations at less than the bargaining agreement prices, may threaten the stability of these agreements maintaining higher prices to producers. Another threat to stability may be the failure of the association to secure reports and adequate audits of milk utilization by the dealers, so that the payments to association members will be properly made according to the arrangements for pooling of milk and classified prices to be paid as the milk is utilized by the dealer. Third, co-operatives do not control the output of their members. Hence, favorable prices may have the effect of so increasing the supply of the commodity that the agreed upon price structure is threatened by large surpluses. If prices have to be reduced and the co-operative officials are forced by reason of these surpluses to assent to the reductions, members may cancel their contracts with the association.[51]

Although in many local milk-marketing areas bargaining co-operatives had attained an important position, their activities were supplemented during the depression years prior to 1933 by at least fifteen state laws providing for state milk control boards to fix prices of milk for various markets, to license dealers, and revoke these licenses for cause.[52] These laws were supplemented by the federal Agricultural Adjustment Act of 1933, which authorized the Secretary of Agriculture to enter

Relations between Law and Public Opinion in England in the Nineteenth Century (1905), pp. 189 ff.; Commons and Andrews, *op. cit.*, chap. iii; D. Lloyd, *The Law of Unincorporated Associations* (London: Oxford University Press, 1938).

[51] These problems are discussed in Gaumnitz and Reed, *op. cit.*, chaps. ii, v; and in Federal Trade Commission, "Summary Report on Conditions with Respect to the Sale and Distribution of Milk and Dairy Products" (mimeographed [Washington, January 4, 1937]), pp. 20–27.

[52] S. B. Weinstein, attorney of the Oregon Milk Control Board, "Summary of Present Legal Opinions on Milk Control Legislation" (mimeographed [1935]), p. 5. The states were Alabama, Florida, Indiana, Kentucky, Maine, Massachusetts, Montana, New Jersey, New York, Ohio, Oregon, Pennsylvania Rhode Island, Virginia, Wisconsin. See also L. L. Jaffe, "Law-making by Private Groups," *Harvard Law Review*, LI (1937), 201, 227.

into marketing agreements with processors and handlers of milk, producers and associations of producers, with respect to the handling of milk in the current of interstate commerce or directly burdening, obstructing, or affecting such commerce. These agreements were at first accompanied by licenses permitting processors or producers to engage in the handling of such milk, but amendments in 1935 and 1937 substituted orders applicable to the marketing area covered by the agreement.[53] The federal law permitted the establishment of a milk-marketing program in a local area without a license or order, but in that event it was applicable only to those handlers signing it. On the other hand, orders might go into effect without the consent or agreement of the handlers if approved by two-thirds of the producers, by number or volume, in the area during a representative period determined by the Secretary. Marketing programs under all these laws were based upon the practices developed by voluntary bargaining arrangements between co-operative associations and dealers prior to the enactment of these laws. Producer-owned and controlled co-operatives took the initiative in asking for re-enactment of the authority for marketing agreements after the production-control features of the law were declared unconstitutional in 1936, and these co-operatives have taken advantage of the statutory opportunity of securing administrative orders in the face of distributor opposition or refusal to sign agreements.[54]

The Agricultural Adjustment Act of 1933, as amended, and the Agricultural Marketing Agreement Act of 1937 are complicated documents, but one thing stands out clearly in both of them, namely, that the legal responsibility for promulgating

[53] Pub. No. 137 (75th Cong. [June 3, 1937]), sec. 8*c* (Agricultural Marketing Agreement Act of 1937), re-enacting, amending, and supplementing the Agricultural Adjustment Act, Pub. No. 10 (73d Cong. [May 12, 1933]), Title I, as amended by Pub. No. 320 (74th Cong. [August 24, 1935]).

[54] Letter to the writer from C. W. Holman, secretary, National Co-operative Milk Producers Federation, December 20, 1939; cf. annual reports of the Federation, entitled *Dairy Problems: 1937*, p. 9; *Dairy Problems: 1938*, p. 8; *Dairy Problems: 1939*, p. 6.

marketing licenses and orders rests squarely upon the Secretary of Agriculture. It would be impossible to understand the statutes, however, to say nothing of the content of the administrative orders issued thereunder, unless the primary interests of the economic groups, as implemented by practices of bargaining arrangements evolved over a period of years, are grasped by the observer. The legal verbiage of the statutes can then be interpreted as a delegation by the economic associations to a public agency of authority to administer agreed upon terms of a complex marketing plan in specified areas. In the light of such practices, trade-unions which have not developed reliance upon or delegation to government of legislative authority over the terms of exchange (excepting perhaps the advocacy of minimum-wage standards) exhibit less of a "socialistic" trend than the interests of "capitalistic" farmer-producers. However, the qualification has to be made that the procedure of the Agricultural Marketing Agreement Act requires extraordinary majorities of favorable producer opinion before an official order may take effect, so that Act falls short of completing the transition from private to governmental initiative, which is usually regarded as the distinguishing feature of socialistic administration.

THE MERCANTILE STOCK AND COMMODITY EXCHANGE

In a developed stage of mature capitalism, the institutionalized interests of the traders in negotiable securities and commodities perhaps receive less emphasis than they did in the formative periods of earlier centuries.[55] Aside from their historical importance, however, the stock and commodity exchanges, largely developed through the initiative of private trading interests, have recently acquired a new significance in the technique of administrative regulation by public authority.

[55] See, generally, H. Sée, *Modern Capitalism* (New York: Adelphi, 1928); W. Sombart, *The Quintessence of Capitalism* (New York: Dutton, 1915); J. R. Commons, *Legal Foundations of Capitalism* (New York: Macmillan, 1924).

After a very brief survey of the interests implemented by stock and commodity exchange organization, we shall attempt to outline this development.

There are marked similarities between open-price associations and exchanges. Both are organized groups of traders providing a common meeting ground and a continuously-functioning mechanism for recording the market operations of their members. But while open-price associations are made up solely of sellers in the particular market with respect to which they are organized, exchanges are composed of both buyers and sellers, or more accurately, of traders who buy as well as sell in the same market. . . . . In the long run all the members of the association, being exclusively sellers with reference to the particular market, are guided by common interests. But since the membership of a genuine exchange represents both buyers and sellers, subject to conflicting interests in the course of prices, no concert of action is developed touching the level of bids and offers or the volume of dealings. While the recorded operations exert a vital influence on the course of prices, it is an influence untainted, *in the absence of conscious manipulation*, by agreement or understanding among the associates in the exchange. [Italics mine.][56]

Recent investigations have revealed that the combination of the functions of the floor trader or dealer and the commission broker in the same person may be conducive to considerably more manipulation than was indicated by the National Industrial Conference Board report quoted above.[57] However, it does not appear that such practices necessarily reflect conflicts of interest within the exchange. They indicate, rather, an identification of function which may prevent the ideally perfect play of competitive forces that unorganized groups outside the exchange would prefer to prevail.

From the organizational standpoint, members of a stock exchange, whether buyers or sellers, are united by a common

[56] National Industrial Conference Board, *op. cit.*, pp. 98–99.

[57] "Investigation of Stock Exchanges," *Hearings before Senate Committee on Banking and Currency* (72d Cong., 2d sess. [1932–33]); C. A. and M. R. Beard, *America in Midpassage* (New York: Macmillan, 1939), I, 149–91; Securities and Exchange Commission, *Report on the Government of Securities Exchanges, January 24, 1935: House Doc. 85* (74th Cong., 1st sess.); *Report on the Feasibility of Segregating the Functions of Dealer and Broker* (Washington: Government Printing Office, June 20, 1936).

interest to eliminate competition between traders forcing downward the level of the price for their services in negotiating security transactions. The following agreement among a group of New York brokers was associated with the origin of the New York Stock Exchange:

> We, the subscribers, brokers for the purchase and sale of public stock, do hereby promise and pledge ourselves to each other that we will not buy or sell, from this day for any person whatsoever any kind of public stock at a less rate than one-quarter per cent commission on the special value, and that we will give preference to each other in our negotiations.[58]

From this community of interest has grown the institution which regulates the marketing, through 600 member-firms and approximately 1,375 individual members, of approximately 85 per cent of the listed share transactions in the country.

The Board of Trade of the city of Chicago, organized in 1848, was incorporated in 1859 with the following preamble:

> The objects of the Association are: To maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and dissimenate valuable commercial and economic information; and generally, to secure to its members the benefits of co-operation in furtherance of their legitimate pursuits.[59]

The Board of Trade, through approximately 1,500 members and 491 member-firms in 1936, is the market in which annually about 85 per cent of the hedging transactions in grain-futures contracts is completed in the United States.[60]

Both the Exchange and the Board have developed a complicated governmental structure through their Constitution and *Rules and Regulations*. Through this organization the affairs of

[58] Twentieth Century Fund, *The Securities Markets* (New York: McGraw-Hill, 1935), pp. 220–22; J. E. Meeker, *The Work of the Stock Exchange* (New York: Ronald Press, 1930), p. 63.

[59] Board of Trade of the City of Chicago, *Rules and Regulations* (1938), p. 2.

[60] U.S. Department of Agriculture, Commodity Exchange Administration, *Annual Report, 1936*, p. 3; *Annual Report, 1938*, p. 4.

the market, the relations of its members to one another, to their customers, and to the general public are governed. Court decisions have recognized an autonomous power in exchanges and boards of trade to restrict membership,[61] to limit trading in securities or commodities by the device of "listing" or the establishment of selling grades or standards, to control members' relations with clients or customers, and to make internal regulations governing the adjustment of disputes over trading transactions. Judicial sanction of this private rule-making thus has almost eliminated the exchanges' organizational problem. These rules and practices are quite complex. The New York Stock Exchange *Constitution* of 1933 was composed of twenty-six articles and with the *Board of Governors' Rules* comprised one hundred and twenty-five closely printed pages. The Chicago Board of Trade's *Rules and Regulations* contained thirty-six chapters and included over eighteen hundred separate definitions, rules, and provisions.

Institutions with as long a history of self-governing practices as these naturally do not submit readily to outside interference and are characterized by an attitude of extreme distrust toward politics. The fluctuations in stock or commodity values, for which exchange members themselves may not be directly responsible, are often attributed by the outside farming or investing interests to controlled manipulation on the part of exchange members. In many cases it appears to outsiders that such fluctuations should have been prevented by the governing bodies of the exchanges, and discoveries of manipulation, when revealed, have added to the fuel for demands of public regulation. The Grain Futures Acts of 1921 and 1922,[62] the

[61] *People* v. *Chicago Board of Trade*, 224 Ill. 370 (1906); *Board of Trade* v. *Christie Grain and Stock Co.*, 198 U.S. 236 (1905); *Anderson* v. *U.S.*, 171 U.S. 604 (1898); *Chicago Board of Trade* v. *U.S.*, 246 U.S. 231, 238 (1918). The power of exchanges to restrict members' dealings with nonmembers is not so certain (*U.S.* v. *New England Fish Exchange*, 258 Fed. 723 [1919]). In this connection see the opinion and order of the Securities and Exchange Commission, *In the Matter of the Rules of the New York Stock Exchange, October 6, 1941* (Release No. 3033), which was not appealed to the courts by the Exchange.

[62] 42 Stat. 187 (1921) and 42 Stat. 998 (1922).

Commodity Exchange Act of 1936,[63] and the Securities Exchange Act of 1934[64] represent delegations of power to administrative agencies to control the conduct of individual traders not only directly but through regulation of the exchanges themselves.[65] This control is exercised by mandatory registration accompanied by full and accurate information with respect to the securities being registered. The exchange itself must be registered or licensed also, and conditions of registration include filing of periodic reports as to the volume of trading, by stock or commodity, and by individual trader. Responsibility for the conduct of their members is placed upon the exchanges and enforced by sanctions applicable to the exchange as a whole. The public agency assumes a role of residual supervision over the exchange organization, which in turn is presumed to exercise the primary duties of self-regulation and self-discipline.[66]

THE CONSUMER

In the foregoing pages we have been concerned with analyzing the conflicts of organized-producer interests and their relations to public policy. These interests are marked by their special vocational character as opposed to the unorganized universal interest of man as a consumer. Some writers have explained the eclipse of the consumer interest by the producer associations organized around vocational or functional interest by pointing out that human beings' concern over earning their living psychologically (i.e., both in time and by socially con-

[63] 49 Stat. 1491 (1936). [64] Pub. No. 291 (73d Cong. [1934]).

[65] *Ibid.*, secs. 5, 6, 19(*a*)–19(*c*), and 32.

[66] Securities and Exchange Commission, *Fifth Annual Report, 1939*, p. 38. This philosophy of administration has been expressed by successive chairmen of the Securities and Exchange Commission. See official press releases of the Commission: (1) dated September 12, 1935, letter of Joseph P. Kennedy to B. H. Griswold, chairman of the Investment Bankers Code Committee; (2) dated September 30, 1935, announcement that the S.E.C. had asked the I.B.C.C. to co-operate with the Commission as a consultative committee, accompanied by a letter of James M. Landis, then chairman; (3) address of William O. Douglas to the Bond Club of Hartford, January 7, 1938, especially pp. 4–5.

ditioned habit) precedes their general interest as consumers.[67] It is true that women's organizations and consumers' leagues purport to represent the general consumer interest, but when they are effectively organized their activity is concentrated upon support of special objectives, such as lower prices, higher minimum wages for women, elimination of child labor, and so on. A further weakness of consumer organizations is their lack of effective economic strength. Economic power depends upon a collective ability to withhold or to withdraw goods or services demanded by other economic groups. Consumer organizations too often are organized around the intellectual interests of scattered individuals and are not organized so as to exert a compelling influence over particular producers in the market. For this reason consumers' general interests in low utility rates or commodity prices are often far more effectively represented by producer organizations that are not primarily consumers but whose costs are adversely affected by material and supply prices.[68]

In view of this lack of an organized group constituency, an idealistic assumption has arisen that the government should, if it does not, represent consuming interests. It is notorious, however, that governmental bodies engaged in research to protect the consumer by letting him know what he is buying, such as the Bureau of Agricultural Economics, the Bureau of Chemistry, the Food and Drug Administration, the Bureau of Standards, are continually hampered by the opposition of producer groups not effectively counterbalanced by consumer organizations except as other producer groups may be favorably affected by the results of research.[69] This is also true of the work of the Food and Drug Administration and the Federal

[67] Sidney and Beatrice Webb, *A Constitution for the Socialist Commonwealth of Great Britain* (London: Macmillan, 1920); H. M. Kallen, *The Decline and Rise of the Consumer* (New York: Appleton, 1936); "The Consumer and the New Deal," *Annals of the American Academy of Political and Social Science*, May, 1934, p. 7.

[68] Saul Nelson, "Representation of the Consumer Interest in the Federal Government," *Law and Contemporary Problems*, VI (Winter, 1939), 154.

[69] Herring, *op. cit.*, pp. 250–56.

Trade Commission in exposing and prohibiting acts of misrepresentation and deception, although the Federal Trade Commission has self-initiating powers of a prosecuting nature which the research agencies do not possess. Unimplemented by the activities of a so-called group constituency, government agencies, to whom the task of representing or protecting a general consumer interest is delegated, are extremely handicapped.

It was an event of no small significance, therefore, when a consumer interest was recognized in the establishment of the office of a Consumers' Counsel within the administration of the Bituminous Coal and Agricultural Adjustment acts.[70] The incumbents of these offices have found, however, that their most serious problem is the lack of support in the face of organized groups opposing their activities. Their position, in a situation characterized by the desires of producer groups and the administration for immediate positive action, often succeeds in being little more than obstructionist. Their positive achievements seem to have been mainly of a research character.[71] Appropriate and extensive recognition has been accorded

[70] Pub. No. 48 (75th Cong. [1935]), sec. 2(*b*) (1), provided: "There is hereby established an office in the Department of the Interior to be known as the consumer's counsel of the National Bituminous Coal Commission. The office shall be in charge of a counsel to be appointed by the President by and with the advice and consent of the Senate. . . . . It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters relative to the coal industry and the administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission.

"The Counsel shall annually make a full report of the activities of his office directly to the Congress."

The A.A.A. Consumers' Counsel is appointed by the Administrator and has no statutory authority for his activities.

[71] Interviews with Donald Montgomery, Consumers' Counsel, A.A.A. (February, 1938), and John Carson, then consumers' counsel, National Bituminous Coal Commission (April, 1938). Cf. J. M. Gaus and L. O. Wolcott, *Public Administration and the United States Department of Agriculture* (Chicago: Public Administration Service, 1940), pp. 202–7; P. Campbell, *Consumer Representation in the New Deal* (New York: Columbia University Press, 1940), pp. 93–98, 249–61.

this work and the objectives of the Consumers' Counsel in the annual reports of the A.A.A.

SUMMARY

Despite the brevity of this survey of the conflicts between economic interests and the relationships between group organizations and statutes embodying public policies of regulating these interests, it is clear that public policy, even if viewed generically as a resultant of group pressures, does not follow a uniform pattern. In one case public policy promotes conflicts of individual competitive interest, leaving to administrative agencies and the courts the problems of clarifying the cooperative group activities in which competitive enterprises may appropriately engage. In another case it encourages a process of nongovernmental collective action between highly organized groups, in which public administration intervenes only to prescribe restraints on the process and to facilitate voluntary agreements. In a third example public policy was observed to impose on the administrative agency price-fixing and executing duties which the traditional economic-exchange mechanism has not performed to the satisfaction of the politically powerful farmer group. Fourth, public policy has utilized the group organization and practices, in the case of stock and commodity exchanges, to control their members' business conduct by establishing a governmental supervision over the group in addition to an ultimate sanction over individual conduct.

The significance of these observations is not that the facts are novel, but the recognition of their institutional significance in public regulation has been so belated. Not public officials but economists and sociological jurists have made the significant interpretations.[72] In 1912 the Austrian, Eugen Ehrlich, pointed out:

[72] John R. Commons, "Bargaining Power," *op. cit.*: "Bargaining power does not emerge as a distinct subject for economic theory until legal support is furnished for concerted economic action. The two principal methods of concerted

The idea that law is nothing but a body of legal propositions dominates legal thinking today. . . . . But modern investigation of the normative significance of the factual, of the *Konventionregel* [a rule created by agreement between the parties] and of the practices of administrative boards has shown that [law] does not consist exclusively of legal propositions. . . . . In a much greater number of instances judgment is rendered upon questions of fact than of law. And the fact is a matter of the inner order of human associations as to which the judge or public official obtains information from the testimony of witnesses and documents, experts, contracts, agreements and declarations.[73]

But it is not only that the subject matter of administrative regulation is composed of group practices and customs that makes familiarity with and understanding of them an essential requirement among the administrator's qualifications. The possessor of such understanding is far less likely to interject arbitrary interpretations or preferences into his personal standards of official discretion. It is this part of the administrator's education which gives him that quality of judgment so necessary to the true expert.

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action are the corporative and the regulative. In the corporate form, individuals authorize a board of directors and a manager to make the bargains which legally bind the shareholders. Individual bargaining is thus eliminated. In the regulative method, however, the participants, whether individuals or corporations, yield to rules, laws or regulations which limit their individual or corporate bargaining power. Individual bargaining continues, but is limited. . . . . Bargaining power, with its sanctions of economic coercion rises to a pre-eminence even more comprehensive than the formerly dreaded political power with its physical coercion. Indeed, the state, either by its own act or by its permission of concerted action, becomes one of the instruments of bargaining power."

[73] *Principles of the Sociology of Law*, p. 35.

CHAPTER III

INTEREST REPRESENTATION IN ADMINISTRATIVE PROCEDURE

IN THE preceding chapter we surveyed several fields of social action in which public regulation grew out of the conflicts between special group interests. It may be asked, however, does this conclusion mean anything more than the well-recognized fact that administrative bodies operate in the midst, if not as a resultant, of group pressures?

While such an approach may be both realistic and fruitful,[1] the writer wishes to raise the question whether it is not more relevant when the observer is appraising the effect of legislation or administrative action in terms of the group interest favored or benefited in any particular case rather than when he seeks to describe the actual practices by which interests are personally represented in administrative procedures. When actual behavior is analyzed, it becomes evident that there are wide variations in the practices of different administrative agencies. Furthermore, from the standpoint of the group interests themselves, the forms through which such representation occurs are of varying importance. For example, in the administration of much of the legislation affecting agriculture, the public hearing is considered of far less importance as a device for influencing

[1] This approach seems to have been first generalized by A. F. Bentley in *The Process of Government* (1908). In "Some Reflections on the Nature of the Regulatory Process," Friedrich and Mason, *Public Policy*, I (1940), 298–99, Professor Fainsod has cogently pointed out its limitations: "In dismissing all regulatory instruments as mere pawns in a struggle among interests, this analysis misses the possibilities of functional objectification inherent in the very development of these instruments . . . . there is a tendency to underestimate the independent creative force and manipulative power which the wielders of these instruments acquire by virtue of their special competence or their strategic position. . . . . The skill with which [the regulatory agency] is able to build upon shared purposes or emergent communal aspirations will determine the success it enjoys."

policy than are personal contacts and conferences.[2] By way of contrast, in the administration of the Interstate Commerce Act, the general acclaim of the Interstate Commerce Commission as a model of administrative regulation both by students and by affected groups is generally attributed to its careful maintenance of the forms of judicial impartiality and restraint.[3]

In general, studies of interest representation in both administrative structure and procedure have been concerned primarily with the effect of official action upon group interests in the given field of regulation. Since the groups concerned, and the accompanying conflicts of interest, differ with each new field, such studies have usually adopted a classification of the material by agencies. This approach results in a description of the operations of separate agencies, such as the Bureau of Internal Revenue, the Department of Agriculture, the Federal Power Commission, and so on.[4] In the present chapter an alternative method is used, describing the procedural relations between group representatives and regulatory agencies in relation to the various forms of administrative action. By "forms" is meant the distinctive functions of administrative

[2] Herring, *Public Administration and the Public Interest*, p. 268.

[3] I. L. Sharfman, "The Interstate Commerce Commission: An Appraisal," *Yale Law Journal*, XLVI (April, 1937), 944–46; generally, see his *Interstate Commerce Commission*, especially Part IV (New York: Commonwealth Fund, 1938).

[4] In his pioneer study in 1927 Professor Comer (*Legislative Functions of National Administrative Authorities*, p. 201) pointed out: "Just what the procedure is in any particular department or special agency at any one time is difficult to get at: departmental practices are not for the outsider. . . . . Few departments give freely. . . . . Annual reports have contributed something. . . . . Congressional hearings or members' requests give some additional insight. . . . . Private persons help out now and then." If what one wants is personal knowledge of how an agency works, he has to get it from an employee or from a person in more or less continual contact with it. Personal friendship and obligation is of course the surest way of discovering what goes on. This is precisely the way the lobbyist works. It is necessary to distinguish, however, between interest representation as (1) personal influence, (2) policy or action favorable to a special group, (3) joint consultation between representatives of all affected groups.

regulation exercised under statutory grants of authority. We will adopt the classification suggested by Professor Freund in his *Administrative Powers over Persons and Property*. Freund identified five distinctive forms of administrative action under the headings of (1) summary powers—acts not requiring ultimate judicial sanction, (2) enabling, or licensing, powers—acts permitting individuals or groups to do business, (3) dispensing powers—acts exempting applicants from statutory provisions, (4) directing powers—acts determining rights and duties of parties in particular cases, and (5) examining powers—acts of investigation. In addition to these five forms of administrative action we shall add two others, namely, (6) legislative powers—acts prescribing general rules or directions of conduct and (7) mediatory powers—acts of conciliation and adjustment.[5] We shall also expand the specific meaning given by Freund to his category of examining powers, which he restricted to formal acts of requiring testimony and production of books and papers.[6]

These headings are not presented according to an ascending scale or degree of interest representation, because it is difficult to state the data in quantitative terms. Instead, they may be grouped, generally, into two types of procedural interest representation: (1) those in which the appropriateness of group participation in responsibility for the administrative act is doubtful and (2) those in which group participation in responsibility for administrative performance has potentialities of considerable practical value. We shall now take up the types of administrative authority under the first category.

[5] Freund excluded rule-making powers from his monumental survey as "legislative in substance." He was interested in excluding "legislative" from "administrative" powers, a distinction obviously of no relevance to the purpose of the present inquiry. He also excluded a distinct mediatory power of administration (but see *op. cit.*, pp. 80–84). Compare the classification of F. F. Blachly and M. E. Oatman (*Federal Regulatory Action and Control* [Washington: Brookings Institution, 1940], pp. 13–37).

[6] The noncoercive powers of public administrators are listed and discussed by Professor L. D. White in his *Introduction to the Study of Public Administration* (New York: Macmillan, 1939), chap. xxx.

I. JUDICIAL

SUMMARY POWERS

Summary powers of administrative authorities are those which they are permitted to exercise without judicial sanction or review. Traditionally, the areas of such authority in Anglo-American law are few because of the presumption that legal compulsion operates through the approval of a court of law. The principal areas thus exempted (at least in part), partly through judicial abdication, partly through statutory provisions, partly through the application of a doctrine of residual prerogative power in the state, are those of the public health and safety, public order, and the collection of revenue.[7] In these fields it is now generally settled that public officials may proceed under an official presumption of urgent necessity with the execution of their statutory and discretionary duties, including the seizure, sale, and destruction of property and temporary restraint of customary rights of personal freedom, without interference from the courts other than such subsequent restitution as may be forthcoming if the courts can be persuaded to consider issues of constitutionality or due process of law. In other fields powers have been delegated to administrative officials to close or take over insolvent banks, to exclude obscene or subversive written matter from the mails, and to impose restrictions on foreign ships and commerce.[8] A practically final power is vested in immigration officials to expel or exclude aliens, in whose cases there need be an administrative hearing only before the final decision on the facts is rendered.[9]

In such summary proceedings there is an implication that personal representations of interests will be eliminated. Since public hearings are not required, it appears that neither legis-

[7] John Dickinson, *Administrative Justice and the Supremacy of Law* (Cambridge: Harvard University Press, 1927), chaps. ix–x.

[8] Freund, *op. cit.*, pp. 196–204.

[9] Deportation orders can always be tested by habeas corpus in the courts (W. C. Van Vleck, *The Administrative Control of Aliens* [New York: Twentieth Century Fund, 1932], p. 149). See also H. C. Mansfield, "The Legislative Veto on the Deportation of Aliens," *Public Administration Review*, I, 281–86.

latures nor courts deem important the ordinary safeguards to affected interests, namely, publicity, opportunity to be heard and a public record of the trial, as against the consequences in such cases of not reposing summary powers in the public authority. In a system of law characterized by solicitude for individual liberty, there is a presumption in favor of limiting powers of summary action to classes of acts and cases which are relatively narrow in scope and determinate in character. Thus the problem of establishing the facts of a bank's insolvency, or of the existence of a contagious disease, while requiring the exercise of interpretation and judgment, is conceded to be a matter for technical experts, whose methods can be verified by other experts. The moral or conventional criteria applicable to the obscenity or subversiveness of written matter are obviously less determinate,[10] and there is a notorious lack of consensus as to the types of situations requiring the exercise of summary powers to maintain public order at the expense of civil and political liberties.[11] Properly defined, however, the situations in which summary powers should be applied are cases in which the public interest and statutory intent are specific or the crisis element is compelling. Hence joint representation of interests would serve no purpose except perhaps to bring facts to the public official's attention which he would not otherwise know, and this is properly the duty of his own technical staff.

However, in fact, it is at this point that an informal representation of interests is likely to occur. If the application of authority is to be made as soon as official attention is brought to the matter in hand, it is essential that this information be correct and complete. When the criterion of action is clear and uncontroversial, susceptible to expert determination, there is no room for bargaining or compromising the purpose of the

[10] Lindsay Rogers, *The Postal Power of Congress* (Baltimore: Johns Hopkins University Press, 1915), pp. 56–60, 158 ff.

[11] See, e.g., *Hague* v. *Committee for Industrial Organization*, 59 Sup. Ct. Rep. 954 (1939); Zechariah Chafee, *The Inquiring Mind* (New York: Harcourt, Brace, 1928; *Freedom of Speech in the United States* (Cambridge: Harvard University Press, 1941), pp. 31–35, 38–51, 80–87, and chap. xv.

law. Yet there are obvious opportunities for individuals or groups unfavorably affected by a regulatory power to resort to informal means of pressure to avoid application of legal sanctions. The chief threats to the efficient administration of banking laws, condemnation of unsafe buildings, sanitary inspection laws, or regulations over food or livestock are the resort of private interests to methods of personal influence, financial persuasion, or even less savory means of avoidance.

Summary powers are granted to be applied unconditionally in situations where a single objective is entertained as all important. Hence they generate interests of a unilateral character, that is to say, the power operates either wholly in favor of or wholly against the one goal. The public agency is not faced with a problem of selecting between group demands so much as it is required to drive through to an objective against any or all interests unfavorably affected by its exercise of authority. However, this "ideal-type" conception is progressively less applicable to situations in which the criteria of summary action become more indeterminate and controversial. In such cases the exercise of power tends to favor one special interest against another.

The foregoing observations do not necessarily constitute an argument against summary powers per se. They do, however, establish the advisability of restricting the delegation of such powers to situations characterized by certain conditions. It is to be remembered that summary powers are by definition incompatible with a process of joint deliberation and consideration by affected groups, once the need for invoking the power has arisen. The alternatives are great public danger or calamitous loss to the community. But the number of such situations would appear to be relatively few if the following conditions to the application of summary powers are accepted: (1) extraordinarily urgent requirements of haste, (2) a practically uncontroversial justification for official action, and (3) technical factors prerequisite to action, to the consideration of which joint group participation in the process of official decision would contribute nothing of value.

DISPENSING, OR EXEMPTING, POWERS

The authority of administrative officials to make exceptions in classes of cases, or exemptions in individual cases, from statutory or administrative rules is known as dispensing powers. They furnish a means whereby the rigidities of general rules can be relaxed or avoided. As such they are very similar to the administrative power of contingent rule-making[12] or the discretionary power to grant or refuse licenses, but are distinguishable in purpose. Dispensing powers may be justified by (1) an uncertainty on the part of the legislative body as to the appropriateness of an inflexible application of its policy, (2) a recognition of the complexity of the task of regulation and a corresponding desire to proceed gradually and experimentally, (3) temporary, unforeseen emergencies, and (4) a discretion necessary to avoid personal or family tragedies, though this is usually of but limited application.

Dispensing powers afford both personal and group interests an opportunity to influence the administration of a regulatory statute. Opportunities for such influence are often provided for in the law. The requirement of notice and hearing is rarely associated specifically with such powers. A well-known example of the dispensing power is the exempting clause of the fourth section of the Interstate Commerce Act, permitting the Commission, "after investigation," to authorize a common carrier to charge less for longer than for shorter distances for transporting passengers or property.[13] Investigation may be interpreted broadly to provide for a hearing, but this is obviously a matter within the Commission's discretion. As a matter of

[12] I.e., whereby statutory provisions do not become effective until implemented by administrative rule or order, as the executive power to raise or lower the tariff or to withdraw public lands (C. T. Carr, *Delegated Legislation* [1921], p. 12; Comer, *op. cit.*, pp. 30–33; generally, cf. James Hart, *The Ordinance-making Power of the President* [1925]; Great Britain, H.M.S. Office, *Report of the Committee on Ministers' Powers* [1932], Cmd. 4060).

[13] The main clause makes it unlawful to charge more for a shorter than for a longer distance on like traffic in the same direction on the same line or route. This was a former method of discrimination (U.S.C., Title 49, sec. 4).

fact, the Commission has created within its own organization a body called the "Fourth Section Board" to handle applications for such relief and to make recommendations to the Commission. The importance of this power is indicated by the fact that from 1920 to 1936 there were from 116 to 505 applications from carriers annually.[14]

Discretionary dispensing powers may also be implied from statutory provisions. Administrative tribunals charged with the duty of investigating charges or complaints of law violations may, after investigation, dismiss such charges without record of reasons. Presumably they will do so only after failing to discover any factual grounds upon which to justify formal proceedings, but the fact remains that aggrieved parties have no recourse to test such findings. The National Labor Relations Board closed 539 cases, or 12.7 per cent of all cases closed in 1939, by dismissal.[15] No outcry resulted because the result of the dismissals was the acquittal of the employers of the charges, while the unions probably felt they could get no further favorable consideration.

Still another kind of implied discretionary power lies in the authority of the Industrial Commissioner of New York not to issue minimum wage orders for specific occupations. The law takes effect only by administrative order after an investigation has been undertaken by the Commissioner and the specified procedure in the statute has been complied with. Unless he is petitioned by fifty or more residents of the state engaged in an occupation to have the wages and conditions of employ-

[14] Interstate Commerce Commission, *Interstate Commerce Activities: 1887–1937* (1937), p. 97 n. Sections 2 and 3 of the Public Utility Act of 1935 grant the Securities and Exchange Commission authority to exempt certain holding companies completely from the Act (Pub. No. 333 [74th Cong.]; Securities and Exchange Commission, *Fifth Annual Report, 1939*, pp. 78–81). Of 467 applications received in 1938–39, 115 were approved.

[15] National Labor Relations Board, *Fourth Annual Report, 1939*, p. 34. This is comparable to the discretionary power of district attorneys and departments of justice not to prosecute. Cf. the *Chicago Crime Survey* (1930) for statistics of *nolle prossed* cases; and S. C. Wallace, "Nullification: A Process of Government," *Political Science Quarterly*, XLV (1930), 347 ff.

ment in that occupation investigated, the initiative in undertaking such investigations and defining the occupation to be investigated rests entirely with him.[16] Hence, instead of a minimum wage applying to all women and children in the state, the law actually affects only such persons covered by his orders (in 1939 there were four: laundries, confectionery manufacturing, hotels and restaurants, and beauty shops).

A dispensing power not so much implied as assumed was discovered by a Senate investigating committee in 1926, which found that established practice in the Treasury's Bureau of Internal Revenue sanctioned administrative interpretations and rulings, both by letter and by decision, exempting individual cases from the terms of the law. Complete information has never been assembled as to the exact proportion of such rulings which have the effect of exemption, but the Committee estimated that 85 per cent of such rulings had never been published.[17]

Perhaps the outstanding example of the administrative power was section 3(*a*) of the National Industrial Recovery Act, which provided, in part, that "the President . . . . may provide such exceptions to and exemptions from [code] provisions as in his discretion he deems necessary to effectuate the policy herein declared."[18] Under this authority, out of 695 codes and supplements, 683 codes permanently excepted executives and supervisors from the operation of the code hours provisions; 319 excepted certain groups of employees for specified periods; 394 excepted all employees for specified periods; 174 provided for general overtime; and 113 contained a provision for averaging working hours.[19] In addition to this elasticity provided through code provisions, approximately 5,000 petitions for exemptions from the approved codes were sub-

[16] *Laws of New York, 1937*, chap. 276, sec. 554.

[17] Comer, *op. cit.*, pp. 156–57.

[18] Pub. No. 67 (73d Cong. [June 16, 1933]), sec. 3.

[19] L. S. Lyon and Others, *The National Recovery Administration*, pp. 366–91, esp. p. 369.

mitted to the N.R.A., largely in connection with the labor provisions. The requests were inherently controversial and yet, from the applicant's viewpoint, extremely urgent. Opposition was aroused both from competitors and from representatives of labor. Delays encouraged noncompliance. Even a generally favorable appraisal of N.R.A. experience admitted that the N.R.A. never solved the administrative problem of exemptions and exceptions.[20] Over 2,000 exemptions were granted through a wholly informal procedure. This was probably necessary, because the delays necessitated by formal proceedings would have aggravated the lack of code compliance.

Dispensing powers usually are exercised through whatever formal or informal procedures that the administrative agency may see fit to adopt. There is no formal distinction between individual applications and those of groups. The procedures involve no more than written statements (perhaps on prescribed forms), correspondence, briefs, conferences, and an opportunity to appeal from the original investigator to the official(s) empowered to make the final administrative decision. The significant aspect of dispensing powers from the standpoint of interest representation is the fact that group representatives, by virtue of continual contact and expert training, are more likely than individuals to take advantage of every conceivable opportunity to present their clients' cases effectively. Knowledge of exemptions granted under certain conditions enables them to present the facts of new cases in the light of precedent. The primary importance of exemptions to group interests is the awareness that an exemption, granted in a representative case, may be made applicable to all persons in similar circumstances. But this, again, does not imply that the procedure of granting the dispensation should be based upon bargaining between group representatives. A policy consistent with the purposes of the statute must be main-

[20] Message of the President to Congress, March 2, 1937, *The National Recovery Administration*, pp. 24–25.

tained.[21] The form of representation which occurs, therefore, is advocacy on behalf of parties-in-interest before the official agency.

The representative most adaptable to this procedure is the attorney, who may be retained by individuals as well as by corporations or associations. The peculiar interest of attorneys, which they identify as a matter of technique with their clients' problems, is to establish (1) uniform and fixed practices of procedure, (2) guiding precedents, and (3) the right of appeal to higher sources of authority. In so far as these considerations are controlling, the procedures leading up to the administrative dispensation or exemption tend to assume the character of a judicial proceeding, even if informal.

Such a tendency does not eliminate interest representation.[22] The kind of representation which occurs is formal or informal action, through steps prescribed by the administrative body, to secure rights or privileges provided or permitted by the law. As advocates, the group representatives are not responsible for the administrative act. In this type of proceeding the significance of interest representation must be judged by the observer in terms of which interest was favorably affected by the decision.

POWERS OF LICENSING AND REGISTRATION

The procedure of granting licenses or permits to engage in a business, trade, or profession has acquired, under judicial decisions, a largely discretionary character. In granting them, notice or hearing is not required.[23] In denying them, in the

[21] J. M. Landis, *The Administrative Process*, p. 39.

[22] An excellent illustration of procedural forms being developed to handle interest conflicts is the board of adjustment, whose primary problems are the activities of real estate groups to secure exemptions from building code and zoning ordinances (see E. M. Bassett, *Zoning* [New York: Russell Sage Foundation, 1936], pp. 117–70; *Annals of the American Academy of Political and Social Science*, CLV [May, 1931], 108 ff.; C. M. Kneier, *Illustrative Materials in Municipal Government and Administration* [New York: Harpers, 1939], pp. 421–30).

[23] Freund, *op. cit.*, pp. 104–28.

absence of arbitrary action, the statutory delegation of discretion as to procedure will usually be upheld by the courts. In cases of revocation, a hearing is generally required. Application is made on behalf of individuals either as natural or as corporate persons. The procedure does not involve any peculiar group interest except in the unusual case when notice to competitors is required, which appears to be an invitation to vested adversary interests to oppose the granting of license.[24]

Statutory procedures for the granting or denial of licenses tend to make the procedural forms somewhat automatic.[25] This is less true of public utility and communications regulation, where the issuance of certificates of "public convenience, interest, and necessity" has economic consequences not present in the standards applicable to (1) the sale of liquor, (2) determining the competence of persons desiring to practice a profession, and (3) agents or brokers handling other persons' money or commodities for sale. In the latter cases, the object of regulation is not the control of the number of persons entering the field so much as the establishing of an incentive to comply with the terms of the license. This is accomplished through the threat to the licensee's livelihood of a revocation in the event of misconduct.[26] In the public utility field, however, in which the opportunities for profitable enterprise are limited, the standards for granting and denying licenses are somewhat more controversial, since the right of persons to engage in busi-

[24] *Ibid.*, p. 107.

[25] Outstanding exceptions are the Interstate Commerce Act, which prescribes hearings, notice, due showing and the Commission's affirmative consent to pooling earnings, interlocking directorates, consolidations, mergers, etc. (U.S.C.A., Title 49, sec. 5, and the Federal Communications Act [see n. 31, p. 67]).

[26] Revocations are usually small in proportion to the total number of licenses. For example, in 1938–39, of 6,736 registrations, only 25 were revoked or suspended by the Securities and Exchange Commission. Of 1,135 applications, 4 were denied (*Fifth Annual Report, 1939*, p. 59). Of 693 registered commission merchants in 1939, although several proceedings were pending, none had had their licenses revoked during the year (Commodities Exchange Administration, *Annual Report, 1939*, p. 46). See also annual reports of the Federal Power Commission, which rarely contain accounts of revocations of licenses.

ness conflicts with the profit opportunities of enterprises already in the field.[27]

Profit considerations are not the only factors that distinguish group interests in the public utility field. In the relatively short experience of public control of radiobroadcasting through the licensing device, technical considerations arising from the limited number of radio frequencies have dominated the policy of the Federal Radio Commission and, to a less degree, those of its successor, the Federal Communications Commission.[28] The F.C.C. in its investigations has revealed an awareness of the social implications of the concentration in ownership of broadcasting facilities and control of program content—implications which are not effectively met by a potential exercise of the license-revoking power.[29] Policy considerations such as these, however, are, from the tactical standpoint of public control, largely irrelevant to the "all-or-none" nature of a license. Once the operating managerial policies of private enterprise become subject to public scrutiny and shared with administrative responsibility, there is an increasing tendency to substitute the administrative order or regulation for the license.[30]

It is difficult to visualize a place for specific responsibility of group representatives in deciding whether or not a license should issue. In the performance of this function, the adminis-

[27] C. S. Hyneman, "The Case-Law of the New York Public Service Commission," *Columbia Law Review*, XXXIV (January, 1934), 67, 70–77.

[28] C. B. Rose, *National Policy for Radio Broadcasting* (New York: Harpers, 1940), pp. 6–14, 24–25.

[29] Federal Communications Commission, *Report of the Committee To Supervise the Investigation of Chain Broadcasting* (Commission Order 37 [June 12, 1940]); cf. C. J. Friedrich, "The F.C.C. Monopoly Report: A Critical Appraisal," *Public Opinion Quarterly*, IV (September, 1940), 526–32.

[30] In this connection the group organization of the broadcasters, the National Association of Broadcasters, has revealed an outstanding ability to foresee and forestall, through a mobilization of private initiative, demands for greater public censorship, control, and competition (Rose, *op. cit.*, pp. 78–81; *New York Times*, May 11, 1941; "Radio Chains in Fight on F.C.C. Restrictions," *ibid.*, May 16, p. 42).

trative authority admittedly should have considerable latitude in determining its methods and establishing the facts which it deems significant in arriving at a decision. This latitude includes ample opportunity for informal consultation and conference between the regulatory agency, its staff, and the affected interests, provided, of course, that such consultation is not ex parte in substance though it may be in form.[31] The outstanding exception to the rule that group representatives officially do not participate in the formulation of standards for granting and revoking licenses is found in state laws establishing professional examining boards. Such boards are composed of representatives of the profession or trade appointed by the state governor, in which case the boards themselves are the public authorities.[32]

DIRECTING POWERS

The directing functions of administration are those which, after an essentially judicial procedure, result in an order (1) prescribing a procedural rule of conduct or (2) determining the rights and duties of the parties upon the facts of particular cases. Either or both results may have a predictive effect that is really legislative in character but nevertheless is inseparably bound up with the fact-finding work of administrative adjudication. As Professor Landis has said: "The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making."[33]

Judicial procedure involves a representation of interests

[31] A somewhat restrictive provision is contained in the Federal Communications Act of 1934, published by the Commission, sec. 308(*a*) and 309(*a*): "The Commission may grant licenses . . . . only upon written application therefor received by it. . . . . In the event of the Commission on examination of the application does not reach decision with respect thereto, it shall fix and give notice of a time and place for hearing and shall afford such an applicant an opportunity to be heard under such rules and regulations as it may prescribe."

[32] Below, chap. iv.

[33] *Op. cit.*, p. 39; cf. Dickinson, *op. cit.*, p. 24: "An administrative tribunal adjudicates for the direct purpose of informing itself how best to perform its functions of enforcement."

through attorneys and the legal forms of complaint, notice, hearing, direct and cross-examination, oral argument, briefs, and so on. From the interests' standpoint, however, the essence of quasi-judicial procedure is that if one interest cannot control the judge the other shall not either. The principal variations of the administrative from the common-law procedure are, first, that the decisions must be guided by statutory policy and its implications instead of judicial precedents and, second, that the rules of evidence are relaxed. These relaxations in the direction of informality do not involve delegation of official authority to the parties-in-interest. Hence the idea of group consultation within this process has relatively little significance in strict administrative adjudication.[34]

This is not to say that the objectives of social groups are not genuinely represented in acts of adjudication, because rights and privileges are definitely determined by such acts. The representation is virtual rather than personal. A single case which affects procedurally only two individual parties may have a representative significance far beyond the immediate administrative order. We may take, as an example, a 1937 decision of the Federal Trade Commission under the Robinson-Patman Act of 1936. That law provided, in part:

> It shall be unlawful . . . . to discriminate in price between different purchasers of commodities of like grade and quality where the effect may be to substantially lessen competition . . . . , provided that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of sale, manufacture or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.[35]

The Commission issued its complaint against Bird and Son, Incorporated, a rug manufacturer, and the Bird Floor Covering

[34] It should be mentioned that stipulations of fact for a legal record are of great assistance to the regulatory agency in making its decisions and that such bodies make every effort to facilitate agreements between the parties to facts. Such procedures fail to meet the central problem of interest representation, namely, the conflict of wills necessitating the proceeding.

[35] Pub. No. 692 (74th Cong. [June 19, 1936]), sec. 2.

Sales Corporation, charging them with selling to Montgomery Ward and Company, a mail-order house, at lower prices than to competing retailers. The evidence showed that Bird sold to jobbers and mail-order houses at prices from 14 to 18 per cent lower than the same materials sold to retailers. But Montgomery Ward, which was permitted to intervene in the proceeding, succeeded in showing that Bird's selling costs, allocated between mail-order houses, jobbers, and retailers, respectively, varied from 18 per cent of total costs in the case of mail-order houses to 28 per cent and 47 per cent to jobbers and retailers. The Commission found that the differential in selling costs between the classes of Bird's customers justified the differential in prices to them and dismissed its complaint.[36] The opinion was frankly based on the proviso of the law. Thus a law which was passed presumably to protect small retailers as a group was construed to permit price differentials of as much as 18 per cent against them.

This case reveals how the substantive representation of interests will usually be traced back to the statute in administrative judicial decisions and that interest representation in judicial procedure has to be studied from the standpoint of the effects of leading decisions upon the affected groups. Relatively few studies have been made of the effects of administrative decisions on group interests, largely because of the difficulties of maintaining a consistently clear definition of interest.[37]

There is no distinctive recognition of group interests in the formal quasi-judicial procedure of administrative bodies.[38] An

[36] Federal Trade Commission, *Order and Memorandum Opinion Dismissing Complaint* (Docket No. 2937 [July 17, 1938]).

[37] Examples of these studies are W. Z. Ripley, *Main Street and Wall Street* (1925); F. A. Fetter, *The Masquerade of Monopoly* (1931); Stephen Raushenbush, *The Power Fight* (1932); J. G. Kerwin, *Federal Water Power Legislation* (1922); R. R. R. Brooks, *Unions of Their Own Choosing* (1938); F. Pecora, *Wall Street under Oath* (1939).

[38] An exception may be an implied recognition of the interest of attorneys skilled in practice before them. From a perusal of the rules of practice before

interesting development in illustrating the hidden role of group interest in such procedure may, however, be observed in the general revenue rate cases before the Interstate Commerce Commission. The Interstate Commerce Act makes no reference to any group interest. Its sanctions apply to carriers individually. But in the administration of the rate-control provisions of the Act a definite class of cases has come to be recognized, where the paramount question is whether the aggregate revenues of the carriers shall be increased or reduced by a change in the general level of rates throughout the country or in territorial parts thereof.[39] In such cases the Commission authorizes percentage changes in rates by broad classes or aggregates of charges but approves no specific rate as reasonable, just, or equitable.[40] The Commission takes the position that this action does not have to be justified on any ground other than the nature of the proceeding, that is, the petition for general increases or decreases in rates, which is necessary to remove "undue, unreasonable or unjust discrimination against interstate commerce."[41] Such a petition may be filed by the carriers through attorneys representing any of their regional or national associations.

For example, in *Ex Parte* 123, known as the Fifteen Per Cent

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regulatory commissions governing procedure, admission to practice, and definition of parties, it seems clear that practice before these bodies is difficult and complex, requiring technical training and competence that members of the legal profession presumably are required to handle.

[39] General revenue cases are described in 186 I.C.C. 615 at 620 (1932).

[40] U.S.C., Title 49, sec. 15, provides: ". . . . The Commission is hereby authorized and empowered to determine and describe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, to be charged." The "statutory rule of rate-making" is contained in sec. 15(*a*) and provides that the Commission shall consider, among other factors, the effect of rates on the movement of traffic, the need of adequate and efficient railway service, and the need of carriers' revenues to provide such service. The former rule of "fair return" was eliminated in 1933.

[41] *Wisconsin R.R. Commission* v. *C.B. and Q. R. Co.*, 257 U.S. 563, 586; *New England Divisions Case*, 261 U.S. 184, 197; *Brimstone R. Co.* v. *U.S.*, 276 U.S. 104, 123.

case of 1938,[42] the petition was filed by 16 attorneys on behalf of 137 Class I railroads. The American Short Line Railroad Association filed a supporting petition on behalf of 323 member-lines; the American Transit Association filed another on behalf of various electric railways, and the American Trucking Associations, Incorporated, filed one on behalf of 49 federated state associations of motor-carriers. Other interveners were the Security Owners Association, the Transportation Association of America, the National Industrial Traffic League, and, though not parties to the case, many other associations were permitted to be heard. Although nowhere mentioned in the official decision, the Association of American Railroads initiated the whole proceeding, and the chief witnesses on behalf of the petition were its president, J. J. Pelley, and its chief economist, Dr. Julius Parmelee, head of the Association's Bureau of Railway Economics.[43]

In so doing the Association did not even become a formal party-in-interest. It simply acted as the unifying agency which had to be recognized as the *de facto* representative of the carrier interest. Indeed, the objective of the Association has been throughout its history to get the carriers to work together as a unit to face the unified government control vested in the Commission.[44] But, if the Commission does not formally

[42] 226 I.C.C. 41 (1938).

[43] Cf. "Petition of Railroads for Authority To Increase Their Rates, Fares and Charges" (November 5, 1937), and "Brief of Principal Petitioning Railroads," in *Ex Parte* 123, decided March 8, 1938 (226 I.C.C. 41).

[44] Interview with M. J. Gormley, executive assistant to the president, A.A.R., May, 1938. For many years the avenues of escaping regulation through appeal to the courts had encouraged an individualistic attitude on the part of many carriers. The American Railway Association, whose function was promoting uniform action among carriers, had always been separated from the three powerful regional railway associations—the Eastern Presidents' Conference, the Western Association of Railway Executives, and the Southeastern Presidents' Conference. The American Railway Association was associated with much of the rule-making and standardization work promoted by the I.C.C. ever since the first Safety Appliance Act of 1893. In 1934 the A.R.A. combined with the independent technical associations, the Railway Accounting Officers Association and the Bureau of Railway Economics, into the Association of American

recognize the Association in the procedure of establishing rates, it has on one occasion formally referred to the other functions of the Association. In a 1935 decision it expressed its hope that the railroads, through their Association, would be able to engage in analyses of rate structures and their effect on traffic and indicated its belief that such efforts held forth promise of more beneficial results than did permanent increases in freight rates.[45]

One searches in vain for distinctive forms of economic interest representation in the formal procedures of administrative adjudication. The impact of interests upon administration, and vice versa, has to be studied either from the standpoint of the effect of decisions upon interest groups or by examining the controls and pressures exercised upon the agency by the legislature or chief executive. The patterns of the latter techniques have been definitely outlined by Professor Herring and Professor Cushman.[46]

A problem which receives scant attention in administrative adjudication, undoubtedly because of its informal, indeterminate character, is the extent to which representatives of group interests, merely by virtue of their continuous personal contacts with the staff of administrative agencies, are able to to influence their internal deliberations. This has no reference to fraud or bribery but acts as an unconscious pressure arising through personal friendliness and mutual experiences. The problem has arisen in connection with the administration of workmen's compensation in Wisconsin, where an able student of the Industrial Commission there found it impossible to

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Railroads. Under the new A.A.R. the three regional presidents' associations choose the board of directors, which selects the officers of the A.A.R., and the technical organizations are absorbed as operating bureaus. The names and functions of these bureaus are strikingly similar to the bureaus of the I.C.C.

[45] *Emergency Freight Charges*, 208 I.C.C. 4, 62.

[46] Herring, *op. cit.*, chaps. vii–xi; R. E. Cushman, "The Problem of the Independent Regulatory Commissions," in President's Committee on Administrative Management, *Report* (Study No. III [Washington: Government Printing Office, 1937]).

measure the extent of this influence.[47] It appears, however, that this problem is related to the economic inability of individuals in some cases to retain experienced counsel. When both parties before the administrative body are in a financial position to employ counsel experienced in the work of that agency, it would appear that the factor of personal friendliness would cancel itself out as between the opposing groups and the administrative staff.

SUMMARY

Of the three meanings of interest representation that has been distinguished,[48] namely, informal personal and pressure influences, advocacy of group interest through and within the procedural forms established by the administrative agency, and joint consultation of affected interests, it is apparent that the second type, which is divorced from active participation by group representatives in official responsibility, is the one which most adequately characterizes the summary, dispensing, licensing, and order-making functions of administration. This is not surprising, for these are traditionally judicial functions in which all groups realize that some agency has to make the decisions, and the main issue is who shall make them. The foregoing analysis indicates that these functions preferably should be delegated to a presumably neutral public agency. This conclusion is based upon the assumption that this judicial power will be exercised with justice and equity.[49] We shall now consider a group of administrative functions whose successful performance seems to be more appropriately associated with a considerable blending of private interest and official responsibility.

[47] R. A. Brown, *The Administration of Workmen's Compensation* ("University of Wisconsin Studies in the Social Sciences and History," No. 19 [Madison: University of Wisconsin Press, 1933]), pp. 85–86.

[48] Above, n. 4, p. 55.

[49] The classic statement of the difficulties of realizing this assumption in the traditional judicial sphere is contained in B. N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1923).

II. LEGISLATIVE

INVESTIGATORY POWERS

In the larger sense the whole process of administration is one of investigation, at least in so far as administrative acts are conceived as the detailed exercise of legislative policies upon the facts of particular cases or classes of cases.[50] From this standpoint, no matter what the form of administrative action—whether promulgation of rules, handing down decisions and orders, grants or refusals of licenses and exemptions—the administrative power simply represents the application of the statutory norm, rule, or sanction to the details of factual situations, after discovery and determination of the relevant facts by the duly authorized agency of the legislative power. Procedural forms have no inherent value in themselves except as means of developing the facts and securing compliance with the statute. Persons holding this view place primary emphasis upon the professional character of the administrative personnel with respect to each field of regulation, and they maintain that proper guaranties against arbitrary action by the expert agency will be secured through a judicial review of rules and orders to determine (*a*) constitutionality, (*b*) statutory authority, and (*c*) reasonableness of the exercise of authority.[51] Carried to its logical conclusion, this view would make administrative procedure primarily a matter of legislative and administrative discretion, to be conducted in as formal or informal a manner as the expert administrator finds necessary to secure the facts

[50] Interstate Commerce Commission, *Fifty-second Annual Report, 1938*, pp. 25–28; cf. John R. Commons, *The Industrial Commission of Wisconsin: Its Organization and Methods* (Madison: Wisconsin Industrial Commission, 1913).

[51] *I.C.C.* v. *Ill. Central Ry. Co.*, 215 U.S. 452, 469; *I.C.C.* v. *Union Pacific Ry. Co.*, 222 U.S. 541, 547. These are the early leading cases on administrative finality with respect to the Interstate Commerce Act. Differently worded statutes have produced far more restrictive doctrines of court control over administrative procedure (cf. Dickinson, *op. cit.*, pp. 52–54, 159–74; Carl McFarland, *Judicial Review of the Interstate Commerce Commission and the Federal Trade Commission* [Cambridge: Harvard University Press, 1933]; Freund, *op. cit.*, chap. xv; *Crowell* v. *Benson*, 285 U.S. 22 [1932]).

essential to an informed and appropriate application of the law. The legal terms of action are misleading, since, as observers of the administrative process have pointed out, an administrative order may be legislative in substance, though the whole procedure out of which it was formulated was judicial in character.[52]

There are, obviously, different kinds of investigation. One—perhaps best characterized as inspection—is a process of applying trained observation and informal personal contact to the task of finding the facts as to whether the statutory norm or administrative regulation is being complied with. Inspection usually includes the duty of attempting by educational or persuasive means to secure compliance.[53] Second, there are powers of compulsory examination, which include the conduct of formal proceedings, the taking of evidence, the subpoenaing of witnesses, books, records, papers, etc.[54] Third, many administrative agencies have an independent power of general inquiry, which might be called administrative research, into common practices in the field bearing upon specific problems of regulation.[55]

Whether viewed from the broad standpoint of a whole process or from the more specific methods of fact-finding, the function of administrative investigation is a process in which

[52] Blachly and Oatman, *op. cit.*, pp. 85–88. The courts have interjected many requirements which must be met in administrative-judicial procedure (*ibid.*, pp. 108–31).

[53] White, *op. cit.*, p. 494.

[54] Freund, *op. cit.*, chap. ix; D. E. Lilienthal, "Power of Government Agencies To Compel Testimony," *Harvard Law Review*, XXXIX (1926), 694–724.

[55] Examples of general statutory powers of investigation are: Securities Exchange Act, Pub. No. 291 (73d Cong., 2d sess. [1934]), sec. 21, and the Federal Trade Commission Act, 38 Stat. 721 (1914), sec. 6 (Landis, *op. cit.*, pp. 37–45). General inquiries may be instituted on the agency's own motion or at the direction of the legislature or political executive. Of 107 general inquiries of the Federal Trade Commission from 1914 to 1936, 62 were made pursuant to resolution of one or both houses of Congress, 23 pursuant to Executive request, 22 on the motion of the Commission (Federal Trade Commission, *Annual Report, 1937*, pp. 149–68).

facts are presented to presumably impartial, expert public officials, whose findings, conclusions, and acts are controlled by a statutory mandate or policy. Not only the demands of group organizations but the facts underlying the conflicts of interests are the data of investigation. In this process group representatives, having in mind a favorable application of the law, are concerned with presenting as much of the facts as are favorable to that end, which involves emphasizing some and neglecting or minimizing others. The "advocate" psychology and method is a disqualification for persons responsible for making administrative investigations.[56] In so far as the objective of investigation is to disclose all relevant facts to the end that the statutory purpose and authority will be exercised only in the light of all such facts, there is room for no other loyalty than to the statutory standard.

This by no means involves an exclusion of group or personal interests from participation in the investigatory process. On the contrary, being the sources of fact and often of the demand for the exercise of administrative powers, they are associated with every phase of it except with ultimate responsibility for decision. The administrative problem is not one of isolating the investigators from group interests but of establishing contacts with all of them, so that the investigation will be most likely to secure all the relevant facts. This problem calls for a discriminating exercise of judgment in the use of the three techniques of fact-finding.[57]

The general research function is associated primarily with investigation as to proposed regulations or policies and is dis-

[56] A persuasive argument can be made out for bipartisan or multipartisan boards of investigation, on the assumption that impartiality and neutrality in policy-formulation is unattainable (see *Hearings on Establishment of a National Economic Council* [72d Cong., 1st sess. (1932)] on S. 6215 [71st Cong.], p. 441). But this applies only when the policy-making authority is removed from responsibility for problems of administration.

[57] It seems to be assumed at times that these functions are mutually exclusive or that administration should be confined to the use of one or the other (cf. the report of the National Policy Committee, *Memorandum on the Function of Administrative Agencies* [Washington, 1940], pp. 10–11).

cussed below in connection with the legislative functions of administration.

The examining powers of administration are exercised primarily through formal proceedings which are connected with proving or demonstrating specific charges of law violation.[58] As such, they are subject to strict requirements of procedural due process of law enforced by the courts. This gives rise to the representation of parties-in-interest by lawyers versed in technicalities of judicial process, including appropriate forms of notice, formal complaints, the legal requirements of a fair hearing based upon a record, and a process of including or excluding evidence. These functions are essential and vital to an effective enforcement of law, but, if expert administrative investigation were restricted to proceedings such as these, not only would the administrative process be unduly hampered, but much of the information relevant and vital to appropriate enforcement action would never be forthcoming. Powers of compulsory examination are generally used only when compliance with the law can be obtained in no other way than by formal procedure of enforcement.

In many differing fields of regulation the trained observation of relevant facts and the expertness that comes from administrative experience originate in the mastery of the techniques associated with inspection and informal contacts.[59] There are innumerable situations in which an *ex parte* conference is more productive of co-operation in getting at the facts than formal hearings at which the parties are constantly on their guard lest admissions damaging to the winning of their case be made. Facts gained in the former manner must of course be checked by similar methods with opposing parties. When formal proceedings have to be taken against a person or company to secure compliance, no question exists but that he is entitled to all

[58] *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298 (1924) and cases therein cited. Generally, see H. M. Stephens, *Administrative Tribunals and the Rules of Evidence* (Cambridge: Harvard University Press, 1933).

[59] The statements in this paragraph are based largely on the writer's experience as a field examiner (investigator) for the National Labor Relations Board.

the procedural guaranties associated with due process of law. As every administrator knows, however, one criterion of good administration is the degree of compliance with the law without the necessity of formal action. This criterion is subject to the requirements that the compliance be substantial rather than merely technical and that it be obtained by methods which result in the investigator's retention of the parties' confidence in his integrity. These aims can be achieved through intimate knowledge of background factors and personal relationships which are rarely part of the formal record and would probably be considered incompetent, irrelevant, and immaterial in formal proceedings.

The importance of this aspect of administrative regulation may be brought out by the records of informal action taken by several of the regulatory boards and commissions. Thus the Interstate Commerce Commission in its first annual report in 1888 said: "The great majority of complaints have been laid before the Commission informally, and have either presented matters over which the Commission has no jurisdiction, or they have been adjusted with its assistance by correspondence or in some other manner disposed of by the parties themselves."[60] In 1907, after the passage of the Hepburn Act of 1906, 4,382 informal complaints were filed as compared with 1,002 in 1906 and 503 in 1905. Separate divisions to handle correspondence and claims were established, which were consolidated in 1916 in a bureau now known as the Bureau of Informal Cases. A special docket was provided for cases in which carriers admitted that their charges were unreasonable, in violation of section 1 of the Interstate Commerce Act, and in which they could apply for authority to make reparation to the passenger or shipper. In 1937 the Commission summarized its informal activities by saying:

From January, 1907, to October 31, 1935, orders have been entered in 146,778 cases awarding reparation, the total exceeding $27,000,000. No

[60] *Interstate Commerce Activities, 1887–1937* (Washington: Government Printing Office, 1937), pp. 54–55. (Hereinafter cited as *I.C. Activities*.)

record has been kept of the total number of informal complaints adjusted to the satisfaction of the parties, but the number has been very large.[61]

In 1938 the Federal Trade Commission reported a cumulative record for twenty-four years in which it disposed of 26,944 preliminary inquiries. Of this number, 19,125, or approximately 67 per cent, were closed after investigation, leaving the remaining third as having been docketed as applications for formal complaints. Over the same period there were 12,943 applications for formal complaints, of which 11,753 were

TABLE 6*

METHODS OF DISPOSING OF APPLICATIONS FOR FORMAL COMPLAINTS, FEDERAL TRADE COMMISSION: 1914–38

Method of Disposition	Number	Per Cent
Stipulation to cease and desist	3,647	31
Settled by acceptance of trade-practice rules	92	.
Dismissed for lack of merit	3,863	33
Closed for other reasons	1,043	9
Issuance of formal complaint	3,108	26
Total	11,753	100

* *Source:* Federal Trade Commission, *Annual Report, 1938*, pp. 93–95.

disposed of as indicated in Table 6. According to these figures, over a twenty-five-year period only about one-fourth the numerical volume of business of the Federal Trade Commission constituted cases in which it was necessary to take formal action.

The National Labor Relations Board reported for the fiscal year 1938–39 that it closed 6,569 cases, as indicated in Table 7.

The Securities and Exchange Commission follows an informal method of securing compliance with the Securities Act of 1933.[62] When an applicant for registration of security to be issued files his registration statement, the Commission must within twenty days notify the applicant if the effective date of

[61] *Ibid.*, p. 56.

[62] Pub. No. 22 (73d Cong. [May 27, 1933]).

the registration is to be postponed pending examination or if examination of the applicant's books and records is necessary; if necessary, a "stop order" may be issued, preventing the statement from becoming effective indefinitely.[63] The Commission, through the exercise of one or a combination of these powers, has secured the modification of many registration statements, eliminating inaccurate or misleading assertions or omissions.[64]

TABLE 7*

METHODS OF DISPOSITION OF CASES, NATIONAL LABOR RELATIONS BOARD: 1938–39

Method of Disposition	Number	Per Cent
Before formal action	5,534	84
Withdrawal	1,749	27
Dismissal	803	12
Settlement by agreement	2,942	45
Other reasons	40	.....
After formal action	1,035	16
Total	6,569	100

* *Source:* National Labor Relations Board, *Fourth Annual Report, 1939*, p. 19.

Informal methods of fact-finding, accompanied when feasible with settlements by agreement, constitute an integral part of the process of administrative investigation. It is not compulsory for persons charged with violation of law to make settlements, since by refraining from the officially requested mode of compliance they enjoy the privilege of compelling official recourse to formal procedure. The activities of correspondence, consultation, and conference vary of course from agency to agency. One of two types of interest representation, however, occurs in all of them. In one, the joint conference and agreement takes place between the staff of the administrative agency

[63] *Ibid.*, sec. 8(*b*), (*d*), (*e*).

[64] Securities and Exchange Commission, *Third Annual Report, 1937*, pp. 4–7; *Fifth Annual Report, 1939*, pp. 24–28, 47–48.

and the representatives of a single group interest. This type of settlement is associated with cases where the administration is identified with an unorganized interest, as, for example, when the Securities and Exchange Commission represents potential individual investors against the highly organized promoter, dealer, or underwriter, or when the Federal Trade Commission represents the individual businessman against the collective unfair practices or restraints of trade of his competitors. When the conflicting interests are more equally organized, the conferences and settlements are likely to take place between the organized groups, with the administrative agency acting as the public representative to see that the agreement does not violate the law. The latter cases are exemplified by the shipper-carrier agreements under the Interstate Commerce Commission and the union-employer agreements sanctioned by the National Labor Relations Board.

Settlements may also be consummated between the administrative agency and either of the parties, with or without the consent of the other. In this regard a comparison of the settlement policy of the Federal Trade Commission with that of the National Labor Relations Board is enlightening, especially since the contrasts have to be explained primarily in terms of the character of the group interests affected by the laws. There is a similar procedure of enforcement under each law, namely, a cease-and-desist order against individuals found to have committed specified unfair practices. The administrative order is enforceable by a circuit court of appeals.[65]

The Federal Trade Commission's informal settlements always take place between the respondent and the Commission. The Commission has an inflexible policy of not publishing or divulging the name of an applicant or complaining party, who has no legal status before the Commission except as he may be allowed to intervene in the formal proceedings after the issuance of the Commission's complaint.[66]

[65] 15 U.S.C.A., sec. 45; 49 Stat. 449, sec. 10.

[66] Federal Trade Commission, *Rules, Policy and Acts, 1938*, p. 23.

The Commission determines the form and subject matter of all stipulations which are prepared in accordance with the facts disclosed by an investigation. If a respondent alleges the facts to be other than the investigation discloses, then the matter is not subject to stipulation, and the proper and only procedure is to try the issue in order to develop the true facts.[67]

Further, the Commission considers that the disposition of a case by stipulation is a privilege and not a right; in its official regulations the Commission puts all parties on notice that, for any reasons it regards as sufficient, it may refuse to extend this privilege.[68]

In contrast to this viewpoint, which might be summarized by saying that a lawsuit is always preferable when there is any difference of opinion with regard to the facts in any case, the National Labor Relations Board has actively "encouraged the effectuation of settlements without recourse to formal Board procedure."[69] There is no concealment of the names of the party filing charges of law violation, and the facts alleged in the charges are brought to the attention of the respondent before any formal action whatever is taken. The theory of the Act, stated in a legislative declaration of policy, is that encouraging the practice and procedure of collective bargaining based upon full protection of the rights of workers to organize will result in the rapid removal from the area of industrial conflict of many of the causes of economic strife. The National Labor Relations Board's function of eliminating unfair labor practices is only a preliminary phase of a broader national labor relations policy which looks forward to a consummation of voluntary collective agreements between organized employers and employees; the Federal Trade Commission's function of eliminating unfair trade practices reflects a national policy of enforced competition with which the idea of organized co-operation between

[67] Federal Trade Commission, *Annual Report, 1938*, p. 41.

[68] Federal Trade Commission, *Rules, Policy and Acts, 1938*, p. 22.

[69] National Labor Relations Board, *Annual Report, 1939*, p. 20. Of 877 cases disposed of through bilateral agreements involving union recognition, 745 resulted in written collective agreements.

competitors has never been satisfactorily reconciled. It is of course inadvisable to promote agreements between competitors when the law and the courts are uncertain as to the appropriate content and scope of such agreements.

Agreements between the outstanding organization representative of the industrial shippers, the National Industrial Traffic League, and the American Railway Association (now the Association of American Railroads) have in several instances been sanctioned by the Interstate Commerce Commission. A "no-recourse" clause in the uniform bill-of-lading rules agreed upon in conference was approved by the Commission in one of its decisions.[70] An agreement exists by which changes in the carriers' uniform rules for car demurrage, diversion, and reconsignment are taken up jointly between representatives of the League and the Association, and, if an agreement is impossible, the dispute is referred to a representative of the Commission for arbitration.[71] The Commission on at least one occasion has in effect acted to compel an agreement, although the contents were in no sense dictated by it and the agreement was in form entirely voluntary between the League and the carriers. After a four-year period, during which the League had unsuccessfully tried to secure satisfaction on the problem of liabilities for damages on private sidetracks, it filed a formal complaint with the Commission in 1920. An agreement was then reached between the carriers and the League; a joint request was made to the Commission to dismiss the petition, which was finally done.[72]

The informal activities of securing compliance and promoting agreements which do not become the subject of formal proceedings or action by public regulatory agencies therefore con-

[70] 52 I.C.C. 671 (1919).

[71] *The National Industrial Traffic League: Its Purposes and Achievements* (Chicago: National Industrial Traffic League, 1931), pp. 12–13.

[72] *Ibid.;* 61 I.C.C. 120. The Commission's position was that it had no jurisdiction.

stitute no small part of the work and the importance of such agencies. The representation of interests is essentially a joint process, but it does not involve a complete delegation of authority to the group representatives. The essential element in the process is a statutory rule, standard, or norm which the administrative body is charged with the responsibility of enforcing. Joint consultation, or representation of interests, occurs in the context of a delayed process of enforcement in which the administration investigates the existence of events or practices as a prerequisite to the exercise of its powers invoked by one of the parties. In checking such facts against the statutory standard, administration affords the parties an opportunity to comply with the law if discrepancies in behavior appear. In so doing it performs the same functions as courts of law which approve settlements out of court by withdrawal or dismissal of the formal proceedings.[73]

RULE-MAKING POWERS

With the exception of the formalized procedures of examining and directing powers, the foregoing types of administrative action were associated with a process of conducting investigations as informally as necessary in order to develop the facts essential to an informed decision. This informality is not less adaptable to the legislative or rule-making functions of administration. Moreover, in the deliberative process of rule-making, there is a much greater opportunity for participation by group interests in formulating the content of the proposed regulations.[74] When opportunity for choice between conflicting

[73] Settlements by stipulation may be made after formal administrative action is initiated. A customary requirement in such cases is consent to the entry of a court order. This procedure is outlined by Blachly and Oatman, *op. cit.*, pp. 77–81. See also Attorney General's Committee on Administrative Procedure's *Report* (1941), pp. 35–43; *Hearings on Administrative Procedure on S. 674, 675, and 918* (77th Cong., 1st sess. [1941]), Part II, p. 804.

[74] A distinction should perhaps be made between the regulations establishing and controlling its own organization and procedure and the regulations controlling conduct of persons and companies outside its own operations. The former, it used to be thought, lay completely within the discretionary, exclusive

interpretations of the statutory standard exists, or when there is some doubt as to the legislative intent, the consultation of group interests operates as a necessary and useful means to secure (1) factual data, (2) representative, as distinguished from individual, views of what administrative policy should be, and (3) from the interests' standpoint, procedural safeguards against hasty or arbitrary action by the administration.

Methods of such consultation vary, and differing agencies give differing treatment to the views of the consulted interests. A method quite commonly used prior to the promulgation of forms, particularly for keeping accounts and for submitting statistical reports, is the submission of draft regulations by the administrative agency to representatives of expert or interest organizations for criticisms and suggestions. The Federal Power Commission, in preparing regulations for uniform accounting systems among electric utility companies, consulted not only the National Association of Railroad and Utility Commissioners but the accounting committee of the Edison Electric Institute.[75] The Securities and Exchange Commission followed similar tactics in drafting forms for the registration of promotional mining companies. In that case the Commission submitted its proposed forms to engineering and mining experts and, in addition, sent representatives to an annual convention of the American Mining Congress to discuss them and to solicit suggestions.[76] These methods are not new. In 1907 the Association of American Railway Accounting Officers set up a special committee to participate for a period of over ten months in the preparation of the system of uniform carrier accounts prescribed by the Interstate Commerce Commission

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jurisdiction of the administrative body. However, in so far as such regulations control the relations between individuals in relation to the public agency, they may involve due process questions (*Morgan* v. *U.S.*, 298 U.S. 468 [1936] and 304 U.S. 1 [1938]). The older view is enunciated by Freund (*op. cit.*, pp. 213–16).

[75] Federal Power Commission, *Seventeenth Annual Report, 1937*, pp. 5–7.

[76] Securities and Exchange Commission, *Third Annual Report, 1937*, p. 7. Interview with Commissioner G. C. Mathews, January, 1938.

that year.[77] The Commission's Bureau of Statistics has co-operated with the statistical bureau of the American Railway Association in the preparation and revision of rules for reporting accidents and other statistics.[78]

In some cases the consultation of interest groups, i.e., the carriers' organizations, by the Interstate Commerce Commission has approached actual delegation of legislative authority. In 1893 the first Safety Appliance Act provided that after January 1, 1898, it should be unlawful for any common carrier to haul or permit to be hauled any car not equipped with couplers coupling automatically by impact and which could be uncoupled without the trainman's going between the ends of the cars. This necessitated a standard height for drawbars, which the law provided should be fixed by order of the Commission after the American Railway Association had, within a ninety-day period fixed by the law, designated such a standard.[79] This delegation of authority to the Association was subsequently upheld by the Supreme Court.[80]

In 1906 the American Railway Association created a bureau to promote the safe transportation of explosives and other dangerous articles through uniform regulations. The bureau was hampered by the failure of many carriers to become members or to co-operate with it. The Transportation of Explosives Act of 1921 specifically authorized the Commission to utilize the bureau's services in formulating regulations for the safe transportation of such articles.[81] The Commission has, by regulations, authorized the bureau to make investigations, inspections, confer with manufacturers and shippers, and bring its conclusions to the Commission with a statement of facts bearing on the matters investigated. The Commission

[77] *I.C. Activities*, pp. 108–9.

[78] *Ibid.*, p. 82. Interview with M. O. Lorenz, chief, Bureau of Statistics, April, 1938.

[79] 27 Stat. 531, sec. 3.

[80] *St. Louis, Iron Mountain and So. R. Co.* v. *Taylor*, 210 U.S. 281 (1908).

[81] 41 Stat. 1445, sec. 232.

while not bound thereby, gives due weight to the expert nature thereof in the formulation of appropriate regulations.[82] The promotion of safety by uniform regulations may, when the interest organization is well enough organized, even be obtained by taking no further formal action than investigation. In 1926, pursuant to investigation by the Commission and informal conferences with the American Railway Association's Bureau of Safety, the Association revised its rules for the maintenance of power-brake equipment, and the desired uniformity was secured by collective action on the part of the carriers without formal sanctions by the Commission.[83]

Under authority of the Esch Car Service Act of 1917 and the Transportation Act of 1920, the Commission was empowered to make not only just and reasonable rules and regulations but immediate directions with respect to the movement, exchange and interchange, distribution and return of cars without regard to ownership, and to give directions for preference or priority in traffic movements.[84] In May, 1920, dislocation and abnormal conditions after the return of the railroads to private management caused the Commission to issue three sweeping relocation orders. The continuing relocation was carried on by the Car Service division of the American Railway Association.[85] This car-service division is organized on a district basis, with thirteen districts, each with a district manager, who, in cooperation with a shippers' advisory board, has the duties of anticipating local car requirements and overcoming car-service difficulties.[86] This naturally results in lightening the demands on the Commission's Bureau of Service. With the exception of the Commission's Bureau of Inquiry, the Bureau of Service has the smallest field staff of the Commission's bureaus.[87] This

[82] *I.C. Activities*, p. 138.

[83] *Ibid.*, pp. 129–30.

[84] 40 Stat. 101; 41 Stat. 456, 474.

[85] *I.C. Activities*, pp. 157–58.

[86] Association of American Railroads, Operations and Maintenance Department, *Organization Chart and Map of Car Service Division* (1937).

[87] *I.C. Activities*, p. 24: The field staff of the Commission's bureaus as of December 31, 1936, numbered as follows: Motor-Carriers, 215; Accounts, 170; Valuation, 90; Safety, 68; Locomotive Inspection, 64; Service, 19; Inquiry, 12.

interpenetration of function between the Commission and the American Railway Association in the fields of safety and car-service regulation in a sense almost seemed to make the latter an administrative agency of the Commission.

Conferences of more official character and less influence in determining administrative policy are exemplified in the Trade Practice Conferences of the Federal Trade Commission, which were initiated in 1919.[88] The purpose of these conferences was originally

> to gather the best judgment of representative members of a particular industry as to whether certain practices were fair or unfair and were in or against the public interest. It was understood that the judgment of the industry, as expressed, should be for the guidance of the Commission and should be regarded as *prima facie* law merchant for the industry.[89]

The question of whether the representative opinion of an industry could constitute valid criteria of "fair" practices, let alone "unfair" practices, which were the only ones the Commission was empowered to prevent by cease-and-desist order raised vexing problems. In 1926 the Commission instituted the practice of distinguishing between rules covering trade practices which are considered to be unfair methods of competition prohibited by the law, the decisions of the courts, and the Commission (known as Group I rules) and rules which "embrace the voluntary or recommended industry practices that are not compulsory requirements or prohibitions (Group II rules).[90] Violations of the Group I rules are subject to immediate proceedings by the Commission.

The procedure for initiating a conference involves filing a statement of facts with the Commission, together with a request for authorizing a conference. The facts include information enabling the Commission to ascertain the representativeness of the group or association petitioning for the conference,

[88] Federal Trade Commission, *Trade Practice Conferences* (1933).

[89] Commissioner Healy, quoted by E. L. Heermance, *Can Industry Govern Itself?* p. 223.

[90] Federal Trade Commission, *Annual Reports, 1938*, p. 107; *Annual Reports, 1940*, p. 115.

either by proportion of concerns represented or by volume of production and sales. If the Commission authorizes the conference, it appoints a time and place and a member of its staff to preside over the proceedings. A transcript of the proceedings is kept and filed in the offices of the Commission. The proceedings may be short or last for several months. The action of the conference eventuates in a set of rules which are submitted to the Commission, which may, with or without public hearing, accept, reject, or revise the rules and divide them into Group I and Group II. The rules have the effect of an interpretative statement of the application of the Federal Trade Commission Act to the particular industry, which is, however, binding on neither the Commission nor the courts' determination of law or of fact.[91]

As we shall have occasion to observe again and again, the principal purpose of a consultation of group interests in legislative or policy-determining activities is to bring about a shared responsibility for determining the substantive content of policy even though the legal forms of final promulgation may be solely the responsibility of the public authority. On this count the Trade Practice Conference falls short of a complete representation of interests.[92] This is perhaps inherent, however, in the uncertainty of public policy toward organization and collective action by business competitors and industrial associations.[93]

Joint conferences of a more unofficial character may exhibit a far more influential element of interest representation in the determination of policy. Outstanding examples of such

[91] The above statement of trade-practice procedure is taken from the Commission's *Rules, Policy and Acts* (1938), Rule XXIV (see G. C. Henderson, *The Federal Trade Commission* [Cambridge: Harvard University Press, 1924], pp. 78–80); N. B. Gaskill, a former commissioner, expounds a critical view in *The Regulation of Competition* (New York: Harpers, 1936), chap. xi.

[92] On June 30, 1933, the rules of 96 Trade Practice Conferences were in effect. Only 8 more were approved during the two-year N.R.A. period. From May, 1935, to July, 1939, 30 more were approved.

[93] W. H. Hamilton, "The Problem of Trust Reform," *Columbia Law Review*, XXXII (February, 1932), 177.

joint consultation and agreement were the conferences of March 10, 1933,[94] and May 26, 1933,[95] between farm leaders and the Secretary of Agriculture and his staff. These conferences initiated the main outlines of administrative policy subsequently followed by the Agricultural Adjustment Administration, and it was the support of the farm organizations secured by their participation in determining these policies that enabled the A.A.A. to mobilize the county farm bureaus and production-control associations in aid of the whole program. Otherwise the tactics of publicity and organization used by the Department's county agents would inevitably have been attacked as "political machine-building" far earlier than they actually were.[96]

In the formulation and revision of cotton and grain standards, the Department's Bureau of Agricultural Economics (now Agricultural Marketing Service) has from the very beginning consulted and acted upon the recommendations of representatives of producers, processors, traders, and shippers.[97] In 1929 a biennial International Universal Cotton Standards Conference was provided for in agreements between the Department of Agriculture and nine cotton exchanges in this country and in Europe.[98] These conferences are continually revising the standards for judging the quality and value of these commodities.[99] Voluntary standards are dependent for their application upon the co-operation of the groups whose use

[94] C. V. Gregory, "The American Farm Bureau Federation and the A.A.A.," *Annals of the American Academy of Political and Social Science*, May, 1935, pp. 152–56.

[95] Agricultural Adjustment Administration, *Agricultural Adjustment: May 1933—February 1934*, pp. 44–48.

[96] Gladys Baker, *The County Agent* (Chicago: University of Chicago Press, 1939), pp. 70–87.

[97] Comer, *op. cit.*, pp. 219–23.

[98] U.S. Department of Agriculture, *Service and Regulatory Announcements*, B.A.E. No. 117 (November, 1929).

[99] *Report of the Secretary of Agriculture, 1936*, p. 99; *Report of the Secretary of Agriculture, 1937*, p. 71.

of them facilitates transactions and the consumer's knowledge of what he buys. Having developed a voluntary acceptance of group-initiated standards, it is easier, over a period of month, or years, to initiate if necessary a compulsory imposition of standards enforced by a public authority.[100]

The results of deliberations between representatives of public agencies and of group interests in determining the content of general rules and regulations may or may not be placed before the public by way of public hearing. The legal rule is that this question is governed by statute; in the absence of express provision for notice and hearing, none is required by the courts prior to the promulgation of such regulations.[101] It is generally assumed that notice and hearing are desirable as public safeguards. In the administration of the Trade Agreements Act of 1934, however, an example exists in which the objective as expressed in the statute, namely, the alteration of the tariff structure by executive agreement, would actually be imperiled by the requirement of hearing; consequently, the Act originally did not require one.[102] The 1934 Act was in part, at least, the outcome of a feeling that the methods of congressional tariff-making resulted in no further enhancement of the public interest than that which might result from a process in which each home-industry group supports one another's demands for generally higher tariff rates.[103] Under the 1934 Act, therefore, a Committee on Trade Agreements, composed of representatives of various government departments, was established to do the actual negotiating with representatives of foreign countries, while no more than "reasonable public notice of intention to negotiate an agreement" was required in order that interested persons might have an opportunity to present their

[100] Comer, *op. cit.*, p. 232.

[101] *Bimetallic Investment Co.* v. *State Board of Investigation*, 239 U.S. 441 (1915).

[102] 48 Stat. 493, sec. 4. Section 336 of the Tariff Act of 1930 provided for hearings under the flexible tariff provisions.

[103] E. Schattschneider, *Politics, Pressures and the Tariff* (New York: McGraw-Hill, 1936).

views to the President or such agency as he might designate.[104] Executive Order 6750 (June 27, 1934) created a nonpartisan Committee for Reciprocity Information, also composed of government experts, to receive such views and present them to the Committee on Trade Agreements. In this way a buffer was set up between the pressure groups and the negotiating committee. This buffer was partly eliminated when, in May, 1937, members of the Committee on Trade Agreements were designated as members of the Committee on Reciprocity Information.[105] In the case of the executive negotiation of trade agreements, the whole point of the procedure is to avoid pressure from group interests trying to prevent concessions from being made upon individual commodities. When these are known there is a recrudescence of the old influences prevalent under congressional tariff-making. Moreover, the factual data developed in public hearings are much less valuable than written briefs and private consultation.[106] The experience under the Trade Agreements Act affords an enlightening, if somewhat extreme, example of the uses to which public hearings may be put by group interests excluded from participation in the negotiating processes of administrative legislation.[107]

The following points must be observed in connection with the representation of interests in administrative legislation:

1. It is essential that the final authority for promulgating rules and regulations be vested in the administrative agency; conference and consultation might otherwise result in postponing or preventing action unduly, rather than facilitating it.

[104] Carl Kreider, "Democratic Processes in the Trade Agreements Program," *American Political Science Review*, XXXIV (April, 1940), 317.

[105] *Ibid.*, p. 322.

[106] *Ibid.*, pp. 323 ff. Executive Order 8190 (July, 1939), placed the Committee for Reciprocity Information in the State Department.

[107] The Securities and Exchange Commission rarely holds public hearings prior to promulgating its general rules and regulations. In 1939 it modified its rules covering the short-selling of securities on the national securities exchanges after conferences with the officials of the New York Stock Exchange (*Third Annual Report, 1939*, p. 44; cf. Attorney General's Committee on Administrative Procedure, *The Securities and Exchange Commission* (Mono. No. 12 [1940]).

2. The rule-making questions on which administrative tribunals have most generally consulted representatives of group interests are matters of extremely technical import. In such cases, an effective safeguard to the public interest lies less in public hearings than in an adequate representation of each affected group in the informal stages where policy is really determined. This responsibility lies directly upon administration.
3. From the standpoint of securing an adequate representation of interests, public hearings are not the phases of the rule-making process in which substantive decisions of policy are made. They are a device through which group opinions can be focussed for or against a proposed regulation, which may serve to delay or postpone the promulgation of the rules, or to gain further concessions. As such, the hearing, while a democratic device, may be used to prevent desirable regulations definitely in the public interest. Hence, "no rigid formula should be laid down for all types of regulations."[108]

MEDIATORY FUNCTIONS

The heretofore-discussed functions of administration have all been types in which the administrative authority acted as the preliminary or final agent in executing a public policy supported by the sanctions of the law. It is sometimes thought that the mediatory functions of administration lack such sanctions. This is not the case. Mediation is a process in which the statute defines and limits the rights and duties of groups or classes of persons subject to the law. The powers of the mediatory officials are also given statutory sanction but are limited to investigating the conditions threatening the maintenance of industrial peace and to using their good offices to bring the conflicting parties to an agreement. This usage of the term "mediation" in labor relations is often confused with the idea of conciliation in other fields of government action where, however, accompanying controls over the freedom of the parties to disregard the statutory procedures are lacking.

Mediation implies that the responsible agents in determining the terms of an agreement are the representatives of the group interests themselves. The law defines certain rights and duties of the parties which, at least during the time mediation is going

[108] Hart, *op. cit.*, p. 31.

on, are binding upon them. Thus the Railway Labor Act provides that both carriers and employees shall make "every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes in order to avoid interruptions to commerce.[109] Further, both carriers and unions are prohibited from changing the status quo until the National Mediation Board decides the dispute cannot be settled by mediation and until a subsequent board of investigation has made and rendered its report.[110] Thus definite restrictions upon the right to strike and to change conditions of employment are imposed upon both employers and employees. Conciliation, on the other hand, imposes no rights or duties upon the parties whatever. The United States Department of Labor Conciliation Service has no powers other than that of public opinion to compel disputants to meet either with it or with each other.[111]

Mediation and conciliation are functions which have been evolved historically out of the conflict of employer-employee interests and therefore are naturally adaptable to dealing with situations in which the statute does not prescribe the content or terms upon which the parties must agree. The very name of the process, collective bargaining, reflects the organized nature of the interests involved. No compromise with statutory policy is involved, since the aim of that policy is to secure compromise adjustments between the demands of opposing groups. Although the Railway Labor Act does not speak in terms of delegating authority to the representative groups for the making of these agreements (it speaks of carriers as if they were individuals and employees as if there were no unions) or as imposing rights and duties upon such groups, the law in effect regulates the terms and conditions under which the process is to take

[109] Pub. No. 442 (73d Cong. [June 21, 1934]), sec. 2, First.

[110] *Ibid.*, secs. 5–6. See *Investigation of Executive Agencies: Sen. Doc. 1275* (75th Cong., 3d sess. [1937]), pp. 989–99.

[111] 337 Stat. 736, sec. 8: "The Secretary of Labor shall have power to act as mediator and to appoint commissioners of labor disputes whenever in his judgment the interests of industrial peace require it to be done."

place. Within these conditions the public policy covering land and air transportation in the United States is that employer-employee relationships shall be decided by collective agreement between management representatives of the organizations of capital, on the one hand, and the union representatives of employees, on the other.

Involving, as they do, negotiation, demands and concessions, bargaining, and give-and-take, the processes par excellence of mediation and conciliation are personal consultation and conference. A considerable part of the technique of mediation is to judge the proper time to hold *ex parte* or joint conferences. The public hearing is completely eliminated. Publicity of the proceedings would have the practical effect of preventing concessions by group representatives because of the irresponsible charges and suspicions of their constituents.

The first function of the mediator-administrator is to serve as the agent upon whom the parties can displace their resentments at each other. This involves the ability to exhibit sympathy with the legitimate position of each and at the same time point out without incurring resentment the strength in the factual and strategic position of the other group. The second function is to serve as a repository of experience in many other situations upon which the parties may draw. From this experience he may suggest principles upon which the demands of the parties may be reconciled and detailed plans whereby the necessary concessions on the part of the group representatives can reasonably be explained and their "faces saved." Third, he acts as the vocal representative of the public, whose unfavorable reaction to overt struggle has to be kept continually before the parties; he has to focus the attention of the parties upon considerations more fundamental and broader than their own demands, which considerations may have a direct effect in reformulation of the issues; he emphasizes the importance to each side of framing their demands so as to secure favorable public response, which is so essential to the winning of overt conflict. This process of analysis, exposing

the weak points in each party's position, making possible an agreement on a different basis than the original issues, is the job of the mediator. Indeed, a person possessing this capacity is bound to be influential in any administrative position.

It is of course impossible to conceive of all administrative functions in terms of mediation. In many fields of public regulation, compulsion is necessary to coerce minority or group interests into accepting the majority will, however that will or its content is expressed and defined. Functions of government service, in their execution, cannot be administered by mediation once the decisions of policy have been arrived at. Mediation in the strict sense exemplifies the role that administration may assume in a conflict of interests in which there is no consensus except that public or political officials should not prescribe the content of their adjustment or agreement. Under such conditions the public official has no more order-making powers than the weapons of investigation, advice, and his public position enable him to exert by way of recommendation.

SUMMARY

In discussing the investigatory, legislative, and mediatory functions of administration, interest representation has emerged more clearly as a technique of joint consultation. Its justification in public policy consists in adherence by administrative officials to an ideal in which the objective is, through joint investigation and mutual education, an agreement or concurrence between group representatives obtained in advance of the action required by public policy on the facts. The public agency retains ultimate legal responsibility for determining the facts as to whether statutory sanctions should go into effect, but it invites the group representatives to assume responsibility for agreeing on the content or meaning of an indeterminate statutory standard. The role of the group interests involved in the investigatory process is that of furnishing data and acting as catalytic agents in the decision-making process. Instead of the data of group demands being determinative of

the results of administrative investigation, they are consulted as aspects of the total factual situation, controlled by a statutory norm which the public agency has discretion to apply. In this context there is an opportunity for constructive, intelligent public action rather than application of compulsion to resolve open conflicts between partisan groups.

The degree of recognition of organized groups, as a matter of procedure, varies as between the types of administrative function. There is and probably should be no distinctive treatment of groups as compared with individuals in the case of summary, dispensing, licensing, or adjudicating functions. In investigation, rule-making, and mediation, however, there is a progressively increasing degree of recognition of and concession to representatives of organized groups of an informal share in the decision-making process. This characteristic of the latter functions is applicable to two types of situations frequently faced by public officials: (1) the promotion of uniform standards of individual conduct or behavior previously unregulated by law and (2) the exercise of powers dependent to a considerable extent upon the voluntary consent of organized groups. The need for specific forms of interest representation seems to vary directly with the degree of controversy over the application of regulatory sanctions.

It is necessary to maintain a distinction between consultation which involves no more than a request for suggestions or criticisms and a joint consultation between representatives of opposing groups and administration which involves a genuine responsibility for the formulation of policy and hence a certain degree of delegation of public power. Opportunities for the latter kind of consultation are relatively limited among the forms of administrative procedure. Other than in mediatory procedures, such opportunities exist primarily in the framing of policy, rules, and regulations.

When, moreover, the vaguely defined norms controlling the administrator have been tested by years of experience, it ap-

pears that the procedural representation of interests is less a matter of delegating a *de facto* responsibility for decisions of legislative policy than a problem of convincing them that the law is being administered as fairly and reasonably as the statutory responsibilities of the administrator permit. If the administrative problem can be formulated in these terms, the dissatisfaction of affected groups can be directed squarely at the law.

Such a conclusion may perhaps be illustrated specifically once more with a reference to the experience of the Interstate Commerce Commission. From the relations which it maintains with the organizations of shippers and carriers, it is evident that the Commission entertains very clear views of the importance of these groups in the administration of the various acts regulating the railroads. The Commission insists that its responsibilities are primarily legislative, rather than executive or managerial, although in its performance of legislative functions it "necessarily functions after the manner of a court."[112] Certainly with a field staff of less than six hundred and fifty, the Commission has not taken over the operating management of the railroads. Yet, in the exercise of its powers of "fostering guardianship and control," the Commission shares responsibility for the welfare of the industry with private management and ownership, and, regardless of the formal relationship that exists between it and the interests it regulates, the Commission has based its operations on a recognition of the problem of interest representation. The railroads have never publicly joined in the suggestion to dispense with regulation, and the National Industrial Traffic League in 1937 voted to oppose the reorganization bills of that year in so far as they affected the

[112] Interstate Commerce Commission, *Annual Report, 1938*, p. 26. In this same report the Commission referred to the opportunity for negotiation and conferences between carriers and shippers looking forward to voluntary action and then said: "These promotional functions clearly have not been laid upon the Commission by Congress."

Commission in any way.[113] So, although the Commission has kept itself clear of politics in the sense of domination either by the Executive or by Congress, its adjustment to the demands of the organized interests affected by its work has been extraordinarily effective politically.[114]

[113] Interstate Commerce Commission, *Annual Report, 1938*, p. 8; and see *Proceedings, Thirtieth Annual Meeting of the National Industrial Traffic League, 1937* (Circ. 2125), pp. 110–12.

[114] This is not to say that the carriers are satisfied with particular decisions of the Commission. The Executive Assistant to the President of the Association of American Railroads told the writer after the decision in the Fifteen Per Cent case (*Ex Parte 123*) in 1938 had been handed down: "The Commission puts our case in stronger terms than we do, and then gives us about one-third what we ask for!"

CHAPTER IV

REPRESENTATION OF INTERESTS UPON ADMINISTRATIVE BOARDS

IT IS well recognized that the plural-headed form of administrative authority permits a representation of more than one viewpoint in the formulation of policy, even if the appointment of group representatives as such is not specifically provided for by statute.[1] In the selection of the members of a board or commission, in some sense the representative quality of the board or commission is always involved. For example, when appointments are made to boards rendering specialized or technical services to the public, it is advisable that the appointees be of good standing in their professional group; when the agency is engaged in regulatory control, accompanied by controversial and complicated issues requiring formal procedures, not only professional standing or expertness but additional factors connected with the problem of securing the confidence of the affected groups must be considered. These factors are dealt with by political executives through appropriate attention to regional or sectional claims, political obligations, and vocational experience.[2] The representative character of an administrative board or commission is not necessarily associated with the idea that economic interests must appoint board members, be represented in person, or directly participate in the selection of board members; for it

[1] See, generally, White, *Introduction to the Study of Public Administration*, pp. 89–92; F. F. Blachly and M. E. Oatman, *Administrative Legislation and Adjudication* (Washington: Brookings Institution, 1934); *Investigation of Executive Agencies: Sen. Doc. 1275* (75th Cong., 1st sess.), chap. i; C. S. Hyneman, "Administrative Adjudication," *Political Science Quarterly*, LI (1936), 383, 516.

[2] E. P. Herring, *Federal Commissioners* (Cambridge: Harvard University Press, 1936), *passim*.

may happen that the board most acceptable to affected groups is completely neutral as far as group affiliation is concerned and the administrative task thereby performed with a minimum of controversy and dissatisfaction with the board.

The official technique of bringing group representatives into the structure of administration is appointment by the chief executive, department head, or bureau chief. The fact of official appointment confuses and complicates the exact nature of the representation that results. Legislation, whether because of the doctrine of separation of powers or other reasons of policy, rarely limits too rigidly the appointing executive's discretion. This discretion may be used in such a manner as to make the appointee a representative of the executive rather than of the interest group. The grades of this discretion are, roughly, (1) no restriction upon executive choice other than political expediency, (2) a statutory provision providing that an appointment shall be made from a category of interest such as bankers, manufacturers, employees, agriculture, etc., (3) statutory provision that appointment shall be made "after consultation with" groups representative of such groups or classes of interest, (4) statutory provision that appointments shall be made from panels suggested by groups representative of specified classes of interest, and (5) appointment of a nominee by the interest group itself. From the standpoint of securing genuine representatives of a group or category of interest, it would appear that grades 3, 4, and 5 would be subject to less manipulation by the appointing official than grades 1 and 2. Group representation through the latter methods could be genuinely indigenous, but it is legally fortuitous. In the present chapter it is proposed to discuss the most common forms of interest representation upon administrative boards: first, statutory provisions leaving practically unlimited discretion in the hands of the executive and, second, provisions which allow interest groups to make nominations.

REPRESENTATION OF INTERESTS THROUGH EXECUTIVE APPOINTMENT

THE EXCLUSION OF PERSONAL FINANCIAL INTEREST

An outstanding characteristic of federal legislation with respect to the qualifications of the members of the independent regulatory commissions is the sharp prohibition of personal gain or pecuniary self-interest on the part of the commissioners. This eliminates the obvious connection which might otherwise be traced between the commissioners and their outside financial connections. Prospective material gain subsequent to resignation, or rewards "for service rendered" upon completion of the member's term, is not eliminated by such provisions, but it would be difficult to restrict the right to resign.[3]

The Act To Regulate Commerce provided:

> No person in the employ of or holding any official relation to any common carrier subject to the provisions of this part, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said commissioners shall not engage in any other business, vocation or employment.[4]

Similar provisions occur in the Federal Reserve Act,[5] the Federal Power Act,[6] the Federal Communications Act,[7] and the Securities Exchange Act of 1934.[8] The revenue act of 1916 which created the United States Tariff Commission,[9] the

[3] Sec. 10(2) of the Federal Reserve Act prohibits a member from holding an official position in a banking institution for two years after he ceases to be a member unless he serves the full fourteen-year term.

[4] Interstate Commerce Commission, *The Interstate Commerce Act* (revised to October 1, 1935), Part I, sec. 11.

[5] *The Federal Reserve Act* (as amended to October 1, 1935), sec. 10(2),(4), requires that a certified statement under oath be deposited with the Board secretary testifying that the appointee has divested himself of his private financial connections.

[6] *The Federal Power Act* (revised to August 26, 1935), sec. 1.

[7] *The Federal Communications Act* (revised to May 20, 1937), sec. 4(*b*).

[8] Pub. No. 291 (73d Cong. [1934]), sec. 4(*a*).

[9] U.S. Tariff Commission, *Laws Relating to the U.S. Tariff Commission* (1935). Act of September 8, 1916, Title VII, sec. 700.

National Labor Relations Act,[10] and the Federal Trade Commission Act[11] include only the second sentence of the above paragraph.

It has been pointed out that these provisos exclude able and active business leaders who find their personal obligations too great to sever these ties for a period of government service.[12] This criticism brings out the importance of appointing men upon the commissions in whom the affected interests have confidence. It illustrates the political fact that something over and above technical expertness is a qualification for administrative responsibility. It recognizes that a vocational background or a similarity of outlook with respect to certain problems between a commissioner and group may be desirable. This relationship is obviously a form of interest representation, yet the interest group nominally has no connection with the appointment. "Dollar-a-year" men are the outstanding example of this indirect interest representation. They occupy, willy-nilly, a representative position, in the absence, however, of controls over them by their constituent groups to insure the fact of their representativeness. This raises the old question as to whether it is worth while to obtain for positions of administrative responsibility persons who do not consider it personally or financially feasible to divest themselves of their private business connections. When there is a compelling need for experience and ability in a new regulatory venture, such as the National Recovery Administration or the Office of Production Management, the temptation to use men of such talents approaches the status of a necessity. It may be suggested, however, that while it may be wholly salutary for industry to train its own executives and lend them to the government on occasion, a regulatory program contemplating any degree of permanence might well include the encouragement and training of specialists in the economic-managerial problems of specific in-

[10] 49 Stat. 449 (Act of July 5, 1935), sec. 3.

[11] Federal Trade Commission, *Rules, Policy and Acts* (1938), p. 25.

[12] Herring, *op. cit.*, chap. iii.

dustries. This training would have somewhat double-edged advantages, for, while it would lessen the dependence of the public authority on the personnel of the regulated interest, it would still face the danger of developing experts whose view of policy might be associated, however unconsciously, with the welfare of a particular vested interest.[13]

THE REPRESENTATION OF POLITICAL INTERESTS

Political party membership is explicitly recognized in the qualifications imposed upon boards and commissions by statutes which customarily prescribe that not more than a bare majority, two out of three, three out of five, or four out of seven shall be of the same political party.[14] This provision obviously results in practically the same total number of representatives from each party.[15] The division of political interest represented on the boards or commissions is not so much of a split on party lines as upon a general similarity or sympathy of outlook with the Executive making the appointments. If the Executive is able to select his appointees without much interference from the Senate, the party label is not much of a restriction upon his ability to secure men whose views on the general problem at hand are substantially in sympathy with his own; in fact, he may welcome the statutory restriction to appoint men of ability under the opposite party label. Senatorial control of appointments, on the other hand, is more likely to result in emphasis upon acceptability to the party

[13] This problem poses the old dilemma of broad general training versus special competence or vocational preparation, a dilemma whose horns it appears may be avoided by improved programs of post-entry training and a closer relationship between university graduate work and the public services (see, generally, G. A. Graham, *Education for Public Administration* [Chicago: Public Administration Service, 1941]; Lewis Meriam, *Public Service and Special Training* [Chicago: University of Chicago Press, 1936]).

[14] See statutory references cited in nn. 3–11, p. 102, above. The act creating the Tariff Commission allows 3 out of 6 to be of the same political party.

[15] Herring, *op. cit.*, Appen. A, counted 73 Republicans, 68 Democrats, 2 Independents.

organization or upon rewards for financial contributions or other political party services.[16]

Economic groups may of course be represented on a board or commission through the indirect method suggested above of having a general similarity of outlook with the Executive. From the standpoint of the group interest, however, the political appointee can never be completely trusted. The political appointee, in the strict sense, has a conception of his responsibility and personal self-interest which, at its lowest level, is characterized by an allegiance to his organization and a desire to continue that organization in power. On a higher level, the political appointee is guided by broader considerations of public welfare than the content usually given to that conception by special groups. The political appointee therefore cannot be relied upon to maintain a fixed adherence to the economic tenets of a particular group. From their own standpoint, economic groups rightly distrust "politics" in the appointment of administrators of regulatory legislation.

POSITIVE REQUIREMENTS OF VOCATIONAL EXPERIENCE

Section 10 of the Federal Reserve Act provides: "In selecting the members of the Board, not more than one of whom shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial and commercial interests, and geographical divisions of the country." There is no evidence that after the passage of the Act in 1913 this provision was ever construed to mean that the interests specifically named were to assume any responsibility for nominating their representatives, although a committee of the American Bankers Association went to President Wilson prior to the passage of the Act to protest against its failure to provide for such representation.[17] Actually, as it has worked out, the twenty-one Board mem-

[16] This is excellently illustrated in Matthew Josephson, *The Politicos* (New York: Harcourt, Brace, 1938), pp. 83–99.

[17] Carter Glass, *An Adventure in Constructive Finance* (New York, 1927), pp. 112–16; *Sen. Report 133* (63d Cong., 1st sess. [1913]).

bers from 1913 to 1935 were divided as to vocational experience among six occupations: twelve bankers, three "agriculturalists," two lawyers, two professors, one railroad man, and one publisher-congressman.[18] In spite of the predominance of the banking profession in the composition of the Board, it does not appear that the bankers consider the Board in any genuine sense as their representative.[19]

Agitation by farm-bloc senators during the agricultural depression of 1920–22 led to specific provision for a representative of agriculture on the Federal Reserve Board in the Agricultural Credits Act of 1923. This provision did not alter the method of appointment in any way, since the farmer-representative was appointed as one of six members by the President. The specific provision was repealed by the Banking Act of 1935 so that the paragraph quoted above stands as the sole restriction upon the President. In a speech to the American Farm Bureau Federation on December 10, 1936, the representative of agriculture interpreted this provision as follows:

> The Act does not require that one member shall be named who represents agriculture as such. It contemplates that the entire Board and all its members shall be representatives of all the interests that make up our nation. . . . . The Board of Governors [title changed from Federal Reserve Board in 1935] is composed of men who, without exception, regard themselves as representative not of any one group or class interest, but of the common interest and the public welfare. . . . . Fortunately, it is not necessary for agriculture, in its current relations with the Federal Reserve System, to lean upon the weak reed of a solitary spokesman.[20]

Apparently, then, section 10(1) of the Federal Reserve Act has been interpreted as providing for a body which as a whole will reflect group viewpoints rather than any relation of group

[18] Herring, *op. cit.*, pp. 114, 117–20.

[19] P. M. Warburg, *The Federal Reserve System* (New York: Macmillan, 1930), II, 495, 775, 838; T. M. Steele, "The Work of the Federal Advisory Council" (mimeographed address to stockholders of Boston Federal Reserve Bank, 1935 [in Federal Reserve library in Washington]).

[20] Chester C. Davis, mimeographed address in Federal Reserve Board library in Washington.

control over the members of the Board of Governors. It seems quite clear that the controlling influence in appointments will be White House policy rather than any appointee's occupational affiliations.[21]

The Bituminous Coal Act of 1937 provides:

> There is hereby established in the Department of the Interior a National Bituminous Coal Commission, which shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate, for a term of four years. . . . . Two members of the Commission shall have been experienced bituminous coal mine workers, two shall have had previous experience as producers, but none of the members shall have any financial interest, direct or indirect, in the mining, transportation or sale of, or manufacture of equipment for, coal, oil, gas, or in the generation, transmission or sale of hydro-electric power, or in the manufacture of equipment for the use thereof, and shall not engage actively in any other business, vocation or employment. Not more than one commissioner shall be a resident of any one state, and not more than one commissioner shall be a resident of any one of the districts hereinafter established. . . . .[22]

The origin of the tripartisan composition of the Board was the almost evenly divided support for and against the bill in the House Committee.[23] To get the bill out of committee two votes were needed and certain concessions had to be made. The low-cost producers and the captive-mine operators opposed the bill; union labor and some of the influential operator-members of the selling agencies affiliated with the National Coal Association favored it. The two necessary votes were obtained by inserting the provision for a Consumers' Counsel and giving labor two representatives on the Commission.

The Board began to function in May, 1937. The chairman, C. F. Hosford, Jr., was a former coal operator. He had never had any government experience, and he looked upon the Commission's job as one of getting prices fixed and promulgated

[21] Sec. 12(1) creates a Federal Advisory Council, representative exclusively of banks and bankers. See chap. vi, below.

[22] Pub. No. 48 (75th Cong. [April 26, 1937]), sec.2 (*a*).

[23] Interview with John Carson, then consumers' counsel, National Bituminous Coal Commission, April, 1938.

without delay. He maneuvered politically to get a majority of four-to-three on the Commission and then ran things to suit himself. He succeeded in controlling the Commission, but internal repercussions soon developed which were reflected in events outside its deliberations.

The district producer boards provided for in the Act began to propose prices in September, 1937. Hearings were begun on the co-ordination of the district and area prices in October. On November 29, 1937, the Commission promulgated marketing rules as provided for in the Act, and on December 26 it established the national price schedules.[24] But its hearings on the schedules were restricted to protests on the injustices of individual cases. The Consumers' Counsel had been excluded from the Commission's deliberations in establishing prices; and, as individuals did not know how the prices had been fixed, they were in an extremely difficult position in attempting to prove injustices in individual cases. The Consumers' Counsel felt it necessary to indicate his disapproval of the Commission's procedure by making strong statements to the newspapers.[25] Opposition interests resorted to the courts, which granted injunctions to several railroads, the city of Cleveland, and to the members of Associated Industries, Incorporated, the statewide employers' association of New York. In the face of this pressure the Commission, on February 23, 1938, revoked its schedules covering an estimated thirty thousand prices.[26] Chairman Hosford subsequently resigned.

The Commission had to start all over again. This time it took good care to hold hearings, not only in the case of the co-ordinated schedules, but on the prices proposed by the district boards. It proceeded so cautiously that, on July 1, 1939, when the President by Executive Order under the Reorganization Act of 1939 abolished the Commission and replaced it by a division headed by a single director, no new prices had yet been

[24] J. P. Miller, "The Pricing of Bituminous Coal," in C. J. Friedrich and E. S. Mason, *Public Policy* (Cambridge: Harvard University Press, 1940), p. 173.

[25] *New York Times*, February 24, 1938. [26] *Ibid.*

promulgated. The official policy swung to the extreme of deliberation. But the essential point is that the early debacle was directly attributable to dominance of the Commission by group representatives who were ignorant of the time-honored procedures necessarily developed by government in dealing with adversary interests.

The Smith-Hughes Act of 1917 created a Federal Board of Vocational Education

> to consist of the Secretary of Agriculture, the Secretary of Commerce and the Secretary of Labor, the United States Commissioner of Education, and three citizens of the United States to be appointed by with and the advice and consent of the Senate. One of said three citizens shall be a representative of the manufacturing and commercial interests, one a representative of the agricultural interests, and one a representative of labor.[27]

The Federal Board was empowered to approve plans of state boards, as a condition of receiving the money appropriated by the Act, showing the kinds of vocational education proposed, the kinds of schools and equipment, courses of study, methods of instruction, and qualifications of teachers. Whether or not the Cabinet members of the Board actively functioned in their capacities as members and regardless of the principle of interest representation, the Board was transferred with practically no official or public comment by Executive Order to the Department of the Interior in June, 1933, to act in an advisory capacity without compensation.[28] The following October the Secretary of the Interior issued an order transferring the functions of the Board to the Commissioner of Education and directing that official to proceed with the reorganization of the Office of Education, including the staff of the Federal Board.

The Advisory Council on Education, reporting five years later, in 1938, found that the official policy, in so far as excessive federal control over state and local administration of

[27] Pub. No. 347 (64th Cong. [February 23, 1917]), sec. 6.

[28] Office of Education, *Statement of Policies for the Administration of Vocational Education* (rev. February, 1937), p. 2. This *Statement* was itself prepared in co-operation with representative advisory committees (pp. iv–v).

vocational education programs was concerned, had not greatly differed as between the abolished Board and the present Commissioner.[29] This may have been due to the fact, which was noted in the Council's report, that the law's provisions were susceptible of such interpretation and that the Commissioner of Education was influential under both administrative regimes. However that may be, the abolition of the Board's administrative duties and placing its staff under the Office of Education seemed to create no stir of any kind that was reflected in the Department of Interior reports of that period, and the Board itself has practically ceased to function.[30] The only protests that were raised were resolutions passed somewhat apathetically by American Federation of Labor annual conventions, which have been without effect.

The foregoing experience in federal regulatory administration constitutes a very shaky foundation upon which to base an argument for specific group representation on administrative boards. The statutory provisions we have examined, providing for executive appointment from a general category of interest, (1) are subject to political manipulation, (2) fail to provide incentives to unified management of the agency's affairs, (3) tend to accentuate group conflicts outside the agency itself, and (4) place responsibility for inadequate administration upon group organizations for which they were not organized nor intended to assume.

Turning to the states, there is very little evidence of research bearing directly on administrative experience under laws providing vocational experience as a qualification of appointment. Our information is therefore limited to the content of legislative provisions. The outstanding method of explicit representation in state legislation appears to be provision requiring special knowledge, skill, or experience in the field of regulation. In

[29] Advisory Committee on Education, *Report* (Washington: Government Printing Office, 1938), p. 80.

[30] *Ibid.*, p. 181: "The Board has met only five times since 1933 and is seldom consulted in the development of policies."

public utility legislation, for example, the Michigan law requires that one commissioner shall be an attorney "experienced in the law relating to common carriers,"[31] while the others must have "knowledge of traffic and transportation matters."[32] The Nevada law specifies that one member shall be familiar with fares, tolls, charges, and so forth. However, only five states' public utility or railroad commission laws contain such qualifications, and there appears to be no trend toward enacting such requirements among other states.[33]

Sixteen state tax-commission laws require that appointees shall possess knowledge and skill in tax matters.[34] Delaware, Pennsylvania, and Virginia specify that commissioners shall be "generally known to possess executive ability or be specially qualified by experience in administrative positions." The only specific type of economic representation is provided for in Nevada's tax law, which requires that of its five tax commissioners one each, respectively, will have "practical knowledge" of land values, livestock, banking business, and mining. Fif-

[31] It is perhaps appropriate at this point to comment on the relation of skilled advocates and technicians to the problem of interest representation in administration. To take the example of the attorney, it must be admitted that the branch of the legal profession experienced in representing clients before public utility commissions undoubtedly contains a mine of valuable skill. The problem of interest representation, however, lies in relating that skill to an ideal of public service dissociated from the attorney's personal and financial needs. It is difficult for the technician owning only his skill, even if he is a member of a profession, to adjust the exigencies of his personal life to the abstractions of equal justice to all interests. A Louis D. Brandeis is, after all, unique. Hence it is essential to establish conditions which enable the technician to exercise his skills in a public and not a partisan interest. Otherwise the presumption is that economic circumstances will force him to trim the sails of his philosophy to the winds of the interests of his past or prospective employers.

[32] W. E. Mosher and F. G. Crawford, *Public Utility Regulation* (New York: Harpers, 1933), p. 58.

[33] In a study not of legislative qualifications but of the previous occupational affiliations of 164 members of state public utility commissions, F. X. Welch found that 79 were lawyers, 29 were businessmen and bankers, 17 were farmers, 13 were engineers, 12 were industrial workers, 9 were government employees, and 5 were journalists (*Public Utilities Fortnightly*, IV [1929], 801).

[34] W. N. Hogan, *Tax Magazine*, XIV (1936), 27–31, 48–55.

teen state tax-commission laws contain provisions similar to the Wisconsin statute, which provides that its commissioners "shall have knowledge of taxation and skill in matters pertaining thereto." In the field of tax assessment and equalization, therefore, the trend is apparently away from group representation and toward technical expertness.[35]

Fourteen of the thirty-six states passing state unemployment-compensation laws in 1935–36 provided for representation of employers, employees, and the public on the administrative board or commission.[36] Six provided for gubernatorial appointment without confirmation by the state senate or council, seven provided for such confirmation, and one provided for appointment by a department head. Such provisions contemplate a type of economic group representation as distinguished from the requirement of technical knowledge in the public utility and tax-commission laws. The early years of unemployment-compensation administration, however, did not develop any outstanding cleavages of interest between representatives of employers and employees.[37] Emphasis was almost universally placed on the technical problems of expanding the employment offices, tax collections, drafting of forms for reporting wage and employment data, setting up the machinery for processing claims, and so on, with the result that the plan of interest representation did not develop the signifi-

[35] H. L. Lutz (*The State Tax Commission* [Cambridge: Harvard University Press, 1918]) barely mentions these provisions in passing. But see J. D. Barnett, "Representation of Interests in Administration," *National Municipal Review*, XII (1923), 347.

[36] Social Security Board, *Analysis of State Unemployment Compensation Laws, January 1, 1937.*

[37] Preliminary indications of such cleavages were employers' preferences for lowered tax rates and solvent insurance funds and unions' desires for liberalized benefits (interviews with Glenn A. Bowers, former director, Division of Placement and Unemployment Insurance, New York Department of Labor, November, 1937; F. J. Marshall, District of Columbia Unemployment Compensation Commission, July, 1938; but see W. Matscheck and R. C. Atkinson, *The Administration of Unemployment Compensation in Wisconsin and New Hampshire* [Chicago: Public Administration Service, 1936], pp. 2–3).

cant conflicts of interest along these lines that might have been anticipated.

In the administration of state departments of labor and industrial commissions, where a representation of interests might, if anywhere, be expected, the tendency in the pioneering states with the highest reputations for efficiency in this field, such as New York and Wisconsin, has been to eliminate such representation on the administrative body itself and provide for it on advisory councils or boards. Wisconsin's Industrial Commission, created in 1911, one of the first of the commissions established to administer all the state labor legislation, never experimented with the representative commission but from the very beginning organized representative advisory councils.[38] New York's experience has been centered around the distribution of functions between the industrial board and the single-commissioner head of the Department of Labor. Prior to 1913, when the Industrial Board was established, with power to make rules and regulations affecting the safety and health of the employees of the state, there was but one Department of Labor, headed by a single commissioner.[39] In 1915 an industrial commissioner was created to administer the Workmen's Compensation Law, the safety and health regulations of the Industrial Board, and the factory-inspection laws of the Department of Labor. In 1921 there was another distribution of functions, the administrative duties of the department being assigned to an industrial commissioner, while the legislative and judicial functions were restored to the Industrial Board. In 1926 the Board was increased from three to five members, and it was provided that two members should represent employers, two should represent employees, and one

[38] Commons and Andrews, *op. cit.*, pp. 521–27; J. B. Andrews, *Administrative Labor Legislation* (New York: Harpers, 1936), pp. 28 ff.; A. J. Altmeyer, *The Industrial Commission of Wisconsin* ("University of Wisconsin Studies in Political Science" [Madison: University of Wisconsin Press, 1932]), pp. 318–19; Industrial Commission of Wisconsin, *The Industrial Commission of Wisconsin: Its Organization and Methods.*

[39] U.S. Department of Labor, Bureau of Labor Statistics, *Bull. 479*, pp. 1–4.

should be an attorney. The following year the requirement of representation of employers and employees was eliminated, so that the law now contains only the qualification that "at least one [member] shall be an attorney or counsellor-at-law duly admitted to practice in the state."[40] Dissatisfaction with the division between the administrative and legislative-judicial functions resulted in an investigation of the Department in 1928, which recommended that the strict division be modified either by placing the commissioner on the Board or by giving the Board administrative as well as judicial supervision of the Bureau of Workmen's Compensation.[41] A change of commissioners seemed to remedy the difficulty arising from the division of functions, however, and in 1937 a new Board of Standards and Appeals[42] was created to perform the functions of the Industrial Board with respect to industrial safety. This board likewise failed to embody the principle of interest representation. Thus in two states with outstanding records of performance in industrial labor legislation, characterized by different methods of administrative organization, representation of interests has been taken out of the administrative board itself and incorporated by statute in an advisory body to the head(s) of the administrative department.

In conclusion, nothing in the foregoing data appears to alter the general opinion of students of administration that the representation of interests directly upon administrative boards is not particularly desirable. As we have seen, neither statutory requirements of vocational experience nor positive statements that an appointee shall be representative of a particular class of persons constitute really effective barriers to political discretion in appointment. As a result, the representa-

[40] *New York Laws, 1927*, chap. 166; Department of Labor, *New York State Labor Law*, p. 19. This law provided for a bipartisan industrial council of 10 members, to be composed of persons "known to represent the interests of" employers and employees (increased to 15 in 1935).

[41] Lindsay Rogers, "The Independent Regulatory Commissions," *Political Science Quarterly*, LII (March, 1937), 8–10.

[42] *New York Laws, 1937*, chap. 819.

tive may very well be less representative of the group than the executive. In the second place, the divisions of opinion about alternatives of administrative policy do not appear to correspond to divisions between interest groups. Third, requirements of experience, knowledge, or training in the subject matter of regulation in various state laws give no clue to the character of representation that is likely to ensue. On the other hand, in so far as statutory requirements of vocational experience or representativeness are not serious limitations upon the discretion of the executive, they do not seem objectionable as calling attention to the desirability of considering the interpenetrating interests affected by the statute in formulating administrative policy and procedure. If representatives of class interests are appointed who entertain the enlightened views of their representative position held by Mr. Chester Davis, for example, the principle of representation need be no greater threat to unity in the formulation of policy than the opposing views of experts, which, in the administrative situation, have to be reconciled.

REPRESENTATION OF INTERESTS THROUGH NOMINATION BY INTEREST GROUPS

PROFESSIONAL EXAMINING BOARDS

While a professional association may not be an economic interest group primarily,[43] since it restricts the number of entrants by testing qualifications rather than by imposing numerical limitations, some professional associations have developed very important functions as pressure organizations.[44] Their

[43] See, generally, A. M. Carr-Saunders and P. A. Wilson, *The Professions* (London, 1933); Freund, *op. cit.*, chap. xxii; R. M. MacIver, *Society: A Text-Book of Sociology* (New York: Farrar & Rinehart, 1937), chaps. iii, vii. The distinction is usually made on the ground that the profession is primarily concerned with the establishment of standards of competence and the maintenance of a code of ethical practice rather than establishing standards of remuneration or limiting the number of entrants to the trade.

[44] H. F. Gosnell and M. Schmidt, "Professional Associations," *Annals of the American Academy of Political and Social Science*, May, 1935; E. P. Herring, *Group Representation before Congress* (Baltimore: Brookings Institution, 1929), chap. x.

specific representation in administration has arisen from the practice in many states of delegating the task of setting standards of admission to practice in the professions to the professional organizations. State regulation usually takes the form of licensing or certifying candidates who have passed required tests and, upon occasion, exercising a power of revoking these licenses. It was formerly a common practice to delegate complete administrative authority to professional organizations, a vestige of which remains in Alabama, where the State Board of Health is the Governing Board of the State Medical Association.[45] This was, in effect, a monopoly of control by a single-interest group rather than a form of joint representation, and, as Professor Freund has said, this is somewhat "inconsistent with modern principles of public law."[46] The more recent trend has been to create professional examining boards appointed by the governor from panels submitted by the state professional associations.[47] An outstanding example exists in the New York medical examining board, the Regents of the University of the State of New York, whose discretion is limited by the statute, which prescribes the conditions under which medical institutions must conduct examinations, the length of practice which may be accepted in lieu of education, and the causes and procedure of revoking licenses.[48]

In the past the liberal delegation of discretion to refuse to issue or to revoke a license developed rivalries between various

[45] *Parke* v. *Bradley*, 204 Ala. 455 (1920).

[46] *Op. cit.*, p. 47.

[47] L. W. Lancaster, *Social Forces*, XIII (1934–35), 283 ff., found the practice had extended as indicated by the following table:

NUMBER OF STATES REQUIRING APPOINTMENT OF PROFESSIONAL EXAMINING BOARDS FROM PANELS SUBMITTED BY PROFESSIONAL ASSOCIATIONS (1934)

Pharmacists	22	Optometrists	7
Dentists	18	Osteopaths	5
Nurses	16	Lawyers	3
Physicians and surgeons	13	Chiropodists	3
Embalmers and morticians	9	Engineers	1
Veterinarians	7	Architects	1

[48] Freund, *op. cit.*, pp. 429–30.

professional schools,[49] a situation which has been remedied by administrative rules of various state medical or health boards refusing permission to take examinations to persons not graduates of schools approved by the American Medical Association.[50] On the whole, the tendency away from complete delegation of authority to the professional association in testing qualifications seems a salutary one. While there is little reason to question the appropriateness and desirability of the profession's standards of competence, experience has demonstrated that these objectives can be achieved without a complete delegation of power to establish standards for issuing public licenses or certificates to practice.[51] Yet one cannot help but agree with Graham Wallas in his criticism of what he called "professionalism," namely, that, while there is much to admire in professional organizations, they are marked by "an instinctive shrinking from the effort of social habituation combined with a narrow calculation of individual advantage.[52] In recent years Wallas' point received dramatic emphasis in the District of Columbia case in which the local medical society used its powers over "professional standards" to prevent physicians from becoming staff doctors in a group medicine plan.[53] The case strikingly brought out the public responsibilities of the professional association and focused attention on the conflict between these responsibilities and the private pecuniary in-

[49] A case involving this issue arose in *People* v. *Illinois State Board*, 110 Ill. 180 (1888).

[50] *Jones* v. *State Medical Board*, 111 Kan. 813 (1922).

[51] G. W. Adams, "The Self-governing Bar," *American Political Science Review*, XXVI (June, 1932), 470–82.

[52] *Our Social Heritage* (New Haven: Yale University Press, 1921), p. 131.

[53] On June 3, 1940, the United States Supreme Court denied an appeal from a United States Circuit Court decision ordering that the District of Columbia Medical Society must stand trial under the antitrust laws on charges by the Department of Justice that it had engaged in "restraint of trade" through its activities against certain doctors affiliated with a group health association in the District. On April 4, 1941, a District jury handed down a verdict holding the Society guilty but acquitting the individual officers (*Washington Post*, April 5, 1941).

terests of the members. However, it must be said that self-regulation by the medical profession has demonstrated that a division of function can be worked out in which public authorities and private associations can properly utilize each other's support and sanction. The problem seems to turn upon whether the public purpose for which the state seeks to utilize the association can be satisfactorily defined in terms of limited functions to be performed by each.[54]

AMERICAN RAILROAD LABOR BOARDS

The outstanding field in which the principle of interest representation has been applied, i.e., where the group organizations have directly selected their own representatives on the public authority, is that of railroad labor relations. After the Armistice in 1918, the railroad labor organizations opposed the restoration of the railroads to private operation. When Congress, in the Transportation Act of 1920, reinstated and expanded the system of regulation by the Interstate Commerce Commission, it created a Railway Labor Board of nine members, to be appointed by the President, by and with the advice and consent of the Senate.[55] Three members were to represent the public, three were to be selected to "represent the employees and subordinate officials of the carriers" from not less than six nominees submitted in accordance with rules prescribed by the Commission, and three were to be selected to represent the carriers from not less than six nominees submitted in accordance with rules prescribed by the Commission. The rules, promulgated in March, 1920,[56] classified the railroad labor unions into three groups, each to nominate two representatives. These groups were combinations of the railroad crafts, roughly, as (1) the train-service and switchmen's unions, (2) shop crafts, (3) telegraphers, clerks, signalmen, and maintenance-of-way employees. The carriers were classified by their regional associations—(1) eastern, (2) southern, and (3) western.

[54] Lancaster, *op. cit.*, p. 291.

[55] Pub. No. 152 (66th Cong. [February 28, 1920]), Title III, sec. 304.

[56] 1 R.L.B. 116 (1920).

The functions of the Board were to hear and decide disputes involving grievances, rules, or working conditions not settled by local, system, or national boards of adjustment and to assume upon its own motion jurisdiction of "all disputes with respect to wages or salaries" not settled in conference, if it was of the opinion that the dispute was likely to interrupt commerce substantially.[57] Its decisions were not made enforceable upon either party and were apparently meant to serve as foci for public opinion in the event of strikes or interruptions to commerce.

The Board was in disrepute for almost the entire six years of its existence, first, with the unions and, later, with the carriers.[58] In one of its earliest decisions it abrogated some of the treasured working rules of the unions; in 1921 it affirmed a reduction of wages for the train-service brotherhoods, and in 1922 its support of the carriers' wage reductions for the shop crafts, clerks, and maintenance-of-way employees was in large measure responsible for the loss of the shopmen's strike of that year. Two years later the carriers in the western region filed a case with the Board as a move to block the wage demands of the brotherhoods of engineers and firemen. The Board ultimately decided in the carriers' favor, but the unions threatened to strike and secured a favorable wage increase through direct negotiations, in spite of the Board's decision. They then refused to submit the matter to the Board. Obviously, from the carriers' standpoint, an agency which the unions could circumvent with legal impunity when its decisions were unfavorable was seriously defective.

Another problem arising from the principle of interest representation on the Board was the manipulation of the units of representation established by the Interstate Commerce Commission. President Harding appointed two of the three labor members to the Board from a group which contained only 8

[57] Sec. 307 of the Act.

[58] H. D. Wolf, *The Railroad Labor Board* (Chicago: University of Chicago Press, 1927), chaps. iii, xv.

per cent of the railroad employees and which was composed largely of unorganized clerical workers and subordinate carrier officials.[59] This left the standard railroad unions, representing 92 per cent of the employees, with but one-third of labor's representation on the Board.

Other factors heightened the unions' opposition to the Board. The chairman of the Board, a public member, took it upon himself in his public speeches to criticize what he called "radical" tendencies among the railroad labor organizations, while, on the other hand, he seemed to bid for the support of carrier opinion. This injection of political differences, plus a consistent voting against the labor members, who became almost a constant minority, led to the practice of dissenting opinions and even rebuttal answers by the majority. Such divisions within the Board reflected against its dignity and integrity as a unit and lessened the public influence of its decisions; the dissenting opinions were seized upon with glee for future reference by parties antagonistic to particular decisions of the Board.

Finally, in 1925 and early 1926, five representatives of the carriers and unions met and negotiated a jointly agreed upon draft of a new plan for the guidance of labor relations in the railroad industry—which plan was incorporated in a bill enacted as the Railway Labor Act of 1926.[60] This law completely eliminated the principle of representation of interests on the public agency. The Act stated specifically that "no person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member" of the five-member Board of Mediation. Instead of exercising quasi-judicial functions of handing down decisions (if not orders), the new Board's functions were to be those of a mediatory agency, that is, to use its good offices to bring the parties to a settlement of disputes not settled by conferences or through

[59] *Ibid.*, chap. xv; *Labor*, May 19, 1923.

[60] Pub. No. 257 (69th Cong. [May 20, 1926]).

the boards of adjustment.[61] If mediation failed the Board was instructed to attempt to have the parties submit the dispute to arbitration;[62] this, however, was not compulsory, and, if a substantial interruption to interstate commerce threatened, the Board was instructed to notify the President, who, in his discretion, might appoint an emergency board of investigation to report on the dispute.[63] No changes in working conditions by either side were permissible while this statutory procedure was in effect. The Board of Mediation was given certain powers to appoint arbitrators in the event the parties failed to agree on the impartial member(s), and, if either of the parties requested, the Board might give its interpretation of the meaning or application of any agreement.[64] This was the only function of the Board that approached being "judicial."

The Board of Mediation functioned until 1934, when it was replaced by a National Mediation Board of three members under a series of amendments to the 1926 Act.[65] The principal changes in the law were (1) the creation of a National Railroad Adjustment Board to make judicially enforceable awards in "disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions" when such disputes could not be settled by the local adjustment boards[66] and (2) the empowering of the National Mediation Board to investigate and certify the majority representatives of the employees in any craft or class for purposes of collective bargaining.[67] The National Mediation Board was made a neutral body by virtue of the same provision as that in the case of the old Board of Mediation, but the National Railroad Adjustment Board, which had powers of compulsory arbitration in the class of cases cited, was established on the principle of bipartisan interest representation.[68]

[61] *Ibid.*, sec. 5, First.

[62] *Ibid.*, secs. 6 and 7

[63] *Ibid.*, sec. 10.

[64] *Ibid.*, sec. 5, Second and Third.

[65] Pub. No. 442 (73d Cong. [June 21, 1934]).

[66] *Ibid.*, sec. 3 (esp. subsections [*i*], [*m*], [*p*]).

[67] *Ibid.*, sec. 2, Ninth.

[68] *Ibid.*, sec. 3(*a*), (*b*), (*c*), (*h*).

The Adjustment Board consists of thirty-six members, eighteen of whom are selected by the carriers and eighteen by labor organizations that are national in scope. The Act creates four divisions, each of which carries on its business separately from the others, three having ten members equally divided and the fourth having six.[69] If either the carriers or the unions fail to make their selections, the Act provides that the National Mediation Board shall make the appointments. In any division deadlocks on a particular case, the members may select, or if they are unable to do so the National Mediation Board is required to appoint, a neutral referee to sit as a member of the division and make the award. The distinction in duties between the National Railroad Adjustment Board created under the 1934 amendments and the old Railway Labor Board of 1920–26 lies in the fact that the Adjustment Board has no jurisdiction over disputes regarding changes in agreements or in matters involving the making, amendment, or repeal of agreements covering rates of pay, rules, or working conditions. A unique feature of the Board is that its members are paid by the parties they represent, while the employees of the Board are paid out of the appropriation of the National Mediation Board.

Criticism of the Adjustment Board to date has come principally from the carriers, whose objections are aimed not so much against the principle of arbitration itself as against the rules and provisions of the contractual agreements interpreted by the divisions of the Board. Violations of these rules may be compensated by orders of back pay. In such cases the Board frequently deadlocks, but the practice of dissenting opinions has not arisen because it is not the representatives of the parties who make the final award but the referee appointed by the National Mediation Board. The Adjustment Board itself has

[69] Division 1 covers train and yard service employees; division 2, shop crafts; division 3, station, tower, and telegraph employees, signalmen, clerks, freight-handlers, maintenance-of-way and pullman workers; division 4, marine-service workers and those not included in the first three divisions.

no power to enforce its decisions. If the carrier refuses to comply, the union may petition the district court for an order enforcing the Board's award. No union has as yet done so. "The presumption therefore is that neither the carriers have voluntarily complied or have complied upon threat of strike."[70] While it appears that the Board's internal operations are not completely routine and it is not completely certain that its constitution may not be changed, it has established during its seven years of existence (to 1941) that an effective quasi-judicial arbitration agency can be maintained on the principle of specific interest representation. In this connection, however, Dean Garrison has pointed out that "the Board is an instrument for making collective agreements work and survive, not to dispense justice in the orthodox sense."

In the regulation of labor relations, interest representation always means equal representation of employers and unions. Such an arrangement has the effect of placing responsibility for reaching a settlement equally upon both. This is at once the strength and weakness of the principle. In the absence of an agreement, open hostilities result. Hence most boards constituted on the interest principle now have public representatives to mediate between the group representatives to avoid that eventuality.[71] The railroad labor experience indicates, however, that the principle of equal representation works out more to the satisfaction of the unions, employers, and the public if the opposing groups retain in their own hands responsibility for the legislative act of making their agreements. The incentive for exercising this responsibility lies in the probability that Congress would deprive both groups of privileges they hold very dear if they did not in practice keep this responsibility clearly in mind.

[70] Lloyd K. Garrison, "The National Railroad Adjustment Board," *Yale Law Journal*, XLVI (1937), 567 ff.

[71] The outstanding recent example is the National Defense Mediation Board, established by Executive Order 8716, March 19, 1941, which was replaced by the National War Labor Board, organized on the same principle, on January 12, 1942.

BRITISH PUBLIC CORPORATIONS

A reference to the publicly owned corporation may not be inappropriate here, because this device raises a very interesting problem of interest representation. The publicly owned corporation and public utility trust forecast a possible structure of public administrative organization in a society in which government responsibility and ownership of economic enterprise is far wider than we know it today. The interesting problem of interest representation that arises in connection with such bodies is the prospective position in which group representatives would find themselves on a public body charged with rendering public services as distinct from an agency regulating private organizations.

The British Port of London Authority, the government instrumentality controlling dock facilities, warehousing, river conservancy, and collection of port charges for the port of London, has since its inception been constituted on the principle of interest representation.[72] It is by statute a corporate body, its Governing Board being composed of eighteen members, elected triennially, and ten appointed members. The Minister of Transport issues rules and regulations governing the method and conduct of the elections, and the 1920 Port of London Act prescribes the method of selecting the appointed members. The composition of the Authority is as tabulated[73] on the facing page.

This method of selection and representation of interests was not outlined by the 1908 Act but has come about through experience and custom. The practice of nomination through the two associations of shipowners and merchants has resulted in making the triennial elections a mere formality. The appointive device has resulted in securing the services of engineering, financial, and sanitary experts. Labor's representation has been the source of considerable controversy. On one hand,

[72] L. Gordon, *The Public Corporation in Great Britain* (London: Oxford University Press, 1938), pp. 25–32.

[73] *Ibid.*, p. 27.

a former chairman of the Authority was firmly opposed to such representation.[74] On the other, the Transport and General Workers Union has demanded increased labor representation, proposing nine representatives of labor, nine of trading groups, nine appointed by various local government authorities, and four appointed by government departments, on a thirty-one-member board.[75] Nothing has come of this suggestion, and the

Elected* (18).—Payers of port and dock charges	
Shipowners (nominated by the London General Shipowners Society)	8
Merchants (nominated by the London Chamber of Commerce)	8
River-craft owners	1
Wharfingers	1
Appointed (10)	
A. Without statutory qualification (usually experts in finance, engineering, or administration	
By the city of London	1
By London County Council	1
By the Minister of Transport	1
B. To represent special interests	
By the admiralty (navy)	1
By Trinity House	1
By the city (Sanitary District)	1
By the London County Council (consumer)	1
By the Minister of Transport (labor)	1
By the London County Council (labor)	1

* The chairman and vice-chairman are elected by the Authority and may come from outside the 28 members.

domination of the Authority by representatives of shippers and merchants, in the opinion of its most informed American critic, has secured the services of successful businessmen and produced a highly successful regime.[76]

[74] Sir Joseph Broodbank, *Public Administration*, IV (1926), 313, on the ground that the labor representatives thought only of "improving the lot of the workpeople."

[75] Gordon, *op. cit.*, p. 31.

[76] L. Gordon, in W. A. Robson (ed.), *Public Enterprise* (London: Allen & Unwin, 1937), p. 56.

The same critic considers that, while "a moderate increase in labor's representation would be a valuable modification in the P.L.A. constitution," the shipowner and merchant interest has been a sufficient incentive toward efficiency in the affairs of the Authority. He suggests that the labor interest is rather comparable to that of the Authority's creditors, who, as holders of port stock, have no voice in the port's control. From the public point of view, Gordon believes that the appointed members have, "on the whole, exercised a leavening effect upon the whole body, displacing the equilibrium between particular and general interests of the elected members in the latter direction."[77] But, he goes on to say: "The representative public concern can be applied only to a narrow field of enterprise, restricted to industries catering to the public indirectly and limited in geographical area."

The London Passenger Transport Act of 1933 placed the ownership and operation of the publicly and privately owned railways, trams, and busses in an area of 1,986 square miles, including a population estimated at nine and one-half million people, in a public London Passenger Transport Board.[78] The Act followed the lines of a capitalist merger in that it prescribed the details of the terms of transfer of ownership to the Board, including the compensatory shareholding rights and the arbitration machinery to settle disputes as to the terms of

[77] *Ibid.*, p. 28. "Only an unusual concomitance of circumstances makes such a constitution possible. It is dependent upon a clear, direct, common interest among P.L.A. electors, and upon their organization into powerful trade associations coinciding with the area of the port and affording general acquaintanceship with the leading personalities in the community. . . . . The number of shipowners and merchants is limited. . . . . Where utilities of national scope are involved, or where the service is utilized by unorganized bodies of consumers, the public concern must take a different form, more closely related to the national legislature and dependent upon other motives for its effectiveness." Robson (*op. cit.*, p. 368) says the principle of interest representation is of limited utility, applicable only to situations where the interests are (1) small, (2) coherent, and (3) easily defined.

[78] Ernest Davies, "The London Passenger Transport Board," in Robson, *op. cit.*, p. 167.

enterprises taken over after the effective date of the Act. The bill to create the Board was sponsored by Mr. Herbert Morrison, minister of transport in the Labour government of 1929–31. He favored a body appointed solely on the basis of ability by the Minister of Transport,[79] but the Conservative government under which the bill was finally enacted amended it (and this was practically the only respect in which the bill was amended) to provide for a Committee of Appointing Trustees, composed of a number of ex officio public servants and private citizens. The Committee consisted of the chairman of the London County Council, a representative of the London and Home Counties Traffic Advisory Committee, the chairman of the London Clearing Bankers' Committee, the president of the Law Society, the president of the Institute of Chartered Accountants and (after the original board was apppointed) the chairman of the Board. The Board is composed of seven members, two appointed for initial seven-year terms, two for five-year terms, and three for three-year terms. The qualifications required were "experience and capacity in industrial, commercial, financial or transport matters or in the conduct of public affairs . . . . [and] two members must have had not less than six years' experience in local government within the London Passenger Transport Area."[80]

The representation of interests legally provided for through the Committee of Appointing Trustees is almost ridiculously indirect. Representatives of the legal, banking, and accounting professions and two local government officials are recruited to select the Board. Whatever the motives behind this device, the original Board was composed of the chairman of the Board

[79] H. Morrison (*Socialization and Transport* [London, 1933], chaps. x–xi) describes his difficulties in defending his decision before the Labour Party Convention. Morrison considered that a body constituted on any adequate basis of interest representation would have been too unwieldy a body. He also thought a board of technical experts would be too narrow in judgment.

[80] Davies, *op. cit.*, pp. 164–66; Gordon, *The Public Corporation in Great Britain*, pp. 263–69. Only the two seven-year members are full-time directors; the other five meet periodically and have special duties.

of Directors and the managing director of the old private traffic combine, who were appointed for the two seven-year terms, an official of the Transport and General Workers Union and a director of the Bank of England for the two five-year terms, a member of the London County Council, a former official in the Ministry of Transport, and an experienced local government official for the three three-year terms. If this kind of Board personnel could have been obtained by direct nomination of the interests represented, there seemed to be little excuse for resorting to this Committee.

The Act provides for two methods of protecting consumer or passenger interests: (1) by establishing the right of local government authorities to appeal to the Railway Rates Tribunal when dissatisfied with the facilities provided by the railways and (2) by giving statutory sanction to the investigatory functions of the London and Home Counties Traffic Advisory Committee. This Committee consists of forty members, twenty-three appointed by municipalities in which the Board operates, five by the Minister of Labour, two by the Board itself, two by the amalgamated railway companies operating in the area, and the remainder by the Home Secretary, the Minister of Transport, and the police. The Committee can undertake any inquiry into transport matters; it can hold public hearings and compel testimony under oath. It has no power to compel action on the part of the Board, however, so that its findings and recommendations are no more than advisory. It may bring its complaints to the attention of the Minister of Transport. It appears, however, that the Committee's "main concern has been with traffic control and road construction, which are matters largely outside the scope of the Board .... [and] for the present it is clear that the Committee does not concern itself overmuch with the Board's affairs."[81]

Labor representation is provided for through Board policy rather than in the Act itself. The Committee of Appointing Trustees appointed a union official as one of the part-time

[81] Davies, *op cit.*, pp. 176–78.

members, and the Board allocated to him the responsibility for dealing with labor matters. Within two years of its creation the Board reported that "practically the whole of the Board's staff are now covered by negotiating machinery through Trade Union representation or their elected staff councils or committees."[82] The railway men and streetcar men had been subject to the Railway Wages Board, and the London Passenger Transport Act sets up similar machinery. This machinery provides for disputes to be taken up directly between the union and management first; then referred to a negotiating committee of twelve, six appointed by the Board and two each by the Society of Locomotive Engineers, the National Union of Railwaymen, and the Railway Clerks' Association. If the negotiating committee fails to effect a settlement, the dispute must go to a Wages Board, with an independent chairman appointed by the Minister of Labour, twelve members divided equally between the Board and the unions as in the negotiating committee, and four new parties appointed, one each by the General Council of the Trades Union Congress, the Co-operative Union, the Association of British Chambers of Commerce, and the National Confederation of Employers' Organizations. This procedure applies to matters arising out of the application and interpretation of agreements covering rates of pay and conditions of employment and amounts to a concession from the Board, giving up its claim to absolute authority over such matters. It is interesting to note that the bus-operators, represented by the Transport and General Workers Union, have opposed the statutory negotiating or arbitrating machinery and maintain only a local system of direct grievance committees. When this breaks down the only further step is the strike, which occurs sporadically among these employees.

As conceived in the statute, and as operated in practice, the London Passenger Transport Board is a structural form of state capitalism which is owned by the public but financially benefits the holders of capital stock. Reduced financial burdens

[82] *Ibid.*, pp. 180–84.

can be brought about only by a government willing to upset the bargains made and contained in the 1933 Act.[83] Under such conditions it appears that the operating features of capitalist enterprise still remain, that is, (1) management control by experts and men of ability, (2) labor representation through collective bargaining, and (3) capital and interest costs being primary charges on the gross income of the enterprise. The consumer is limited to indirect representation through other government agencies with powers only of investigation and publicity. It would appear, therefore, that the corporate device in and of itself does not change the underlying conflicts of economic interest. The British experiments indicate that practices developed under capitalism will carry forward under public ownership at any rate as long as the purpose of economic enterprise requires efficient management with a freedom of discretion as to methods of achieving that purpose.[84]

SUMMARY

The demand for personal representation of interests upon administrative boards is usually associated with distrust of present administrative officials or policies or with discretionary powers of whose exercise the group is apprehensive. To these fears there is no logical answer. From a survey of experience with personal interest representation on administrative boards, however, certain reasons become evident for excluding such representation. In the first place, representation of any one group necessarily invites a demand for representation of another or others. This does not make for smoothly functioning administration, because it divides the board into opposing camps. When the board members feel a higher loyalty to a group interest than to the administrative task, their attention

[83] *Ibid.*, p. 206.

[84] Gordon, *The Public Corporation in Great Britain*, pp. 326–33. Cf. A. W. Macmahon, "The New York City Transit System: Public Ownership, Civil Service, Collective Bargaining," *Political Science Quarterly*, LVI (June, 1941), 161–98; "Workers' Administration of Mexican Railways," *Public Administration Review*, Vol. I (fall, 1941).

is diverted from making the law work to making a particular viewpoint predominate. This is almost impossible when the group representatives are equally divided. When a third interest—a neutral or public representative—is on the board, that person either is in the uncomfortable position of an arbitrator or else he has the alternatives of siding with one or the other or of compromising. As a day-to-day proposition, this is likely to become extremely distasteful to an expert, and, in either case, one or both of the representatives of the other interests are usually dissatisfied.[85]

In the second place, if a representative of a group interest diverges from the wishes of his "constituents," he places himself in an embarrassing position as far as his future relationships with his own group are concerned. Hence he faces a tremendous personal problem, if indeed he really considers it, in turning his attention from heeding the demands of his group to a disinterested consideration of the requirements in each new specific situation of the public interest. The result is therefore likely to be a wholehearted advocacy of the interest viewpoint[86]

[85] Some such considerations were apparently in the mind of M. W. Latimer, chairman of the Railroad Retirement Board, when he addressed the chairman of the Senate Select Committee on Government Organization as follows (July 2, 1937): "The Railroad Retirement Act of 1937 .... specifies that one member shall be appointed by the President upon recommendations of representatives of employees and another upon recommendations of representatives of carriers. .... One member is to be appointed by the President as the chairman of the Board and may not be pecuniarily or otherwise interested in any employer or organization of employees..... The office of Chairman was created in order to make possible Board decisions by majority vote in the case of the inability of the representatives of the two primary parties to agree, and in order to give some representation to the public interest..... Speaking for myself only, it would not seem to me to be contrary to the agreement (embodied in the Act between the railroad labor organizations and the carriers) to abolish the office of Chairman and to provide for some other method of making decisions by the Board, in the event of disagreement, and of giving representation to the public interest" (*Hearings before the Senate Select Committee on Government Organization on S. 2700, Pursuant to Sen. Res. 69* [75th Cong., 1st sess. (August 2–12, 1937)], p. 477).

[86] An interesting illustration of this position occurred within a few days of the establishment of the National Defense Mediation Board in March, 1941. Negotiations for renewal of the S.W.O.C. contract with the United States Steel Corpo-

or, if not, an extraordinarily difficult strain on the representative's loyalty.

Third, the representation of interests on administrative boards places the groups in a rather embarrassing position to criticize the acts of the body on which they are represented. If they cannot control the Board, their only alternative is to amend the Act, even though the existing definition of administrative powers and duties may be satisfactory. The ability to criticize freely is an important element in the influence of group interests, and this is hampered by official representation. Even assuming that a single economic group might control administrative policy for some period of time, the effect of a turnover in control would be more likely to sabotage administration than anything else.

The most persuasive argument for interest representation arises in connection with a board within whose scope of authority its discretionary powers are relatively unrestricted and which divorces itself as much as possible from details of administration. These conditions apply, for example, to *ad hoc* boards that prescribe minimum wages for specific industries or trades[87] and to boards of directors of corporations whose discretion is practically free from statutory control. Economic research and planning boards in Europe have been organized on the principle of interest representation,[88] and similar

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ration were going on at the time. The president of the Congress of Industrial Organizations, Philip Murray, left an alternate to serve in his place on the Board in Washington and went to Pittsburgh to call a strike of 260,000 steelworkers (*New York Times*, Sunday, April 6, 1941). The resignation of the two C.I.O. members of the Board in November, 1941, over the union-shop issue resulted in the resignation of all C.I.O. alternate members of the Board and the refusal of C.I.O. unions to take their cases before it.

[87] D. Sells, *British Wages Boards* (Washington: Brookings Institution, 1938).

[88] H. Finer, *Representative Government and a Parliament of Industry* (London: Macmillan, 1923); *Hearings on Establishment of a National Economic Council on S. 6215* (71st Cong. [1931]), pp. 319–41; L. L. Lorwin, *Advisory Economic Councils* (Washington: Brookings Institution, 1931); Sir Henry Bunbury, *Governmental Planning Machinery* (Chicago: Public Administration Service, 1938).

bodies have been proposed for this country,[89] but Bunbury's authoritative study of these agencies opposes application of the principle even to a general staff organization.[90] To quote the words of Chairman Altmeyer, of the Social Security Board, interest representation upon administrative boards "seems to be destructive of that continuing mutual deference and concession so necessary to successful administration."[91]

[89] *Hearings on a National Economic Council on S. 6215* (1931). Cf. testimony of Dr. J. M. Clark, Columbia University economist (*ibid.*, p. 213), with Sidney Hillman, trade-union leader (*ibid.*, p. 441): "I believe that in a council of that kind it would be advantageous that every group represent what they conceive to be their interests. They could engage experts whose duty it would be to supply them with so-called impartial facts. I have found that at times different experts will supply different facts or draw different conclusions from the same set of facts. . . . . There are different interests and those interests should be properly represented, and the more the different points of view are brought out publicly the better it will be to judge [as to] which interest is in the line of national interest."

[90] Bunbury, *op. cit.*, p. 21. The potential influence and scope of a national economic planning agency is so tremendous, of course, as to duplicate, if not to fill, the place of the national legislature. The principle of interest representation, applied to such bodies, is therefore exposed to strong objections grounded in political theory (see chap. x, below). For a favorable view, however, see International Labour Conference, *Methods of Collaboration between Public Authorities Workers' Organizations and Employers' Organizations* (Geneva: International Labour Office, 1940), pp. 295–309, 324–30.

[91] *The Industrial Commission of Wisconsin*, pp. 318–19.

CHAPTER V

GROUP ATTITUDES TOWARD ADMINISTRATIVE RESPONSIBILITY

WE NOW turn from consideration of the forms in which class interests may be represented in administrative procedure and structure to an examination of the forms that representation of group organizations may assume in public regulation.[1] We shall first, however, have to take into account some of the disparate viewpoints of group organizations toward the assumption of official administrative responsibilities.

The group-interest attitude toward government is characterized by a self-seeking aspect. This trait is not necessarily an invidious one. By definition, interest groups are animated by hopes of securing rights and privileges not heretofore enjoyed or of conserving those already possessed. But this self-seeking aspect of group activity that underlies the demands for statutory rights and privileges rarely anticipates assumption of administrative responsibility by the group. This lack of anticipation is probably derived from a realization that the public character of administrative functions limits the alternatives of specific representation upon administrative boards. If the administrative authority is not to be a single-headed department or a neutral board, representation implies that the board be either a bipartisan or a multipartisan body. It is obvious that this alternative, involving as it does responsibilities to constituent organizations, forebodes friction between constituents and representatives that, as we have seen, group leaders may prefer to avoid. A contributing factor may also be the difficulty, in pushing bills through a legislative body in the face of powerful opposition, of defending a proposal providing for partisan administration. It is not surprising, therefore, that no surveys,

[1] On definition of "class" and "group," see chap. i, pp. 6–8, above.

attitude tests, or reports on the attitudes of interest groups toward representation in administration are extant.[2]

PREFERENCES FOR IRRESPONSIBILITY

It is well recognized that political departments exist with names corresponding to the large categories of economic groupings, e.g., agriculture, commerce, and labor, and that their heads occupy positions in the President's cabinet in a dual capacity—as his agents for executing Administration policy as well as department heads executing statutes passed by Congress. The secretaries of Commerce, Agriculture, and Labor are unique in that their titles do not conform to names of customary governmental functions (War, Navy, Justice, State). The groups who were influential in having these departments created used the argument that their establishment would not only integrate the administration of regulatory laws but would result in an increased promotion of the welfare of the broad producing groups designated by those names.[3] "Farmers in

[2] The elicitation of attitude would depend, undoubtedly, upon such factors as (1) the specific powers and duties of the administrative agency, (2) the representation of other groups and the relative apportionment of representatives, (3) the express or implied responsibilities in the status of the group itself, (4) consequent limitations upon individual or group autonomy of action. The complexity of a sensible decision on such a question would seem to vitiate the application of a polling technique (cf. G. Gallup and S. F. Rae, *The Pulse of Democracy* [New York: Simon & Schuster, 1940], pp. 92–107).

[3] L. M. Short, *The Development of National Administrative Organization in the United States* (Washington: Brookings Institution, 1923), pp. 377–80: "A national agricultural society was organized on June 25, 1852, the United States Agricultural Society, through the co-operation of a group of men actively interested in various local agricultural boards scattered principally over the northeastern states. The establishment of a national department of agriculture was recommended at the first annual meeting in February, 1853. . . . . A bill providing for an agricultural and statistical bureau was approved by the President on May 15, 1862." The Bureau of Labor set up in the Interior Department in 1884 was largely a result of the insistence of the old Knights of Labor (R. M. Smith, *Political Science Quarterly*, I [1886], 437). The American Federation of Labor always opposed the consolidation of the Bureau of Labor in the Department of Commerce and Labor created in 1903 and was influential in securing a separate status for the Department of Labor in 1913 (Secretary of Labor, *First Annual Report* [1914], pp. 8–9; Short, *op. cit.*, pp. 400–406).

general look upon the Department [of Agriculture] as theirs; they naturally expect the head of the department to be agriculturally-minded and an active champion of agricultural interests."[4]

The general farmers' organizations, beginning with the Grange in 1867, the Farmers' Alliance in 1877, the American Farm Bureau Federation in 1919, and the Farmers' Union in 1920, have concentrated on securing favorable legislation rather than demanding specific representation in the Department of Agriculture or on the state railroad and public utility commissions whose organic statutes they were influential in having enacted.[5] In perusing the legislation administered by the federal Department of Agriculture, one is struck by the fact that the Secretary is almost universally named as the sole administrative authority. This may have several explanations. The Secretary of Agriculture seems to have been successful in establishing a sense of identity between the farmers and the Department, which has been enhanced by the steady expansion of services and aids administered by it. Perhaps it has been the self-conscious awareness of their function as pressure-group agencies that has led the farmers' organizations to refrain from demanding specific representation in administration, realizing that it would probably entail counterdemands from other groups. Aware of their influence with Congress, and having confidence in the Secretary, the leaders of the powerful American Farm Bureau Federation in 1933 urged the sweeping delegations of authority to him contained in the Agricultural Adjustment Act of that year.[6]

[4] *Investigation of Executive Agencies: Sen. Report 1275* (75th Cong., 1st sess. [1937]), p. 30.

[5] S. J. Buck, *The Granger Movement* (Cambridge: Harvard University Press, 1913); J. D. Hicks, *The Populist Revolt* (Minneapolis: University of Minnesota Press, 1931); B. H. Hibbard, "Legislative Pressure Groups among Farmers," *Annals of the American Academy of Political and Social Science*, May, 1935, p. 17; F. E. Haynes, *Social Politics in the United States* (Boston: Houghton, 1924), pp. 130 ff.

[6] C. V. Gregory, "The American Farm Bureau Federation and the A.A.A.," *Annals of the American Academy of Political and Social Science*, May, 1935, p. 155.

The expert and efficient performance of statistical, technical, or regulatory functions of a department or regulatory commission may result in ties of a professional as well as a "vested interest" nature. The reliance of agricultural groups upon the statistical services of the Bureau of Agricultural Economics, of businessmen upon the Bureau of Foreign and Domestic Commerce and Bureau of Standards, and of unions upon the Bureau of Labor Statistics is paralleled by the relations of educators to the Office of Education, social workers to the Children's Bureau and Social Security Board, the medical profession to the United States Health Service, railroads and shippers to the Interstate Commerce Commission, and so on.[7] Such relationships may become so close as to constitute a serious obstacle to attempts at reorganizations of particular bureaus and agencies, as in the campaign against the reorganization bill of 1938 growing out of the proposals of the President's Committee on Administrative Management.[8] Against the dangers of "political interference," which in that case meant the possible loss of influence through the existing administrative personnel and procedures, interest groups were observed to express preferences for the independence and diffused responsibilities of such bodies as the Interstate Commerce Commission.[9] The American Farm Bureau Federation passed a resolution at its annual convention in 1937 as follows: ". . . . We will resist

[7] *Sen. Report 1275*, pp. 31 ff.; E. P. Herring, *Public Administration and the Public Interest*, chaps. xvi–xviii; Lewis Meriam and L. F. Schmeckebier, *Reorganization of the National Government* (Washington: Brookings Institution, 1939), pp. 58–60.

[8] *Sen. Doc. 8* (75th Cong., 1st sess.); *Hearings before Joint Committee on Government Reorganization, Pursuant to Public Res. 4* (75th Cong.), pp. 27–44.

[9] *Hearings before Senate Select Committee on Government Reorganization on S. 2700, Pursuant to Sen. Res. 69* (75th Cong.), pp. 208–55. The Interstate Commerce Commission has built around it an Association of Practitioners, organized in 1929 and having approximately two thousand members in 1938. The membership qualifications are admission to practice before the Commission (by the I.C.C.) and election by a three-quarter vote of the Association's Executive Committee present and voting. The officers of this body appeared before the Senate Select Committee and vigorously opposed Title IV of the Reorganization Bill of 1938 (*S. 2700*), as it would have affected the I.C.C.

any proposed reorganization of departments of the federal government which will take from, divide or duplicate functions properly within the jurisdiction of the Department of Agriculture."[10]

When, therefore, a relationship of confidence is built up between the administrative agency or department and the affected interests, the conditions necessitating a demand for explicit representation by the latter would appear to be lacking. They apparently prefer that responsibility should have the appearance of being external and objective, enforced through the interests' influence with the legislature.[11]

The position of the cabinet officer is of course not the same as that of the independent regulatory agency, although some

[10] American Farm Bureau Federation, 19th Annual Convention (1937), Resolution No. 17. But in 1940 Resolution No. 1 passed by the A.F.B.F. convention read in part as follows: "The new programs which have been provided in the agricultural legislation enacted during recent years have resulted in too much overlapping and duplication of activity. . . . . A woeful lack of co-ordination and planning in carrying out these programs is evident to every farmer. On too many occasions one agency recommends an activity in conflict with that of another agency. Too many instances prevail where personnel is employed to accomplish an activity already embraced within the functions of an existing agency. Farmers do not want numerous agents consulting them on farm programs. . . . .

"We believe that the remedy for this situation lies in the unification of administration in the hands of a five-man *non-partisan* Board within the Department of Agriculture. This Board should be representative of the nation's agriculture. It should be independent in its position with respect to other bureaus and agencies of government. It should cover the administration of the A.A.A. and Crop Insurance, the Soil Conservation and Domestic Allotment Act, Surplus Marketing and Disposal, including the Stamp Plan, Commodity Credit Corporation, and the planning activities now in the Bureau of Agricultural Economics.

"We recommend that the Director of Extension (Service of the Land Grant Colleges), after consultation with state-wide membership farm organizations submit annually to the proposed Federal Board nominations of persons to compose the State Committee. The State Committee will be responsible for the administration of the Agricultural Adjustment Act, including conservation practices and crop insurance . . . ." (*Sen. Doc. 35* [77th Cong., 1st sess.], *Final Report and Recommendations of the Temporary National Economic Committee, 1941, Pursuant to Public Res. 113* [75th Cong.], p. 200).

[11] But see n. 10 above and n. 63 at end of chapter.

of the regulatory functions of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, the Commodity Exchange Act of 1936, and the Agricultural Co-operatives Act of 1922 involve the exercise of quite as quasi-judicial a function as do those of the Federal Trade and Securities Exchange commissions. The secretaries of Commerce, Agriculture, and Labor are presumably appointed with a view to their acceptability, respectively, to those leaders of industry, agriculture, and labor whom the President considers important.[12] As department heads, their contacts with the Appropriations and other committees of Congress serve to focus the impact of interests upon legislative policy. However, it is important to note that cleavages may develop between the cabinet officer and his respective group interest. Such a schism could come about through the President's preference in appointment for persons not too directly affiliated with group organizations or because he may choose to appoint persons unaffiliated or unsympathetic with general attitudes of the general business, labor, or farmer organizations. A conflict may arise if the Administration chooses to follow its own conceptions of the general interests of business, labor, or agriculture as a class, or as expressed in party platforms, rather than adjust its views to those of the organized sectors. But under such conditions, even more than when the administrative agency or administration policy is favorable, the interest group may prefer to be in a position of irresponsibility, as far as the administration of a law is concerned, in order that its position as a publicity and pressure agency will be unhampered and unembarrassed.

PREFERENCES FOR AUTONOMY

Established economic groups, particularly those of businessmen, have a preference for being let alone by government, excepting, of course, cases in which governmental action pro-

[12] Interesting aberrations are President Hoover's appointment of a fraternal lodge executive, J. J. Davis, as Secretary of Labor and President Roosevelt's appointment of a social worker, Harry L. Hopkins, as Secretary of Commerce.

motes their own ideas of the group welfare.[13] From a group maintaining such an attitude, one might presuppose that there would be slight possibilities of demands for active assumption of responsibility jointly with representatives of other interests, in the administration of laws to which the group is opposed. A distinction, however, may usefully be made between essentially political organizations of businessmen and the primarily economic organizations. By a primarily economic group is meant one which is organized around the competitive market of a particular industry or trade. A political organization of businessmen is one which is organized across lines of functional economic groups, around symbols of interest with broadly inclusive terms of reference. The bylaws of the following associations of businessmen are illustrative of the political type of business organization. The purposes of the National Association of Manufacturers, when it was organized in 1905, were stated to be the promotion of ". . . . the industrial interests of the United States . . . . the education of the public in the principles of individual liberty and ownership of property . . . . the support of legislation in furtherance of these principles and opposition to legislation in derogation thereof."[14] The bylaws of the Chamber of Commerce of the United States of America read: "This organization . . . . is intended to secure co-operative action in advancing the common purposes of its members, uniformity and equity in business usages and laws, and proper consideration and concentration of opinion upon questions affecting the financial, commercial, civic and industrial interests of the country at large."[15]

[13] Examples of such exceptions are (1) the tariff (see F. W. Taussig, *Tariff History of the United States* [Cambridge: Harvard University Press, 1931]; E. Schattschneider, *Politics, Pressures and the Tariff* [New York: McGraw-Hill, 1936]); (2) contracts for shipbuilding and mail-carrying (*Hearings before Senate Committee Investigating Mail Contracts, Pursuant to Sen. Res. 349* [73d Cong., 2d sess.]); (3) public lands (B. H. Hibbard, *A History of the Public Land Policies* [New York, 1939]).

[14] Report of Senate Committee on Education and Labor (76th Cong.), Report 6, Part 6; *National Association of Manufacturers*, p. 223 (pursuant to *S. Res. 266* [74th Cong.]).

[15] Article I (as amended to January 8, 1935).

While, with respect to the slogans of opposition to government competition with or control of production in private enterprise, higher taxes, an unbalanced budget, "restrictive" labor legislation, and so on, the narrower trade and industrial groups may be wholly in sympathy with the more inclusive political associations of businessmen, their adherence to such principles has no precise predictive value as to their behavior with respect to legislation affecting their narrower trade or industry. Their general attitude may still be characterized as that of preference for autonomy and self-regulation, but a less belligerent viewpoint is indicated by the statements of objectives in some of their bylaws and constitutions: "The objects and purposes for which this corporation is formed [include] . . . . securing efficient enforcement of State and Federal laws relating to mineral coal rights, mines and miners, and encouraging all proper movements having in view the safety and welfare of the men employed in or about the mines . . . . the establishment of bureaus to furnish information to coal producers, buyers, consumers, to State and Federal officials and the public generally . . . . co-operation with public officials, both state and national, in carrying out the objects of the corporation."[16] "The object of this League shall be to promote adequate national transportation, and to this end: . . . . to cooperate with the Interstate Commerce Commission and other regulatory bodies, both federal and state, and the transportation companies, in developing a thorough understanding of . . . . the transportation requirements of industry; to obtain legislation that will be helpful to commerce . . . . and to promote cordial relations between shippers and carriers."[17] "The nature of the business, or objects and purposes to be promoted, are: to foster and promote the art of radio broadcasting; to protect its members in every lawful and proper manner from injustices and exactions; to foster, encourage and promote laws, rules, regulations, customs and practices which will be

[16] National Coal Association, *Certificate of Incorporation*, sec. 3.

[17] National Industrial Traffic League, *Constitution* (as amended, 1938), Art. I.

for the best interests of the public and the radio industry."[18] "The objects of the Institute shall be: . . . . The ascertainment and making available to the members and the public of factual information, data and statistics relating to the industry. . . . ."[19]

Concentration of attention upon the problems of a particular industry and upon the position of the individual members with relation to uniform policies affecting the entire industry is reflected in divisions of opinion among the industry's members and, particularly with respect to legislative or administrative action, may result in the absence of a united front on the part of the industrial association. Two examples may illustrate this point.

The bituminous coal industry during the decade of the 1920's was characterized by a general state of demoralization, if not depression, accompanied by a reduction of more than one-third in the number of mines in operation and the number of workers, with hourly earnings and per ton net proceeds falling more than one-half.[20] This condition resulted in the establishment of a number of marketing or selling agencies, the most famous of which was Appalachian Coals, Incorporated. The legality of this type of marketing organization was upheld by the Supreme Court on March 13, 1933,[21] but its preliminary efforts at price stabilization were dwarfed by the Bituminous Coal Code under the National Recovery Administration, and the Appalachian Agreement (with the United Mine Workers of America), the effect of which was to bring 95 per cent of the industry's producers under relatively standardized conditions of labor cost.[22] The demise of the N.R.A. on May 27, 1935, was

[18] National Association of Broadcasters, "Certificate of Incorporation," Art. III, in *A Plan for Reorganization of the National Association of Broadcasters, Inc., Dec. 11, 1937.*

[19] Edison Electric Institute (reorganized National Electric Light Association), *Constitution*, Art. II (as amended to June 6, 1934).

[20] J. P. Miller, "The Pricing of Bituminous Coal," in Friedrich and Mason, *Public Policy*, pp. 152–53.

[21] 288 U.S. 344.

[22] Lyon *et al*, *The National Recovery Administration*, pp. 431–33.

followed by a general cutting of prices and a demand from a large part of the industry for continued government action to prevent price-cutting and wage-rate reductions.[23] This resulted, with the support of the United Mine Workers, in the passage of the Bituminous Coal acts of 1935 and 1937.[24] The National Coal Association, a federation of regional selling agencies, and perhaps the only association claiming to be representative of any substantial sector of the industry, took no official position with respect to either of these acts.[25] Members of the Association, as individuals, appeared before Congress in support of and against the bills, but the officers and staff of the Association refused to take either side. The effect of the Association's position of neutrality was to militate in favor of the Act. The official neutrality resulted from an almost even division of opinion among the Association's members on the bills.

In another case under the N.R.A., this time in the men's clothing industry, the internal division within an industry with respect to a uniform policy of competitive standardization resulted in the formation of two associations. One, the U.S.A. Association, was organized on May 22, 1933; the other, the Industrial Recovery Association, was formed twelve days later, on June 3.[26] The N.R.A. deputy administrator in charge of negotiating the Men's Clothing Code found that the primary difference between the two associations lay in the fact that the U.S.A. Association was composed of firms under contract with the Amalgamated Clothing Workers of America, while the Industrial Recovery Association was for the most part nonunion. The two associations submitted separate codes but

[23] *Proceedings, Annual Meeting, National Coal Association* (1937), pp. 8–9.

[24] Pub. No. 402 (74th Cong. [August, 1935]); Pub. No. 35 (75th Cong. [April, 1937]).

[25] *Proceedings, Annual Meeting, National Coal Association* (1937), p. 15 (statement of Executive Director J. D. Battle); writers' interview with Mr. Harry Gandy, assistant to Mr. Battle (April, 1938).

[26] R. H. Connery, *The Administration of an N.R.A. Code* (Chicago: Public Administration Service, 1938), pp. 8–14.

finally accepted a single code recommended by the N.R.A. The constitution of the code authority provided for ten representatives appointed by the U.S.A. Association, five appointed by members of the industry not members of the Association, five representatives appointed by the N.R.A. upon the nomination of the Labor Advisory Board, and one representative of the N.R.A. itself appointed by the Administrator. As it actually functioned, the code authority was composed primarily of manufacturers who believed that the welfare of the industry was best promoted by establishing minimum standards of labor cost through collective agreement with the Amalgamated Clothing Workers Union.[27]

Even the broader political group organization of business, the Chamber of Commerce of the United States, has under extreme circumstances of depression altered its preference for strict autonomy. In 1931 the Chamber proposed that the antitrust laws be relaxed to permit businessmen, individually or collectively, "to enter into contracts for the purpose of equalizing production to consumption, and so carrying on business on a sound basis." It realized, however, that "such agreements should be made, not only with the fullest publicity, but under supervision of some governmental authority which would have the right to review or annul such agreements."[28] The problem immediately arose, of course, as to who would control or supervise the governmental authority. In that case the Chamber did not suggest that it be represented in such a body's makeup, and it rejected the idea of a National Planning Board with positive order-making powers over production and shipments. Instead it proposed a body to be known as the National Economic Council, with "purely advisory powers . . . . not to have any executive authority . . . . dependent for its force and ef-

[27] *Ibid.*, pp. 24–27, 134–43.

[28] This and succeeding quotations are taken from the *Report of the Committee on Continuity of Business and Employment, Chamber of Commerce of the U.S., 1931*, reprinted in *Hearings on Establishment of a National Economic Council*, pp. 182–210.

fect entirely upon its standing before the Community."[29] The Council was to be appointed independently of the government, and its financial support was to come from nongovernmental sources.

We recommend the appointment of a council, preferably of three members, five at the most, to be given the responsibility of organizing a similar [i.e., similar to . . . . scientific and engineering research] attack on our economic problems. The members must be men of the very highest ability and integrity. They must have the experience and the background which will enable them to understand sympathetically the circumstances of all the essential elements of our industrial life, but they must think and act for the country as a whole and be without obligation to any particular *constituency.*

We suggest that this council should be appointed by a larger appointing board. The members of this board should be invited to serve by the Chamber of Commerce of the United States and should be representative of some such group of interests as the following: The United States Department of Commerce, the Chamber of Commerce of the United States, labor, agriculture, manufacturing, banking, railroads, public utilities, distributive trades, the law, engineering and professional economists. The appointment to the council should be made for a three-year term, at the end of which period an appointing board, constituted in the same way, should consider reappointments or changes.

The council should not represent any particular interests. In other words, it should be a body of impartial men of recognized ability and public leadership. The appointing board would have to recognize its great responsibility, and should be in practically unanimous agreement as to the breadth, ability and impartiality of its choices.[30]

The distinctively group character of the assumptions implicit in this report should be clearly set out. First of all, the report identifies the interest of business and industry generally with the welfare of the country as a whole. On this assumption the proposal of appointing and financing the Council by the Chamber or its members is reconciled with the incongruous statement that the Council should represent no particular interests. Second, the report eliminates the notion of joint action

[29] *Hearings on Establishment of a National Economic Council*, pp. 171–72 (testimony of H. I. Harriman).

[30] *Ibid.*, p. 193 (italics are the writer's).

based upon agreement or decision between representatives independently appointed by groups representing conflicting interests. The assumption is that unity of action must come through unity of outlook secured through the method of appointment.[31] Third, a threat to unity of attitude on the Council is avoided by eliminating possible political influences emanating from unharmonious interests. If these conditions reflect the sentiment of the business community as to the circumstances under which its members wish to accept duties of a representative character, it seems clear that their preferences are primarily for autonomy. The powers of the public agency would be either permissive (enabling) or supervisory. The representative agency would be advisory and the method of representation controlled by indirect appointment so as to secure a general attitude of unity and conformity within the representative body.

In 1933 the Chamber supported the National Industrial Recovery Act, but it did so on the understanding that the codes would be initiated and administered by trade associations or dinustrial groups, subject only to a reviewing and approval power vested in the President.[32] The possibility that these associations would have to assume responsibilities connected with their public authority was minimized, if indeed it was clearly analyzed at all. The slogan upon which the N.R.A. was sold was "self-government," with public sanctions of enforcement limited by the voluntary basis of the codes and such extralegal devices as the "Blue Eagle."[33] The writers of the 1931 report probably foresaw the divisions within industrial groups which later developed under the N.R.A., when such adminis-

[31] A later paragraph provided: "The council would, of course, co-operate closely with existing trade associations, and it should encourage such associations to establish strong central committees to study in detail the problems of coordination of production and consumption, stabiilzation of employment, etc., within their particular industries."

[32] House Ways and Means Committee, *Hearings on H.R. 5664* (73d Cong., 1st sess.), p. 134.

[33] Hugh S. Johnson, "The Blue Eagle from Egg to Earth," *Saturday Evening Post*, January 19, 1935.

trative questions as the particular level of competitive standards had to be decided upon and enforced. On this point the division of interest within the trade and industrial group was often as deep as the division between such groups and the "outside" interests. In 1934, after less than a year of code-making, the Chamber's support of the Act shifted to a warning that codes should be promulgated "only through co-operation with representative trade associations. Government control should not be substituted for self-regulation, nor should impetus be given to the building up of bureaucracy."[34] This change of emphasis undoubtedly reflected the opinion of the members of the Chamber who had come into contact with the N.R.A.'s efforts to introduce standardized provisions into the code structure, to eliminate unfair trade-practice provisions which had no direct bearing upon increasing employment, and to supervise to some extent details of code-authority organization.

It would appear that the preference of business groups for autonomy of private collective action and of businessmen as individuals for unregulated freedom of enterprise follows from their established position in the legal and economic structure of society. The preference for autonomy arises from the following considerations: (1) If the problems and objectives of organized or collective action are being handled satisfactorily on a voluntary basis without the assistance of government, there is little incentive to solicit or assume further responsibilities. (2) If the group representative on an official body considers his duty to be the promotion of the demands of his constituency, the welfare of other interests to him seems remote, irrelevant, vexing, inconsequential. (3) The representative position inevitably involves considerations for the representative to which his constituents are blind. If he transcends the immediate claims of group loyalty he is likely to lose its confidence, with results embarrassing to the public agency and to

[34] R. J. Swenson, "The Chamber of Commerce and the New Deal," *Annals of the American Academy of Political and Social Science*, March, 1935, p. 139.

himself personally. (4) Government agencies have evolved procedures and regulations out of their experience as public bodies which continually limit the discretion of persons accustomed in nongovernmental enterprise to doing things with dispatch as soon as the general policy is decided upon. The restrictions of "red tape" offer additional reasons for leaders of nongovernmental administration in deciding not to assume the difficulties of a representative position of administrative responsibility. The latter problems may be avoided if the representative controls his constituency or has its absolute confidence, but the appropriate combination of these two qualifications is somewhat rare.

DEMANDS FOR JOINT PARTICIPATION

Less firmly established groups, striving to win a place for themselves within the socioeconomic structure, attempt to secure representation in public administrative agencies when they feel that other groups are undermining or attacking the basis of their organized existence through the medium of law.[35] An outstanding example of this type of situation is the war crisis, in which all forms of collective action are subordinated to the demands and needs of the military and industrial organization of the nation. In 1917 Samuel Gompers demanded representation for organized labor along with employers and the public in the administration of the Selective Service Act, and this action was duplicated by a resolution of the Fifty-ninth Annual Convention of the American Federation of Labor in 1939:

Provided, that the American Federation of Labor take steps to inaugurate a movement that will protect organized labor from the menace of war dictatorship such as is contained in the "Industrial Mobilization Plan"; to which end we make the following suggestions: that legislation be immediately drafted to include the following points, (1) that on all

[35] This type of aspiration is to be distinguished from that of groups which, striving to undermine or destroy a given system of social or class relations, believe that participation in administration of public policy is objectionable as "class collaboration" or "bad" technique of tending to identify favorable (plus) symbols with a social order that the group is trying to disintegrate.

War Boards, labor shall be adequately represented by men appointed from the trade unions themselves, (2) that the rights of collective bargaining by trade unions shall be maintained, (3) that present labor laws shall not be abrogated or nullified on the flimsy pretext of a national emergency.[36]

When the National Industrial Recovery Act was passed in June, 1933, the American Federation of Labor was under the impression that codes were to be negotiated jointly between representatives of trade associations and trade-unions.[37] When the President's statement as he signed the Act was issued, saying that affected labor groups would be entitled to representation in an advisory capacity and would be entitled to be heard, the A.F. of L. representatives lost no time in obtaining from the Administrator a clarification of code-making procedure. On June 23, 1933, it was announced that a representative of the Labor Advisory Board would be called into conference to discuss the proposed labor provisions of each code.[38] This fell short of the Federation's original conception of its role, but as this arrangement at least provided a method whereby the Labor Advisory Board would know what was going on, this plan was carried forward for the time being. It then appeared that section 7(*a*) was not being given the interpretation by employers, the Administrator, or his General Counsel that organized labor placed upon it. Far from being constructed to sanction collective bargaining in the negotiation of codes, section 7(*a*) was interpreted by the Administrator and his General Counsel in a series of public statements as upholding the anti-union practices of a number of employers.[39] This section of the law had been interpreted by organized labor as a guaranty of collective bargaining, freeing workers from the fear of losing their jobs, and ordering employers to enter into trade agreements. The official interpretations permitted employers to

[36] *Proceedings, 59th Convention, A.F. of L.* (1939), pp. 509–12.

[37] *American Federationist*, July, 1933, p. 695 (editorial).

[38] *New York Times*, June 23, 1933. Later officially confirmed by the N.R.A. Office Order 15, effective August 5, 1933.

[39] N.R.A. Release 34, July 7, 1933; *New York Times*, August 24, 1933; N.R.A. Release 3125, February 4, 1934.

form company unions or employee-representation plans, to deal with as many groups as they chose, and to refuse to recognize unions, enter into agreements, or otherwise decline to bargain collectively in any accepted sense of the term. This threat organized labor sought to meet by varying means, first, the bipartisan National Labor Board, created by agreement between members of the Industrial Advisory Board and the Labor Advisory Board and then appointed by the President;[40] second, representation on code authorities set up to administer the codes; and, third, representation on the National Industrial Recovery Board itself.

The early history of the National Labor Board was one of a steady extension of jurisdiction outside the role originally intended for it, conflict with the Administrator, and an internal conflict of function.[41] Finally the bipartisan composition of the Board was dropped in favor of a neutral board of three experts created under congressional joint resolution and set up July 9, 1934.[42]

Labor representation on code authorities never had official N.R.A. approval, and of 557 basic codes finally promulgated, less than 30 provided for genuine representation.[43] A move developed within the N.R.A. for bipartisan Industrial Relations Boards for code compliance in each industry, but, on the whole, the idea did not meet with much approval by either the Labor Advisory Board or industry code committees.[44] The Labor Advisory Board early became aware that its effectiveness as a

[40] *New York Times*, August 6, 1933.

[41] L. L. Lorwin and A. Wubnig, *Labor Relation Boards* (Washington: Brookings Institution, 1935), chaps. iii–iv.

[42] 48 Stat. L. 1183 (June 16, 1934).

[43] Lyon *et al.*, *op. cit.*, p. 459. N.R.A. policy never went further than providing for the appointment of a labor representative on the staff of the administration representative(s) on code authorities. This was unacceptable to the Labor Advisory Board and none were appointed.

[44] A study made by the staff of the Labor Advisory Board in July, 1935, showed that of 87 industrial relations boards and code-compliance committees provided for, 14 were operating prior to May 27, 1935.

participant in code negotiations and in code administration depended upon the degree to which the employees in the industry or trade were organized. Many of the union officials on the Labor Advisory Board lost interest in internal negotiations within the N.R.A. and concentrated their efforts upon organization drives throughout the country.

The five-member National Industrial Recovery Board, established to replace the office of Administrator abolished in September, 1934, contained one representative of labor. An Executive Order of March 21, 1935, appointed a seven-man board, two members of which were union officials, two business representatives, and three "public" representatives.[45] This board had scarcely begun to function when the Schechter decision was handed down, on May 27, 1935.

Organized labor, as represented by the American Federation of Labor, has concerned itself with the administration of vocational education both in securing the passage of the Smith-Hughes Act and during its subsequent history. As early as its 1904 convention, the A.F. of L. urged the establishment of a distinct system of publicly supported vocational education in the schools, but it was not until 1912 that it presented specific proposals for grants-in-aid of vocational education in the administration of which organized labor would be represented.[46] The Smith-Hughes Act of 1917 provided for a representative of labor on the Federal Board for Vocational Education, along with representatives of business and agriculture (one for each), the secretaries of Commerce, Labor, and Agriculture, and the United States Commissioner of Education.[47] The transfer of

[45] Gustav Peck, "Labor's Role in Governmental Administrative Procedure," *Annals of the American Academy of Political and Social Science*, March, 1936, pp. 85–86; Executive Orders 6859 and 6993.

[46] J. H. Lee (ed.), *Objectives and Problems of Vocational Education* (New York: McGraw-Hill, 1938), chap. xiv; Workers Education Bureau, *Labor and Education* (published by A.F. of L. in pamphlet form), contains various quotations of resolutions by A.F. of L. conventions.

[47] Pub. No. 347 (64th Cong. [1917]); Pub. No. 673 (74th Cong. [1936])—George-Deen.

the Board to the Department of the Interior by Executive Order on June 10, 1933, "to serve in an advisory capacity without compensation,"[48] was vigorously protested by the 1934 convention of the A.F. of L.[49] Unsuccessful in restoring the old administrative board, the A.F. of L. has reverted to a program of urging that all but ministerial control by the United States Office of Education over the administration of vocational education be terminated. It would restore administrative autonomy to local boards of education, except that a federal committee on labor standards would be created to advise the Secretary of Labor. When this committee's recommendations on labor standards have been promulgated by the Secretary, they would become a mandatory condition for the allocation of grants to localities by the Commissioner.[50] The 1939 convention passed a resolution opposing a Senate bill amending the Smith-Hughes and George-Deen acts and reorganizing the system of vocational-education grants to the states "insofar as it does not provide for a representative Federal Board for Vocational Education as a policy-determining body."[51]

It would appear that the program to restore the administration of vocational education to local school boards is opposed both by the professional education group—the Office of Education —and by the state administrators through their American Vocational Association.[52] Primarily, the A.F. of L. is concerned with the prevention of dangers to high labor standards, abuses which arise from the use of vocational-training students

[48] Executive Order 6166.

[49] Speech of Henry Ohl, former member of Federal Board for Vocational Education (*Proceedings, 59th Annual Convention, A.F. of L.* [1939], p. 414).

[50] "Report of Executive Council, A.F. of L.," *ibid.*, pp. 208–11.

[51] *Ibid.*, p. 415.

[52] *Ibid.*, p. 209; "Our committee was unable to reach an agreement with the officers of the American Vocational Association as to the principles which should underlie administration of voactional education." Cf. also *Report of Advisory Committee on Education* (Washington, 1938), pp. 73–95, for an exposition of the views of the professional educators with respect to the problems of administering vocational education.

in private employment at substandard learners' rates of pay and the threat to such standards implicit in turning out partly trained students to compete with skilled craftsmen at much lower rates of pay. Opponents of group representation on an administrative board have pointed out that these abuses should be recognized and prevented by any expert administrative agency,[53] but this has never satisfied organized labor as long as the abuses continue to exist. It is interesting to note that, while the A.F. of L. Executive Council report agrees with that of the Advisory Committee on Education with respect to merging the vocational-education program within the general-education curriculum, it completely diverges from the latter in proposing to vest complete control of that curriculum in the local boards; the American Vocational Association favors the national representative board but strongly opposes the merging of the two programs, either on the state or on the local levels.[54]

It may be concluded that, for the most part, leaders of organized labor have limited their urgent demands for representation in administration to situations in which public agencies have wielded power that could be used to threaten the existence or the standards of labor organizations. Their preferences, at least as far as the established unions are concerned, have been to establish improved standards of working conditions through joint collective action in the nongovernmental sphere and to extend the area of organization into union organization.

SOME GENERAL CONSIDERATIONS

There is an important prospective development involved in asking for or accepting responsibility as a group within administration. This development is the potential extension of supervision by or regulation over the private voluntary association in connection with any public responsibilities it may assume.

[53] *Ibid.*

[54] G. P. Hambrecht, "The Federal Board for Vocational Education (with Supplementary Materials)" (mimeographed copy furnished the writer by Mr. Hambrecht, president, American Vocational Association, in July, 1937).

In matters of selecting officers, control of finances, and methods of settling internal disputes, the voluntary association enjoys autonomous rights based upon assumptions of freedom of association.[55] The group officials are elected by the group members; their powers and duties are regulated by the group's articles of association, constitution, or bylaws. The government of voluntary associations may range from forms of quite democratic to extreme minority control, but these are presumed to be advantages of freedom from governmental interference as long as the right to withdraw from the association is legally unimpaired. In a political society which maintains a sphere of free private association and enterprise, government controls of unincorporated associations are in general limited to those exercised externally through (1) legislation which in effect limits group activities to functions permitted by public policy, (2) court decisions which may punish, remedy, or refuse to enforce illegal or *ultra vires* acts of group officials.[56] These public controls may be interpreted to allow extremely rigorous controls but with certain exceptions have gradually been relaxed since the first half of the nineteenth century.[57] Voluntary unincor-

[55] In England and the United States such freedom of association was always limited by the common-law doctrine of conspiracy, which has been gradually relaxed by the courts and modified by statute, particularly by the "combination laws" in England (A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century*, pp. 185 ff.; Dennis Lloyd, *The Law of Unincorporated Associations* [London: Oxford University Press, 1938], pp. 23–27). In France rights of association were regulated by the "association laws" of 1884 and 1901 (Dicey, *op. cit.*, and Lloyd, *op. cit.*, Appen. I). The most recent survey of the legal status of voluntary associations in the state is the report of the International Labour Conference, *Methods of Collaboration between Public Authorities, Workers' and Employers' Organizations* (Geneva, 1940), pp. 3–32, 57–92.

[56] Lloyd, *op. cit.*, pp. 142 ff.

[57] Examples of such cases are the injunction and damage suits against labor organizations (*Loewe* v. *Lawlor*, 208 U.S. 274 [1908]; *Lawlor* v. *Loewe*, 209 F. 721; 235 U.S. 522 [1915]; *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U.S. 229 [1917]; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 [1922]; 268 U.S. 295 [1925]). Generally, see E. E. Witte, *The Government in Labor Disputes* (New York: McGraw-Hill, 1932), chaps. iii–vii and Appen. A.

porated associations have been restricted only by limitations that their objectives must be legal and that their officials' acts must not be illegal. These can be extremely broad limitations, and, in effect, if the articles of association are drafted in general enough terms and the members accept these provisions when they join, practically the only method by which the group members can control their officers is by organizing and maintaining a majority on the board of directors or executive council. But this again is presumed to be an advantage of the free right of voluntary association.

When, however, a group requests legal sanctions from government to control the freedom of members or nonmembers to violate intragroup or intergroup rules or agreements, demands immediately arise for either specific legal requirements or government supervision to insure the representativeness of the officials before the requested sanctions are permitted to go into effect. These demands may come from disaffected members of the association or from opposing groups. Thus under the National Industrial Recovery Act the President was required to make a finding that the trade associations submitting codes were truly representative of the trade, industry, or subdivision thereof that the codes were intended to cover.[58] The Railway Labor Act, in sanctioning the exclusive bargaining rights of the representative of a majority of the class, craft, or other appropriate bargaining unit of employees, took the question of what was the appropriate unit out of the hands of the union and placed its decision in the hands of administrative agencies of the government.[59] Under the agricultural marketing-agree-

[58] Pub. No. 67 (73d Cong. [1933]), sec. 3(*a*), provided: ". . . . The President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof. . . . ."

[59] Pub. No. 442 (72d Cong. [1934]), sec. 2, Fourth, provided: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the class or craft for the purposes of this Act."

ment program, extraordinary majorities of producers are required before the proposed agreement or order may go into effect.[60]

The examples cited do not indicate that the voluntary associations affected by such provisions have been subjected thereby to any great degree of internal regulation or supervision. Leaders of these voluntary associations would do well to consider, however, whether the enhanced organizational strength secured through government sanctions and privileges will not result later on in governmental supervision over such internal matters as selection of officials, finances, and protection of individual or minority rights.

As a matter of fact, such a development may have a salutary as well as a restrictive effect. In the corporation field, studies have shown the difficulties that a majority (in number) of stockholders have in changing corporation policy or gaining control of the board of directors.[61] It was remarked over forty years ago that unincorporated voluntary associations also are characterized, as they develop institutional forms, by the establishment of a more or less permanent administrative staff, or "civil service," as the observers expressed it.[62] These organ-

[60] Pub. No. 137 (75th Cong. [1937]), secs. 8*c* (1), (8), provided: "The Secretary of Agriculture shall, subject to the provisions of this section, issue and from time to time amend, orders applicable to processors, associations of producers and others engaged in the handling of any agricultural commodity specified in this section . . . . provided, that no order . . . . shall be effective unless the Secretary determines that the issuance of such order is approved or favored: (A) by at least two-thirds of the producers who, during a representative period determined by the Secretary, have been engaged within the production area specified in such order in the production for market of the commodity specified, or who, during such period, have been engaged in the production of such commodity for sale in the marketing area specified, or (B) by producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced . . . . or sold within the marketing area specified in such order."

[61] A. A. Berle and G. C. Means, "The Legal Position of Management," in *The Modern Corporation and Private Property* (New York, 1932), chap. iv; "The Legal Position of Control," in *ibid.*, chap. v.

[62] Sidney and Beatrice Webb, "Trade Union Government," in *Industrial Democracy* (London: Macmillan, 1897), chap. iii.

ization workers come to have a full-time status, partly because of the necessity and partly because they become expert in the specialized techniques of bargaining, negotiating, and group management. Since the members of the group usually have their own full-time jobs, their control over their officers is restricted to approving long-run results of policy either in national conventions or in local referendums.

Hence, when there is a question of representing the group before a governmental agency, the logical application of the interest-group principle requires that the group organization select its own representatives, and, since the group's officials are usually elected periodically by referendum or convention, it is but a step to saying that the group officials should select the representatives. While we saw in chapter iii that this principle is acceptable in administrative procedure, it raises certain difficulties when applied within the structure of administration. These difficulties arise because of the customary practice of not limiting rigidly the discretion of the chief executive, his department heads, or bureau chiefs in appointing men in whom they have confidence. Legislation providing for interest representation usually uses the term in the sense of a class or category, such as employers, bankers, employees, and so on. This distinction between group association and group category paves the way for executive discretion in the appointment of representatives of group interests. It is a double-edge tool: while furnishing a safeguard against private monopoly in the hands of a limited group of the right to represent a particular interest, it also permits the appointment of persons who may be unrepresentative of the majority or the substantially organized group.

These two considerations, namely, the requirement of publicly determined standards of representativeness and the possibility of political manipulation in the appointment of interest-group representativeness, constitute conditions which groups demanding representation in administration must anticipate in their immediate plans, let alone the potentialities of further internal supervision. The group strong enough to ob-

tain its demands often tends to think its present strength sufficient to avoid such future eventualities. Permutations and combinations of other groups in the course of time, however, may well result in the changed status of a particular group, especially if, as is usually the case, it is a minority.

To summarize the question of attitudes of organized groups toward representation in administrative agencies, the following points should be noted. Established pressure-group organizations usually avoid official responsibility for administrative policy-determination, preferring to maintain a position in which they will be free to criticize the results of policy unfavorable to themselves or their members. Exceptions to this rule seem to be restricted to cases where extraordinary conditions prevail, such as war or depression,[63] when a new experiment vitally affecting the existence and welfare of the groups' organization necessitates close observation and control, or, as in the case of the A.F. of L.'s attitude toward the administration of vocational education, when the group has had to fight not only to obtain the legislation in question but to prevent what appears to it to be abuses. When a relationship of confidence and respect exists between the interest groups and the administrative agency, the groups prefer a nonpartisan administrative personnel. Demands for explicit representation almost necessarily imply counterdemands from other groups. Explicit representation of groups raises possibilities of political manipulation in appointment of representatives and ultimate supervision of "internal" affairs of the group organization.

At the beginning of this chapter a presupposition was suggested in general against explicit representation of group organizations in administration. We have now seen from the standpoint of the group itself that great care is advisable before urging the establishment of any such official system. Three precautions may be noted. Reasonable care should be taken to be sure in advance that one or more of the representatives selected are not fundamentally opposed to the principle

[63] Events under the defense program, including the dual-headed Office of Production Management and Philip Murray's "Industrial Council Plan" do not, I think, require essential modification of these statements.

of legislation as to engage in open or passive sabotage. The matters within the jurisdiction of the administrative agency should be of sufficient importance and controversy that both interest groups and their representatives feel that their welfare is vitally affected. The group representatives must be given positions or duties which will make them feel that they have an opportunity for effective action. It may confidently be suggested that the presence of all three of these conditions in considerable degree is essential to the satisfactory operation of any scheme of explicit group representation on administrative bodies. We shall have frequent occasion in the following chapters to refer to considerations based upon these group attitudes.[64]

[64] The exclusive preference on the part of special interests for the method of legislative expression of their views was characteristic of the older practice of special and detailed legislation, whose operation resulted in the benefit of particular groups. These acts have been largely remedied by grants of broad administrative discretion to administrative officials, removed from a position of political allegiance to special groups. The familiar examples of the former type of legislation occurred in local government, where the granting of franchises, letting of contracts, exemption of classes of property from tax and zoning ordinances all in the hands of the city council, resulted in the practices characterized by the phrase "invisible government" and led so many people to identify "politics" with "special interests" and "corruption." The outstanding examples of such special legislation in local government today are the extremely detailed requirements specified in city building codes, so specific that they require the installation of particular kinds of equipment made only by certain manufacturers of building materials (cf. John T. Flynn, syndicated column in *Washington Daily News*, July 18, 1940). Issues of the *Chicago Tribune*, January 16 and February 16, 1940, contain accounts of practices whereby indictments were obtained against associations of building-materials manufacturers and officials of trade-unions under the antitrust laws. The indictments, however, apparently have no effect upon the provisions of building codes, which are maintained by the lobbying power of the unions and the financial relationships between the unions and the manufacturers. The activities of vested interests against social legislation and in obtaining special favors are described in R. M. La Follette, *Autobiography* (1912); Lincoln Steffens, *The Shame of the Cities* (1906) and *Autobiography* (1931); Matthew Josephson, *The Politicos* (1938); Ida M. Tarbell, *History of the Standard Oil Company* (1901); G. A. Myers, *History of the Great American Fortunes* (Modern Library ed., 1938); H. F. Gosnell, *Boss Platt and His New York Machine* (1924); C. E. Merriam, *Chicago* (1929), esp. pp. 51–53; C. M. Kneier, *City Government in the United States* (1934), pp. 249–72, and references cited; Brand Whitlock, *Forty Years of It* (1913); Harold Zink, *City Bosses in the United States* (1930). The trend away from the former methods of bribery and personal corruption toward more impersonal techniques of pressure, propaganda, and publicity is described by E. P. Herring, *Group Representation before Congress* (1929); Stephen Raushenbush, *The Power Fight* (1932).

CHAPTER VI

REPRESENTATIVE ADVISORY COMMITTEES

NATURE AND IMPORTANCE

THE advisory committee has been characterized by Professor Macmahon as "legionary, fugitive and inherently particular."[1] A committee may be called into being at a moment's notice by any political executive or administrative official to consider practically any problem or question of policy. As a method of conference, discussion, or negotiation, there are scarcely any limits to the adaptability of the advisory committee.[2] Its fugitive character arises either from specific terms of reference which imply that its task is done when it has submitted a report or from overly general assignments that its members are unable or unwilling to formulate into effective programs of work. In certain cases, however, particularly of continuing programs of research, advisory committees have been given statutory status.[3]

[1] A. W. Macmahon, "Boards, Advisory," *Encyclopaedia of the Social Sciences*, II, 609–11.

[2] J. A. Perkins ("Permanent Advisory Committees in British Government Departments," *American Political Science Review*, XXXIV [February, 1940], 85) counted 97 permanent committees in the British ministries and offices of Agriculture, Air, Colonies, Education, Health, Home, Labor, Pensions, Post Office, Scotland, Board of Trade, Transport, Treasury.

[3] The National Advisory Committee for Aeronautics, created by Act of Congress (38 Stat. 930, amended by 45 Stat. 1451) in 1915 and 1929, is required "to supervise and direct the scientific study of the problems of flight, with a view to their practical solution . . . . and direct and conduct research and experiment in aeronautics." The Committee is composed of 15 members appointed by the President, 2 representatives each from the War and Navy departments, 1 each from the Smithsonian Institution, Weather Bureau, and Bureau of Standards, and 8 additional persons, including a representative of the Bureau of Air Commerce, who are "acquainted with the needs of aeronautical science, either civil or military, or skilled in aeronautical engineering or its allied sciences" (Office of Government Reports, *United States Government Manual* [October, 1939], pp. 326–27).

Representative advisory committees composed of representatives nominated or selected by economic groups are to be distinguished both from interdepartmental co-ordinating committees composed of government officials and from committees made up primarily of technical experts.[4] The representative committee is established in order to secure active contributions of service and subsequent political support for the formulation of administrative policy; the expert committee is established to secure technical advice and to promote and sponsor scientific research; the co-ordinating committee is supposed to eliminate sources of duplication and conflict of function between several departments or agencies.

The factors favoring the creation of representative advisory committees, from the standpoint of administration, are their utility in "breaking proposed administrative measures on the back of the public"[5] and in sharing public, if not legal, responsibility for administrative conclusions and recommendations. Participation by representatives of interest groups, if a satisfactory result is reached, goes far toward securing favorable sentiment from the other members of those groups. From the standpoint of the interests, their representatives can discover through the advisory committee, what influences are at work in administration and in turn have the opportunity of influencing the substance of administrative action.[6] From an over-all point of view,[7] the significance of the representative advisory

[4] M. C. Trackett, "The Committee as an Instrument of Coordination in the New Deal," *American Political Science Review*, XXXI (April, 1937), 302, says: "Approximately 300 inter-departmental committees were in use [in the federal government] from 1932–1936; and they were assigned every sort of duty, from framing legislative proposals to allotting wave-lengths to government broadcasting stations."

[5] J. A. Salter, *Allied Shipping Control* (Oxford, 1921), pp. 259–62; *The Framework of an Ordered Society* (New York, 1933), chap. iii.

[6] H. J. Laski, *A Grammar of Politics*, pp. 384–87; J. A. Fairlie, "Advisory Committees in British Administration," *American Political Science Review*, XX (November, 1926), 812–22.

[7] J. M. Turner, "Democracy in Administration," *American Political Science Review*, XVII (1923), 213; J. B. Andrews, *Administrative Labor Legislation;* J. M.

committee lies in the functional co-operation of the government with its component groups, an interaction in which the state relinquishes its order-giving, superior-inferior relationship to its citizens in return for an assumption of public responsibility and service on the part of the group interests. A more pragmatic advantage of the representative advisory committee is that, properly handled, it furnishes an excellent test of the reasonableness of proposed administrative policy.

The origin of the representative advisory committee is obscure, but the systematic use of representative advisory committees may be traced to the delegation of discretionary rule-making powers under legislative standards to administrative agencies executing various types of social legislation.[8] "Social legislation" is a broad category, but, as Professor Freund pointed out,[9] it was this type of legislation which relaxed the strict restraints upon administrative action formerly imposed by legislation specifying every detail of policy and administration. With such delegation of discretionary authority to administration, however, went the danger of arbitrary or unreasonable action. The idea was conceived in Wisconsin, the state which led the movement to redraft laws affecting industrial safety and workmen's compensation, that the groups concerned with the exercise of discretionary authority might be allowed to participate in it. The 1911 law thereupon provided: "It shall also be the duty of the commission, and it shall have

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Gaus, "American Society and Public Administration," in J. M. Gaus, L. D. White, and M. E. Dimock, *The Frontiers of Public Administration* (Chicago: University of Chicago Press, 1936).

[8] The fugitive character of advisory committees undoubtedly accounts for the lack of material on their history and origin. N. N. Gill ("Permanent Advisory Committees in the Federal Government," *Journal of Politics*, II [November, 1940], 412) enumerated 82 such committees in 1939, the oldest of which, the Board of Visitors of the Bureau of Standards, was created in 1901. The date of earliest creation of a permanent committee in England given by Perkins is 1904 (Committee on Tropical Diseases Research Fund).

[9] E. Freund, *Standards of American Legislation* (Chicago, 1917), pp. 18–27, 111 ff., 248 ff.

power, jurisdiction and authority to . . . . appoint advisors who, without compensation, shall assist the commission in the execution of its duties."[10]

This provision was related to the broad requirement of the law:

> Each employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and frequenters thereof, and shall furnish and use safety devices and safeguards, and . . . . shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters.

By repealing the old detailed legislative requirements, these provisions paved the way for a complete revision of the state industrial safety and sanitation regulations by administrative order based upon the investigation of experts and the deliberations of representatives of employers, organized labor, the insurance companies, and municipal departments of health. The applicability of the representative advisory committee to almost all phases of state industrial-commission or labor-legislation work was envisaged by Professor John R. Commons,[11] and the device has been used not only in Wisconsin but in other states with respect to employment offices,[12] minimum-

[10] *Wisconsin Revised Statutes*, chap. 101.10. John R. Commons (*Myself* [New York, 1934], pp. 154–59) gives an account of the influences entering into the drafting of the law; a descriptive account of its philosophy of administration is contained in *The Industrial Commission of Wisconsin: Its Organization and Methods* (1913), published by the Commission, pp. 4–21.

[11] *Report of the Commission on Industrial Relations: Sen. Doc. 415* (64th Cong. [1916]), I, pp. 171–230; Commons, *op. cit.*, pp. 164–77, and his *Representative Advisory Committees in Labor Law Administration* (New York: American Association for Labor Legislation, 1930).

[12] The Wagner-Peyser Act, Pub. No. 30 (73d Cong. [June 6, 1933]), provided for a Federal Advisory Council to be established by the director of the United States Employment Service, to be composed of "men and women representing employers and employees in equal numbers and the public for the purpose of formulating policies and discussing problems relating to employment and insuring impartiality, neutrality and freedom from political influence in the solution of such problems. . . . . The director shall also require the organization of similar State advisory councils" (U.S. Department of Labor, U.S.E.S.,

wage orders,[13] apprenticeship regulations,[14] unemployment insurance,[15] and vocational education.[16]

FUNCTIONS

The representative advisory committee, attached to the top administrative officer or board of a department or commission, may have as wide a range of activities as the board or official itself. Its jurisdiction, unless specifically limited, covers the entire scope of the work of the administrative agency, although in practice certain self-imposed restrictions have to be exercised. From the standpoint of the administrative agency, these activities may be grouped as follows:

Specifications Governing State Advisory Councils of State Employment Services Affiliated with the U.S.E.S. (Bull. V); Shelby M. Harrison, *Public Employment Offices* [New York, 1924], chap. x; F. Kaufmann, "Cooperation and Confidence through Advisory Councils," *American Labor Legislation Review*, March, 1931, p. 34; Bureau of Labor Statistics, "Relation of Advisory Councils to Public Employment Services in Various Countries," *Monthly Labor Review*, December, 1936).

[13] E. M. Burns, *Wages and the State* (1926), pp. 114–23; D. D. Lescohier and E. Brandeis, *History of Labor in the United States*, III (New York, 1935), 481–95, 522–39, 642–59; U.S. Department of Labor, Bureau of Labor Statistics, "Minimum Wage Legislation in the United States (as of July 1, 1935)," *Monthly Labor Review*, August, 1937; Bureau of Labor Statistics. *Bull. 619* (1936), p. 160.

[14] Stuart Scrimshaw, *Apprenticeship* (New York: McGraw-Hill, 1932). Pub. No. 308 (75th Cong. [1937]) gave statutory status to the former Federal Committee on Apprentice Training, which under Executive Order encouraged the formation of joint state committees on apprenticeship (Secretary of Labor, *Annual Report* [1937], pp. 63–65).

[15] B. M. Stewart, *Planning and Administration of Unemployment Compensation in the United States* (New York: Industrial Relations Counsellors, Inc., 1938), pp. 132–56; Bureau of Labor Statistics, *Discussions of Labor Laws and Their Administration* (Bull. 609), pp. 112–13. Wisconsin and New York originally set up an advisory council for unemployment-insurance administration separately from the employment-service advisory councils.

[16] The U.S. Office of Education reported in 1938 that 21 states had established state-wide representative councils to formulate policies and act as technical consulting services in the administration of state programs of vocational education. The Office's outline of procedure to be followed by the states for the five-year period from 1937 to 1942 provided for the creation of such committees (Department of the Interior, *Annual Report* [1938], pp. 326–27).

External:

1. Interpreting the work of the agency to the public
2. Giving sponsorship and prestige
3. Raising money, influencing appropriations, securing amendments
4. Interpreting the community to the staff

Internal:

1. Advising on decisions of policy
2. Scrutinizing and criticizing policies and procedures[17]

The function of scrutinizing and criticizing the work of the executive officer, or the person who is responsible for administration, is the one over which greatest degree of conflict is likely to arise between the committee and the administration. Energetic committees often tend to assume a supervisory attitude and to act as if they were responsible for administrative policy. For this reason many administrators prefer special-purpose committees brought in to advise on a specific problem rather than a standing, permanent committee.[18] There is, obviously, in the case of the special-purpose advisory committee, less opportunity for objectionable interference in day-to-day decisions of administrative officials. With special-purpose com-

[17] C. King, "Social Agency Boards and How To Serve on Them," *Midmonthly Survey*, LXXIII (November, 1937), 342–44.

[18] New York Labor Law, Art. 18, sec. 518 (*Laws of 1935*, chap. 468), provides: "There is hereby created a state advisory committee of nine members to be appointed by the governor. Three of the appointees to the council shall be persons who, on account of their previous vocations, affiliations or employments, can be classed as representatives of employers; three . . . . of employees; three . . . . of the public. One representative (of each class . . . . shall be appointed for a term of two years; one (of each class) . . . . for four years; one (of each class) . . . . for six years; and thereafter as their terms may expire the governor shall appoint or reappoint members for the term of six years. The governor may at any time remove a member of the state advisory council for inefficiency, neglect of duty, malfeasance, misfeasance or nonfeasance in office. Vacancies will be by appointment by the governor for the unexpired term. Members shall serve without salary but shall be allowed actual and necessary travelling and other incidental expenses. *The state advisory council shall consider and shall advise the (industrial) commissioner upon all matters submitted to it by the commissioner in connection with this article, and may upon its own initiative recommend such changes in the administration of this article as it deems necessary.* It shall have full investigatory powers, and shall have direct access to all sources of information." (Italics mine.)

mittees, the administrator is not concerned with preserving the line between questions of policy and detail. He has a problem about which he wants the advice of the committee, and he wants it to take informed action. Hence there is no obstacle to furnishing it with all the facts. The same result may be obtained with a standing committee which meets only on call of the administration, but it is likely to entertain ideas of its continuing responsibility, which the administrator may find irksome.

On the other hand, there is little conflict between administration and the committee over its "external" functions. As a public relations device, the advisory committee has long been recognized as invaluable in acquainting representative leaders of the community or country with the work of the agency and in turn securing competent appraisals of its work from responsible outside sources. Through this process of mutual education it is possible to build up a foundation of prestige for the administration. There is considerable symbolic value in associating with a particular agency the names of prominent citizens, particularly if they represent substantial divisions of public sentiment. An appearance of unity on the part of a representative body with such prestige carries great weight in securing appropriations from city councils or legislatures and in conveying a sense of united community support behind particular legislative proposals.[19] In two successive sessions of the Wisconsin legislature in 1935–37, bills indorsed by the Wisconsin Unemployment Compensation Advisory Committee were passed unanimously by the state legislature at a time when the Industrial Commission, which administers the law, was seriously under attack on other counts.[20] The Milwaukee

[19] R. C. Atkinson, L. C. Odencrantz, and B. Deming, *Public Employment Services in the United States* (Chicago: Public Administrative Service, 1938), chap. ix; *Report of the Commission on Industrial Relations*, p. 348.

[20] Wisconsin, *Laws of 1935*, chaps. 192, 446; *Laws of 1937*, chap. 343; Bureau of Labor Statistics, *Discussions of Labor Laws and Their Administration* (Bull. 609), pp. 112–13; W. Matscheck, *Unemployment Compensation Administration in Wisconsin and New Hampshire* (Chicago: Public Administration Service, 1936), p. 6.

Citizens' Committee on Unemployment, composed of five representatives of the Federated Trades Council, five appointed by the Chamber of Commerce, five members of the City Council (and later, five representatives of the County Board), has acted as a financial sponsor and board of directors for the Milwaukee office of the State Employment Service since 1911.[21]

While there is no tendency to question the desirability of these external functions of the representative advisory committee, there does seem to be a tremendous problem in realizing the potentialities of the committee. It is necessary to arouse the members' interest in the work of the administration and the importance of the function the committee is intended to perform, and this often raises a dilemma when the members of the committee have been appointed with a view to their prestige rather than their ability and interest in the work. Consequently, the burden lies upon the shoulders of administration, not only of arousing the members' attention, but of sustaining and guiding that interest through controversy and conflict to the ends of joint collective agreement. As a precondition of sustaining that attention, the committee must be fully informed of the work of the department, office, or agency, and it follows that the committee should not be consulted except on questions on which it is intended to follow its advice. Nothing causes attendance or activity on a committee to flag more than a feeling that it is not influential in making decisions. On the other hand, the recommendations of a representative committee, to serve any useful purpose, practically has to be unanimous. Dissenting opinions destroy the public effect of the committee's work, and if the representatives of any of the interests go back to their constituents dissatisfied with the action taken, so far as the administration is concerned, the objective of securing goodwill and co-operation is farther away than when the committee began.[22] The task of handling a useful advisory committee

[21] Citizens' Committee on Unemployment, *25th Annual Report* (Milwaukee, 1937).

[22] M. L. Cooke, *Our Cities Awake*, p. 68 (quoted in Harrison, *op. cit.*, p. 187): "The advisory board, when properly handled, is an inspiration and help to any

calls for an administrator who has the ability, the personality, and the imagination to attract men of vision among influential groups, to impart a sense of urgency in solving his problems, and to give them a sense of pride in being associated with his work. The lack of this capacity on the part of many local employment offices vitiated the compulsory establishment of such councils after the leaders of the national employment-service movement had become convinced of their importance.

COMPOSITION

In the field of labor-law administration it has become something of a custom to recognize three categories of interest upon the representative committee, that is, an equal number of representatives of employers and employees and an indeterminate number of representatives of the public. The early safety and sanitation committees of the Wisconsin Industrial Commission contained representatives besides officials of insurance companies, the state manufacturers' association, the state federation of labor, and local public health members of its own staff. The importance of having two conflicting interests is to focus the incentives in participation; the "public" category is intended to secure the services either of experts or of influential persons. The extraordinarily successful Unemployment Compensation Advisory Committee of Wisconsin made no provision for public representation from outside the Industrial Commission. It contained three representatives of employers and three of employees, while the director of the Division of Unemployment Compensation or his delegate fulfilled the role of expert,

public official. . . . . There was never a vote taken on any question that came before (our) board. . . . . I do not recall a single occasion when the action finally taken was contrary to the consensus of opinion. Matters were always presented so that the members were not called upon to determine detailed questions of fact. They were given the facts as definitely determined previous to discussion. Time is wasted in discussing and voting on opinion which should be determined by the facts. A real committee sits to interpret facts." Cf. W. J. Donald, "Technique of Group Actions," *Management Handbook* (1931), sec. 6, chap. vii; J. J. Hader and E. C. Lindeman, *Dynamic Social Research* (New York: Harcourt, Brace, 1933).

mediator, and citizen. The New York Industrial Council is representative of employers, employees, and physicians, each of whom has five representatives on the Council.[23]

The Federal Advisory Council of the Federal Reserve System is representative of only one interest—the professional banking group—although this is modified by the regional principle in the statute requiring that there be but one member from each Federal Reserve district.[24] The Business Advisory and Planning Council, appointed by the Secretary of Commerce, had fifty-seven members in 1937 and represented what might be called a general business interest.[25] It does not confine itself to affairs of the Department of Commerce but makes reports and recommendations on all phases of federal government activity affecting business, particularly on tax and fiscal questions and the social security program.[26] The unipartisan advisory council canalizes and focuses sentiment and opinion of individuals and interests of narrower scope within the broad class interest, but it lacks the community character of the multipartisan council. Unless the unipartisan council has a favorable administration to receive its recommendations, its activities tend to resemble those of a lobby, not of an agency of collective action.[27]

[23] New York State Labor, Law Art. 2, sec. 10(*a*); *Laws* (1926), chap. 284; *Laws* (1927), chap. 166; *Laws* (1935), chap. 258.

[24] The Federal Reserve Act, sec. 12; U.S.C., Title 12, sec. 261.

[25] Secretary of Commerce, *Annual Report* (1937), pp. xxxv–xxxvii. The Council's membership included one college professor, Dr. W. Y. Elliott, of Harvard, and one government official, Mr. John H. Fahey, chairman of the Federal Home Loan Bank Board.

[26] Interview with Walter White, assistant to the chairman of the Council, January 11, 1938.

[27] The statutory powers of the Federal Advisory Council, for example, are "(1) to confer with the Board . . . . on general business conditions; (2) to make oral or written representations concerning matters within the Board's jurisdiction; (3) to call for information and make recommendations in regard to discount rates, note issues, reserve conditions . . . . the purchase and sale of gold or securities by the reserve banks, open-market operations of said banks, and the general affairs of the reserve banking system." Under such conditions the Board's "estimate of the relevance of the Council's recommendations" is likely

At the other extreme is the multipartisan committee exemplified by the Advisory Council on Economic Security, composed of over fifty members representative of employers, unions, insurance actuaries, economists, physicians, social workers, statisticians, college professors, and government officials. This committee, which has to be distinguished from the many smaller technical subcommittees which did the actual drafting work, was largely responsible for the passage of the Social Security Act.[28] The committee went out of existence when the

to determine the importance of the latter's views, and, "while the Board has been courteous and cooperative in responding to the Council's requests for information, and in discussion, the opinions of the Council have at times been tolerated rather than sought" (T. M. Steele, "The Work of the Federal Advisory Council" [mimeographed address of a former Council member to the board of directors of the Boston Federal Reserve Bank in 1935; copy in Federal Reserve library in Washington]). The Council has protested against Administration policy in Republican, as well as New Deal, administrations. On November 28, 1928, it warned the Board and banks against borrowing for purposes of making speculative loans. On February 15, April 19, and May 21, 1929, faced with the financial boom, it recommended that the Board raise the discount rate on loans made with speculative collateral, action which was definitely rejected by the Board on May 23, 1929, when it publicly announced that it favored the expansionist credit policy of the reserve banks (G. B. Robinson, *Monetary Mischief* [New York, 1935], chaps. iii–iv). E. A. Goldenweiser (*Federal Reserve System in Operation* [1925], chap. xiv) points out that the Council was blamed for the depression of 1921 for recommending the same action in the boom year of 1920. On February 17, 1931, the Council is recorded as believing that "the credit situation will be best served if the natural flow of credit is unhampered by open market operations or changes in discount rates"; on March 29, 1932, the Council thought "the present an inopportune time to raise many of the issues presented by the Glass bill" (later enacted as the Banking Act of 1933); on February 21, 1933, the Council expressed opposition to publicity of Reconstruction Finance Corporation loans other than reporting them to the President and chairmen of congressional committees; on November 21, 1935, the Council advocated selling the Reserve System's entire holdings of government securities. Thus the Council has functioned as a vehicle of group opinion rather than a potent influence upon Federal Reserve policy. The Council's recommendations are contained in the annual reports of the Board of Governors.

[28] Committee on Economic Security, *Report to the President* (1935), in the *Hearings before Senate Finance Committee on S. 1130: Economic Security* (74th Cong., 1st sess.).

President signed the Social Security Act on August 14, 1935, but, when it became apparent that new amendments were inevitable, the Senate Committee on Finance in co-operation with the Social Security Board appointed an Advisory Council on Social Security in May, 1937. This committee's recommendations were submitted in December, 1938, and were substantially incorporated in amendments to the Social Security Act signed by the President on August 11, 1939.[29] This second committee was composed of twenty-five members—six representative of organized labor, six representative of employers, and thirteen public members. In its deliberations the Council availed itself of the services of the administrative and research staff of the Social Security Board, the Treasury, and the post-office. In this type of advisory council the representation of group interest is blurred; the practical operations of the Council are dependent upon the findings and recommendations of its expert members of staff investigators. But while the unwieldy multipartisan council does not itself function effectively as an initiating body, its discussion and unanimous ratification of technical proposals furnishes powerful impetus and protection to the expert administrative suggestions which partisan political opposition find it extremely difficult to attack.

As in the case of legislative qualifications of vocational affiliation or experience for members of administrative boards, representatives of group interests on advisory committees are in form said to be representative of the entire category of interest. In practice, however, the appointing official requests organized groups to nominate representatives, or he appoints their officials on his own initiative. In the unusual case of the Federal Advisory Council of the Federal Reserve System, the law provides that the interest group shall appoint directly its own representatives.

[29] Advisory Council on Social Security, *Final Report: Sen. Doc. No. 4* (76th Cong., 1st sess. [December 10, 1938]), pp. 1–3; Committee on Economic Security, *Social Security in the United States* (Washington: Social Security Board, 1937); Social Security Board Press Release No. 6102, dated August 11, 1939.

The question of representing the unorganized sectors of a given interest has been analyzed by Professor Commons as follows:

> Ideally, it would be desirable to have the unorganized represented. But in order to have real representation, with representatives whose word will carry weight, it is necessary that the representatives be backed up by an organized group. In practice, a representative must represent somebody. If he is merely a sort of statistical sample of his class, he will find himself in the weak position of having to pit his personal opinion against the demands of an organized opposition. A real representative must also have a constituency to which he has to report. Otherwise he lacks the incentive to persistence in the face of opposition, and is likely not to have the sense of responsibility which comes from being required at frequent intervals to render an account of stewardship.[30]

To the theoretical objections that there may be important interests left unrepresented by providing solely for "class" and organized group representation, the category of "public" representatives offers a method of representing objectives not identified with any organized group. This form of "imputed" representation has the advantage of preventing the confusion and argument that inevitably arise when the organized group representatives each claim that their position embodies the public interest. As a matter of fact, the public representatives are usually disinterested experts in the particular field of regulation. Also, these public representatives provide an opportunity for the administrator to shift the emphasis within the committee away from the immediate conflict of group interest toward the broader objectives of the statute.

It is important to realize that the public category also gives the administrator an opportunity to "pack" the committee with persons favorable to his point of view. But if it be remembered that the representative advisory committee, constituted primarily on the principle of conflict of interests, loses its usefulness unless the outcome of its deliberations is agreement by either substantial unanimity or overwhelming majority, it is difficult to see any objection to the appointment of experts

[30] *Representative Advisory Committees in Labor Law Administration*, p. 4.

favorable to the spirit and intent of the statute. For example, when Wage and Hour Administrator Andrews appointed a Cotton Textile Industry Committee in September, 1938, composed of twenty-one members equally divided among representatives of employers, employees, and the public, to recommend minimum-wage rates for the industry higher than those prescribed by the statute,[31] it was well known that the most difficult issue was not so much the level at which the minimum was to be set but the question of a geographical differential between northern and southern manufacturers. Mr. Andrews appointed three members of the public group, two members of the employees' group, and four members of the employers' group, from southern states, making a total of nine from the South as opposed to twelve from the North. The Committee spent six months in its investigations and deliberations and finally had to put the question of the differential to a vote. A flat minimum of $32\frac{1}{2}$ cents per hour was carried by a 13 to 7 majority. It is possible that a valid charge of "packing" might be pressed against Mr. Andrews, but, in view of the caliber of the committee members, the character of its procedure, and its evident sense of responsibility and awareness of the importance of its final action, it is difficult to say that it was an "unreasonable" packing. The Fifth Circuit Court of Appeals, in passing upon this very question, found that the law had endowed the Administrator with power to exercise sound discretion in appointing the Committee and that in this case the Administrator had not abused his discretion.[32]

Some critics of the representative-council idea build their objections upon the fundamental assumption underlying its composition, namely, a conflict of interests. This assumption of conflict, it is said, results in a bargaining process rather than an attempt to reach the truth or the right answer. Exponents

[31] Fair Labor Standards Act, Pub. No. 718 (75th Cong., 3d sess. [June 25, 1938]), secs. 6(*a*), 8.

[32] *Opp Cotton Mills* v. *Wage and Hour Administration*, 111 F. (2d), 33 (1940). Upheld by U.S. Supreme Court in 61 Supreme Court Reporter 524 (1941).

of this type of criticism usually advocate advisory committees composed of experts whose trained outlook and techniques, however conflicting, are not distorted by advocacy of the demands of a particular economic group.[33] This viewpoint is well founded if the purpose of the committee is to search for scientific truth with the objectives given. The condition which the representative advisory committee attempts to meet is precisely a conflict of objectives which cannot be solved on purely technical or factual grounds. It is based on the assumption that a concerted form of social action will follow from a procedure in which the available facts are furnished to the representatives of conflicting economic interests to see if a mutually agreeable basis of future policy can be agreed upon. The expert advisory committee is based on the idea that the truth, when found, will somehow be put into effect, but the committee itself is not a part of that process. The representative committee is a part of the process not only of investigation but of social and political change. When interest representatives, by reason of (1) having been acquainted with the facts and (2) having participated in the legislative process of modifying original proposals, have agreed upon appropriate lines of policy, a presumption is erected that the wider social groups themselves have assented to it.[34]

[33] Bunbury, *Governmental Planning Machinery*, esp. pp. 20–23. Continued majority-minority splits also diminish the value of these committees. See W. Gellhorn, *Federal Administrative Proceedings* (Baltimore: Johns Hopkins University Press, 1941), chap. iv, and n. 22, above.

[34] The validity of this presumption of course depends upon the representativeness of the organizations by whom the representatives are chosen, but this is a statement of precaution, not of perfection. A great danger inherent in any scheme of interest representation lies in the ability of the representatives to withdraw, whereby the whole machinery breaks down. An interesting attempt to avoid this feature of interest representation was made in the P.W.A. Board of Labor Review, which was created under a resolution providing: "The Board .... shall consist of three members: one to represent labor, one to represent contractors and a Chairman to represent the Administrator. The members shall be appointed by the President of the United States but *no member shall be connected in any way with any organization of building workers or directly connected with, or have any interest in, contracting.* The Chairman shall not be in any

The foregoing paragraphs are by no means intended to urge that all advisory committees be constituted on the interest principle. The writer's position is that the representative advisory committee, under certain conditions, offers an opportunity to liberate forces of change through a process of mutual adjustment between the realm of fact, on the one hand, and opinion associated with vested interests, on the other. Since the objective of both public administration and scientific research is to narrow the area of opinion and to increase the area of accepted fact on any given problem, it may be true that the need for representative committees should progressively diminish. As long, however, as specific problems of policy arise, raising conflicts of objective or purpose between organized economic groups, a place for the representative advisory committee will remain.

POWERS

A statutory representative committee obviously has a more stable foundation than a committee established by executive or administrative order, which can be abolished at will. Its legal status is no clue to its effectiveness, however, nor is it a guaranty of its continuous functioning.[35] One method of increasing the committee's prestige is to have it appointed by an authority higher than the administrative agency to which it is attached. In New York, the State Industrial Council and the Unemployment Insurance Council are appointed by the Governor rather than by the Industrial Commissioner.[36] The formation of the Labor Advisory Board and the Industrial Ad-

way connected with the P.W.A. Decisions of the Board shall be final and binding" (italics mine). This provision obviously made the Board a quasi-judicial arbitral body, with perhaps the subjective requirement of a vocational point of view rather than a legislative agency (Lindsay Rogers, "The Independent Regulatory Commissions," *Political Science Quarterly*, LII [March, 1937], 11–12).

[35] The statutory Federal Advisory Council of the U.S.E.S. rarely met oftener than twice a year.

[36] *New York State Labor Law*, Art. 2, sec. 10(*a*); Art. 18, sec. 518.

visory Board of the National Industrial Recovery Administration was announced by the President, and they were appointed by the secretaries of Labor and Commerce, respectively, while the Consumers' Advisory Board was appointed by the Administrator.[37]

The powers of advisory committees may be purely advisory, that is, having no legal effect or restraint on the administrative body whatever, or consultative. In the latter case the administrative authority is legally required to meet and confer, even though the committee's advice may be disregarded. The practical difference between these powers may not be significant, since a committee is rarely created if there is no intention of consulting it.

The outstanding example of representative advisory committees with powers of compulsory consultation was embodied in the administrative procedure established by the National Recovery Administration, in which a communication, report, or approval of each of the advisory boards and the two technical divisions was made a condition of presidential or administrative approval of the codes of fair competition.[38] Participation by members of the advisory boards of their staffs in the stages of code-negotiation and code-drafting was a necessary precondition to such report or approval, with the result that the code-making process became somewhat of a haggling or bargaining procedure, turning in the last analysis upon the haste of the industry committees for a code, the administration's insistence upon speed, the strength of the organizations supporting the boards, and the latter's ability to squeeze the most out of the negative act of withholding approval.[39] The

[37] Statement of President Roosevelt upon signing the National Industrial Recovery Act (N.R.A., *Bull. 1; New York Times*, June 17, 1933).

[38] Office Order No. 15, August 15, 1933. Interview between Administrator H. S. Johnson and the Labor Advisory Board reported in the *New York Times*, June 23, 1933.

[39] The stages of code procedure might be described as (1); preliminary: organization of trade or industrial association, negotiation of draft of code, selection of its code committee; (2) submission of proposed code to the

result was that withholding approval meant delay of the administrative mechanism at best and a temporary breakdown at the worst. As a matter of fact, the Administrator never formally stated that the advisory boards had the power to prevent promulgation of codes by withholding their approval; on one occasion he warned them that if they were not careful their failure to approve might be disregarded. This hybrid procedure whereby the representative boards exercised powers of a qualified negative was not very satisfactory to anyone, including the boards.[40] It was almost impossible to reconcile in conference the views of the industry code committee and representatives of five other interests. A preliminary return to the advisory-committee idea was made when the Advisory Council was created in May, 1934. After this was reorganized in October, 1934, by the National Industrial Recovery Board, a considerably more satisfactory arrangement was worked out whereby each advisory board sent two representatives to the Council, which was "charged with the duty of making recommendations to the N.I.R.B. upon any matter referred to it by

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N.R.A., checking by the N.R.A. of code committee's representativeness, assignment of code to a deputy or divisional administrator, notification of the advisory boards and technical divisions; (3) preliminary conferences between the deputy, the code committee, and representatives of the Industrial Advisory Board, the Labor Advisory Board, the Consumers' Advisory Board, the Research and Planning, the Legal Division; (4) notice and public hearing, (5) post-hearing conference between same parties as in stage 3; (6) approval and promulgation by the President or (in industries of less than 50,000 employees) the Administrator (cf. Lyon *et al.*, *The National Recovery Administration*, chap. vi, pp. 427–30; President's message to Congress, "The National Recovery Administration" (March 2, 1937), pp. 15–19.

[40] The boards were vulnerable to the charge of captiousness, since they were really a part of the administrative procedure. If the objective of the statute was to encourage industrial confidence by permitting industries to take unilateral collective action through freedom to combine without fear of the antitrust laws, then particular provisions were less important than general uniformity of competitive conditions created by the code regardless of content. This was the general position taken by Chairman Leo Wolman of the Labor Advisory Board (cf. *Washington Post* [interview], June 19, 1933; cf. Pub. No. 67 [63d Cong. (June 16, 1933)]).

way of the Advisory Boards."[41] Thus a means of appeal and review of the decisions of the deputy administrators was secured, and the irritating bickering, delay, and riding roughshod over the opinions of advisers in formal and informal conferences was lessened.[42] In the Council, the staff representatives of the boards seemed to be able to relax their desperate insistence upon the original bargaining demands. An atmosphere more appropriate to a staff advisory council was developed. An emphasis was placed upon securing unanimous opinions, which naturally had great weight with the Board. It should be noted, also, that the Council acted as a single committee, as opposed to the disparate structure of the three unipartisan boards.

It is possible to adapt the purely advisory committee to the administrative process itself. The Department of Safety and Sanitation of the Wisconsin Industrial Commission makes the advisory committee a definite stage in its investigations prior to the promulgation of its orders. The role of the advisory committee can be visualized in the following outline of steps in this process:

1. Demand for, or decision that there will be, regulations
2. Investigation by the Department's staff
3. Appointment of representative advisory committee; deliberation and report of draft regulations
4. Notice and formal hearing
5. Reconsideration by advisory committee
6. Adoption of code by commission
7. Promulgation[43]

The Wisconsin Industrial Commission has adopted the practice of following the recommendations of the advisory committees on its various safety and sanitation orders, so that the

[41] Office Order No. 89, May 21, 1934; N.R.A. Press Release 8142, October 7, 1934; Office Memorandum 306, November 14, 1934.

[42] By that time, however, the mass of codes had been pushed through—500 by August 8, 1934. The Council called its recommendations "decisions," and from June 20, 1934, to May, 1935, rendered them in 233 cases. Its influence on policy in the stage of code administration was therefore far from slight.

[43] Andrews, *op. cit.*, pp. 28 ff.

committees exercise *de facto*, if not *de jure*, rule-making powers. The Commission does so, however, only if the recommendations are unanimous or substantially so. It appears that of twenty-two state-wide safety and sanitation codes in effect in February, 1936, all orders except one had been drafted by advisory committees.[44]

An advisory function with a quasi-judicial procedure has been worked out for the Public Contracts Board of the Federal Department of Labor. This Board has no statutory authorization but functions under an administrative order of the Secretary of Labor by authority of section 4 of the Walsh-Healey Act of 1936.[45] This Board is composed of three members appointed by the Secretary, one each supposedly representative of employers, employees, and the public. After an investigation has been made and evidence assembled by the Public Contracts Division of the Department as to the minimum wages prevailing in an industry, a hearing is held, after due notice, before the Board. The Division presents its evidence as to wage data, the employers through their association or otherwise are given full opportunity to present their evidence and views, and upon the basis of the public record before the Board the latter makes its findings of fact and recommendations to the Secretary. Under the Act, the Secretary determines the ". . . . prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured under said contract" (between any government agency and manufacturer or furnisher of supplies for the agency's use

[44] Interview with R. M. Keown, chief engineer, Wisconsin Industrial Commission, July, 1938. A member of the Commission's staff sits as a member of the committee and usually acts as its secretary.

[45] Pub. No. 846 (73d Cong. [June 30, 1936]). Secretary of Labor, *Annual Report* (1937), p. 34; Administrative Order dated October 6, 1936. Sec. 4 of this Act authorizes the Secretary to appoint "such other employees with regard to existing laws . . . . as he may from time to time find necessary for the administration of this Act."

in excess of $10,000).[46] Formally and legally the Board's duties are advisory, but it seems to perform much the same function as a trial examiner in one of the independent regulatory commissions.

Minimum-wage boards under both state and federal legislation are not advisory committees in the strict sense, but the scope of their activity is so restricted, their role is so vital a part of the procedure of minimum-wage administration and so similar to the rule-making procedure of purely advisory committees discussed above, that a reference to them here is not inappropriate. They really constitute an extension of the principle of advisory committees. The minimum-wage board, which is now set up under practically all laws providing for promulgation of minimum wages by administrative order, should perhaps be called an administrative board,[47] because it has a sphere of activity and function in which it cannot be superseded by the administrative officer. Thus, in the New York minimum-wage law the board is appointed by the Industrial Commissioner, and the board alone "recommends minimum wage standards for women and children in the occupation or occupations for which it was appointed to investigate .... classifies employments in any occupation according to the nature of the services rendered and recommends appropriate rates for different classes of employment .... (or) localities."[48] It may recommend suitable scales for learners and apprentices and may recommend "such regulations as it may deem appropriate to safeguard the minimum wage standards

[46] *Ibid.*, sec. 1(*b*). In *Perkins* v. *Lukens Steel Co.*, 60 Sup. Ct. Rep. 869 (1940), upheld the constitutionality and interpretation of the Secretary applying "locality" to the steel industry in seven different states. See also U.S. Department of Justice, Attorney General's Committee on Administrative Procedure, *The Public Contracts Division of the U.S. Dept. of Labor* (Mono. No. 2 [Washington, 1940]).

[47] Burns, *Wages and the State, passim;* Lescohier and Brandeis, *op. cit.;* D. Sells, *British Wages Boards* (Washington: Brookings Institution, 1938).

[48] New York Labor Law, Art. 19 (*Laws of 1937*, chap. 276), sec. 556(1), (4), (6), (7), (8).

recommended in its report." In these functions the wage board's jurisdiction is exclusive, although advisory; the Commissioner may "confer with the board," but, if it does not see fit to accept his suggestions, he must either accept or reject the report within ten days after it is submitted to him. The board has an independent sphere of legislative operation, although it is circumscribed by the Commissioner's activities before and after it is convened. Thus the Commissioner decides whether there is to be an investigation of a particular occupation or group of occupations; he undertakes the investigation; he defines the scope of the board's jurisdiction (and of the application of the final order); he appoints the board; if he accepts its report he holds public hearings and makes the order (first directory and later of mandatory application).[49] Enforcement through the factory-inspection division of the department, publication of recalcitrants' names in newspapers, and, if necessary, civil action, devolve upon the Commissioner.[50] The representation of interests is restricted to rule-making and focused upon a specific problem, since different committees are appointed for each occupation and wage order.

An interesting combination of advisory, rule-making, and quasi-judicial functions exists in the New York Industrial Council established within the State Department of Labor. This body is required to " . . . consider all matters submitted to it by the commissioner and advise him with respect thereto; on its own initiative recommend to the commissioner such changes in administration as, after consideration, may be deemed important and necessary. . . . ."[51]

[49] *Ibid.*, secs. 553, 554, 557–65.

[50] The predecessor of this law, based upon a different standard of determination, was invalidated in *Morehead* v. *Tipaldo*, 298 U.S. 587 (1936). The decision in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) seems to uphold the principle of minimum-wage legislation for women and children generally, however, and the Court's decision referred specifically to the representative wage board on whose recommendation the challenged order was based.

[51] *New York State Labor Law*, Art. 2, sec. 10-*a*(4). The Council is also required to ". . . . cooperate with the civil service commission in conducting ex-

In summary, it seems clear that the importance of the representative advisory council does not primarily depend upon the legal nature of its powers. Its importance is derived from the role it plays in the administrative process. The common activity pattern is: (1) investigation by the permanent, expert administrative staff; (2) submission of all the facts available to the advisory committee; (3) deliberation and report by the committee with recommendations; and (4) consideration of recommendations by the administration, perhaps after hearings, leading to adoption, modification, or rejection. In some of the examples cited the committee performs the whole rule-drafting function, except promulgation, on a particular problem. In others the administration does the investigatory, drafting, and promulgating work, and the committee only approves, disapproves, and perhaps amends specific proposals of the administration. This procedure, in the case of the Federal Advisory Council on Social Security, was transformed into a research project or investigation, divorced from any particular administrative problem and organized around the task of amending essential features of the Social Security Act.

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aminations and in preparing lists of eligibles for positions, the duties of which require special knowledge or training, and advise the commissioner in the selection and appointment of employees to such positions;

"consider all matters connected with the practice of medicine submitted to it by the commissioner or industrial board; consider the qualifications for, or persons being considered for appointment by the commissioner to positions involving the practice of medicine . . . . ; prescribe rules and regulations to govern the procedure of investigation and hearings of medical societies or boards of charges against authorized physicians or licensed compensation medical bureaus;

"investigate on its own initiative charges made by a physician that he has been improperly refused authorization to do compensation work by a medical society or board and if it sustain the charges recommend such authorization to the commissioner; on its own initiative investigate and pass on charges of misconduct by either a physician or bureau . . . . ; review the determination of charges of misconduct where the physician accused appeals from the decision of the district medical society or board . . . . *and the decision and recommendation of the council shall be final, binding and conclusive upon the commissioner.*" (Italics mine.)

ORGANIZATION

The size of a representative advisory committee depends partly on the number of interests it is necessary to provide for to insure a comprehensive system of representation and partly upon the function the committee is intended to perform. A bipartisan legislative committee usually has a minimum of six and tends to get unwieldy if it contains more than twelve. A tripartisan committee functions most effectively with from nine to fifteen members, preferably the former, but some standing committees have had thirty-six and fifty-four.[52] In the latter cases frequent, if not permanent, absence of a large number of the committee members is likely to be a prominent characteristic of the committee's meetings. A tripartisan committee usually varies in multiples of three, but rarely more than twenty-seven.

The frequency of meetings of advisory committees tends to turn on whether they are standing, permanent committees or special-purpose committees. The former rarely meet oftener than monthly, with perhaps more frequent sessions of such subcommittees as their executive committee or investigating groups assigned to a current problem. Quarterly, semiannual, or even annual meetings are not uncommon for the large, standing committees. Special-purpose advisory committees have a wide range of meeting-frequency. If they must complete their work within a certain time-period they may meet daily; if not, they may meet weekly or at longer intervals, but rarely less frequently than once a month. A special-purpose committee may be assigned to a long-time research project, necessitating a great deal of staff work, in which case there is no need for frequent meetings until the time comes for arriving at a decision or preparing its report.

An outstanding feature of advisory committees is that they usually serve without salary. The advisability of this aspect of

[52] The English trade boards, which are permanent bodies whose members have two-year terms, have from 15 to 53 members. The most common size is 27 (Sells, *op. cit.*, pp. 117–18).

their organization does not arise from the economy motive but in order to avoid job-seekers and to secure persons whose services will not be motivated by pecuniary considerations. Observers have remarked that the voluntary services of advisory-committee members would in many cases have cost the department more than its own appropriations for personal services. The members of the committee do, however, receive a per diem allowance and usually are reimbursed for traveling and necessary expenses. It is hoped that by eliminating the attributes of a steady job the advisory committee will attract men of high standing in their own businesses, vocations, or professions whose personal qualities are such that they will be willing to contribute on a part-time basis time whose value is far in excess of the per diem remuneration.

The operating link between the administrative department and the committee is furnished by the secretarial, stenographic, and other services which the permanent agency is able to contribute. In Wisconsin, the staff member of the Safety and Sanitation Division who is in charge of the investigation and preparation of the proposed code serves as secretary of the committee. In New York, the director of the Division of Women in Industry and Minimum Wage acted as secretary of the first wage boards which were appointed under the Minimum Wage Law of 1933. When members are appointed who are classed as representatives of the public, it is customary for one of these to be appointed as chairman. If no public members are appointed, the chief of the administrative department or his agent may act as ex officio chairman. The Wisconsin Unemployment Compensation Advisory Committee, which meets only on call of the director, functions in this manner.

There is little consensus and no uniformity as to the methods of keeping records, minutes of meetings, and conducting the business of advisory committees. Services of a stenographic and clerical nature are generally made available by the administration, but the committee, particularly when engaged in discussions of a bargaining nature involving demand and

compromise, may prefer to restrict its formal records to final action taken, to a summary of argument and discussion, or to none at all.[53] This attitude tends to be characteristic of special-purpose committees. Standing committees, meeting once a month or less frequently, usually keep more detailed records, and, of course, when a committee finds it necessary to conduct hearings for purposes of compiling a public record upon which to make formal findings of fact, stenographic minutes or transcripts of the proceedings are made.

The relations between the advisory committee and the administrative department are sensitive and have to be handled with the greatest tact. If the administrator allows the committee to get the notion that he is trying to control it, a greater display of independence may result. The manner in which the results of expert investigation are presented to the committee may influence the outcome of the committee's work as much as any other factor. On the other hand, the committee needs leadership and guidance; it needs to be made aware of how it can be useful in the whole process of which it is one essential part. The chairman of the committee should be one who knows how to make committees work, who is fundamentally in accord with the objective of the statute, and who is able to maintain a proper balance between an independent contribution of views by the committee and a sympathetic co-operation with the administrative department. This co-operation may be obtained when the chairman is appointed by the administrator; if the latter serves as chairman, the responsibility for the committee's co-operation devolves upon himself personally. If he has time enough to do it, this personal contact has obvious advantages. The index of a smoothly functioning co-operation between the committee and the administration is, of course, the acceptance of the committee's reports and recommendations without objection or substantial alteration by the latter.

[53] "The deliberations of a wage board require only such minutes of record as it may desire for its own purposes" (opinion New York State Attorney-General, May 21, 1935).

If the report and recommendation are disregarded, or brusquely overruled, the committee's time and the expense has been wasted, and, if the committee is a permanent one, its subsequent relations with the administration are quite likely to be strained, if not acrimonious. Miss Sells has shown in her study[54] of the English trade boards that such conflicts may arise from faulty co-ordination between the boards and the Ministry of Labor, as well as from external conflicts of interests and attacks on the entire legislative plan. The integration of official and committee views into mutually agreeable decisions of policy must be effected before the committee's report is made, not afterwards. The difficulties of achieving this integration are increased if the relations between them are indirect and impersonal.

In planning the role of the representative advisory committee, perhaps the most important problem is the restriction of its jurisdiction. To many administrators "restriction" means drawing a line between a sphere in which he has sole authority and responsibility and a sphere in which the committee is permitted to function; usually this means that his sphere is the whole sphere of administration in which by sufferance the committee is allowed to inquire, discuss, and recommend. Such an official predisposition is a barrier to the successful functioning of the committee. The restriction of jurisdiction applies to a particular problem, or perhaps a particular problem at a time. When a committee is appointed to consider such a definite problem, it should have as complete authority to investigate as the administration itself. Its deliberations should be as well informed as those of the chief administrative head, and the latter should be prepared to discuss his own views with the committee, for whom those views should be important data. In practice, it is advisable in many cases for the administration to refrain from any appearance of influencing or controlling the

[54] Sells, *op. cit.*, chap. ix. Some of these conflicts arose from the division of administrative duties of enforcement between the Ministry of Labor and the boards.

committee's proceedings, but, if the administration refrains completely from participating in the committee's deliberations, it is in effect ceding its responsibility. The assumption of the committee's existence is that its recommendations will receive consideration as tentative formulations of policy. While legal responsibility is retained in the hands of the public authorities, the purpose of the representative committee is largely vitiated if its recommendations, made in conjunction with official views, are not adopted. The check on its work lies not in its advisory powers but in the judgment exercised in appointment and in the precondition of substantial unanimity before its recommendations are accepted.

SUMMARY

The representation of interests upon advisory boards and committees has been advocated in connection with efforts to remove from the administrative board or committee itself the inducements to partisanship arising from conflicts of interest and to emphasize the desirability of qualifications of expertness and disinterestedness on the part of the board members. It is thought that by projecting these conflicts upon a body with advisory powers the evil effects of partisanship within administration can be minimized. While the general validity of this objective cannot be questioned, there is a correlative danger that the representative committee will not fill an effective role and that the connection that it furnishes between officialdom and the social interests will wither and die of its own desuetude. In such an eventuality, unless it has other methods, the administrative body is isolated from contact with the group interests which are forced, in the event of discontent, to resort to the old method of pressure upon the legislature, or chief executive, and the administration is thereby brought back into politics.

Thus the representative advisory committee is really a political device for keeping administration out of politics. Paradoxically, it works by keeping the public agency in a close

personal relationship with the groups who are in a position to help or to harm it by one political means or another. If these groups, through their representatives, can be brought into positions in which they have agreed upon a policy to be followed, experience has demonstrated that the representative committee is useful in protecting that administrative department from political attack, in securing financial help from public and private sources, in promoting desirable and needed amendments to the law, and above all, in educating the members of the group as to the services that the government is rendering. In successfully performing these functions, the representative advisory committee has unquestioned public relations values. But, again, these values are potential, and their realization is beset with extraordinary difficulties. The committee rarely functions as a self-generating mechanism. Its driving force usually emanates from the administration or from sources outside the committee. Since it is a serious matter to raise issues in a manner having possible political repercussions, such procedural problems as the timing of the committee's appointment, formulation of its terms of reference, the conduct of preliminary investigation, and personal contacts between the committee and administration present important questions of policy. Hence, while the representative advisory committee from afar seems to offer an attractive way out of a controversial situation, the conditions of its success include a heavy burden of time, labor, and uncertainty upon the administrative department or agency.

CHAPTER VII

ADMINISTRATIVE FUNCTIONS OF INTEREST GROUPS[1]

THE distinctive mark of the principle of interest representation in regulatory legislation is the application of legal provisions to a group rather than to the individual as the subject of the law. Certain types of regulatory legislation in recent years have disclosed a tendency to supplement the regulation of individual and corporate behavior by imposing official responsibilities upon a group organization with which, in custom and in practice, the economic interests of individuals (personal and corporate) have become intertwined. Responsibilities thus imposed have not always been sought by such organizations. In some cases the law or the regulatory agency has attempted to create artificially a representative organ where none previously existed. In either event, a pattern of functional responsibility can be discerned in which the law either provides for participation by the group organization in the rule-making functions of the administrative agency or contemplates a plan of regulation in which the execution of administrative policy is divided between the public authority and the group organization. The present chapter examines several of these laws and administrative practices to see how this pattern of functional responsibility has been implemented in fields of widely varying problems and subject matter.

DISTRICT BOARDS UNDER THE BITUMINOUS COAL ACT OF 1937

During the decline of the bituminous coal industry in the last twenty years, several forms of regulation and control, both

[1] The present chapter was written before the appearance of *Economic Standards of Government Price Control* (Mono. 32, Temporary National Economic Committee, Senate Committee Print [76th Cong., 3d sess. (1941)]). The studies in this monograph cover much of the material in this chapter.

voluntary and compulsory, have been tried.[2] The first voluntary method of group co-operation was the regional marketing agency, whose legality was upheld in the Appalachian Coals case in March, 1933. Hardly had this decision been handed down, when the National Industrial Recovery Act was passed in June, 1933, and a method of industry-wide stabilization was offered in the Bituminous Coal Code by voluntary agreement, implemented by the organization of 95 per cent of the industry's employees into the United Mine Workers, whose district wage agreements were incorporated into the code. Within three months after the Supreme Court declared the N.I.R.A. plan unconstitutional, Congress passed the Bituminous Coal Conservation Act of 1935, which levied a tax of 15 per cent on the sale price of coal at the mine but entitled any producer who accepted the wage-and-hour and price-fixing provisions of a code promulgated by a coal commission to a refund of 90 per cent of the tax.[3] This measure was invalidated by the Court in 1936, and the following year a second compulsory form of regulation was adopted in the Bituminous Coal Act of 1937.[4] This plan differed from that of the 1935 Act in that the code of industrial government for the industry was placed in the Act itself, and the Act eliminated all reference to the fixing of wage rates. Instead of permitting producers and their associations to meet and establish price schedules by agreement, the Act provided that the code should be promulgated by the National Bituminous Coal Commission and enforced by a provision imposing a 19½ per cent tax upon producers failing to comply or not members in the code, while code members paid only a one cent per ton tax.[5] The code provides for the creation and organiza-

[2] W. H. Hamilton and H. Wright, *A Way of Order for Bituminous Coal* (Washington: Brookings Institution, 1925); J. P. Miller, "The Pricing of Bituminous Coal," in Friedrich and Mason, *Public Policy*, I (1940), 169.

[3] Pub. No. 402 (74th Cong. [August 24, 1935]), invalidated in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[4] Pub. No. 48 (75th Cong. [April 26, 1937]); upheld in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940).

[5] *Ibid.*, sec. 3(*b*). The Commission was abolished by Reorganization Plan No. II, July 1, 1939, and its functions transferred to a director of the Bituminous

tion of twenty-three district boards of code members, the procedure of establishing minimum or maximum prices, the establishment of marketing rules and regulations by the Commission (now director), and lists thirteen unfair methods of competition which are made violations of the code.[6]

The concept of a delegation of self-governing powers to an industrial association is lacking in the 1937 Act. Membership in the code is but a formality of executing papers prepared by the director. The twenty-three district boards are artificial bodies, created by law, whose powers are restricted to the legislative process of establishing or revising prices. The steps in the price-fixing procedure are: (1) the boards determine average cost for the coal produced in the district. These proposals are based upon reports of district statistical bureaus whose managers are appointed by the director, and the code specifically precludes any member, employee, or representative of the district board from being an employee of the statistical bureau. (2) The cost data are then submitted to the director. The code takes the cost-determining functions out of the hands of the district boards by providing that the basis upon which costs are to be calculated is the "price-area," of which there are only ten. The director determines the weighted average costs for the ten price areas and transmits this information to the boards. (3) On the basis of these figures the boards are required to "coordinate in common consuming market areas upon a fair competitive basis minimum prices and rules and regulations." (4) Their proposals are submitted to the director, who finally reviews, revises, and establishes the effective minimum prices.[7]

The twenty-three boards upon whom the Act places the responsibility for determining district cost data and proposing coordinated area prices are organized under the following conditions imposed by the Act. A board may have not less than

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Coal Division in the Department of the Interior; Attorney General's Committee on Administrative Procedure (Mono. 23), pp. 71–76.

[6] *Ibid.*, sec. 4.

[7] Secs. 4(*a*), (*b*).

three nor more than seventeen members. All but one of the board members must be a code member. The number of producer members must be an even number; the odd man is selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. One-half of the producer members are selected by the majority in number of the district code members at a meeting called for this purpose; one-half are elected by votes cast in proportion of the annual tonnage output of the members in the district for the calendar year preceding the date of the election. However, not more than one officer or employee of any code member within a district may be a district board member at the same time.

The Act clearly imposes a specific responsibility upon these producer boards in the investigation and proposal of appropriate minimum prices. It seems clear from the Act that the director may not, on his own initiative, promulgate minimum prices.[8] The action of the boards, in two steps of the process, while based on the statistical findings of the director's staff, is based upon an exclusive jurisdiction which the director cannot, except informally, invade. Even in the review or revision of minimum prices, the Act provides that the director shall increase or decrease minimum prices at any time upon satisfactory proof made by any district board of a change in weighted average total costs of two cents per ton in the price area (exclusive of seasonal changes). However he may, either on complaint or on his own motion, review and revise effective minimum prices, rules and regulations, in accordance with the general standards prescribed by the Act.

As we saw above, in chapter iv, there was more than a three-year delay in the effective promulgation of prices. Both the early procedure of the Commission and the complicated standards prescribed by the Act are probably responsible for this.

[8] In contrast to the provisions for establishing minimum prices, sec. 4(*c*) of the Act empowers the Commission to establish maximum prices for coal in order to protect the consumer whenever "in the public interest, the Commission (Director) deems it necessary."

There is only presumptive evidence that the price-making process in which the responsibility for separate steps is passed back and forth between the director and the boards is responsible for the delay. It is possible that on the basis of the cost figures there is very little discretion in proposing prices. Yet this shifting of responsibility in the process can be explained only on two grounds. Either, in view of the division of opinion in the industry as to the desirability of establishing prices, this method was purposely adopted in order to avoid responsibility for inaction or, in order to secure any kind of consensus within the industry favorable to the particular price schedules adopted it was deemed necessary to acquaint the producers with each step of the process and make them realize the difficulties of the problem. On this assumption it was necessary to give them powers of a possible veto on the whole plan (or at least for a particular district), in order to secure their active co-operation. Otherwise it would seem that the same process of regional boards' proposing prices on the basis of the director's statistical bureaus' cost figures could have been worked out informally or by rule and regulation rather than by dividing the legislative responsibility by statute. The method adopted emphasizes joint responsibility close to the point of paralysis.

STOCKMEN'S ASSOCIATIONS UNDER THE TAYLOR GRAZING ACT OF 1934

"Before 1934, the work of the General Land Office consisted mainly in disposing of and in carefully recording the transfers of available tracts of public land."[9]

The Taylor Grazing Act of that year reversed the general land policy of distribution by pre-emption which had been in effect since 1841.[10] It authorized the Secretary of the Interior, in his discretion, to establish by order grazing districts not to

[9] *Report of the Secretary of the Interior* (1938), p. 87.

[10] B. H. Hibbard, *History of the Public Land Policies* (New York: P. Smith, 1939), pp. 156–58. The general public land policy had previously been modified by the Forest Reserve Act of 1897 (34 Stat. 35) and the Mineral Reserve Act (41 Stat. 437) of 1920.

exceed eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States. The Secretary was further empowered to

> make provision for the administration, regulation, improvement and protection of such grazing districts . . . . and he shall make such rules and regulations and establish such service, *enter into such cooperative agreements* and do any and all things necessary to accomplish the purposes of this act and to insure the objects of such grazing districts, [and] *Provide by suitable rules and regulations for cooperation with local associations of stockmen, State land officials and official State agencies engaged in the conservation of wildlife* interested in the use of the grazing districts, [and] provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative office in charge in a manner similar to the procedure in the land of department.[11]

These provisions recognized the necessity for working out some kind of co-ordination between public and private landowners in order to secure unified management and direction of plans for land development and appropriate use. The Department of Agriculture Forest Service had officially recognized national, state, and local associations of stockmen in formulating grazing rules for the national forests as far back as 1906.[12] The General Land Office had to deal with problems of checkerboard ownership rather than a single area and therefore had quite as much occasion for utilizing the experience of these associations.

The Secretary of the Interior has approved two general forms for co-operative agreement governing the administration of the grazing districts.[13] One, known as the Montana form, provides in substance for turning over all lands of whatever ownership in the district to the stockmen's associations for policing and executing the terms of the agreement. The Oregon form provides for turning over all lands to the General Land Office to be administered under the agreement. The Montana form is used

[11] 48 Stat. 1269 (June 28, 1934) (italics mine).

[12] J. P. Comer, *Legislative Functions of National Administrative Authorities*, p. 207.

[13] *Report of the Secretary of the Interior* (1938), p. 116.

when the area of public lands is small in relation to the area of private holdings; the Oregon form is used when the public range is greater in proportion. Between 1934 and 1938 twenty-two agreements had been approved by the Secretary, for the most part of the Montana type. In the Montana District No. 1 in that year "10 stockmen's associations grazed approximately 150,000 livestock on lands of all ownerships in the district."[14]

In addition to the execution of the co-operative agreements covering the control of grazing, agents of the Land Office have consulted the stockmen's associations over a period of years in the drafting of a rule of priority rights in the use of the range which was completed in 1938 and inserted in the Federal Range Code.[15] This rule was based on section 3 of the Taylor Act, providing that preference in the use of the range should be guided by "the proper use of lands and waters owned, occupied and leased." The effect of the rule is to eliminate the owners of livestock who did not own or lease lands adjoining the public domain for three years or any two consecutive years during the five-year period preceding June 28, 1934, the date of the passage of the Act.[16]

By way of contrast to the Bituminous Coal Act, the legislative authority of the Secretary is clearly vested in him and him alone. If he wishes to enter into agreement with state officials or the stockmen's associations, he may do so. If not, he may issue such rules and regulations as after hearing appear to be appropriate. In practice, he might hesitate to do so, but there

[14] *Ibid.*, p. 107. The utility of these co-operative arrangements can be appreciated from the fact that there are but 9 regional graziers, 33 district graziers, and 22 range examiners, totaling 64, to administer the theoretical 80,000,000 acres of public range eligible for inclusion in grazing districts.

[15] Priority rights are governed through the issuance of grazing permits. Up to 1938 these permits were issued on an annual basis, but beginning in that year annual permits were replaced by term permits of not more than ten years' duration.

[16] In the 49 districts thus far established, advisory boards composed of 665 locally chosen stockmen have been created to aid the field staff of the General Land Office in the survey and classification of the public range for appraisal as to its proper use or rehabilitation.

is no impairment of his legal responsibility by a veto power vested in the private association.

Having made the general regulations and approved the specific agreement, the Secretary, through the General Land Office, exercises his authority under the Montana form only through general supervision and review upon appeal of the acts of the local officials. In these executive functions the associations clearly exercise delegated administrative responsibilities in which the public officials interfere only through the supervisory power to see that the general regulations of the Secretary and the terms of the agreement are carried out.

PRODUCERS' ASSOCIATIONS UNDER THE AGRICULTURAL MARKETING ACTS

Prior to the depression years of 1929–32, the dairy industry had been subjected to considerable regulation by states and municipalities, but this regulation had related principally to sanitation requirements enforced through licensing dealers and tasters, prohibiting adulteration, inspection, branding, and so on.[17] Methods of market control and price regulation had been experimented with on a private, voluntary basis.[18] Following strikes of milk-producers in 1931–32, several states enacted legislation creating state milk control boards to fix minimum prices for milk, to license dealers, and to revoke those licenses for cause. Although the primary responsibility for fixing prices and conditions of sale for milk was generally placed upon the state board, Wisconsin, for example, placed a provision in its statute providing that one of the considerations the Department of Agriculture and Markets had had to take into account was the terms of existing bargaining agreements between producers' co-operatives and dealers.[19] The Oregon statute con-

[17] *Fisher* v. *St. Louis*, 194 U.S. 361; *Lieberman* v. *Van de Carr*, 199 U.S. 552; *St. Johns* v. *New York*, 201 U.S. 633, were early cases upholding such regulations.

[18] Above, chap. ii, n. 52.

[19] *Wisconsin Revised Statutes* (1931), chap. 101.03, sec. (5)(*a*).

templated the establishment of a "pool-quota" system.[20] The New York law of 1933 provided for direct price-fixing and enforcement by the State Milk Control Board, but this was modified in 1937 by the Rogers-Allen Law, an enabling act which authorized associations of producers and dealers to negotiate agreements covering the price of milk to producers.[21] Such agreements were to be submitted to the Commissioner of Agriculture and Markets, who, after public hearing and a finding that the agreement was approved by 75 per cent or more of the producers in the district, could issue an order making the agreement effective in the entire district.[22] This act was unique among the state milk control laws.

MARKETING AGREEMENTS UNDER FEDERAL LEGISLATION

The Agricultural Adjustment Act of 1933 authorized the Secretary of Agriculture to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity

[20] S. B. Weinstein, attorney for Oregon Milk Control Board, "Summary of Legal Opinions on Milk Control Legislation," p. 6 (mimeographed article in possession of the writer). Cf. E. W. Gaumnitz and O. M. Reed, *Some Problems of Establishing Milk Prices* (Washington: Agricultural Adjustment Administration, 1937), pp. 32–40, for a description of the methods of prorating proceeds of sales to distributors.

[21] *McKinney's Consolidated Laws of New York*, Book 18-A, Art. 21-A, sec. 258, upheld in *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Hagerman Farms Corp.* v. *Baldwin*, 293 U.S. 163; *Borden Farms Products Co.* v. *Baldwin*, 293 U.S. 194; *Baldwin* v. *Seelig*, 294 U.S. 511. The Rogers-Allen Law of 1937 (*New York Laws* [1937], chap. 383) was invalidated by a lower court in January, 1939, but this was later reversed under authority of *U.S.* v. *Rock Royal Co-op.*, 59 Sup. Ct. Rep. 993 (June 5, 1939).

[22] Within two weeks after the passage of the Rogers-Allen Law, the Metropolitan Cooperative Milk Producers Bargaining Agency was organized and incorporated with a membership of twenty-three producer co-operatives representing over fifty-thousand milk-producers. In November, 1937, an agreement was reached between this body and the Metropolitan Distributors Bargaining Agency (*New York Times*, November 5, 1937). Legal entanglements led the co-operatives to press for a federal marketing order, which went into effect in August 1938. This order in turn was entangled in litigation until the Supreme Court's decision in June, 1939.

or product thereof in the current of interstate or foreign commerce and to issue licenses permitting processors, associations of producers, and others to engage in the handling of such commodities or products.[23] Amendments in 1935 and 1937 replaced licenses as the enforcement weapon, with orders to be issued by the Secretary (in certain circumstances with approval of the President), applicable to processors, associations, and others engaged in the handling of certain specified commodities.[24] Such agreements and orders are issued only after notice and opportunity to be heard.[25] A marketing agreement may be issued by the Secretary without an order, but, as it is applicable only to those handlers who sign it, the usual procedure is to issue an order regulating the handling of the commodity in the particular area in the same manner as does the agreement.[26] Before such marketing agreement and order can become effective, it must be signed by the handlers of at least 50 per cent of the volume of the commodity produced in the area, and the Secretary must determine that two-thirds of the producers by number or two-thirds of the volume produced or marketed in the area favor the issuance of the order. The order may be put into effect without approval of the handlers if the Secretary, with the approval of the President, finds that such action is favored by two-thirds by number or volume of the commodity in the marketing area, that noncompliance by handlers tends to nullify the purposes of the Act, and that such action is the only practical means of advancing the interests of the producers.[27] A referendum is authorized to determine the

[23] U.S. Department of Agriculture, *Annotated Compilation of the Agricultural Adjustment Act* (as amended to August 26, 1935) sec. 8*b*. The definition of interstate commerce has been amended several times (*q.v.*).

[24] Pub. No. 320 (74th Cong. [August 24, 1935]), sec. 5; Pub. No. 137 (75th Cong. [June 3, 1937]).

[25] U.S. Department of Agriculture, Ashley Sellers, *Administrative Procedure and Practice under the Agricultural Marketing Agreement Act of 1937* (1939).

[26] U.S. Department of Agriculture, A.A.A., *Stability in Milk Markets* (1938), p. 6.

[27] Pub. No. 137 (75th Cong.), secs. 8*c*(8), (9).

wishes of the producers in each area, and in the Secretary's determination he is required to consider the approval or disapproval of any co-operative association as the approval or disapproval of the members, stockholders, or contractees of the association.[28]

The usual procedure of establishing federal control by order in a particular market is as follows:

1. The cooperative or cooperatives representing a substantial quantity of the milk produced for that market apply for a marketing agreement and order;

2. Conferences are held between representatives of the cooperatives, handlers and the dairy section of the Agricultural Adjustment Administration to canvass the situation in the particular market;

3. If the Department officials decide that the application has merit, the Secretary of Agriculture gives notice of a public hearing, at which all interested parties have opportunity to file oral or written evidence. It is customary for the dairy section itself to place in the record a study of the market made by the economists of the dairy section of the A.A.A.;

4. Following the hearing, if the project is not abandoned, the proposed agreement and order may be revised. In case the Department decides to go ahead, the perfected agreement and order is placed before the producers and distributors of the milk shed in order to register their approval and disapproval as required by the Act. If the distributors do not care to sign the agreement, the order, drafted in identical form as the agreement, is sent to the President, whose approval of the findings made by the Secretary makes the order legally effective. Pending the publication of the perfected order and its signing by the President, additional opportunity is given interested parties to criticize it or to make suggestions for alteration.[29]

Section 8*c* (7) provides that all orders must contain *inter alia* provision for the selection by the Secretary, or for a method of selection, of an agency or agencies and defining their powers and duties which shall include only the powers

(i) to administer such order in accordance with its terms and conditions;
(ii) to make rules and regulations to effectuate the terms and provisions

[28] *Ibid.*, sec. 8*c*(12). Italics mine.

[29] Letter from C. W. Holman, secretary, National Cooperative Milk Producers Association, to the writer; also, see U.S. Department of Agriculture, A.A.A., *Agricultural Marketing Programs* (1937).

of such order; (iii) to receive, investigate and report to the Secretary complaints of violation of such order; (iv) to recommend to the Secretary of Agriculture amendments to such order.

The practice in the case of the local milk-marketing agreements and orders under the Agricultural Marketing Agreement Act of 1937 has been for the Secretary to appoint a market administrator removable by him at any time.[30] The national marketing agreement for the Evaporated Milk Industry,[31] the marketing agreement and order regulating the handling of Anti-hog Cholera Serum and Hog-Cholera Virus,[32] and some agreements covering agricultural commodities other than milk have set up control committees composed of representatives of the manufacturers, growers, and producers.[33] These orders directly delegate administrative responsibility to the interest groups which participated in the conferences and hearings leading to the promulgation of the orders and constitute an extension of the principle of self-government into agriculture along the lines of the N.R.A. The Oregon cauliflower and Florida celery agreements, for example, provide that the control committee may recommend "proration periods" during which the Committee may determine the total amount of the product to be shipped and prorate this amount among the various shippers in the area.

[30] For example, Orders No. 3 and 4, regulating the handling of milk in the St. Louis and Boston marketing areas, Agreement No. 69, regulating the handling of milk in the Fort Wayne, Indiana, area, and Orders No. 13 and 41 (Kansas City and Chicago.)

[31] These agreements, promulgated in September, 1933, were still in effect in 1937 (Secretary of Agriculture, *Annual Report* [1937], p. 60).

[32] This was Code LP-7, one of the joint N.R.A.–A.A.A. codes. Pub. No. 320 (74th Cong. [August 24, 1935]), secs, 56–60, specifically authorized a marketing agreement and order for this industry. It was promulgated as Bureau of Animal Industry Order No. 361, effective December 7, 1936, and contains provisions for open-price reporting, unfair trade practices, in fact, all the old code features except labor provisions.

[33] Cf. Anti-hog Cholera Agreement (B.A.I. Order 361); A.A.A. Order No. 18 (potatoes grown in Wisconsin and Michigan); A.A.A. Agreements 72 and 73 (cauliflower in Oregon and celery in Florida).

While the agricultural marketing-agreement program is strikingly similar to that of the National Industrial Recovery Act, it appears to be free from several of the defects which marked the administration of the N.R.A. In the first place, responsibility for drafting, if not initiating, the proposed plan of marketing control is clearly vested in the Secretary (not the President). Second, the statutory standards giving the Secretary contingent powers of issuing orders are more restrictive than those of the N.I.R.A. These standards are of two kinds: (1) a finding that the order is likely to bring prices into line with a statutory definition of parity and (2) a finding that an extraordinary majority of the affected producers in the area favor promulgation of the order.[34] The first standard is not too specific in character, but together the two conditions constitute ample grounds upon which the Secretary may refuse to issue marketing orders. Hence he is far better safeguarded than was the National Recovery administrator from pressure of producer groups insistent on price control. Third, the Secretary has not used his statutory authority to place agriculture generally under marketing orders, as the N.R.A. attempted to do with industrial enterprise. In only one year (1934) since the marketing programs were initiated have there been more than fifty milk-marketing agreements licenses, or orders in effect.[35] The general and special crop agreements have never exceeded that number, so that in all there have been less than one hundred orders in effect at any one time. Finally, provision is clearly made in each order for its suspension or termination at any time by the Secretary, so that there is a clear under-

[34] Pub. No. 137 (75th Cong.), secs. 2, 8*c* (18) and 8*e*. The administrator of N.R.A. was technically required to make a finding that a code would not tend toward "monopoly or inequitable restraints." He invariably made the finding—with a minimum of investigation as to the probable fact.

[35] Agricultural Adjustment Administration, *Reports* (1934–36); National Cooperative Milk Producers Federation, "Dairy Problems," *Annual Reports* (1937–39). In 1939 milk-marketing orders were in effect in 26 interstate fluid milk markets. Generally, see J. D. Black, *The Dairy Industry and the A.A.A.* (Washington: Brookings Institution, 1937).

standing among the parties that the powers of market control in which they participate are privileges and not unalterable rights.

It would scarcely be accurate to say that the Act provides for a complete delegation of legislative authority to the producer organizations. It is clearly a divided delegation of power.[36] The producer associations may initiate the procedure, which may culminate in a marketing order, but representatives of the Department of Agriculture participate in every phase of the legislative process and are responsible for the holding of public hearings. The orders, which are really rules and regulations, are promulgated by the Secretary. The legislative authority (in the sense of a veto) of deciding whether or not there shall be an order is therefore divided between 34 per cent of the producers, by number or volume in a specified marketing area, and the Secretary of Agriculture, if he makes a finding that the order will not result in the standards prescribed by the law.

PRODUCTION-CONTROL ASSOCIATIONS UNDER THE AGRICULTURAL ADJUSTMENT ACT[37]

Section 8(*i*) of the Agricultural Adjustment Act of 1933 provided:

> In order to effectuate the declared policy, the Secretary of Agriculture shall have power—(1) to provide for reduction in the acreage or in the production for market, or both, of any basic agricultural commodity, *through agreements with producers or by other voluntary methods*, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption in such amounts as the Secretary deems fair and reasonable. . . . .[38]

[36] The Supreme Court has said it is not an unconstitutional delegation of power (*U.S.* v. *Rock Royal Co-op.*, 307 U.S. 533 [1939]; *Hood and Sons* v. *U.S.*, 307 U.S. 588 [1939]).

[37] The historical setting of the Agricultural Adjustment Administration from a sympathetic and well-written point of view may be found in H. A. Wallace, *New Frontiers* (New York: Reynal & Hitchcock, 1934), Parts I–II. A more severely analytical account may be found in J. D. Black and Others, *Three Years of the A.A.A.* (Washington: Brookings Institution, 1936).

[38] Pub. No. 10 (73d Cong. [May 12, 1933]), Title I.

Over a year prior to the Act's enactment in 1933 provisional details had already been worked out by M. L. Wilson, of the Montana State Agricultural College staff, based upon the voluntary "domestic allotment" method (first proposed by W. J. Spillman of the United States Department of Agriculture in 1927), whereby responsibility for correct allotments of production acreage was placed on production-control associations for each county.[39] The plan as originally proposed affected the control of all crops, but it was most closely followed in the case of wheat.[40] The adoption and execution of the plan was predicated on the voluntary consent of representative farm groups. On May 26, 1933, upon the call of the Agricultural Adjustment Administration, a conference was held in Washington between representatives of both farmers' organizations and processors' and marketing organizations.[41] Three plans were discussed: (1) direct rental and retirement of 1933 wheat acreage; (2) benefit payments to producers on the basis of wheat marketed in 1933; (3) payments to producers on the basis of their proportionate share of the national production domestically consumed, in consideration of their agreement to reduce their acreage in 1934 and 1935, not in excess of 20 per cent, as the Secretary of Agriculture might determine. The small prospective 1933 wheat crop caused the abandonment of the first two

[39] U.S. Department of Agriculture, A.A.A., *Agricultural Adjustment* (May, 1933—February, 1934), pp. 44 ff.

[40] The cotton adjustment program did not follow this pattern. It was more of a direct sales-subsidy plan based on individual contracts signed by farmers offering to enter into such cotton benefit or option benefit contracts. This program was promoted by a tremendous publicity campaign through the extension services of the cotton states between June 26 and July 19, 1933. County associations were not formed under this program. Seventy-three per cent of the total cotton acreage was estimated to be signed up under contracts during this program in 1933.

[41] The farm organizations represented were the Farm Bureau Federation, the National Grange, the Farmers' Educational and Cooperative Union, the Farmers' National Grain Corporation, the Grain Committee on National Affairs (representing 10 boards of trade), the Terminal Grain Merchants' Association, the Grain and Feed Dealers' Association, the Association of Feed Manufacturers, and the National Wholesale Grocers' Association.

proposals, and the majority of the groups represented at the conference recommended the adoption of the domestic allotment plan.

The Secretary of Agriculture announced the principal features of the plan which would be applied to wheat on June 20, 1933:

1. An individual wheat allotment contract between the producer and the Secretary of Agriculture, providing for annual benefit payments to producers, the payments to be adjusted to the acreage agreed to be withdrawn from production in 1934 and 1935.
2. Method of Computing Crop Payments—calculated at 28 cents per bushel on 54 per cent of crop (the portion of the national wheat production found to be ordinarily domestically consumed).
3. A Processing tax to be levied on milling of wheat to provide funds for making payments and other purposes.
4. Acreage and Production Allotments—by States, Counties, Individuals —to be determined by local production control associations.

The execution of points 1 and 4 were crucial in terms of successfully obtaining the voluntary reduction of acreage. Both points involved a tremendous educational program through the radio, farm journals, news releases, etc., followed up by organization of, first, regional educational conferences and, second, local associations of producers. The four preliminary regional conferences were held in late June and early July of 1933 at Kansas City, Missouri, Spokane, Fargo, and Columbus, Ohio. These conferences were attended by the officials of the state agricultural extension staffs, who were thus informed of the basic features of the program, while the Washington representatives of the Agricultural Adjustment Administration learned of varying regional problems and necessary adaptations. In addition to the county agents of the Extension Service already functioning, 524 temporary emergency agents were employed from Civil Service lists. These agents, working in co-operation with temporary county educational campaign committees of 7 to 9 members, did the basic work of persuading

producers to sign application forms for allotment contracts.[42] As applications were approved and the contracts were signed, the producer automatically became a member of the county production-control associations, which succeeded the temporary campaign committees. In order to organize the association, it was usually necessary for the county or temporary agent to hold county or township meetings with the co-operation of the temporary committee, at which time full information was disseminated personally to those affected by the program. Of the estimated 1,200,000 wheat-producers of the country, over 550,000 signed contracts approved by the Secretary,[43] which covered an estimated 77 per cent of the United States wheat acreage for 1930–32.

The heart of the administrative job was the actual assignment and execution of the allotments to individual producers, who in their contracts pledged themselves over the country as a whole to remove 7,595,000 acres, or 11.5 per cent of the average annual acreage (1930–32), from production in 1933–35. This work fell primarily on the shoulders of the county allotment committee.[44] This committee was the point at which an overall view of county production figures as reported by the co-operating producers could be checked with the state estimates of production (broken down by counties). The state estimates were prepared in Washington by the Department of Agriculture's Division of Crop and Livestock Estimates, the adjustments between them having to be made before the final con-

[42] Gladys Baker, *The County Agent* (Chicago: University of Chicago Press, 1939), pp. 77 ff.; *Agricultural Adjustment*, p. 51; see *ibid.*, Appen. 1 for copies of these contracts (Exhibits 19–27).

[43] *Ibid.*, p. 43.

[44] Sec. 10(*b*) (i) of the Act (Pub. No. 10 73d Cong. [May 12, 1933], Title 1 as amended by Pub. No. 320 [74th Cong. (August 24, 1935)], sec. 16) reads: "The Secretary of Agriculture is authorized to establish for the more effective administration of the functions vested in him by this title, State and local committees, or associations of producers, and to permit cooperative association of producers .... to act as agents in connection with the distribution of payments authorized to be made under section 8."

tracts were completed and officially accepted by the Secretary.[45] The county committee was also charged with the duty of advising the Secretary on the acceptability of each contract. The county allotment committee's work was in turn dependent upon the community committees, who had the job of explaining to the individual members of the county associations the acreage adjustments which had to be made and which the Act empowered the Secretary to make.[46]

The county or district production-control association was composed of all producers who chose to co-operate with the Agricultural Adjustment Administration by signing allotment contracts.[47] The association members in each community elected a committee of three to five members. The community committees were made responsible for making contracts available to farmers, assisting them in preparing data required in the contract, obtaining production data of nonmembers, checking data in the contracts, and certifying as to accuracy of statements and performance of contracts.

The chairman of the Community Committee became a member of the county association Board of Directors, each member of whom had one vote. The Board elected a president, vice-president, secretary, and treasurer. The president was ex officio chairman of the County Allotment Committee, and the

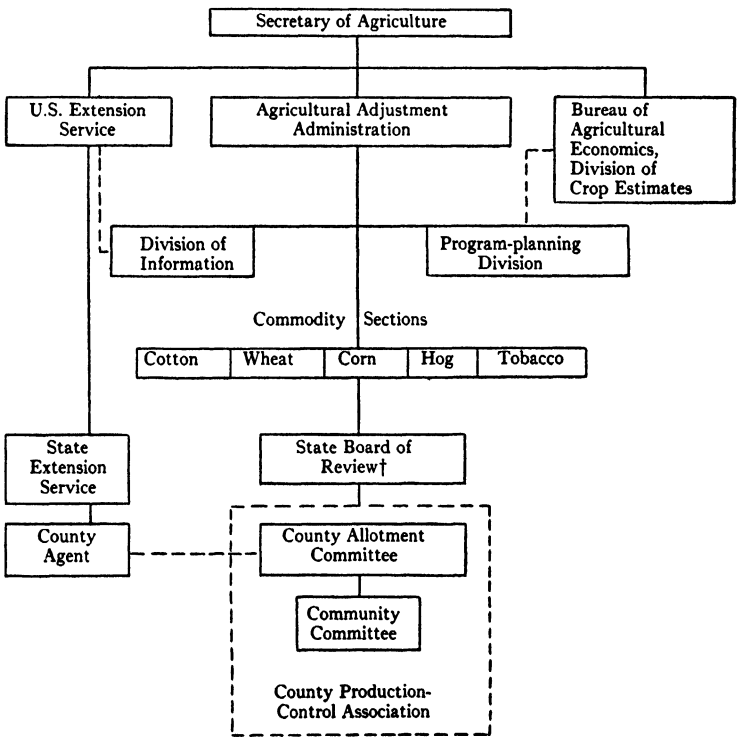
[45] *Agricultural Adjustment in 1934*, pp. 219–22. Intercounty adjustments coordinated by a State Board of Review, usually composed of a state crop and livestock statistician, a representative of the State Agricultural Extension Service, and a farmer. Adjustments on a national, state, and county basis were made by the Division of Crop and Livestock Estimates and Crop Reporting Board.

[46] As amended by Pub. No. 320 (74th Cong.), sec. 2, the pertinent provision of the Act, sec. 8 (2) reads: "Subject to the provisions of subsection 1 of this Section, the Secretary of Agriculture shall provide, through agreements with the producers or other voluntary methods, (*a*) for such adjustment in the acreage or production for market, or both, of any basic agricultural commodity, as he finds upon investigation . . . . will tend to effectuate the declared policy of this title, and to make such adjustment program practicable to operate and administer."

[47] The 1933 wheat program alone resulted in the formation of 1,450 such associations covering 1,700 counties (A.A.A., *Agricultural Adjustment* [February, 1934], p. 53).

Board as a whole selected two to four other members to constitute that Committee. The County Board of Directors, in addition to the work of its Allotment Committee, received

ORGANIZATION CHART OF AGRICULTURAL ADJUSTMENT ADMINISTRATION (SHOWING RELATIONSHIP OF A.A.A. TO PRODUCER ASSOCIATIONS) (1933–36)*



* *Source:* Compiled from *Reports, Agricultural Adjustment Administration: February, 1934,* pp. 13–18; *December, 1934,* pp. 219–22; *March, 1936,* pp. 40–44; *June, 1937,* pp. 53–60.

† The state boards of review were not established until 1936, under the Soil Conservation Act of that year.

appeals from findings of that Committee and, through its secretary, kept the records of the association, the Committee, and the Board, copies of all contracts, records of production, and records of rental and adjustment payments. The records of the county board were therefore a principal source of infor-

mation to the farm supervisors, county agents, and the statistical agencies of the Agricultural Adjustment Administration.

Thus the community and county committees were tied together by an interlocking membership establishing a representative administrative structure on the local level where the farmers came in direct contact with the regulatory program. In turn, the statistical allotment and disbursing work of the state and national divisions of the Agricultural Adjustment Administration depended for their execution upon the co-operation of the local farmers' committees themselves.[48]

Of such importance to the Department of Agriculture were the agencies of co-operation represented by these associations and their controlling committees that even before the Butler decision on January 6, 1936, when the Supreme Court delivered its opinion invalidating the processing-tax provisions of the Act, the Agricultural Adjustment Administration had announced that county adjustment planning committees would continue to co-operate with the state extension services in studying (1) changes in local cropping systems necessary to maintain fertility and to control soil erosion and (2) the relation of production trends in its county to those of the state and nation.[49] These committees carried forward the work of the Soil Conservation Act and Domestic Allotment Act of 1936,[50] in which the

[48] J. M. Gaus and L. O. Wolcott, *Public Administration and the United States Department of Agriculture* (Chicago: Public Administration Service, 1940), pp. 104–10. On p. 196 there is a note of warning: "It should be noted that 'farmer democracy' is for the farmer and fails to include a positive conception of the public interest. It fails to recognize that agriculture is an integral part of the national economy and that its proper interrelation with that economy is a national matter, greater than all of agriculture, and not a local, special interest prerogative."

[49] A.A.A., *Agricultural Adjustment* (1933–35), pp. 40–43.

[50] Pub. No. 46 (74th Cong. [April 27, 1935]); Pub. No. 461 (74th Cong.), approved February 29, 1936; A.A.A., *Agricultural Conservation* (1936), pp. 56–57. The number of county associations dropped, however, from over 4,000 to approximately 2,700, due largely to the consolidation of the commodity programs in each county (cf. *Agricultural Adjustment* [1933–34], p. 273; *Report of the Secretary of Agriculture* [1937], pp. 12–15). The state committees were appointed "upon the recommendation of the regional (A.A.A.) division after consultation with

crop-payment feature of the old Agricultural Adjustment Act was re-enacted in the form of direct federal aid to farmers through state committees appointed by the Secretary. An act of June 24, 1936, authorized the Secretary of Agriculture to advance funds against grants to producers under goals to be established for soil-depleting and soil-conserving crops.[51] Most of the work under the 1936 Act related to setting up the state administrative organization, which, under the grant program, received applications, established goals, approved expenses, transmitted payments, directed the work of inspection, and heard appeals from the action of the local committees. The local structural framework was continued but gradually shifted from a commodity to a county basis, handling the diminished volume of inspection and compliance work under the soil-conservation program but ready for expansion if the plan of establishing production controls of the basic agricultural commodities was once more undertaken.

Such a program reappeared in 1938, when the Agricultural Adjustment Act of that year reinstated some of the basic features of the 1933–35 program.[52] Under the soil-conservation program, the new Act provided once more for national acreage allotments to be proclaimed by the Secretary and apportioned through the local committees.[53] The Secretary was empowered to utilize as standards of payment either "the equitable share of normal national production of a commodity required for domestic consumption," or such share "adjusted to reflect the extent to which their utilization of cropland on the farm conforms to farming practices which the Secretary determines

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the State Director of Agricultural Extension and frequently with State officials and officials of the principal farm organizations. Only farmers are chosen as members, except that in the North Central Region, one member selected by the State Department of Extension is from the staff of the State Extension Service, and in a few States in other regions one member of the committee is a representative of the State college of agriculture" (*Agricultural Conservation* [1936], p. 58).

[51] Pub. No. 131 (74th Cong.).

[52] Pub. No. 430 (75th Cong. [February 16, 1938]), sec. 101(*b*).

[53] Secs. 329(*b*) (corn); 334(*c*) (wheat); 344(*d*) (cotton); 354(*c*) (rice).

will best effectuate the purposes specified in Section 7(*a*)" of the Soil Conservation Act.[54] National marketing quotas were to be established if the Secretary found an excess supply of a commodity exceeding a normal reserve amount in the case of five basic commodities—wheat, corn, cotton, tobacco, and rice. The national quotas were to be based upon standards of normal supply defined in the Act; the allotment of quotas locally and individually was to be carried out by the Secretary through local committees of farmers.[55] Thus, while under the 1938 law withdrawal of acreage from production under soil conservation was separated from marketing control by means of quotas, both programs were to be administered through the county producer committees.[56]

There is some reason to believe that conflict in objective and motivation exists between the production-control and land-utilization programs of the Department of Agriculture. Both programs have been eager to utilize the structure of local committees of farmers.[57] Data are lacking upon the extent to which the local committees for the two programs overlap, although both programs rely upon the services of the county agent of the

[54] Sec. 101 of the 1938 Act, amending the Soil Conservation Act and Domestic Allotment Act of 1936.

[55] Pub. No. 430 (75th Cong.), secs. 313(*b*), 329(*b*), 334(*c*), 344(*d*), 354(*c*). Secretary of Agriculture, *Report* (1940), p. 31; "Each of the 3022 agricultural counties in the United States has today a county A.A.A. committee. There are approximately 9000 county committeemen and 72,000 community committeemen."

[56] Radio address by Secretary H. A. Wallace (*Washington Star*, March 8, 1938). The county agricultural conservation associations had succeeded to the commodity production-control associations. The details covered in the Agricultural Adjustment Administration forms NCR-2, WR-4, and SR-200 (articles of association to be signed by the association's officers and approved by the Secretary). NCR-204 (November 1, 1937) describes the procedure for election of committeemen and operations of county associations for 1938 in the north-central region.

[57] Gaus and Wolcott, *op. cit.*, pp. 105–10, 157–59, and 463–65, for the text of the Mount Weather (Virginia) joint statement (between the Association of Land Grant Colleges and Universities and the U.S.D.A.) on "Building Agricultural Land Use Programs."

Extension Service. Professor Lewis states that the county committees in the land-use program are in practice now appointed in all but five states.[58] This is contrary to the earlier election procedure of the commodity-control and conservation programs. A divergence of viewpoint between the commodity producers, represented through the American Farm Bureau Federation and the technologically minded, and land-planning

TABLE 8*

NUMBER AND MEMBERSHIP, COUNTY AGRICULTURAL CONSERVATION ASSOCIATIONS
A.A.A., 1936–37

REGION	NUMBER		MEMBERSHIP	
	1936	1937	1936	1937
Northeast	.....	201	105,233	183,381
East-central	486	488	622,425	741,998
North-central	877	877	1,287,374	1,188,694
Southern	833	874	1,916,250	2,358,943
Western	517	527	389,845	546,146
Total	2,713	2,967	4,321,127	5,019,162

* *Source:* Data furnished the writer by North Central Division, Agricultural Adjustment Administration. For more recent data, cf. National Resources Planning Board, *Federal Aids to Local Planning* (Washington, 1940), pp. 17–20.

agricultural economists, would help to explain the complaint of the American Farm Bureau Federation in its December, 1940, convention against the overlapping and duplication of the Department's programs,[59] and the demand for their unification under a farmer-controlled board whose state committees would be more likely to reflect the views of the commodity-producer interests.

An outstanding feature of the quota plan in the 1938 law was that, unless an extraordinary majority of two-thirds of the producers of the commodity approved the quota in a referen-

[58] "Democratic Planning in Agriculture," *American Political Science Review*, XXXV (April, 1940), 232, 244–49.

[59] Above, chap. v, n. 10.

dum conducted within a specified time after the Secretary by proclamation announced a national quota, the quota should not become effective. In the case of cotton, the first proclamation was made by the Secretary two days after the President approved the Act, and instructions were issued simultaneously for holding a referendum on the marketing quotas on the 1938 crop.[60] The proclamation, as provided by law, "found and proclaimed" the facts as to the excess of supply over "normal supply," the carry-over from the previous marketing year, the probable domestic consumption for the current marketing year, the estimated carry-over from the current marketing year to the next, and therefore declared the national allotment as provided in the Act to be in effect.

The instructions were issued (*a*) to the county committees of the county agricultural conservation associations, (*b*) to community committees designated by the county committees, (*c*) to the state committees. The instructions also defined the eligibility of voters.[61] The county committees were charged with the responsibilities of:

1. Designating the place and giving public notice of the balloting;
2. Designating the three members of a Community Referendum Committee for each community in the county;
3. Assisting in the provision of ballot boxes;
4. Distribution of the ballot, tabulating and summary forms to each Community Committee;
5. Taking all appropriate measures to secure the secrecy of the ballots;

[60] The Act became effective February 16, 1938; the proclamation and instructions were issued on February 18 (cf. the *Federal Register*, February 19, 1938, pp. 492–99). Instructions were also issued on flue-cured, fire-cured, and dark, air-cured tobacco on that date. The national allotment was set at 10,000,000 bales by the Act (secs. 342, 343[*a*]). The total supply was placed at 24,500,000 running bales, the "normal" supply was set at 18,200,000 running bales, or an excess of about 33 per cent. The statutory prerequisites to the establishment of a national quota is in excess of 7 per cent.

[61] In the cotton referendum only "cotton farmers" who engaged in production of cotton in 1937 were entitled to vote. Each farmer was given one vote. A "farmer" was defined as an individual, partnership, corporation, firm, association, or other legal entity. Only a duly authorized officer of one of these legal entities could cast its vote.

6. Receiving and tabulating the community summaries into county summaries not later than 36 hours after the closing of the polls;
7. General supervision of the community elections, including investigation of challenges, disputes as to correctness of summaries, sealing and preserving the ballots, and reporting the county summaries to the state committees.

The referendum of cotton farmers on December 11, 1938, produced a 92 per cent majority in favor of the quota. The tobacco referendums, held the same day by the same methods, resulted in an 86 per cent majority among tobacco-growers.[62]

The tendency that these referendums have in the direction of conforming public policy to public opinion, thereby tending toward a kind of citizen-participation in formulating administrative programs, has already been noted with approval by students of administration.[63] But, from the standpoint of administration, one suspects that, however important the expression of mass opinion's approving or disapproving a proposed program, the valuable feature of farmer-participation is the organization of the channels of opinion through the county associations. Through these associations not only can opinion be sampled but local leaders can be mobilized in the execution of the program. In turn, through these leaders issues of national policy thus can be brought within the personal knowledge and experience of thousands of persons to whom the government otherwise would be an impersonal, abstract force. The potential educational values of getting that traditional in-

[62] Cf. *New York Times*, December 12, 1938. Over a million cotton-growers voted. The following year the cotton marketing quota again won through the referendum by a majority of 84 per cent, but the tobacco quota got only a majority of 57 per cent, and therefore the quota did not become effective. In 1940 Congress amended the Act to provide for quotas lasting three years. A thorough study of these referenda has been made by L. V. Howard, in "The Agricultural Referendum," *Public Administration Review*, II (winter, 1942), 9–26.

[63] C. J. Friedrich, "Public Policy and Administrative Responsibility," in Friedrich and Mason, *op. cit.*, p. 16; H. A. Wallace and J. L. McCamy, "Straw Polls and Public Administration," *Public Opinion Quarterly*, IV (June, 1940), pp.

dividualist, the farmer, to think in terms of group welfare, concerted action, and the concomitant necessity of taking other interests into account scarcely have to be emphasized. The work of national program-planning officials, extension agents, inspectors, statisticians, and so forth, are immeasurably facilitated if they can get reliable information from leaders or representatives of associations rather than from widely scattered individuals. Lastly, great potential advantage of these associations is that, once organized and co-ordinated on a continuing basis, it may be possible to adapt them to other purposes. The county agricultural associations have already played vital roles in securing allotment contracts, co-operation in improved land-utilization and soil-conservation programs, and in conducting voting referendums. As the Department of Agriculture says, the farmers' county and community committees constitute ". . . . an effective total force of 135,000. . . . a great network of key leaders in agriculture. They form an experienced organization which can be of inestimable value in peace or war."[64]

THE OVER-THE-COUNTER SECURITIES MARKET

A final example of governmental creation and utilization of interest-group organization occurs in the field of securities trading. In this field it is customary to speak of the buying and selling of securities anywhere than on the organized stock exchanges as the "over-the-counter" market. The size of this market can be judged from the fact that over sixty-seven hundred registrations were filed with the Securities Exchange Commission under section 15(*b*) of the Act of 1939, which permits trading over the counter under rules and regulations of the Commission.[65] It is estimated that the value of securities traded exclusively over the counter now equals the value of those listed on the exchanges, exclusive of federal securities which are traded for the most part over the counter.[66] In this

[64] *Report of the Secretary* (1940), p. 31.

[65] *Fifth Annual Report* (1939), p. 59.

[66] National Quotation Bureau, *The Over-the-Counter Securities Market* (New York, 1940), pp. 16–17.

field no market organization comparable to the organized exchanges existed.

The Commission's powers included the promulgation of rules and regulations, over and above registration requirements, governing sales of this type, but the obvious difficulty was to enforce such rules when the transaction took place privately, over the telephone, in conference, or through the mails.[67] The Commission attempted to meet this problem through the creation of a voluntary association among the over-the-counter dealers in stocks and bonds, which might attempt to assume the responsibilities of enforcing ethical trading practices through its own rules and representatives. The nucleus of such an organization was the Investment Bankers Conference Committee, which had applied for and administered the Investment Bankers Code approved under the N.R.A. in November, 1933. This organization never claimed to represent more than seventeen hundred members, however, and, when the constitutional props of the code provisions were knocked away, the Commission almost immediately took steps to revive and promote the self-regulatory functions of the Conference.

During the summer of 1935, the Commission sent an inquiry to some thirty-two hundred bankers registered under the N.R.A. code, asking if they desired to support a permanent organization of a self-disciplining, self-governing association in order to eliminate fraudulent and manipulative transactions and promote fair trade practices. A majority replied, and of the replies received over 90 per cent favored such action and offered to support such an organization.[68] On September 12, pursuant to a conference between members of the old Investment Bankers Code Committee and the Securities and Exchange Commission, Chairman Joseph B. Kennedy addressed a letter to the chairman of the old Committee in which he

[67] Rules requiring registration under sec. 15(*b*) were not promulgated until May 6, 1935, almost a year after the President signed the Securities and Exchange Act.

[68] S.E.C. Release No. 502, September 30, 1935.

stated the desirability, in the minds of the Commission, of a representative body of the investment dealers in the country to serve the following purposes:

1. To focus the attitudes of the securities dealers on pending questions in the hands of the Commission;
2. To handle complaints arising from the public and within the industry; in which event, the Commission would look forward to co-operating with such bodies in much the same manner as it deals with the business conduct committees of the exchanges;
3. To conduct research in connection with pending and future legislation affecting the security markets.

On September 19 the chairman of the Investment Bankers Conference Committee wrote to Mr. Kennedy stating that the Committee as a whole had carefully discussed his letter and that the Committee did not wish to be a promotional agency. However, the reply went on, pending plans for a permanent organization, if the Commission would recognize officially the status of the Committee, he was of the opinion that certain functions could be undertaken. This letter contained specific suggestions as to the language by which these functions might be officially described. The new chairman of the Commission, J. M. Landis, immediately replied, officially stating that, pending the consideration of plans for permanent organization, the Commission would be glad to recognize this Committee as a consultative or conference committee to further the aims set forth in the previous correspondence. The scope of the Committee's functions were specifically confirmed by this exchange of letters.[69]

During the following eight months the Committee had several conferences with the Commission. Its plans for permanent organization did not get beyond the paper stage,[70] but the

[69] One of the functions suggested was the holding of preliminary hearings through subcommittees on complaints of unfair practices by and against dealers accepting the supervision of the committees.

[70] The former Investment Bankers Conference Committee was changed to the Investment Bankers Conference Committee for Permanent Plan, on October 29, 1935.

conferences had tangible results in the modification of the Commission's reporting rules[71] and in the amplification of section 15 of the 1934 law to provide specifically that trading other than on registered national securities exchanges would be unlawful unless the broker or dealer was registered, as provided in a new section 15(*b*).[72]

On June 15, 1936, Chairman Landis made a formal statement to the members of the Investment Bankers Conference Committee for Permanent Plan at a joint meeting in Washington. He outlined the features of a permanent organization which the Commission would consider ideal;[73] he referred to the obvious practical difficulties, stated the preferability from the Commission's viewpoint of having the Investment Bankers Conference Committee develop its own status and vitality rather than seek legislative action, and, finally, pressed the point of immediate action in conjunction with the Commission's co-operation to solve legal and practical obstacles. On June 29 the Chairman of the Investment Bankers Conference Committee replied, somewhat cautiously, referring to the Committee's plan being based on self-imposed discipline and to the fact that complete self-regulation was probably not practically possible in the formative stages of the Conference but expressly stating that "we are prepared to go forward and test the practical aspects of such an organization under existing conditions, and shall hope to be able to consult freely with the Commission as we progress." On September 3, 1936, Investment Bankers Conference, Incorporated, was organized.

[71] July 15, 1936. [72] Pub. No. 621 (74th Cong.), May 27, 1936.

[73] Mr. Landis' ideal features of a permanent organization of investment bankers, dealers, and brokers were: (1) Membership should be open to every member of the industry who has not disqualified himself by conduct clearly inconsistent with what reasonable men regard as honest and fair trade practice. (2) Its form of organization should be such as to command the confidence of the industry, and it should be adequately representative of the membership. (3) Its rules of fair practice should be designed to remove impediments to a free and open market and to elevate the plane upon which the competitive process is conducted. (4) A channel for frank and frequent exchange of views between the Commission and the representatives of the industry.

On April 16, 1937, this new group submitted to the Commission its draft "Rules of Fair Practice." This step, taken pursuant to thorough discussion and adoption within the Conference itself, corresponded to the initial submission of a proposed Code of Fair Competition four years before. On May 4, 1937, members of the Commission's staff met with the Technical Committee of the Investment Bankers Conference, Incorporated, to confer regarding the proposed rules, and on June 25 the Commission sent a tentative draft of rules for regulation of over-the-counter markets to state security commissions, organizations of brokers and dealers, and other interested groups for comments prior to final adoption. After receiving an official reply from the Investment Bankers Conference on July 23, the Commission on August 4 formally adopted a series of eleven rules and regulations defining terms and clarifying procedures of determining what practices constitute fraud, deceit, and misrepresentation and what items of fact and record must be disclosed in the course of completing transactions in over-the-counter markets.[74]

Unlike the policy followed with the New York Stock Exchange,[75] the Commission found it necessary to promulgate the rules covering the over-the-counter trade as its own instead of recommending them to the Conference for adoption. Investment Bankers Conference, Incorporated, in spite of its formal organization, had not been able to develop a procedure whose sanctions the trade generally would respect. The difficulty was that a hearing upon complaints before a subcommittee of the Conference depended for its legal validity upon a consent stipulation by both parties to the jurisdiction and decision of the Conference. The person whose conduct was complained of was not bound to appear, answer, or introduce evidence except by the threat of expulsion, which meant nothing to a nonmember and very little financially to a member. If a wrongdoer therefore could with impunity refuse to comply with the

[74] Rules MC1 through MC8; Rules GB2, GB3, and OA1, S.E.C. Release 1330, August 4, 1937.

[75] See . . . . chap. viii, below.

decisions and orders of the Conference's judicial machinery, there seemed no point in holding two separate proceedings before the case got to the courts.

The next phase of the relationship between the Investment Bankers Conference and the Commission, therefore, concerned methods of giving the voluntary representative organization a preferred character or status which would make membership therein a privilege and its sanctions effective. After extended discussions between them, on January 5, 1938, new draft amendments were introduced on January 17, 1938, by Senator F. T. Maloney of Connecticut.[76] The bill with but slight changes was passed by both houses and approved June 25, 1938.[77] The amendments set up a system of self-regulation through the formation of voluntary nation-wide associations of dealers and brokers which would be permitted to make preferential business arrangements not accorded to nonmembers. Nonmembers still come under the direct supervision of the Securities Exchange Commission under the other parts of the law. The Commission was empowered to review cases of exclusion, dismissal, and suspension from the association, to supervise the conditions of membership and the conduct of association officials, and to remove from office directors and officials of the association for abuse of authority or for failure to enforce the association's rules. Associations were to register with the Commission and thereupon were to be subject to the same requirements as the national securities exchanges under sections 5 and 6 of the Act.[78] The Commission has powers of recommending and, if necessary, ordering the association to adopt rules covering the association's membership and disci-

[76] See Arthur Krock's column in *New York Times* of January 12, 1938; *ibid.*, January 17, 1938, p. 29.

[77] Pub. No. 719 (75th Cong.).

[78] The Act would permit more than one association, but the conditions of nation-wide membership are such as to make it unlikely that more than one, the I.B.C., whose membership had increased to 1,700 in January, 1938, would seek registration. The National Association of Security Dealers, Incorporated, the successor to the I.B.C., did not apply for registration until July 20, 1939, which was granted August 7, 1939.

plinary procedure, amendment of rules, election of officers, and affiliation with other associations.[79]

Thus not only did the Commission frankly seek to create a group organization representative of a regulated interest but openly sought statutory authorization for it, under appropriate controls, as a subadministrative agency, in the belief that such a body would facilitate the task of regulation.

A DISTINCTION IN REGULATORY POLICY

The present chapter has been concerned with a type of interest representation in which organizations of producers, through their leaders or representatives, exercise legal privileges and duties in the formulation and enforcing of administrative regulations, rules, or orders. In none of the examples cited, however, have the group organizations enjoyed a completely independent sphere of authority in the plan of regulation. In each case the group has acted under direct supervision of an official administrative authority; the group of organizations' powers and duties were defined and limited either by statute or by the public agency. In each case, also, the public authority was empowered either to revoke the legal authority under which the group functioned or to review and annul its acts. We shall now consider two plans of regulation in which both the law and the administrative policy contemplate distinct spheres of responsibility for the public authority and the private group organization. The regulatory statute does not constitute a complete charter of the powers and privileges of the group. While the law empowers the public agency to make rules and orders binding upon the conduct of the private organization and its members, in practice such control is exercised primarily through investigation, continuing surveillance through the reports, and informal conferences with group officials. The reasons for the difference in regulatory policy between the succeeding and foregoing examples will become apparent as we proceed.

[79] S.E.C., *Fourth Annual Report* (1938), pp. 32–33; *New York Times*, June 17, 1938, p. 31.

CHAPTER VIII

ADMINISTRATIVE FUNCTIONS OF INTEREST GROUPS—*Concluded*

THE purpose of the present chapter is to analyze, in the regulation of securities and commodity futures trading, the division of labor in the regulatory pattern between the public authority and a private voluntary group organization, both of which regulate the economic conduct of individuals. In both of these fields the private group had preempted the field and the problems of such regulation long before the advent of government on behalf of interests other than those directly represented in the group organization. Against this background, which roughly differentiates the subject matter of the present from the preceding chapter, we shall have the opportunity of observing the interadjustment of administrative policy with "prescriptive rights," as it were, of an interest group when the latter is strongly organized, in comparison with the situation when the interest group(s) is still in an internally divided, infantile, or "subject" stage of development.

CONTRACT MARKETS UNDER COMMODITY EXCHANGE REGULATION

The Grain Futures Act of 1922 was an attempt, arising out of the discontent of farmers in the 1921–22 depression, to control speculative and manipulative influences on the price of commodities on the large exchange markets. Large numbers of farmers, merchants, and processors wish to hedge against possible losses because of changes in price of a commodity while it is in their hands and therefore buy or sell negotiable contracts of sale for future delivery. There is a large degree of concentration of trading in a few markets or exchanges. The proportion of trading in grain futures on the Chicago Board of Trade to all trading in grain futures was 84.8 per cent in 1936

and 86.3 per cent in 1938.[1] This trading was done through a total membership of approximately 1,549, who were associated with 491 firms and corporations.[2] The theory of control in the Grain Futures Act, as amended by the Commodity Exchange Act in 1936, is based upon the principle of denying the channels of interstate commerce and communication to makers of any contract of sale for future delivery of any commodity except when made by or through a member of a board of trade designated by the Secretary of Agriculture as a "contract market."[3] The conditions of qualifying as a contract market for a board of trade are: it must

1. Be located at a terminal market where the commodity is sold in sufficient volume to reflect fairly the commodity's value;
2. Provide for its own and its members' reports as to their transactions as the Secretary of Agriculture may prescribe;
3. Endeavor to prevent the dissemination of false or misleading crop or market information;
4. Provide for the prevention of price manipulation or cornering the supply of any commodity;
5. Admit co-operative associations to membership;
6. Deny trading privileges to members who have violated the law.

A Commodity Exchange Commission, composed of the Secretary of Agriculture, Secretary of Commerce, and the Attorney-General, is empowered to suspend the designation of a board as a "contract market" for a period not to exceed six months or to revoke the designation completely on a showing, after notice and hearing, that the board is not complying with the above requirements; alternatively, the Commission may order the board, its officer, agent, or employee to cease and desist from any violation of the Act or a regulation thereunder.

[1] *Annual Reports* (1936), p. 3; *ibid.* (1938), p. 4.

[2] Chicago Board of Trade, *The Development of the Chicago Board of Trade* (1936), p. 24.

[3] 42 Stat. 187, invalidated by *Hill* v. *Wallace*, 259 U.S. 44 (1921); 42 Stat. L. 998 was upheld in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923); the Commodity Exchange Act, 49 Stat. 1491, is contained in *Rules and Regulations of the Secretary of Agriculture under the Commodity Exchange Act* (Washington: Commodity Exchange Administration, 1937).

The Secretary of Agriculture alone, after notice and upon evidence at a hearing, may by order require a contract market to refuse trading privileges to violators of the law.[4] Floor brokers and commission merchants are required to register with the Secretary under conditions prescribed by the law and by him, and he is empowered to revoke this registration or to suspend it for a period not exceeding six months for violations of the Act or refusing to comply with regulations issued thereunder.

Section 4*a* of the Act empowers the Commodity Exchange Commission to set limits on speculative trading in contract markets by determining the amount of business any individual may transact on a business day and setting limits on the net long or net short position of any trade. The *Rules and Regulations* of the Chicago Board of Trade empower its Board of Directors to break "corners" on the market by postponing dates of delivery set in the futures contract and to set, if necessary, fair settlement prices on ten hours' notice, to fix price limits above and below which there shall be no trading, to punish by expulsion or suspension such activities as extortion, price manipulation, attempts at cornering, and dissemination of false or inaccurate information.[5] The Act therefore supplements the powers of the Board of Trade, but the latter possesses more powers of immediate control over sudden and unreasonable fluctuations or unwarranted changes in the prices of commodities than does the Secretary of Agriculture or the Commodity Exchange Commission.

The rules of the Secretary of Agriculture relate primarily to the requirements of registration and reporting with respect to the trading operations on the contract markets.[6] Each clearing

[4] Three injunction suits to restrain the enforcement of the Commodity Exchange Act were dismissed by district courts in 1936. The 1936 amendments transferred this power from the Commission to the Secretary and made it apply to completed as well as present violations *Report of Chief of Grain Futures Administration* [1936], pp. 6–7).

[5] Nos. 80, 81, and 150.

[6] *Rules and Regulations of the Secretary* . . . . Art. 1, secs. 17–19; Art. 11, secs. 201–23.

member of the Exchange is required to report the total of all customers' contracts open on the firms' books at the close of each day. The regional office of the Commodity Exchange Administration combines the separate reports for each grain and future contract as totals by futures and all futures are combined by grains. It is thereby possible to know the aggregate short or long position in each contract daily, how this is changing, and also the changes in the volume of trading. The normal tendency is for the amounts of grain involved in open contracts to increase as stocks of grain increase and to decline as stocks are reduced. Deviations from this tendency are a forecast of possible market congestion when the time for delivery under the contract expires, a condition which in September, 1937, for example, resulted in restrictions on the amount and price limits of daily trading in corn futures.[7] This action was taken by the Board of Trade after suggestions from the C.E.A. The Secretary's regulations also provide for reports from each clearing member to show the "open" or speculative position of each customer equaling or in excess of a given minimum, which was 200,000 bushels in 1937. These reports enable the C.E.A. to isolate the larger speculative accounts, whose movements can be followed in relation to the current market situation.[8] If the size or character of any one of these accounts seems to threaten the stability of the market, the regional office of the C.E.A. may immediately notify the appropriate committee of the Board of Trade.[9] Article 82 of the Chicago Board of Trade's *Rules and Regulations* reads in part:

The [Business Conduct] Committee shall be charged with the duty and authority to prevent manipulation of prices as provided in Section 5(*d*) of the Grain Futures Act and shall have general supervision over the busi-

[7] *Report of the Secretary of Agriculture* (1937), p. 75.

[8] *Reports by Members of Grain Futures Exchanges: Sen. Doc. 264* (70th Cong., 2d sess. [1929]), I, 21.

[9] Interview with Mr. L. A. Fitts, regional grain supervisor (Chicago), Commodity Exchange Administration, July 18, 1939. Cf. also G. W. Hoffman, "Government Regulation of Commodity Exchange," *Annals of the American American Academy of Political and Social Science*, May, 1931, p. 54.

ness conduct of members, particularly insofar as such conduct affects (1) non-member customers, (2) the public at large, (3) the State Government, (4) the Federal Government, (5) public opinion, (6) the good name of the Association .... if, as the result of any investigation, the Committee finds that a course of conduct is or would be unfair or unjust or in violation of the law or the rules of the Association, the Committee shall notify the member in writing of its conclusions and direct such member to cease and desist from such conduct. The findings and conclusions of the Committee in the premises shall be final and without appeal. Any member who fails to appear before the Committee pursuant to its request, or to submit his books and papers to the Committee for examination, or who conducts himself in violation of any order of the Committee after having been duly notified thereof, shall be charged with an offense against the Association, and if found guilty shall either be expelled or suspended for any specified period by the Board.

The Commodity Exchange and Grain Futures Administration have never used their legal powers under the Act to suspend or revoke the "contract market" designations of the principal boards of trade. Actual cases of disciplinary action are, as far as possible, handled through the Business Conduct Committee.[10] The Commission's orders directing exchanges to deny trading privileges to individual traders have always been challenged by the aggrieved individuals rather than by the contract markets, indicating that the latter were cognizant of and not opposed to the action taken.[11] The Administration's annual reports reveal that from 1936 to 1938 only one such order had to be issued. The Secretary's *Report of 1937* makes the statement that the exchanges generally invite representatives of the Administration to attend the deliberations of the business-conduct committees.

Cases in which the Administration has taken formal action against individuals have been those in which individuals have

[10] L. A. Fitts, interview cited. See D. B. Truman, *Administrative Decentralization* (Chicago: University of Chicago Press, 1940), pp. 172–83, for an excellent account of the relationships between the regulated groups and the Chicago field office of the Commodity Exchange Administration.

[11] *Wallace* v. *Hutten*, 298 U.S. 299 (1936); *Wallace* v. *Howell* (1936), cited in *Report of Director of the Commodities Exchange Administration* (1936).

violated a C.E.A. rule or regulation, registration statements, or refused to send in reports. In other words, the C.E.A. apparently leaves to the Board the cases of violation of "principles of justice and equity in trade" and confines itself to formal proceedings in cases of express violations of the law. Also, as in the case of securities regulation, the C.E.A. has established its own administrative organization primarily for purposes of research and publishing periodic reports, bringing to the attention of the Board such general market situations as these current investigations reveal. The C.E.A. refrained, until June, 1938, from announcing any formal regulations of trading activity. In that month it announced a proposed order which would restrict the volume of speculative trading within definite limits.[12] This order did not go into effect until June, 1939.

The Grain Futures Administration's statistical and reporting functions were originally challenged bitterly by trading groups on the Board of Trade. In 1927, after a three-year campaign led by "An Association To Restore Free and Unrestricted Grain Markets" and climaxed by a formal request from the chairman of the Board's Business Conduct Committee, the Secretary of Agriculture suspended for eight months the requirements whereby the clearing members had to report the speculative holdings of "open contracts" in excess of 500,000 bushels.[13] In retrospect the result of the suspension was unfortunate from the point of view of its sponsors. Their main argument had been that grain prices would improve if speculative buyers were not restrained from entering the market because of the possible consequences of the reporting requirements. The study of the effects of the eight months' suspension showed that the volume of trading in 1927 without the regulations was less than in 1921, 1922, 1924–26, and smaller than the average from 1921 to 1928 by about 23 per cent. No further official attempts were made to attack the requirements by the Board of Trade, and gradually over a period of years,

[12] *Report of Chief of Commodity Exchange Administration* (1938), p. 14.

[13] *Reports by Members of Grain Futures Exchanges*, pp. 13–16.

by lowering the minimum figure in excess of which the volume of open contracts had to be reported, the requirements have been made more thoroughgoing to disclose the operations of speculators.

The role of the Business Conduct Committee thus has included soliciting exemptions and relaxations of the official regulations as well as co-operating with the Administration in the control of members' conduct. Evidence is lacking as to the role the Committee tends to take in the borderline cases where conduct is unethical as distinguished from illegal, but, in the absence of specific data, the presumption would be that the C.E.A. will take no action beyond referring these cases to the Committee.

NATIONAL SECURITIES EXCHANGES

A similar pattern of regulation based upon a legal recognition of the organized interests already in the field was embodied in the federal legislation of 1933–34 regulating the marketing of and trading in securities. Born, as it were, out of the sensational revelations of the Senate Committee on Banking and Currency,[14] the Securities Act of 1933 and the Securities Exchange Act of 1934 were based on the realistic recognition that the problems of regulating the marketing of securities involved a knowledge of the interests operating in the market, how they worked, to what degree they were organized, and how they were regulated under their own group controls. The Securities Act of 1933 provided for regulation of individual issuers and promoters by requiring registration with the Federal Trade Commission of prospective security issues, together with a prospectus whose contents, if false, misleading, or incomplete, might result in the promulgation of a "stop" order, denying

[14] U.S. Senate Committee on Banking and Currency, *Hearing Pursuant to Sen. Res. 84* (72d Cong.); *Stock Exchange Practices*, continued in *Hearings Pursuant to Sen. Res. 56* (73d Cong.). See also C. A. and M. R. Beard, *America in Midpassage* (New York: Macmillan, 1939), I, 159–91, and F. Pecora, *Wall Street under Oath* (New York, 1939).

the privilege of trading in the issue.[15] The Act of 1934 transferred these functions to the Securities and Exchange Commission and formulated a program of regulating the issuers, promoters, and traders of securities through the stock exchanges themselves.[16] This was done through the following provisions:

1. Sec. 5—providing that unless a security exchange is registered with the Commission in accordance with conditions prescribed in the Act, it is unlawful for any broker, dealer or other person to utilize the mails or any instrumentality of interstate commerce for the purpose of using any facility of the exchange.
2. Sec. 6—providing the conditions of registration for exchanges:
   (*a*) by filing a statement prescribed in form by the Commission, accompanying it with an agreement to comply and so far as within its powers to enforce compliance by its members with the provisions of the Act, Amendments thereto and rules and regulations made thereunder, and agreeing to furnish all data with respect to its organization, procedure and membership as the Commission may by rule or regulation require;
   (*b*) by incorporating in its rules a provision for the expulsion, suspension or discipline of a member for conduct inconsistent with just and equitable principles of trade, and a provision declaring that the wilful violation of the Act or regulation thereunder shall be considered conduct inconsistent with such principles.
3. Sec. 19(*a*) (1)—providing that the Commission, upon a finding that the exchange has violated the Act or a regulation thereunder, may after notice and hearing by order suspend for a period up to 12 months or withdraw the exchange's registration, or, after similar procedure, expel any member or officer thereof.
   Sec. 19(*a*) (4)—providing that the Commission may summarily suspend trading in any registered security on any exchange for ten days, or with the approval of the President summarily suspend all trading on the exchange for a period up to 90 days.
4. Sec. 19(*b*)—providing that if, after appropriate requests in writing, a securities exchange fails to effect on its own behalf specified changes in its rules and practices, the Commission may after notice and hearing by order, rule or regulation, direct the exchange to make such

[15] Pub. No. 22 (73d Cong. [May 27, 1933]).

[16] Pub. No. 291 (73d Cong. [June 6, 1934]).

changes with respect to 13 classes of securities transactions or practices.

5. Sec. 32(a)—providing for the fining of an exchange up to $500,000 for violation of the Act or a regulation thereunder.

The importance of supplementing individual controls with exchange regulation becomes clear when it is realized that approximately 6,500 stock exchange firms, brokers, dealers, and traders are registered under the Securities Exchange Act.[17] Obvious simplification of enforcement problems would ensue if the business conduct of these "individuals" could be intrusted satisfactorily to the 22 stock exchanges. Furthermore, there is a tremendous concentration of trading in stock on the New York Stock Exchange, where about 85 per cent of the share transactions in the country are handled through its approximately 600 member-firms and 1,375 individual members. As was pointed out in chapter ii, this organization in the course of over a century has accumulated not only a highly developed reporting and marketing mechanism but a strong group government of its own.

It was clear to the Commission that, faced with such a tradition and strongly intrenched organization, rules and regulations easily made on paper in Washington would meet strong objections and probably would have slight effect on everyday trading conduct. It therefore chose to interpret its statutory powers as calling for no more than supervision of the exchanges, leaving the primary responsibilities for self-discipline and regulation upon the exchanges themselves.[18] The Commission promulgated only two rules which regulated trading from June, 1935, to June 30, 1937, and adopted the practice of recommending trading rules to the exchanges for adoption as their own rules.[19] Sixteen rules were recommended for volun-

[17] Securities and Exchange Commission, *Sixth Annual Report* (1940), p. 112.

[18] This view has been expressed again and again in statements of the Commission and in its annual reports (cf. W. O. Douglas' statements in *New York Times* for November 24, 1937, and January 8, 1938; *Fifth Annual Report* [1939], p. 38).

[19] *Third Annual Report*, (1937), pp. 75–78.

tary adoption in April, 1935, and it was not until January 24, 1938, that one of these rules covering "short selling" was amended and promulgated by the Commission as its own compulsory regulation.[20] The Commission, as of January 3, 1938, had promulgated some ninety rules and regulations affecting securities trading. With the exception of the above-mentioned trading rules, however, these regulations related to registration forms and procedures, admission of securities to unlisted trading, definitions, interpretations, and exemptions.[21]

It seems evident that the Securities and Exchange Commission has attempted to avoid conducting its relations with the New York Stock Exchange on a basis of legal controversy in the courts. The Commission has exercised its influence through its investigatory powers by seizing strategic moments when the Stock Exchange was under the spotlight of publicity to bring skilfully stated facts before the public and through a constant willingness to confer with officials of the Exchange.

The opportunities for research and investigation under the Securities Exchange Act of 1934 are manifold. Section 19(*b*) permits the Commission to order revisions in the rules of exchanges with respect to thirteen broad classes of rules and practices.[22] Instead of drafting trading rules, the Commission chose to request the exchanges to furnish it with statistical and other data with respect to such transactions, the rules covering them,

[20] S.E.C. Release 1548, January 24, 1938. There are practical reasons for this policy. Considerable legal opinion entertains the view that, while sec. 32(*a*) permits fines of exchanges for violations of Commission rules, this does not apply to cases in which they fail to punish members. Note in 46 Yale L. J. 624, at 639 (1937) and 21 Va. L. Rev. 144. Since withdrawal of registration of the New York Stock Exchange, or suspending trading thereon, would have such far-reaching repercussions, both economically and politically, it appears that sec. 19(*a*) (1) and (4) will be put into effect only on occasions of greatest crisis.

[21] S.E.C., *Third Annual Report*, p. 75.

[22] Rules and practices covering (1) financial responsibility, (2) limitation of trading, (3) listing and delisting of securities, (4) hours of trading, (5) solicitation of business, (6) fictitious accounts, (7) settlement and closing accounts, (8) methods of reporting transactions, (9) rates and charges, (10) units of trading, (11) odd-lot transactions, (12) margin deposits, (13) similar matters.

and the effects of such practices. In addition, it maintained current surveillance over trading in more than three thousand security issues for purposes of detecting manipulative or deceptive practices.[23] Evidence of such practices is brought to the attention of the appropriate exchange committee, which takes such action as it sees fit. The Commission takes legal action only in cases of violation of the law or its regulation.

The Act also imposed specific duties of research upon the Commission with respect to the composition of the exchanges, their constitutions, their rules and practices.[24] These provisions were construed by the Commission to contemplate an internal reorganization in terms of a wider internal representation of interests upon the governing board and committees within the exchanges. The most important of these, of course, was the New York Stock Exchange. The Commission's report under section 19(*c*) of the Act on Government of Securities Exchanges was submitted to Congress in January, 1935.[25] It recommended changes in the method of constituting the governing committee, the procedure of the Business Conduct Committee, the method of nominating and electing officers, and eligibility requirements for officers. The Commission expressly stated its hope that the recommendations would be "found acceptable and voluntarily put into effect by the exchanges themselves."[26] Having thus identified the existing interest com-

[23] *Fifth Annual Report* (1939), pp. 90–92.

[24] Sec. 19(*c*) directed the Commission to make a study of the rules of exchanges with respect to the classification of members, methods of electing officers and committees, and expulsion or disciplining of members, and to report the results of its investigation with recommendations, to Congress. Sec. 11(*e*) directed the Commission to study the feasibility and advisability of the complete segregation of the functions of dealer and broker and to report the results of its study with recommendations to Congress before January 3, 1936.

[25] *House Doc. 85* (74th Cong., 1st sess).

[26] *Ibid.*, p. 17. The principal recommendations were:

1. A better representation of the Commission broker, who has more contact with the investing public, on the governing committees. The Commission found that the specialists and odd-lot dealers, engaged primarily in trading for their

position of the governing body of the exchanges, the Commission proceeded with its investigation of the floor operations. The *Report on Feasibility and Advisability of Segregation of the Functions of Dealer and Broker*, submitted in June, 1936, again refrained from any more positive action than recommendations which might be implemented in rule or regulation either of the Commission or of the Exchange.[27] No immediate action resulted from this report.

The Commission had the opportunity of applying public pressure in 1937 and again in 1938. In September, 1937, a precipitate decline in stock values occurred, which was accompanied by a considerable campaign in the financial pages of the press against the "restrictive" regulations of the S.E.C. This had gone on for about two months, when, on November 23, 1937, the chairman of the Commission, W. O. Douglas, issued a frankly worded public statement.[28] This statement quoted figures compiled by the New York Stock Exchange itself to show (1) that considerable influence in daily price fluctuations had been wielded by small groups of specialists trading in the market leaders and (2) that as much as one-fourth of the trading in some of these leaders had taken the form of short selling, practically half of which was done on the traders' own account. Having attempted to demonstrate the degree to which manip-

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own accounts, dominated the organization of the Exchange. No specific plan was suggested for achieving this result.

2. Nomination of the governing committee by petition rather than by the easily controlled method of a nominating committee.
3. Annual election of at least one-third of the governing committee.
4. Nonmembers of the Exchange to be candidates for President and other officerships.
5. Election of President by entire membership.
6. Remove the requirement that membership on the standing committees be restricted to members of the Governing Committee.

[27] (Government Printing Office, June 20, 1936), pp. 109–14. The principal recommendations were: 100 per cent margins and functional segregation on the floor, thus preventing a trader from serving more than one interest at any given time.

[28] *New York Times*, November, 24, 1937.

ulative activity was possible under its so-called "restrictive" rules, Chairman Douglas went on to say that, while the Commission still wished to limit its functions to those of supervision, it was high time that the Stock Exchange "reappraise the traditional methods of exchange administration" in the light of the need for keeping organization in pace with stock exchanges' "evolution from private membership associations to great public market places." The *Fourth Annual Report* of the Commission takes pains to give credit for the events which followed to progressive groups within the Exchange's own membership, but it is clear that these groups were encouraged by Mr. Douglas' action.[29] On December 10, 1937, the president of the Stock Exchange, Charles R. Gay, appointed a committee to study the organization and administration of the New York Stock Exchange.[30] This committee submitted its report on January 27, 1938; a new constitution embodying its recommendations was submitted to the membership on February 23, adopted by a vote of 1,013 to 22 on March 17, and became effective on May 16, 1938.[31]

The rebalancing of interests within the Exchange effected by this reorganization was more sweeping than that envisioned in the 1935 report of the Commission. The Board of Governors was reduced from fifty to thirty-two, fifteen of whom were to be members of the Exchange "selected with due regard to the various interests represented in the membership," six to be nonmember partners of New York member-houses doing a stock or bond business for the public, six to be partners of

[29] *Fourth Annual Report* (1938), pp. 20–21.

[30] The Committee members were C. C. Conway, chairman of the Board, Continental Can Company; A. A. Berle, former professor of law, Columbia University; two former presidents of the Investment Bankers Association, Trowbridge Calloway and John Prentiss; two governors of the Exchange, M. K. Farrell and W. M. Martin, Jr.; one member of the Exchange, John Coleman; K. C. Hogate, president of the *Wall Street Journal;* and T. H. McInerney, president, National Dairy Products Corporation.

[31] *New York Times*, March 18, 1938. Further "streamlining" amendments were adopted in 1941, replacing committees with single-headed departments.

member-firms having their principal place of business outside New York City, and three representatives of the "public" to be appointed by the president of the Exchange and confirmed by the Board of Governors. The office of a salaried, nonmember president was created, whose incumbent was made responsible for the work of the former members of the standing committees; full-time executive staffs were employed to do this work, and the number of standing committees were reduced from seventeen to seven. The control "center of gravity" still lies within the stock exchange membership, however. Reorganization resulted in recognition of nonmember-firms, securities dealers responsible to clients outside New York City, of the public through persons not engaged in the securities business at all, and of the commission brokers, but it remains to be seen whether the public representatives will really represent any outside interest, appointed as they are by the Exchange president and confirmed by the Board of Governors. Public attention may be attracted to a particular incident by the resignation of a public representative (viz., in 1938 President Robert M. Hutchins resigned in connection with the Whitney incident),[32] but by so doing he abdicates from any future influence. A possible connection of confidential liaison between the Exchange and the Commission might be developed, but it seems doubtful whether prominent business executives (who have by and large consitituted the public representatives) would care to assume such a role.

The Commission again relied upon public notoriety to influence the governing board of the Stock Exchange to take voluntary action in connection with the Whitney case in 1938, in which the failure of a prominent exchange firm revealed the loss of millions of dollars in customers' funds and securities. The Commission immediately instituted an investigation and, after hearings, began a series of conferences with Stock Exchange officials which resulted in October, 1938, in the adoption of a program by the Board of Governors of the Exchange

[32] S.E.C., *Fifth Annual Report* (1939), p. 36 n.

intended to remove some of the dangers to customers' funds inherent in their being placed in the hands of a firm doing a combined brokerage and underwriting business.[33]

As in the case of the Commodity Exchange Commission, the Securities and Exchange Commission has used its formal powers, i.e., to issue its own cease-and-desist order or to initiate injunction or indictment proceedings, in the courts, only in the cases of individual persons or corporations.[34] In its relations with the dominant exchange organization it has followed an apparently conscious policy of restricting itself to research and investigation, appropriate and strategic focusing of public knowledge and sentiment upon certain practices, and recurrent conference and negotiation. We have already observed that up to January, 1938, the Commission promulgated only three general trading rules whose enforcement invaded that hitherto sacred prerogative of the exchanges. For its other rules it has relied primarily on its own staff, i.e., in connection with reporting and registration requirements. The lines of responsibility for trading conduct have therefore been kept fairly distinct. In this way, too, it has been able to maintain a consistent attitude toward the exchange organizations, saying to them, in effect:

> We will help you to enforce rules of ethical trading practice insofar as your members violate the Act; we will not make any extended regulations of trading conduct because that is your field of self-discipline and self-regulation; we will in this field simply exercise our powers of investigation to point out to you certain preconditions of establishing effective self-discipline and what you had better do to avoid such errors, mistakes or public disrepute in the future.

[33] *Ibid.*, pp. 262–65. This program contemplates the formation of affiliated companies by brokerage member-firms, which affiliates would carry on the underwriting and investment banking business separately. Other features of the program included (1) more frequent financial statements, (2) annual audits by independent accounting firms, (3) revised capital requirements, (4) reporting of loans above a certain figure to the Exchange.

[34] Such proceedings are listed in appendixes to the Commission's annual reports.

The Commission's administrative duties have been largely devoted to problems arising from the registration of exchanges, that is, applications, withdrawals, and exemptions from registration, applications for "unlisted" trading privileges on exchanges, withdrawals or delistings of securities on exchanges, in other words, problems upon which there is little conflict between legal responsibilities of the Commission and the Exchange organization.[35]

To sum up the relations between public regulatory agencies and established private group organizations in the field of securities and commodity futures trading, we may say that the public authorities seem to have adopted the following practical rules of policy:

1. To restrict the formal exercise of its legislative, rule-making powers to the sphere of investigation, i.e., to requiring information and reports in connection with the Commission's licensing or registration duties;
2. To rely, as far as possible, upon the existing judicial authorities of the private organization in enforcing violations of the spirit and intent of the law;
3. To apply its formal sanctions to individuals (including corporations) rather than to the group organization, and to do so, in the main, after notice and opportunity to act has been given the latter;
4. To invade, by regulation, the hitherto accepted sphere of private initiative and prerogative only after an extended process of informal conferences with the representatives of the private organization.

The objective of these "rules of convenience" is to secure co-operation by refraining as far as possible from issuing rules and regulations for whose enforcement it would have to depend upon an unwilling or unfavorable group organization. By confining its formal requirements to those of a fact-finding nature, it avoids open ruptures with the exchanges on enforcement policy, it is in a consistent position to proceed against individual violations of its own rules, and by informal elimination cases of formal prosecution are reduced to those for which the group officials will not assume responsibility. It is important

[35] The outstanding exceptions to this statement are the rules covering short selling and the Commission's powers to peg or stabilize security prices.

to note the modifications that this policy implies with respect to the type of co-operation between public authority and private association. The co-operation that results is not a miraculous composition of all differences but that which arises from a mutual respect for the requirements of each other's position.

SUMMARY

Each of the examples of interest representation in administration surveyed in the last two chapters has occurred in areas of private business or agricultural enterprise in which there existed an organized method of market control or a demand for such control. Public policy in the regulation of stock and commodity exchange regulation did not contemplate restriction of supply, but it definitely contemplated control of manipulative or speculative activities causing artificial or unnecessary price fluctuations. The bituminous coal acts went further, providing for a stabilized schedule of prices to be administered without control of production, as did the milk-marketing agreements. The farmer's county production-control associations were definitely organized around a plan for the control of supply, and the committees established under the commodity-marketing agreements were empowered under certain conditions to restrict shipments to market, if not the amounts actually grown. Each of the laws chosen for study, with the exception of the Grain Futures Act, was passed in or since 1933, but each of them grew out of conditions which had existed long prior to that year. This legislation therefore constituted efforts in the direction of planning or readjusting relationships between economic interests under controlled rather than chaotic competitive conditions.

The next observation to be made, however, is that, while each statute contemplated a certain degree of delegation of responsibility to group organizations, this delegation by no means involved a complete abdication of control by the public regulatory agency. Only two of the laws cited involved genuine examples of the delegation of legislative powers to group repre-

sentatives. These delegations were to the bituminous coal district boards and the producers' associations under the Agricultural Marketing Agreement Act. These groups had the power to prevent the legislative policy from taking effect. But it was evidently the intent of the statute that, unless opinion in the producing district or the marketing area was strongly enough in favor of price control, the statutory authorization should not go into effect. Of the other six types of group organization, four provided for agreements to be made between the affected groups and the administrative agency, but there was no legal restriction preventing the agency from making rules and regulations implementing the statutory purpose without such agreements. In all the cases examined, the full responsibility for promulgating rules, orders, and regulations under the law was placed on the public authority. On the administrative side, the practice in each case was followed of securing the informal participation of group representatives in conference in each phase of the rule-making process.

We saw, third, that when the public regulatory agency confronted a situation in which no strongly intrenched group organization existed with a tradition of responsible self-government behind it, the public body faced difficulties in applying its formal rule-making powers directly to individuals. When, on the other hand, such a private association did exist or could be organized, it not only furnished a check upon overhasty or incautious incursion upon individual rights and private initiative but acted in an advisory capacity as a barometer of opinion among the individuals composing the regulated interest. Further than the rendering of advice, such group associations furnish an educational influence upon individuals, not only in the direction of making them think in terms of a group welfare, but in making them aware of impinging interests and interdependence with other groups.

It should be recognized that these uses of interest organizations are double edged. The mutual adjustment and accommodation involved in the concept of integration between public

authority and private interests implies that the process of change will be of a conservative rather than a revolutionary character. The residual powers of the group organizations are nominally unchanged. The public agency intervenes only to enforce statutory modifications of existing relationships. The public authority is likely to construe its functions in the light of achieving a "practicable" or "reasonable" application of the statutory innovations. Coupled with this tendency is the personal factor of a mutual liking or respect which accompanies the enhanced understanding of one another's position by the officials of the private interest group and the regulatory authority. In other words, the concept of interest representation is based upon the principle of a continuity with the past rather than faith in the efficiency of a legislated utopia. In a society which is characterized by an urgent need for solutions to economic maladjustments and ideological insecurities and is faced with mass demands for leadership which will promise immediate comprehensive action, the difficulties of a process that requires time, piecemeal reform, and a capacity on the part of the group organizations to realize their public responsibilities are dishearteningly obvious.

CHAPTER IX

LEGAL ASPECTS OF INTEREST REPRESENTATION

WE HAVE analyzed some of the problems of interest representation that arise in (1) the procedure of administrative tribunals, (2) executive appointment of administrative officers, (3) the functioning of representative advisory committees, and (4) the delegation of administrative functions to private group organizations. We may now inquire under what conditions interest groups may legally, i.e., in the eyes of the courts, exercise administrative authority.

With respect to the procedure involved in the functions of administrative adjudication, it will be remembered from chapter iii that the prevailing form of interest representation was the appearance of group representatives as advocates before the tribunal. Such appearance was observed to be a part of the regular procedure of adjudication. Moreover, the same privileges were accorded both to representatives of organized groups and to individuals. Both played the same function in bringing facts and viewpoints to the tribunal's attention. Neither shared responsibility for the ultimate official act. We may infer therefore, that, in so far as the principle of interest representation can be reduced to a formalized participation by group representatives as parties-in-interest in the regular procedure of administration, it will receive no specific judicial attention.[1] It will be subsumed under the general divisions of administrative law relating to procedural due process—appropriate notice, fair hearing, and finality of the administrative permit or order.[2] Administrative acts illegally favoring the welfare of one

[1] Attorney General's Committee on Administrative Procedure, *Final Report* (1941), pp. 108–21.

[2] Freund, *Administrative Powers Over Persons and Property*, chap. xv; Landis, *The Administrative Process*, chap. iv; Blachly and Oatman, *Federal Regulatory Action and Control*, pp. 119–27.

group against others are to be remedied through judicial review of final administrative action for which there is opportunity through raising of questions of law such as *ultra vires* acts, deviations from the statutory standards, abuses of discretion, and so on.[3] Given the validity of the statutory purpose and authorization of administrative methods and the conformity of procedure with judicial requirements, specific representation of interests in the procedure of administrative tribunals raises no distinctively legal problems.[4]

EXECUTIVE APPOINTMENT OF ADMINISTRATIVE OFFICIALS

In the opportunity for representation of interests that arises from the executive power of appointment, it might also at first glance appear that no legal or judicial questions arise. The "pressure" activities of group interests and the "political" factors underlying the appointment of department head and administrative boards and commissions seem to have been relegated by the Constitution to the sphere of politics, that is, to the Executive and Congress. Since, however, Congress shares the appointing power, through its acts of creating public offices and prescribing qualifications for the holders thereof,[5] and through the Senate's power to reject nominations for certain offices,[6] the possibility of conflict between the two political departments raises certain legal questions.

[3] M. E. Dimock, "The Role of Discretion in Public Administration," in Gaus, White, and Dimock, *The Frontiers of Administration*, chap. iv; R. E. Cushman, "The Problem of the Independent Regulatory Commissions," in *Report of the President's Committee on Administrative Management*, p. 227.

[4] This statement is logically a tautology. Our definition of interest representation was "a process of integrating the acts of public administrative officials with the economic groups affected by such acts." Given legislative and judicial sanctions, the only problems that remain are the practical political ones of securing acceptance and observance.

[5] E. S. Corwin, *The President: Office and Powers* (New York: New York University Press, 1940), pp. 65–71; W. W. Willoughby, *The Constitutional Law of the United States*, III (New York: Baker, Voorhis & Co., 1929), 1511; *Myers* v. *U.S.*, 252 U.S. 62, 264–74 (1926).

[6] U.S. Constitution, Art. II, sec. 2.

Representation of group interests may occur through the exercise of the appointing powers in two ways: first, as the Executive deems it advisable to bring group representatives into his administration and, second, as the legislature prescribes express qualifications in the statute creating the office. Illustrations of the latter form of interest representation have already been described in chapter iv, outstanding examples being the Federal Reserve Act,[7] the Smith-Hughes Act establishing federal grants-in-aid of vocational education,[8] and the Bituminous Coal Act.[9] In the Transportation Act of 1920, Congress actually delegated its power to impose qualifications to the Interstate Commerce Commission. In that law it provided that the members of the Railroad Labor Board should be appointed by the President from nominees of the railroad carriers and employees in accordance with a method of nomination prescribed by the Commission.[10] However, it is generally agreed that legislative restriction of the executive appointing power is limited by the principle that formally, at least, discretion as to whether the appointee possesses the qualifications specified and whether he is actually representative of the economic group named in the law is left to the appointing official.

In appointing members of his cabinet (who are also department heads), the President is usually allowed full freedom by the Senate in giving due regard to whatever economic, sectional, or party interests he deems important.[11] It is with respect to members of the great federal regulatory commissions, whom Congress regards as peculiarly responsible to it, that limitations and barriers to the President's control through his appointment and removal powers have been most frequently imposed.[12] If, however, the President and Senate are of the

[7] 38 Stat. 251 (1913). [8] Pub. No. 347 (64th Cong. [1917]), sec. 6.

[9] Pub. No. 48 (75th Cong. [1937]), sec. 2(*a*).

[10] Pub. No. 152 (66th Cong. [1920]), sec. 304.

[11] G. H. Haynes, *The Senate of the United States* (Boston: Houghton Mifflin, 1939), pp. 726 ff.

[12] *Rathbun* v. *U.S.*, 295 U.S. 602 (1935); E. P. Herring, *Federal Commissioners, passim.*

same mind regarding the policy-determining top personnel of his administration, there seems to be no judicial limitation to any representation of interests the political departments choose to institute. Likewise, among the states, as they tend to shift from a system of elective department heads to a plan of appointment by the governor as the sole elective administrative chief,[13] there would be less limitation upon the governor's power to appoint as his department heads group representatives. The judicial attitude apparently is that the interests which receive representation in the structure of official administration are the concern of the electorate and their representatives, and only when a constitutional question involving a conflict between the executive and legislature arises is the judicial department called upon to intervene.

A different issue is involved, however, when public powers and administrative responsibility are delegated to private associations; in other words, when public office and private interest are identified. Can the administration of legal sanctions be intrusted to officials of groups whose interest is private, personal, immediate, and pecuniary?[14] Outstanding examples of outright identification are rare today, the principal ones being the police functions intrusted to humane societies for enforcing humane legislation[15] and the state professional examining boards empowered to prescribe licensing qualifications for admission to practice.[16] In such cases the statute may either require the governor to appoint the members of the board from panels of nominees submitted by the state professional associa-

[13] See, generally, Leslie Lipson, *The American Governor* (Chicago: University of Chicago Press, 1939); studies by James Hart and G. W. Spicer in C. G. Haines and M. E. Dimock, *Essays on the Law and Practice of Governmental Administration* (Baltimore: Johns Hopkins University Press, 1935).

[14] L. L. Jaffe, "Law-making by Private Groups," *Harvard Law Review*, LI (December, 1937), 202, 232–33.

[15] *Columbia Law Review*, XXXII (1932), 80, 92 n.

[16] L. W. Lancaster, "Private Associations and Public Associations," *Socia Forces*, XIII (1934), 283; G. W. Adams, "The Self-governing Bar," *American Political Science Review*, XXXVI (1932), 470.

tions[17] or empower the associations to name the board members.[18] Such outright delegations may be justified on one of two grounds—either that the subject matter of regulation is uncontroversial or that it involves the exercise of peculiar competence controlled by ethical standards (e.g., the medical profession) in which the public must necessarily have confidence. It is further argued that the legislature may revoke or amend the delegated powers, authority which acts as a supervisory check or deterrent upon the professional association.

Legal considerations affect the representation of interests through executive appointment of administrative officials, then, in two ways. As a general rule, the legislature may impose qualifications which narrow the Executive's choice in appointment, but it may not, without violating the separation of powers principle, predetermine the individual whom the Executive appoints. The practical result may be that the Executive will select a person from the specified group who represents the Executive's views rather than those of group organization. Second, it appears from certain state-court decisions affecting professional competence and conduct that, as a technique of regulation, it is possible to delegate definitely public governing powers to private associations by making the executive appointing power in practice a formal certification of nominees put forward by the private association.[19]

REPRESENTATIVE ADVISORY BOARDS

Since, as a matter of experience, direct representation of interests upon administrative boards has in general been discarded, to be replaced where practicable with representative

[17] *State* v. *Daniel*, 87 Fla. 270. (1924); *Sturgis* v. *Spofford*, 45 N.Y. 447 (1871); *Hanson* v. *State Board*, 253 Mich. 601 (1931).

[18] *Ex parte Gerino*, 143 Cal. 412 (1904); *Parke* v. *Bradley*, 204 Ala. 455 (1920).

[19] Here the most significant regulatory power is not the appointment process but the requirements of membership, standards of competence, and conformity to rules of conduct imposed by the association. This technique seems to have been adopted and given general application by the German Nazis in co-ordinating the various service frames with National Socialist policy (cf. Karl Loewenstein, *Hitler's Germany* [New York: Macmillan, 1940], pp. 168–202).

advisory boards, what legal questions may arise with respect to the constitution and procedure of such bodies?

We may start with the observation that, except as may be fixed by statute, matters of internal administrative organization and procedure are generally recognized by the courts as falling within the province of administrative discretion.[20] It would seem to follow that, in so far as representative advisory boards and committees are unknown to the statute and exercise no formal determinative powers, the courts will not interfere with the composition or procedure of such purely advisory bodies. The representation of interests through channels of informal advice, if it results in unjust or arbitrary administrative action, will be remedied either through legislative action or through judicial review of the final administrative order on determination.[21]

A representative board may, however, as in the case of the minimum-wage laws, be recognized in the law and be endowed with practically determinative powers. This was true of the District of Columbia Minimum Wage Board in the Adkins case,[22] although the law was declared invalid on other grounds. In 1937, however, the Supreme Court, in reversing its previous position, adverted specifically and favorably to the consultation of representatives of employers, employees, and the public prior to the promulgation of the challenged minimum-wage rates.[23] The implication was that such representation of interests resulted in less arbitrary, more reasonable, and practicable action than might have been the case by wholly independent legislative or administrative fiat. The New York Minimum Wage Law of 1937[24] and the federal Fair Labor

[20] Freund, *op. cit.*, pp. 213–16.

[21] *Rochester Telephone Corp.* v. *U.S.*, 307 U.S. 125, 135 (1938); *Federal Power Commission* v. *Pacific Power and Light Co.*, 307 U.S. 156 (1938); *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401 (1939).

[22] *Adkins* v. *Children's Hospital*, 261 U.S. 525, 563, 570 (1923).

[23] *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, at 396 (1937).

[24] *Laws of New York, 1937*, chap. 276.

Standards Act of 1938[25] likewise provided for minimum-wage boards, although in each case the Industrial Commissioner and the Wage-Hour Administrator had discretion to accept or reject the board's report. They were in neither case free to promulgate minimum-wage orders which were not recommended to them by the board.

Hence, if under the statute the administrative official responsible for the promulgation of a minimum-wage order has this formal discretion to accept or reject a representative advisory board's recommendations, the courts will apparently hold that the board's proceedings are preliminary and advisory and therefore refrain from interfering with or assuming jurisdiction over its proceedings. Thus, when the validity of the first minimum-wage order under the Fair Labor Standards Act was attacked, in part on the ground that the representative industry committee which had recommended the order had not proceeded in accordance with the provisions of the Act,[26] the Court made no extended analysis of the point but simply said: "The committee functions in an investigatory and advisory capacity and the Act makes no provision for a court review of the proceedings before it."[27] The Court went on

[25] Pub. No. 718 (75th Cong. [June 25, 1938]).

[26] *Ibid.*, sec. 8(*b*) provides that an industry committee appointed by the administrator "shall recommend to the Administrator the highest minimum wage rates for the industry which it determines . . . . will not substantially curtail employment in the industry." The Act makes no specification of procedure other than to say that "the industry committee shall investigate conditions in the industry and the committee, or any authorized subdivisions thereof, may hear such witnesses and receive such evidence as may be necessary and appropriate to enable the committee to perform its duties under this Act." Further than that, the only references to internal committee procedure are that (1) the committee may summon (apparently not subpoena) witnesses and (2) the administrator shall prescribe by rules and regulations the procedure to be followed by the committee. After the committee has filed its report with the administrator, the latter either approves its recommendations by order, after notice and hearing or he disapproves it, in which case he remits it to the committee or appoints another one.

[27] *Opp Cotton Mills* v. *Wage-Hour Administrator*, 111 F. (2d) 23 (1940). The Supreme Court upheld this decision on appeal February 3, 1941, in 85 Law Ed. (Adv. Op.) 407.

to say that the record showed that the committee had for several months made a detailed and exhaustive study of the problems confronting the industry and concluded that the complaint was not well founded.

In the same case the constitution of the industry committee was the basis of another attack on the order's validity, the charge being made that the South was not given full and proper representation on the committee.[28] The Court declined to interfere with the manner in which discretion was exercised in making the appointments, the Court saying: "The Act does not require the Administrator to apportion membership on the committee with mathematical precision. . . . . .It requires him to exercise sound discretion. We do not find he abused that discretion."

Minimum-wage legislation in the United States is in the vanguard of controversy with respect to the validity of administrative regulation of private-property rights. It would appear, therefore, that the facts to which the dictums of the courts in the Opp cases were applied constitute fair indices of the judicial requirements as to the constitution and procedure of representative advisory boards. These requirements sanction the practice of making such bodies a regular part of the investigatory and legislative procedure of administrative agencies.[29]

[28] There were 21 members of the Textile Industry Committee. Sec. 5(*b*) of the Act provides: "An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as Chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on." Of the 21 members, 3 of the public group, 4 of the employers' group, and 2 of the employees' group were from the South. The principal point at issue was the differential between northern and southern minimum rates. The committee by a vote of 13 to 6, recommended a national minimum of 32½ cents per hour.

[29] Above, chap. vi; J. Hart, "The Exercise of Rule-making Power," in *Report of the President's Committee on Administrative Management*, pp. 339–40.

STATUTORY DELEGATION OF LAW-MAKING POWER TO PRIVATE GROUPS

In the preceding section we saw that the courts have sanctioned minimum-wage legislation, which makes the application of the law conditional upon an agreement between a board, representative of different economic interests, and an administrative official with discretionary power to reject or to approve and promulgate the board's recommendations as his administrative order. This procedure envisaged a shared exercise of legislative or rule-making power between private groups and public authority, which was sanctioned because the process seemed to the Court to establish a presumptive degree of practicality and reasonableness in applying the law to the groups affected by the rule-making process.[30]

Where the legislature has seen fit to deal with a problem through the delegation of authority, the courts will usually justify the legislative plan if final decisions under it are made by public officials, not private groups. But some types of delegation raise the question whether this check-and-veto power is not actually exercised by the nonofficial agency, which is then in a position to decide whether or not the law shall take effect. The courts' position, with practically no exceptions,[31] is that

[30] In the heyday of laissez faire, some courts' decisions used to read as though some functions were inherently governmental and others inherently private. The due-process clause was used to keep the line from being crossed. But, as Professor J. D. Barnett pointed out in a brilliant article some years ago ("Public Agencies and Private Agencies," *American Political Science Review*, XVIII [February, 1924], 42–46): "Not only is there no essential distinction in the nature of the functions performed by public and private persons, but the source of these functions is exactly the same. The distinction between public and private functions, where any at all exists, is only an historical [customary] distinction."

[31] Local option referendums are the outstanding exceptions to this principle (*Locke's Appeal*, 72 Pa. 491 [1873]; *People* v. *Barnett*, 344 Ill. 62 [1931]). Despite persuasive dissent, the majority of state courts hold state-wide referendums unconstitutional in the absence of express authorization in the state constitution (*Opinions of the Justices*, 160 Mass. 586 [1894]; *State* v. *Parker*, 26 Vt. 357 [1854]; H. Rottschaefer, *Handbook of American Constitutional Law* [St. Paul; West Publishing Co., 1939], pp. 78–79).

such power cannot be delegated.[32] This position is based upon the principle that law-making power by a constitutional act delegated to governmental agencies cannot be alienated by these agencies.[33] It follows that, in the delegation of public power to private groups, there can be no complete delegation. A statutory plan providing for private group participation in administrative legislation must formally delegate the rule-making authority to a public official or board, who in the eyes of the courts must have a discretionary power to exercise or refuse to exercise the delegated power. This principle was dramatically expounded in *Carter* v. *Carter Coal Co.*,[34] when the Supreme Court by a six-to-three decision invalidated the provisions of the National Bituminous Coal Conservation Act of 1935. This law provided for the fixing of minimum wages by agreement between the producers of two-thirds of the annual tonnage of bituminous coal and the representatives of more than half of the mineworkers employed, for any district or group of districts.

In a more recent decision, however, the Supreme Court had occasion to refer to this sharing of legislative authority by administrative officials and private groups. In *U.S.* v. *Borden*

[32] See, generally, *Columbia Law Review*, XXVII (1937), 447 n.; Jaffe, *op cit.*, pp. 221–28.

[33] Duff and Whiteside, "Delegata potestas non potest delegari," *Cornell Law Quarterly*, XIV (1929), 168. Since, rigidly construed, this maxim would prevent any department or agency of government from exercising a combination of the three types of governmental power—an impracticable consequence—the courts have permitted a practical delegation of legislative power to, and a union of judicial and legislative powers in, administrative agencies, so long as the statute can be construed as not precluding the orders of the agency from judicial sanction or review (cf. n. 2, above).

[34] 298 U.S. 238, at 311 (1936). The majority opinion said: "The power conferred upon the majority is in effect the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . . The delegation is clearly arbitrary and a denial of the rights safeguarded by the due process clause of the Fifth Amendment."

Co.,[35] discussing the relation to the Sherman Act of the agreements provided for in the Agricultural Marketing Agreement Act, the Court emphasized certain conditions which underlie the legality of group agreements having administrative official sanction:

> Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed under the agricultural act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings. . . . . The obvious intention is to provide for what may be found to be reasonable arrangements. . . . . To give validity to marketing agreements the Secretary must be an actual party. . . . . Marketing orders are made by the Secretary. . . . . As to agreements not agreed upon or directed by the Secretary the Act in no way impinges upon the prohibitions and penalties of the Sherman Act.

It has been well established that property-owners may initiate the creation of special-tax and improvement districts by drawing up petitions in writing and presenting them to a court or appropriate administrative official.[36] The courts have held, however, that the rights of individual property-owners must be protected even from extraordinary majorities of their neighbors by requiring that the state law or local ordinance vest in the court or local government officials a discretion to refuse to put the petition into effect.[37] In *Eubank* v. *Richmond*,[38] a city ordinance requiring the city council committee on streets to establish a uniform building line on any side of a square whenever two-thirds of the property-owners thereon submitted a petition in writing to that effect, was invalid, said the Court, because "it leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a

[35] 308 U.S. 188, at 199 (1939).

[36] H. L. McBain, "Law-making by Property Owners," *Political Science Quarterly*, XXXVI (1921), 617.

[37] *State* v. *Drainage District No. 1*, 123 Kan. 191 (1927); *Browning* v. *Hooper*, 269 U.S. 396 (1926).

[38] 226 U.S. 137, at 143 (1912).

given case. The action of the Committee is determined by two-thirds of the property owners."

A provision of the zoning ordinance of Seattle was held invalid by the Supreme Court because it delegated to two-thirds of the property-owners within four hundred feet of a proposed building the power to prevent a property-holder from constructing a home for orphans and aged persons.[39]

If private groups may not exercise an unrestricted power of enacting rules affecting neighboring property, the courts have permitted property-owners to impose restrictions on public officials regulating neighboring uses of property. In *Cusack* v. *Chicago*,[40] a local ordinance was upheld which prohibited billboards unless permitted by the neighboring owners, and in Ohio and Massachusetts legislation has been upheld that required the consent of private persons affected before a public official could make exemptions from the provisions of municipal zoning ordinances.[41]

A Kansas statute requiring that all electric wiring and equipment conform to the standards established by the national electrical code formulated by a federation of private organizations, the American Standards Association, and making violation thereof a crime, was invalidated by the state supreme court on the ground that public law could not be amended at the whim of private organizations without adequate notice and publication.[42] Yet the same court found no objection to a rule of an administrative board refusing permission to take qualifying examinations for the practice of medicine to persons not graduating from schools approved by the American Medical Association.[43] These cases might be distinguished on the ground that the state statute in the former case involved a

[39] *Seattle T. and T. Co.* v. *Roberge*, 278 U.S. 116 (1928).

[40] 242 U.S. 526 (1917).

[41] *State* ex rel. *Standard Oil Co.* v. *Combs*, 129 Ohio St. 251; *Inspector of Lowell* v. *Stoklosa*, 250 Mass. 52.

[42] *Kansas* v. *Crawford*, 104 Kan. 141 (1919).

[43] *Jones* v. *State Board*, 111 Kan. 813 (1922).

criminal offense, but this is scarcely relevant to the issue of delegation. The other ground is that the latter case made the delegation formally contingent upon the discretion of an expert administrative body, which brings the case within the general rule we have been discussing.

We have already observed that in some cases rule-making powers have been delegated to private groups, presumably on the grounds that specialized technical knowledge possessed only by a special group was a prerequisite to handling the regulatory problem. This factor was certainly present in the case of the medical examining boards.[44] and in the case just cited involving the standards for building materials and structures. In *St. Louis and Iron Mountain Railway Co.* v. *Taylor*,[45] the Supreme Court upheld the provision of the Safety Appliance Act of 1893 authorizing the American Railway Association, a voluntary organization of the railroad carriers, to designate the standard height of drawbars of railroad cars. The designation had to be promulgated by order of the Interstate Commerce Commission, but the American Railway Association's designation was binding upon the Commission. It seems quite evident, however, that the delegation of power was made with respect to a single extremely specific fact and was placed in the context of a law which contemplated a ninety-day period in which the private agency might act. If the Association had refused to designate the standard within the time set, the Commission was required to set it.[46] Nevertheless the case constitutes a formal exception to the rule that public officials must have discretionary power to approve or disapprove the acts of private groups.[47]

[44] Cf., nn. 14–16, above.

[45] 210 U.S. 281 (1908). [46] U.S.C.A., Title 45, sec. 5, p. 35.

[47] In *Parke* v. *Bradley*, 204 Ala. 455 (1930), the state court upheld legislation which identified the public body and the private association by making the state medical association the state board of health. Statutes empowering the state medical societies to name the State Board of Medical Examiners were upheld in *Ex parte Gerino*, 143 Cal. 412 (1904) and *Wilson* v. *Thompson*, 83 N.J.L. 57 (1912). As we have seen, this practice is no longer common, the governor now generally making the appointment from a panel of nominees (Freund, *op cit.*, p. 47).

Another exception to our general rule exists in the statute of Congress in 1866 permitting the miners of each mining district to make regulations not in conflict with state or federal laws governing the location, manner of recording, and criteria of possession of mining claims.[48] These rules were discussed, and the action of Congress in giving them the sanction of law was approved by the Supreme Court in several cases.[49] These mining cases are an illustration of the Court's application of customary local practices and usages as sources of law.[50] Regulatory legislation in modern times, however, has increasingly assumed more of a precedent-forming character as it redefines, rather than codifies, the existing relationships between group interests. Hence it appears that the incorporation of intergroup usage and practice into the law is being replaced as a long-run trend by a process of administrative legislation in which the general statutory principle is given content as a resultant of the consensus between group interests and public officials formally endowed with legal responsibility and authority for the administrative act.[51]

THE PROBLEM OF A STANDARD OF DELEGATION

The proposition that delegations of legislative power to private groups must, in form at least, be made to a public body would obviously be unsatisfactory if the delegation to the public official were purely formal and did not provide an adequate check on the action of the group representatives. This question appeared clearly in the National Industrial Recovery Act of 1933, which authorized the President to approve codes of fair competition upon the application of trade or industrial associations if he found that they did not impose inequitable

[48] 14 Stat. at L. 251–53.

[49] *Jennison* v. *Kirk*, 98 U.S. 453 (1879); *Jackson* v. *Roby*, 109 U.S. 440 (1883); *Butte City Water Co.* v. *Baker*, 196 U.S. 119 (1905).

[50] Generally, see C. K. Allen, *Law in the Making* (London: Oxford University Press, 1931), pp. 26–108, on the nature and role of custom in the common and statute law. See also *Borden Co.* v. *Ten Eyck*, 297 U.S. 251 (1936).

[51] J. B. Andrews, *Administrative Labor Legislation* (New York: Harpers,

restrictions for membership and that the codes were not designed to promote monopolies or eliminate small enterprises.[52] When the Supreme Court considered this question in *Schechter Poultry Corporation* v. *U.S.*,[53] it found the delegation of legislative authority to the President unconstitutional for the second time that it had ever invalidated a statute on that ground.[54] It is probable, however, that it was not so much the official delegation to the President that bothered the Court as the practical delegation to the private groups. This appears from the language of Justice Cardozo's concurring opinion:

> If codes of fair competition are codes eliminating unfair methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. . . . . But there is another conception of codes of fair competition. This is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view the extension becomes as wide as the field of industrial regulations. If that conception shall prevail, anything that Congress may do . . . . may be done by the President upon the recommendation of a trade association by calling it a code.

The majority opinions of the Court in the Panama and Schechter cases emphasized the traditional verbal criterion

[52] Pub. No. 67 (73d Cong. [June 16, 1933]), sec. 3(*z*).

[53] 295 U.S. 495 (1935).

[54] In *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), the Court had invalidated an Executive Order of the President under the Petroleum Code and sec. 9 of the N.I.R.A. prohibiting the flow of "hot oil" across state lines in violation of state laws or regulations. But, as Justice Cardozo pointed out in his dissenting opinion, the Court had many times before upheld legislation delegating authority to the President and administrative agencies with no less indefinite standards as to the factual situation in which he might act. The cases go back to the Brig Aurora case in 1813 (7 Cranch 382) without holding congressional action invalid on the ground of delegation of power alone (*Field* v. *Clark*, 143 U.S. 649 [1892]; *Buttfield* v. *Stranahan*, 192 U.S. 470 [1904]; *U.S.* v. *Grimaud*, 220 U.S. 506 [1910]; *Hampton and Co.* v. *U.S.*, 276 U.S. 394 [1928]). Dickinson (*op. cit.*, p. 16 n.) points out that parties have frequently urged that the power to apply general standards to the facts of particular cases is an unconstitutional delegation of legislative power and adds: "The courts have not sustained this contention."

that the legislative function was one of "laying down policies and establishing standards, leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the declared policy is to apply." As a keen student has said,[55] however, "it is questionable whether the requirement of a standard (viz., 'public interest,' 'public convenience and necessity') provides significant control in those fields in which the need of control is strongly felt." Reversal of administrative action solely on the facts of any particular case would place the courts in the questionable position of substituting their view of the "reasonable" exercise of administrative discretion for that of the administrative agency. The courts therefore tend to restrict interference with administrative orders on legal questions, such as "constitutional right," jurisdiction, abuse of discretion, and the questions of sufficiency of the findings of fact.[56] More recent cases have indicated that, if the statute which makes the delegation is an exercise of a power clearly within the power of the legislature, the Supreme Court will not question the delegation alone.[57] The dictums of the Schechter case therefore remain primarily as a warning that the discretion of the public official, to whom a public authority is delegated in connection with statutory participation by private groups, must be a significant factor in the operation of the statutory plan and not merely a formal method of placing legal approval on the acts of such groups.

The Schechter case may be contrasted with the decision of the Court upholding the constitutionality of the Agricultural

[55] Jaffe, *op. cit.*, p. 248.

[56] *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U.S. 452 (1910); *Monongahela Bridge Co.* v. *U.S.*, 216 U.S. 177, 195 (1910); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920); *Crowell* v. *Benson*, 285 U.S. 22 (1932); *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, at 226 (1940). These cases are cited to illustrate the elasticity of the concepts quoted in the text, not to verify the generalization.

[57] *Pacific States Box and Casket Co.* v. *White*, 296 U.S. 186, at 196 (1936); *U.S.* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

Marketing Agreement Act of 1937 in *U.S.* v. *Rock Royal Co-op.*[58] and *Hood and Sons* v. *U.S.*[59] In these cases the statute permitted the Secretary of Agriculture to enter into marketing agreements with producers and handlers of specified commodities and to issue orders after notice and hearing with respect to the marketing of such commodities, even without the consent of handlers (distributors), if the order was approved by two-thirds of the producers of a given commodity by number or volume in the marketing area defined in the order.[60] These orders may include methods for fixing prices to producers, open-price filing plans, or other marketing regulations and may provide for producer-settlement funds, through which handlers' payments to producers may be equalized into uniform average prices weighted according to the handlers' uses of the commodity (milk). This law presented several extreme cases of delegation to the Secretary of Agriculture and to producers' associations.[61] To the complaint that the Act delegates to producers the power to put an order into effect in a particular marketing area, the Court said:

> In considering this question, we must assume that the Congress had the power to put his Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.

Section 8*c*(12) of the Act provides that when a referendum is held the Secretary of Agriculture shall permit the producers' co-operative associations to cast as many votes as the total of the individual members, stockholders, and persons under contract to sell milk through it. To the attack on this provision the

[58] 307 U.S. 533 (1939).

[59] 307 U.S. 588 (1939). Earlier decisions were handed down in *Currin* v. *Wallace*, 306 U.S. 1; *Mulford* v. *Smith*, 307 U.S. 38.

[60] Pub. No. 137 (75th Cong. [June 3, 1937]), sec. 8*c*(9).

[61] *Ibid.*, sec. 2, states the objective of the Act to be the restoration of parity prices, that is, to "establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to [their purchasing power] in the base period."

Court replied that this objection also "falls before the answering argument that inasmuch as Congress could put the Order into effect without any vote, it is permissible for it to provide for approval or disapproval in such way or manner it chooses."

In the Hood case the Court had occasion to consider a regulation of the Secretary defining the eligible voters in the referendum, which had the effect of excluding certain voters. The Court examined each contention of the appellants and said: "The question is simply whether the statute was followed. It seems to us that it was." The point was also urged that, in the referendum, if the producers' co-operatives were permitted to cast all the votes of their members, the Secretary should at least require that a poll be taken of the members by the co-operative or a subsequent approval of their action. Having upheld the power of Congress to make this delegation in the Rock Royal case, the Court disposed of this attack by saying that the statute was complete authority for the act of the Secretary.

As to the general question of standards controlling the exercise of delegated legislative powers, the Court used some broad language:

> It is well settled that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. In dealing with legislation involving questions of economic adjustment, each *enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests Congress needs specify only so far as is reasonably practicable.*[62]

Setting aside such considerations as the changed composition of the Court since 1935 and the varying time-periods during which the philosophy of the Court's decisions seems to undergo a shift of emphasis, what limits do these decisions seem to set to the law-making power, delegated by legislation

[62] 307 U.S. 533, at p. 574 (italics mine). For the general standards controlling the Secretary's discretion, see secs. 2, 8c(5), (6) (7), (8), (9), (18) of the Agricultural Marketing Agreement Act.

jointly to administrative officials and representatives of private groups?

The first consideration is, obviously, whether the legislative body has power to enact the general rule or standard controlling the function delegated to administration. The Supreme Court has made it clear in the Pacific States Box and Rock Royal cases that, given the power to legislate with respect to the delegated function, the issue of delegation alone is not a sufficient ground for invalidating the statute. Second, administrative responsibility must be delegated to a public official or body. Third, the statute must contain a statement of purpose and prescribe the methods of achieving that purpose "with sufficient exactness to enable those affected to understand these limits." The requirement that the affected groups shall be able to understand the limited nature of the delegated powers explicitly recognizes the principle of interest representation and implies a power vested in the public official to use the statutory standards as grounds for refusing to promulgate recommendations that private groups may see fit to propose under the general statement of legislative intent. This conforms to the courts' disinclination to bestow an automatic official sanction upon the acts of private groups. Fourth, administrative action may be made conditional upon the approval of an extraordinary majority of the members of an economic interest statutorily defined. In other words, Congress, although it has the power to prescribe marketing rules and regulations, including methods for determining prices to producers, may choose to refrain from exercising that power until the details of its application have been approved by a two-thirds majority of the affected producers.[63]

SUMMARY

Thus far we have been discussing group participation in administrative legislation, that is, the performance of admit-

[63] The other affected economic interest, the processor-distributors or handlers, has no power to prevent the order from taking effect.

tedly official governmental functions. It is clear from the examples of administrative regulation cited that we have come a long way from the concept of two inherently exclusive spheres of "private" and "public" functions, which obviously underlay the majority decision in the Carter case and the following dictum of the Michigan supreme court:

> It is not in the power of a legislature to abdicate its functions or subject its citizens to interference of any but lawful public agencies. . . . . Such legislative authority as can be delegated at all must be delegated to municipal corporations or local boards and officers.[64]

It is but yesterday that it was radical to aver that coercion and compulsion exist in economic organization and social relationships as well as in the field of governmental functions[65] and that there is no inherent difference in the methods of performance of governmental or private institutions of comparable size and function.[66] Today there is a prevailing trend toward the view that public policy may regulate the conflict of private interests in any of a variety of practically expedient ways, subject to judicial restraints upon arbitrary and unreasonable deprivations of personal liberties. One of the methods by which public policy has chosen to regulate these conflicts is to permit the expansion of private group controls over individuals within

[64] *People* v. *Bennett*, 29 Mich. 451 (1874). This dictum was quoted by the Illinois supreme court in invalidating a state primary law which delegated to district committees, created by county committees in each political party, the power and duty to nominate delegates to state, county, district, or local nominating conventions (*Rouse* v. *Thompson*, 228 Ill. 522 [1907]). The court's contention that the law delegated to private individuals exclusive control over an inherently public function was met by the legislature itself establishing the procedure of primary elections and conventions. In *Nixon* v. *Condon*, 286 U.S. 73 (1932), the Supreme Court held a Texas statute void which delegated to the state executive committee of each political party the power to establish qualifications for voting in the party primary. Yet in *Grovey* v. *Townsend*, 295 U.S. 45 (1935), after the same law had been amended to provide that the party establish such qualifications, the Court held that, as a voluntary association, the party could determine its own membership.

[65] R. L. Hale, "Force and the State: A Comparison of Political and Economic Compulsion," *Columbia Law Review*, XXV (1935), 149–201.

[66] Barnett, *op. cit.*, p. 48.

the group organization so as to improve the bargaining power of the members of that organization relative to outsiders. By expansion of these group controls public policy apparently aims at promoting a nongovernmental solution of the conflict of economic interests.

In this sense the rule-making power vested in the board of directors of a corporation illustrates the authorization of a nongovernmental control expanding the power of investors of capital, although practically it appears that these powers are wielded by management.[67] The judicial relaxation of the old conspiracy doctrine against trade-unions,[68] which was later reinforced by statutes encouraging the principle of collective bargaining by voluntary agreement between organizations of employers and employees,[69] also constituted governmental sanction of nongovernmental controls over individual liberty.[70] Associations of traders in commodity and security negotiable instruments have been permitted a power of restricting membership and of passing "internal" regulations which have no inconsiderable effect on other groups.[71] The power of corporations to make contracts has tremendous repercussions on competitors and consumers, a power the Supreme Court explicitly recognized when it upheld a state law permitting manufacturers to make agreements maintaining resale prices for their products.[72]

From recent decisions it appears that the present Supreme

[67] D. Lloyd, *The Law of Unincorporated Associations*, chap. i; Berle and Means, "The Legal Position of Control," *The Moders Corporation and Private Property*, chap v.

[68] *Commonwealth* v. *Hunt*, 4 Metcalf (Mass.) 111 (1842).

[69] Pub. No. 442 (73d Cong. [1934]), sec. 2, Fourth; The Railway Labor Act; 49 Stat. 449 (1935), sec. 9; The National Labor Relations Act; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937).

[70] *Jacobs* v. *Cohen*, 183 N.Y. 207 (1905); T. R. Witmer, "Collective Labor Agreements in the Courts," *Yale Law Journal*, XLVIII (1938), 195, 212.

[71] Above, chap. ii; J. R. Commons, *Legal Foundation of Capitalism, passim.*

[72] *Seagram Distillers Corp.* v. *Old Dearborn Distributing Co.*, 299 U.S. 183 (1936).

Court at least will be less likely to read into procedural provisions of the Constitution a substantive prohibition of statutory plans of regulation that divide the legislative responsibilities of administrative authorities between public officials and representatives of private groups. The doctrine of delegation of power will not be interpreted as an arbitrary limitation on governmental authority in order to protect private rights. It will be applied to permit a functional differentiation between public and private organizations, a differentiation in which individual liberties are frankly regulated by standards of the common good that are acceptable to opposing groups.

CHAPTER X

CONCLUSION: THE DILEMMAS OF INTEREST REPRESENTATION

THE proliferation of nongovernmental forms of collective action during the past half-century, such as the corporation, the trade association, the trade-union, the farmers' co-operative, has revitalized the perennial problem of "democratizing the organization of authority."[1] This phrase, which restates the objective of interest representation,[2] may refer to either of two areas of organization. It may refer to the devising and institutionalizing, within any hierarchy of authority, public or private, of ways and means by which the ultimate wielders of that authority may be made responsible and accountable to the members of the organization. The other organization area of authority, the one with which we are primarily concerned, is the jurisdiction of public regulatory agencies of government, in whose case the problem is the appropriate division of authority and responsibility between organizations representative of private social interests and the public organizations exercising powers of regulation or strategic control.[3]

[1] On the character of collective controls over individual action see J. R. Commons, "Bargaining Power," *Encyclopaedia of the Social Sciences*, II, 459–62. A critical, stimulating discussion of the impacts of democratizing influences on management may be found in C. I. Barnard, *Dilemmas of Leadership in the Democratic Process* ("Stafford Little Lectures" [Princeton, 1939]); also his *The Functions of the Executive* (Cambridge: Harvard University Press, 1938).

[2] Interest representation is defined as "the integration of the conflicts between economic groups with the exercise of public authority by co-ordinating the powers and duties of public officials with those of representatives of the organized groups affected by administrative action."

[3] C. E. Merriam, *The Role of Politics in Social Change* (New York: New York University Press, 1936), chaps. ii, v; M. H. Boehm, "Federalism," *Encyclopaedia of the Social Sciences*, pp. 159–62.

Underlying both concepts is the tremendous degree to which modern life has become organized or governmentalized, regardless of whether the source of authority is the state or a voluntary association of private persons.[4] The power arising from possession of control over the hierarchy of management or administration has given rise to considerable questioning and reconsideration of the traditional forms of control over administration, both public and private.[5] It is characteristic of modern methods of corporate management and public administration to establish contacts of service and appreciation with the vital movements of daily life among the people affected by the administrative operations. Most modern political leaders act on the theory that it is essential to create an active sense of participation, benefit, or responsibility among the individuals directly or indirectly concerned with the otherwise impersonal action of administration.

In order to establish these contacts, the idea immediately suggests itself of securing this co-operation by enlisting the services of group leaders on behalf of the public agency. These group leaders are representatives of great private voluntary associations with whom large numbers of individuals have direct personal ties of membership, loyalty, and experience in disciplined group action. Why not seek to secure the co-opera-

[4] On some legal aspects of nongovernmental controls see L. L. Jaffe, "Delegation of Law-making Powers to Private Groups," *Harvard Law Review*, LI (February, 1937), 201 ff.; D. Lloyd, *The Law of Unincorporated Associations* (London: Oxford University Press, 1938); A. A. Berle and G. C. Means, *The Modern Corporation and Private Property* (New York: Harcourt, Brace, 1933), chaps. iv–v.

[5] Three general approaches to the problems of securing proper responsibility of administration have been observed and suggested by students of public administration. The oldest tends to rely on the legal checks exercised through the requirements of judicial review and sanction of administrative acts. Another is the growing movement toward a profession of public servants imbued with the "inner checks" of standards of competence, integrity, and a loyalty to the democratic way of life. The third approach comprises the devices and practices summed up in the term "citizen participation" in administration. The names of Ernst Freund, J. Hart, M. E. Dimock, J. M. Gaus, C. J. Friedrich, and F. M. Marx are immediately associated with the literature dealing with these trends.

tion of public agency and private associations by co-ordinating the powers and duties of public officials and group officials?

Three general types of such co-operation may be observed. One is the familiar phenomenon of political pressure being brought to bear on the public agency by the interest group or groups. In a second type of co-operation the initiative is taken by the public agency, which utilizes the channels and techniques of informational publicity to induce among its "publics" favorable attitudes of acceptance and support. A third form of co-operation, which is our subject of attention, is the endowment of the responsibilities of public office upon group officials or representatives, thereby attempting to integrate the powers of public office with the demands of affected groups.

Obvious difficulties arise in theory as well as in practice of implementing this method of obtaining the consent of affected interests to the acts of administration. An immediate problem of terminology occurs in the ambiguity of the word "group," which may mean either a class of persons having some real or imputed characteristic in common or an organized association of persons to achieve objectives shared or held in common. As we shall use the term, "representation of interests" means representation of organized groups unless otherwise specifically indicated.

DILEMMAS OF THEORY

The first dilemma of interest representation goes to the very foundations of the state and its political processes. Carried to its extreme as a constitutional principle, interest representation would be almost the negation of positive government. Although in democratic governments individuals organized in economic groups have a powerful influence over legislative bodies elected on a territorial or population basis, this situation is quite different from a society or community organized politically as a federation of voluntary interest groups.[6] In such a

[6] The prevailing views are set forth in K. C. Hsaio, *Political Pluralism* (New York: Harcourt, Brace, 1926); and J. W. Garner, *Political Science and Government* (Chicago: American Book Co., 1928).

society every case where a powerful well-organized group refused to negotiate or to reach a satisfactory adjustment with other groups on a given issue would become a constitutional crisis. In economic affairs, disputes of this sort are too frequent to allow such a degree of autonomy to any organized economic interest. If such a power were permitted to group organizations, the state would be continually threatened with secession, civil war, or revolution. Political theory and democratic practice have generally, therefore, rejected the group basis of political organization in favor of presupposed common objectives held by all within the political association—objectives whose achievement is delegated to a single source of legal authority.[7]

This decision introduces the perennial problem of the control of that single authority by the individuals and interests subject to it. To this problem John C. Calhoun contributed a formula of interest representation which demonstrates once and for all the dilemma we have been describing:[8]

> . . . . Whether government be that of the one, the few or the many, ... in each there must of necessity be a governing and a governed, a ruling and a subject portion. The one implies the other; and in all, the two bear the same relation to each other, and have, on the part of the governing portion, the same tendency to oppression and the abuse of power. . . . . In the government of a majority, the minority may become the majority, and the majority the minority, through the right of suffrage; and thereby change their relative positions without the intervention of force and revolution. But the duration, or uncertainty of tenure by which power is held, cannot of itself counteract the tendency in government to oppression and abuse of power. . . . .
>
> From what has been said, it is manifest that . . . . any one interest, or combination of interests, [must be prevented] from using the powers of government to aggrandize itself at the expense of the others. . . . . There is but one mode in which this result can be secured; and that is, by the adoption of some restriction or limitation, which shall so effectively prevent any one interest or combination of interests, from obtaining exclusive control of the government, as to render hopeless all attempts

[7] Hsaio, *op. cit.*, pp. 182–87; Garner, *op. cit.*, pp. 648–64.

[8] *A Disquisition on Government* (New York: Appleton, 1854), pp. 53 ff.

directed to that end. There is again but one mode by which this can be effected . . . . *by taking the sense of each interest or portion of the community, which may be unequally and injuriously affected by the action of the government, separately through its own majority, or in some other way by which its voice may be fairly expressed, and to require the consent of each interest either to put or to keep the government in action.* . . . . It is only by such an organism that the assent of each can be made necessary to put the government in motion, or the power made effectual to arrest its action when put in motion; and it is only by the one or the other that the different interests, orders, classes or portions, into which the community may be divided, can be protected, and all conflict or struggle between them prevented—by rendering it impossible to put or to keep [government] in action without the concurrent consent of all.

The advocates of functional representation during the period from 1895 to 1920 never satisfactorily answered the problem involved in Calhoun's logical development of the idea of government based upon a federation of autonomous interest groups.[9] In order that governmental atrophy may be avoided, the conflicts of functional interest necessarily require a higher authority (than the group organizations representing those interests) to maintain the more general and common interests of order and justice in the political community, to select and give priority to social purposes, to define the limits of functional interest, and to enforce methods of settling the conflicts of interest when the will to do so is lacking on the part of the groups themselves.[10] Functional interest does not seem to be a force tending toward social unity. Hence the state, or some form of political association, arises out of the historical necessity for a power organization to compel the several interest groups to agree or, at least, to establish minimum conditions of social order to which they must conform if they will not agree.[11]

[9] W. A. Robson, "Functional Representation," *Encyclopaedia of the Social Sciences*, VI, 518–22.

[10] G. D. H. Cole, *Social Theory* (London: Methuen, 1920), chap. iii.

[11] H. Bunbury, *Governmental Planning Machinery* (Chicago: Public Administration Service, 1938), p. 21: ". . . . . [when] the people are organized by reference to their means of livelihood, that is, the organization is based, in a capitalist society, on interests rather than opinion. This tends to accentuate rather than

While functional interests invariably find representation in the processes and policies of government, there is an almost universal consensus that there must be, as a nucleus, a separate permanent organization of public authority which is charged with the responsibility of administering the general, common, or public purposes of the state.[12]

The various utopian, anarchist, and socialist efforts to plan and build a functional society in which men might govern themselves through their several functional associations have intrigued many thoughtful minds. Two main obstacles have impeded their realization. One is the difficulty of demarcating objectively the proper lines of distinction between the several functional interests which would exercise governing powers. The conceivable possibilities range from the Fascist *one*, through the Marxian *two*, the Webbs's *three*, to the philosophical anarchists' infinite variety of voluntary self-governing groups.[13] The other difficulty is the nonexistence of a consensus between the several functional groups either as to (1) who shall define the public interest, social advantage, or national welfare in any given governmental act or (2) the institutional forms through

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to resolve the cleavages induced by real (or supposed) conflicts of interest, and they can often not be bridged without the intervention of authority, external to the Parliament and its constituents."

[12] G. W. F. Hegel, *The Philosophy of Right*, trans. S. W. Dyde (London, 1896), secs. 257–63, 303–18; Adolf Hitler, *Mein Kampf* (New York: Reynal & Hitchcock, 1939), pp. 873–74.

[13] It is significant that James Madison, in his famous formulation of the economic basis of politics in the tenth number of the *Federalist*, called economic interests the causes of factions, which to him were inherently divisive, partisan, and inimical to the public welfare. ". . . . The most common and durable source of faction has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors and those who are debtors fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests . . . . involves the spirit of party and faction in the necessary and ordinary operations of government."

which the public interest or common good shall be expressed. No political theorist has yet been able to sketch the outlines of such a functional society within the limits of possibility in establishing this consensus. Political realism involves realizing, as Dean Pound has said, that "the canon of social advantage is not something given, but something we are continually striving to discover."[14] Reduced to political terms, this seems to mean that every act of public authority, assuming its legislative or constitutional validity, is but a hypothetical expression of the common good, the validity of which must be tested against the sounding board of the interests affected by its execution. Thus public administration in a democracy becomes a process of testing, through time and under the forms of the law, the satisfaction of group interests with the performance of public functions by the official bureaucracy.[15]

We now turn to a consideration of what we may call the administrative, as distinguished from the political, dilemma of interest representation. The objection to "democratizing the organization of authority" on the basis of a shared responsibility between administrators and group representatives is that it may in practice become a means of reflecting the views solely of the organized sector of a single private interest.[16] As long as this interest, or the views of the organized sector thereof, can be identified with the concept of the welfare of the community, this problem is not serious. However, when the vested interest of the private organization becomes unrepresentative of the

[14] Roscoe Pound, "Fifty Years of Jurisprudence," *Harvard Law Review*, LI (January, 1938), 444, 447; see also his *Contemporary Juristic Theory* (Pomona: Claremont, 1940), pp. 72–80.

[15] E. P. Herring, *Public Administration and the Public Interest*, pp. 23–24.

[16] E. Jordan, *The Theory of Legislation* (Indianapolis: Progress, 1930), pp. 121–31: ". . . . Interest tends to stand alone as substantiated by its own quality with no reference to anything beyond itself. . . . . The interest object is completely abstract and subjective, and any relations to other things are introverted toward its own quality. . . . . Hence it has no positive tendency to public order." See also J. M. Gaus and L. O. Wolcott, *Public Administration and the United States Department of Agriculture* (Chicago: Public Administration Service, 1940), pp. 104–10, 196 n.

group or opposes the reasonable demands of other groups or a planned program of community welfare and development, a question of public if not of political importance is raised. At this point the key question becomes one as to whether this issue can be disposed of within the existing powers and organization of administration or whether it will have to be settled through politics and new legislation.

It is no part of the present inquiry to lay down criteria or standards by which one supposedly might identify situations in which legislation is the appropriate vehicle of public policy. The question examined herein is rather the experience as to the efficacy of settling group conflicts before they become political issues by giving groups representation within the structure of administration. Assuming that the objective of public administration is to secure the routine acceptance of duly authorized administrative action, the dilemma obviously arises as to how such acceptance can be brought about when the policy-making authority itself is internally divided between representatives of conflicting groups.

There are in general three ways of establishing an express representation of group interests within administration. One is to appoint the members of an administrative board expressly on the basis of economic group affiliation. This method tends toward the identification of public office with private interest, an identification that a considerable portion of political history teaches it is undesirable to make. The second way is to place full legal responsibility for administration upon a neutral administrative official or board and to create a representative committee advisory to this authority, with complete powers of investigation into official policies and procedures. The combination of official responsibility and the representative advisory committee has much to commend it, but there is considerable danger that the advisory body may be allowed to disintegrate and wither away of its own desuetude. The third way of representing group interests in public administration is to establish a federalistic division of authority between a public

agency and a voluntary organization representative of the interests included within the scope of the regulatory plan. This method is not completely federalistic, because it requires, in the last analysis, that a residual power of supervision and direction be vested in the public authority, lest the objective that Calhoun desired actually be realized, namely, that a single group or combination of private interests might frustrate the operation or effectuation of the statutory standard of public policy.

INTEREST REPRESENTATION UPON ADMINISTRATIVE BOARDS

The usual method of specifying units of representation upon administrative boards is a legislative provision providing that the appointees of the political executive shall be representative of, for example, farmers, employees, employers, bankers, persons skilled in the practice of law, and so on. Such provisions denote a "class" usage of the economic or vocational interest. That is to say, the interest specified is not delimited by restriction to any particular group organization but is an appellation applicable to an indefinite number of persons to whom the prescribed criterion or qualification might be reasonably applied. It is rare that the legislature will restrict by law the executive appointing power to nominees of group organizations claiming to represent such economic interests.[17] The outstanding exception—the state professional examining and licensing boards—seems to prove this rule. These bodies, while admittedly performing an economic function, are careful to preserve the public appearance of a highly technical, expert profession striving earnestly to achieve a standard of public service through rigorous requirements of competence.[18]

Appointment by a political executive, with discretionary powers legally unlimited by conformity to the nominees of

[17] Corwin, *The President: Office and Powers*, chap. iii, nn. 17–20, reveals several interesting exceptions.

[18] Lancaster, "Private Associations and Public Administration," *Social Forces* XIII (1934–35), 283 ff.; Freund, *Administrative Powers over Persons and Property*, pp. 47–49.

organized groups, often has the effect of making the appointee, supposedly representative of a definite interest, actually representative of the viewpoint of the executive. This result naturally is detested by particularist economic groups who tend to demand what they call nonpartisan appointments, by which they mean representatives nominated by themselves or at least *persona grata* to them.

From the standpoint of the appointee, his dual role of public servant and group official places him in the position of serving two masters and raises the Jekyll-and-Hyde question of which role shall prevail. If, within his oath of office, the appointee identifies his conception of public service with the views of a particular group as to the methods of performing that service, it is but a step to assert that the public interest has no meaning apart from satisfaction of the demands of that group. Such a position annihilates the conception of public office as a function, imposed and controlled by law, in whose operations the interests of two or more groups must be adjusted in the common interest of the community. In actual practice the implications of the former position may be avoided in two ways. The political appointee representative of a particular group may, on the one hand, be careful to maintain the view that his responsibility is that of an adviser or agent of the executive, who is responsible to no single group and who symbolizes and interprets the unity of the commonwealth. An alternative is that the politically appointed group representative may take the position that his group affiliations and sympathies in private life have no connection with his performance of his public duties.[19] The former position in essence replaces the specific principle of interest representation with a higher conception of public interest. The latter way denies the existence of any overt formal implementation of the representative relationship in order that the responsiveness of the delegate appointee to the group may be assured. It is enforced only by removal or resignation requested by his superior, and these remedies come

[19] E. P. Herring, *Federal Commissioners*, chap. iv.

too late if the appointee definitely has transgressed his public responsibilities.

In appraising the principle of interest representation on administrative boards from the standpoint of the effective functioning of the administrative organization, it is useful to distinguish between the powers or functions of the organization. With respect to quasi-judicial functions, it is extraordinarily difficult for group representatives to maintain an essential attitude of internal cohesiveness, dignity, and impartiality that goes so far toward establishing the prestige of such bodies. On fundamental issues upon which the constituent groups are in disagreement, the representatives find it almost impossible to compromise. Since interest representation requires equal representation for each group, there is obviously the possibility of deadlock, if not paralysis. The inclusion of neutral public representatives on judicial boards renders their position extremely delicate and may have the practical result of making them arbitrators. If such a situation does develop, why not drop out the deadlocked group representatives and let the public representatives do the job by themselves?

There is greater justification for interest representation on quasi-legislative administrative boards. The practical difficulty, however, is that unless the board divorces itself from its own administrative problems the administrative process involves a combination of legislative with judicial and executive functions. Even if it were possible to segregate the legislative from the other functions of administration, the everyday continuous character of the administrative task places a tremendous strain on the ability of even the most disinterested experts to get along together amicably. In the last analysis it is this requirement, with its concomitant bearing on the morale of subordinate personnel, that finally necessitates the rejection from administrative bodies of the principle of interest representation. The principle seems fundamentally irreconcilable, as the Chairman of the Social Security Board has phrased it, with

that "continuing mutual deference and concession so necessary for successful administration."[20]

REPRESENTATIVE ADVISORY COMMITTEES

The representative advisory committee has been seized upon by many administrators, as well as legislative bodies, as the answer to demands for representation of interest groups upon the policy-determining administrative authority. It appears to be a ready answer to the question of associating representatives of group interests with the process of formulating policy while, at the same time, leaving the administrator legally free to make his own decisions. This technical division of authority, however, turns out to be no panacea to the problem of obtaining the essential agreement between the group representatives and the administrative agency. Freedom of administrative action is formally assured, but, in the absence of the administration's active co-operation and joint concurrence with recommendations of the advisory body, this freedom may result in complete defection from the agency of the groups represented on the committee. This result may restore all the evils traditionally associated with the conception of "bureaucracy," and it reopens the possibilities for political attack upon administration in the press or in the legislature. Many interest groups in any event prefer to refrain from assuming official administrative responsibilities, thus being free to bring pressure to bear upon the legislature or the administration by means which seem best to themselves. In establishing representative advisory committees, therefore, the practical problem is to create the conditions under which such a body, frankly composed of representatives of one or more interest groups, and whose function is technically restricted to that of investigation and advice, usefully may be made an integral part of the administrative process.

Although the fields in which advisory committees could be

[20] A. J. Altmeyer, *The Industrial Commission of Wisconsin*, pp. 318–19.

useful are almost infinite in number, the function of administrative legislation seems to offer the most suitable opportunities for participation by interest groups.[21] The consideration of divergent views as to the appropriate exercise of administrative discretion is an outstanding problem in the procedure of drafting administrative rules and regulations. Representative advisory committees may have either a standing or an *ad hoc* existence. The authority and composition of standing advisory committees are sometimes defined by statute, as in the case of the Employment Service Advisory Council. Such statutory committees as the Wisconsin Unemployment Compensation Advisory Committee and the New York Unemployment Insurance Advisory Commission have performed a very effective function in helping to obtain passage of administration amendments to the law by the legislature. *Ad hoc* advisory committees, whose existence expires when their assigned task is finished, are most likely to be created by administrative officials in connection with the preparation of regulations covering problems of policy which require both technical knowledge and sympathy with viewpoints of persons affected by the proposed rules. In the United States the first rationalization of a systematic use of representative advisory committees seems to have been made by the Wisconsin Industrial Commission as a result of its experience in formulating rules for industrial safety and sanitation.[22] Its success in this field has resulted in the principle of interest representation being adopted in some form by administrative agencies dealing with practically all problems of industrial and labor relations. As between standing and *ad hoc* representative advisory committees, the problems (1) of keeping the committee from interfering with properly adminis-

[21] J. A. Fairlie, *Advisory Committees in British Administration* ("University of Illinois Studies in Political and Social Science" [Urbana: University of Illinois Press, 1926]), *passim;* E. Freund, *Administrative Powers over Persons and Property* (Chicago: University of Chicago Press, 1928), chap. xi; J. Hart (President's Committee on Administrative Management), *The Exercise of Rulemaking Power* ("Special Study," No. V [Washington, 1937]), chap. iv.

[22] J. R. Commons, *The Industrial Commission of Wisconsin: Organization and Methods* (Madison: Wisconsin Industrial Commission, 1913).

trative matters and (2) of maintaining active interest and participation on the part of the group representatives has tended to encourage a preference on the part of many administrators for the *ad hoc* representative advisory committee as against the permanent body.

All advisory committees face a tremendous problem in arousing and maintaining interest in and respect for its activities, not so much from outsiders, as on the part of its members. It has been discovered that it is almost a precondition of such respect that its ultimate recommendations be followed by administrative officials. In order to do this, an effective check must be imposed on impracticable or irresponsible advice, and an incentive toward constructive attitudes in negotiation must be established. Public officials utilizing the representative committee have found these ends can be achieved by judicious care in the method of appointing or selecting the members of the committee and by requiring extraordinary majorities, if not actual unanimity, behind the committee's recommendations. An ordinary majority vote, divided on strict "interest" lines, might have the result of failing to secure the desired co-operation which was the purpose of establishing the representative committee.

A borderline example which intersects the lines demarcating all three of the methods of express interest representation is the representative wages board, which has evolved along with the technique of establishing minimum wages for specific industries by administrative order. This board actually performs the same function as an advisory committee, but, under the New York State Minimum Wage Law and the federal Fair Labor Standards Act,[23] it possesses independent autonomous powers within the administrative process as a whole.[24] Thus the board

[23] *Laws of New York, 1937*, chap. 276; Pub. No. 718 (75th Cong. [June 25, 1938]); U.S. Attorney General's Committee on Administrative Procedure, *Monograph No. 12* (Washington: Government Printing Office, 1940).

[24] The separation has been carried further in Great Britain. See D. Sells, *British Wages Boards* (Washington: Brookings Institution, 1939), chap. ix, and W. Gellhorn, *Federal Administrative Proceedings* (Baltimore: Johns Hopkins University Press, 1941), chap. iv, for critical views.

determines the content of the order, but responsibility for original determination as to whether there should be any investigation and as to whether the recommended order should take effect devolves upon the permanent administrator.

The advisory powers of representative boards and committees permit recognition of nominees of influential group organizations as distinct from the political appointees of general "class" interests who characterize the constitution of most representative administrative boards. If it is possible to secure the services of able leaders of influential organizations upon advisory committees, obvious advantages accrue therefrom. The principal difficulties lie in securing the services of such group representatives, who are always busy men, and the public official to whom the committee is advisory often does not possess the ability and imagination to attract and retain the working services of the committee members. When, however, these conditions are remedied, the combination of a representative committee and the expert administrator has demonstrated a remarkable capacity for securing both moral and financial support from the "publics" affected by the administrative program. In the social security programs of Wisconsin, New York, and the federal government, representative advisory committees have, in conjunction with administrative departments, proposed legislation which the state legislatures and Congress have approved with relatively little controversy.

The question may be asked why emphasis is placed upon group interests which by nature are special and partial. Why not center attention on ways and means of effectuating the expert, true, and disinterested views of the general welfare? To the presumed identification of the expert, the true, and the good, the reply may be made that expertness as a technique has no independent value in democratic terms. Democratic processes require popular participation and faith in the process of determining whether the expert view is the good. Too often the expert seems to conflict with the public. Skilled techniques of gathering facts, analyzing relationships, and arriving at the-

oretical truths are in practice mobilized in support of different group interests against one another. The calm presumption that all groups would agree on the good and the truth if they only knew what it was simply does not explain the facts of politics. The theory of a natural harmony of interests no longer has vogue. Representative advisory committees offer an opportunity for educating the leaders of these conflicting groups as to the necessity for their getting along together and, if they will agree, for determining in large measure the standards of policy for public officials to enforce. In permitting group leaders or representatives to participate in the formulation of administrative policy, public officials establish contacts by which this essential education can be effected. Intellectual, rational, and expert definitions of public interest alike, in this process, must become incorporated in the ideologies of the group interests if they are not to be relegated to the limbo of utopias.

DIVISION OF FUNCTIONS BETWEEN PUBLIC AND PRIVATE ORGANIZATIONS

From an over-all standpoint, the whole organization of society appears to be a division of labor between public and private organizations. Certain functions are left to the family, the co-operative society, the corporation, the union, the church; others are performed by the community for the common benefit of all. In a more restricted sense, within the scope of systems of public regulation and supervision of private economic enterprise, a relatively novel technique appears to be developing in federal regulation. The theory behind this device is that private, quasi-governmental associations are made subjects of regulation by the law, as well as the individuals to whom the statutory requirements apply. As a subject of regulation, the private association comes under the rule-making and order-making power of a public agency, which, however, may find it administratively practicable to permit a considerable degree of autonomy to the association in controlling the acts of its members.

Outstanding examples of this technique are the official relations between the stock exchanges and the Securities and Exchange Commission, and the commodity exchanges and the Commodities Exchange Administration. In each case the public regulatory body imposes extensive reporting requirements upon the (clearing) members of the exchange, and for these functions it maintains its own staff. The day-to-day trading conduct, however, is largely left to the highly developed practices and machinery of the exchanges. The public agency may proceed against individual violators of the law, but in practice informal contacts with the business-conduct committees of the exchanges are largely relied upon in an attempt to avoid formal action and extensive litigation.

The highly developed organization of the stock and commodity exchanges is by no means typical of all voluntary associations of producers, many of which are inchoate, internally divided, temporary, and lacking a group-accepted and imposed discipline and loyalty. Nevertheless, several statutory plans of regulation in recent years have officially recognized associations of individuals in the field of regulation and provided a distinct role for them in the operation of the plan. The scope of their functions and the degree to which the associations are permitted to operate autonomously are usually placed in the discretion of the administrative official or board to be worked out in formal negotiations, but in the Bituminous Coal Act of 1937 the constitution and procedure of district associations of coal producers are specified in the statute. The defect of specifying a particular function to be performed by a private group is that it lessens the responsibility of the public agency and places an embarrassing power in the group to impede, if not to block, the whole procedure provided in the law. Furthermore, when associations are not firmly established with a widespread membership willing and customarily complying with association rules and practices, it is extremely difficult to delegate governing powers to a private association without incurring charges of minority tyranny—charges which appear the worse

because exercised by an unofficial group. This difficulty is practically nonexistent when an association is established, is representative of a majority of the group interest, and possesses its members' loyalty and faith. In the former case, regulatory policy generally finds it desirable to keep responsibility for official action in its own hands; in the latter, delegation is not so much a concession as a practical necessity; in either, the public body finds it desirable to maintain a policy of proceeding formally against individual violators of the law or regulation made thereunder. The essential point is that the really effective regulation or control of individual activity is based upon the obedience of the individual to the rules of a voluntary association reinforced by the ultimate sanction of the public body.

What happens if the rules of the private association and the public agency conflict? Legally, there should be one answer only, namely, that the public agency's rule should prevail or else the voluntary association be disbanded or removed from any participation in the regulatory pattern. As so often happens, the proper legal principle may involve the breakdown of the desirable co-operation between the public agency and the private group. The latter should never be in a position to impose its own conditions of co-operation upon the public body, but, on the other hand, the complete disregard of private groups' interests by the public authority is the essence of bureaucracy. Hence the balance between the two sources of authority is continually contingent and precarious. The practical administrative situation is likely to involve careful maneuvering by both the private association and the public agency. Each will attempt to be sure that its position is the most favorable one from considerations of existing law in order to maintain an internally united front and of securing a favorable public reaction. The basic stability lies in the condition that both the private associations and the public authorities publicly admit that they must operate within and be controlled by public policy expressed through the forms of law.

PARTIES-IN-INTEREST BEFORE ADMINISTRATIVE TRIBUNALS

The judicial procedure of administrative tribunals excludes representatives of group interests from any share in the responsibility for the official administrative act. Except as such representatives operate through personal influence, whether by appealing to official venality or the subtler forms of social prestige, personal attraction, similar vocational background, or mere propinquity, their participation is restricted to presentation of the group viewpoint as a part of the official procedure of investigation. In this context the group receives no treatment to distinguish it in form from that accorded to any individual and his representative. Thus the distinctive mark of specific interest representation, the recognition of group organizations as subjects of legal duties and obligations distinct from those of individuals, is lacking. The relevant clue to the *de facto* quality of interest representation in judicial procedures must be sought in the statute, for the *de jure* principle controlling the judicial procedure of administrative bodies is equality before the law.

Three major developments have occurred to modify a purely legalistic appraisal of the procedure of such tribunals. In the first place, many such agencies have legislative functions in the exercise of which they often call upon group organizations for informal conferences and consultation that partake of the character of representative advisory committees. Second, particularly when the administrative tribunal is set up to regulate a particular industry, there is a tendency for an industry-wide voluntary association to appear (in some cases it existed prior to the establishment of the public agency) to focus and coordinate the group opinion of the regulated interest toward the agency, the legislature, and the public, to watch over the activities of the public body, and on rare occasions to represent the group interest in formal proceedings. Examples of such parallel organizations of private associations and public regulatory agencies are the Association of American Railroads and

the Interstate Commerce Commission, the National Association of Broadcasters and the Federal Communications Commission, and, to a lesser degree, the Edison Electric Institute and the Federal Power Commission.

Third, many of these administrative tribunals have seen fit to give their sanction to, if not to establish directly, associations of practitioners before them. The Interstate Commerce Commission followed the first method; the Securities and Exchange Commission adopted the latter. These associations constitute official recognition of the important influence that group standards of ethical behavior may play in controlling the legal practice before them. Official control over these bodies may be practically nil, since the commission presumably retains the right to refuse permission to individual practitioners before it. Such associations of practitioners fundamentally are a significant symptom of a growing or considerable degree of technicality in the legal precedents and practical procedural requirements before the commission. They constitute evidence that consideration has been given to the possibility that problems may arise if the interest of the practicing attorney in a given case conflicts with wider standards of the public interest. The mild application of this technique by our regulatory commissions may be compared to its rigorous and widespread use in dominating the so-called "service-frames" in Germany.[25]

THE JUSTIFICATION OF INTEREST REPRESENTATION IN ADMINISTRATION

It is obvious that, in the broad sense in which interest representation was defined above, no justification is required, unless one denies that reconciliation of governmental action with the demands of affected social interests constitutes the objective of public administration. The present inquiry, however, has been directed to determining (1) what the principal typeforms of explicit representation of group interests in adminis-

[25] K. Leowenstein, *Hitler's Germany* (New York: Macmillan, 1940), pp. 168–202.

tration are, (2) how selected examples of each are organized, and (3) what the conditions seem to be under which these forms will function so as to achieve the ultimate objective of a routine acceptance of administrative action. The conclusions drawn from the descriptive and analytical material of our study have been summarized in the preceding paragraphs.

Two ethical problems remain to be disposed of. The first relates to one's concern for individual rights in a regulatory plan in which a private group organization exercises control over the behavior of the individual in addition to that of the public authority. In this connection Rousseau's dictum may be recalled that individual liberty requires the abolition of all partial, special-interest groups intervening between the individual and the state.[26] To this conceptualization of an ideal society it may be answered that, in society as we know it, competent investigations have almost universally concluded that the means of satisfying practically all human wants are organized, institutional, and collective.[27] In the economic sphere individuals have, of necessity, to subordinate their demands to the rules that have been found by experience essential to the continued, effective functioning of the prevailing modes of collective action. Under democratic conditions, in a procedural sense, the individual is given equality of opportunity with his fellows to seek his personal goals. Since, however, he is compelled under conditions of scarcity and conflict to associate with others to satisfy his wants and to establish his views, he is forced to relinquish his absolute private freedoms in return for a realization of as much of them as can be obtained through group action, organized and directed by representatives or managers (administrators).[28] In any given situation the prac-

[26] *Social Contract* (Everyman's ed.), Book II, chap. iii.

[27] E. R. A. Seligman, "Social Theory of Fiscal Science," *Political Science Quarterly*, 1926, pp. 193 ff., 354 ff. Even the scientific, contemplative, and aesthetic wants are dependent upon some kind of organization capable of establishing the conditions under which they can be pursued and enjoyed.

[28] J. R. Commons, *Institutional Economics* (New York: Macmillan, 1934), pp. 58–74.

tical liberties possessed by the individual, from this viewpoint, are the privileges of a continuous re-examination of his organizations' acts and purposes, weighing the alternatives of withdrawal against the opportunities of seeking his livelihood and values by other methods or along different roads.

This is a minimal conception of individual freedom. But in a society characterized by a large degree of organization on the basis of economic interests, a group organization tends to be either compulsory or a privilege or a duty it is impracticable to do without. The individuals whose economic interest is promoted by group organization do not feel that their personal liberties are lessened but rather that they are enhanced. It is the nonconformists and the opposing interest groups who experience the feeling of a loss of liberty. It is such persons that the representative legislature and public officials are called upon to protect. The coercive power of the community or state is to be utilized to redress the balance between organized groups, some of whom already possess effective economic power which is protected by existing law and others less effectively organized who propose to use the machinery of government to promote a greater degree of intergroup equality.[29]

The ultimate paradox of interest representation is that, although interest or class analysis is the most revealing method of explaining social phenomena, explicit representation of or-

[29] Cf. the *Report of Secretary of Agriculture Henry A. Wallace to the President, 1937*, pp. 1, 5–6: "Federal legislation has given expression to agricultural and to urban solidarity. Something more, however, remains to be done. It is necessary to obtain in legislation, not only a more effective expression of various group interests, but also more adequate recognition of the interdependence of the major economic groups. Our democratic form of government functions most effectively when national policies reflect different group needs in due proportion, with group unity as the basis for intergroup co-operation. . . . . Agriculture, labor and capital must give allegiance to increasing balanced production and full continuous employment, on which all of our welfare depends, if we are to solve the dilemma of prices, wages and profits. . . . . *We must take the guiding principle of unity of purpose and reconciliation of diverse interests for the purpose of securing democracy and project it forward as a powerful light by which we may discover the methods of enabling farmers, laboring men, consumers and capital to work together in a harmonious way* . . . ." (italics mine).

ganized groups always struggles against a tremendous burden of proof. Both in the structure of legislatures and in the structure of administration, the prevailing body of democratic theory rejects specific forms of it. And yet, perennially, groups arise to demand such representation. Sometimes such demands are simply part of a bargaining technique to secure changes in legislative or administrative policy. If, however, interest representation becomes something of a political necessity, its adaptability to administration will depend largely on the nature of the administrative duties. Such duties may be primarily ministerial, involving execution of statutory requirements and standards of unambiguous content, or they may call for the exercise of judgment based on discretionary considerations of fairness and reasonableness. In the former case there is no room for interest representation because official duties are clear and fixed. In the latter instance a case for specific interest representation exists. Judgment must be founded on facts, but the facts include the values maintained by the affected interests. A basic unity must be maintained, which means that the legal standard upon which public authority and responsibility are delegated cannot be compromised. When this condition is preserved, the limits of compromise are restricted only by the conditions which must be met in order to effect a relatively lasting agreement between the affected interests.

Generally three preconditions may be stated as necessary adjuncts to any plan providing for representation of organized groups. There should be an independence of administrative initiative which serves as a compelling incentive for affected groups to co-operate. Second, either through the terms of the grant of authority or in specific declarations of policy, the statute should make it clear that administrative responsibility is wider in scope than any one group interest. Third, administrative officials should be able to calculate consequences of particular group proposals and to secure modifications of these proposals if necessary so that they will be acceptable to other groups. Obviously this concept of administrative ability in-

cludes the capacity of persuading particular interests to appreciate the necessity of accepting and conforming to a positive program of public welfare, which almost inevitably embodies something other than the groups' original demands.

The foregoing statements are an attempt to express the ethical and political assumptions of interest representation. In the view here taken, too much emphasis cannot be placed on skills and judgment, both on the part of group representatives and on the part of the public administrator in presenting views, analyzing consequences, and agreeing on a program which will be supported by the consensus of the affected interests. By applying this view to the behavior of group representatives endowed with public responsibilities, it is hoped that the frequent assumption will be avoided, namely, that there is only one type of interest representation, which is secretive, self-centered, and shortsighted. In trying to specify the conditions under which administrative policy can be integrated with the legitimate demands of group organizations, an alternative is offered for the intellectual paralysis which often results from a conception of public interest which formulates an ideal program and fails to reckon with the necessity of dealing with powerful conflicting values.

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