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American Government in Action

Administration and the Rule of Law

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To
My Mother

Editor's Foreword

THE LITERATURE of politics has been one of the major forces in our national life. Much of it, especially before the 1860's, although polemic in purpose and form, contributed significantly to the shaping of governmental institutions and policies. Another main current in the literature of politics emerged just over a century ago. We had by the 1820's matured sufficiently to begin to review our own development as a nation. Scholars and lawyers became interested in the observation and appraisal of the institutional patterns of our political order. The new approach was reflected first in formal expositions of the Constitution and later in hardly less formal analyses of the workings of government. As the state became more complex in its organization and more comprehensive in its activities, observation and appraisal of government were, however, too often channeled into rather rigid —and frequently narrow—categories of analysis. The influence of cultural, economic, and social forces on political organization and procedure, the concept of government as the nexus of reconciliation or adjustment of conflicting ideas, interests, and institutions within a dynamic society such as ours, only incidentally affected the scholarly "disciplines." The attempt to apply to the American political scene the catholicity of outlook of an Aristotle or a Montesquieu is indeed yet to be made. "The art of governance" is all too

frequently identified with the minutiae of the government's structure or procedure.

There is one brilliant exception. Just a century ago this year there appeared the second volume of Alexis de Tocqueville's *Democracy in America*. His unique contribution to our understanding of America—today no less than in the 1830's—was that he saw government in action as a focus of the desires and purposes of the people in all their daily manifestations, as an agency for the democratic accommodation of cultural, economic, and social tensions within society.

It is in this tradition that we who are co-operating in this series have thought it worth while to add to the already voluminous literature about American government. Current discussion of a "functional" approach to its study is in fact a return to the course which De Tocqueville charted as to how and with what tools government should be observed and appraised.

No single refracting lens can, however, today catch all the variables in a political spectrum, the "invisible radiations" of which filter into every aspect of the hopes, desires, and purposes of a people bent on making the ideals and practices of democracy effective. We have sought to bring together, therefore, in this series the special competence and the varied outlook of some of those who in recent years have been responsible in significant ways for setting government in action or of observing and appraising it as it functions in the many aspects of the nation's life. The series as a whole should give citizens and students alike an adequate view of how our national government functions. The individual volumes analyze the institutional forms—constitutional, legislative, executive, administrative, and judicial—at the critical points where they affect, often determine, the workings of a democratic system. The problems selected for discussion in the series are today, as they have been in the past, foci of public debate and

political pressure. They are areas in which emergent ideas and forces are molding the future of American democracy. We hope that these volumes will stimulate further analyses, more searching appraisals, and more informed judgments by our fellow citizens of today and tomorrow.

No field of American politics is more alive today than that of the relations between administrative agencies and the courts. The rapidly expanding functions which government has taken over at all levels in response to popular demand have imposed the necessity of creating a wide variety of administrative agencies for implementing legislative policy. The result has been, almost inevitably, to raise afresh the perennial question of the sphere of governmental action as it affects private persons and interests. The Logan-Walter bill, recently vetoed by President Roosevelt, was symbolic of the friction between traditional concepts of the "rule of law" and the newer demands for governmental intervention in social and economic affairs. Professor Pennock in his *Administration and the Rule of Law* has analyzed the development of doctrine and practice in this most viable field of constitutional law. The picture which he draws of the fundamental safeguards which have developed around administrative action to insure the preservation of private rights and interests is one on which every American should reflect. The charges so often levied against administrative independence and irresponsibility are here searchingly explored and appraised. He demonstrates that the courts have seldom abdicated their final control of administrative action and that administrative agents have not often ignored it in the discharge of their responsibility.

PHILLIPS BRADLEY

Queens College
May, 1941

Preface

THE reconciliation of freedom and authority may be said to be the central problem of government. The specific form in which this general issue presents itself to democracy today is the conflict between individual "rights" of liberty and property and the demands of the positive state for continuous modification of these rights in pursuit of the general welfare. Is the liberty of the individual, in the nineteenth-century meaning of that phrase, compatible with "planning"?

This great problem manifests itself in many ways and may be dealt with on various levels. For instance, one may speculate upon the probable consequences of a marked increase in economic "planning"; or one may attempt to appraise the present situation. The possession by our government today of extensive "administrative" power attests the fact that laissez faire has already been left far behind. What has been the effect on individual liberty? Where liberty has suffered, can the situation be improved? What effect have constitutionally protected liberties had upon the efficiency of efforts to promote the general welfare through governmental action? Where the latter has suffered, are there available remedies? These questions suggest the approach taken in this book to the general problem set forth above. The great enemy of individual liberty has traditionally been conceived as arbi-

trary government. The rule of law, on the other hand, has been formulated as the great opposition principle to arbitrary government. What are the relationships between the rule of law and the administrative process as it is practiced in this country today? That, more concisely, is the question which is explored in this volume.

Both in the United States and in England the problem has been recognized as one of great and growing importance for several years. Of late, the controversy in this country has been brought to a focus by the proposals of the American Bar Association. Those proposals, in the form of the Logan-Walter bill, have recently failed of enactment into law by the narrow margin of a presidential veto. That the issue is not dead we may be sure; and whatever may be the ultimate fate of the Bar Association's proposals, the general subject is destined to attract increasing attention.

Numerous pitfalls await anyone, and especially a layman, who attempts to deal with the vast and intricate subject of the relations between law and administration in this country. The hazards are multiplied by the necessity of confining the discussion within the limits of a small book. Friends have saved me from many errors. My colleague, Professor Frederick J. Manning, contributed generously of his time in reading the manuscript and suggesting improvements. Mr. John Dickinson was kind enough to read Chapters IV–VII, giving me the benefit of his learning and mature judgment; and Mr. A. Sidney Johnson, Jr., read the entire manuscript and made many helpful suggestions from the point of view of a practicing lawyer. To these friends, and to others too numerous to mention, I am exceedingly grateful.

J. R. P.

Swarthmore, Pennsylvania
May, 1941

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Chapter I

The Nature of the Problem

BEFORE the days of the automobile there was no need for policemen to direct traffic. Before our population had multiplied and become concentrated in congested urban areas, sanitary inspectors were not so necessary as they are now. Before the development of large-scale business enterprise, the sale of securities required no supervision by the government. At first the government did not bother to regulate stagecoach lines, or at most what little control it did exercise over them was absurdly simple as compared with the supervision needed by our modern rail, highway, and air transportation systems.

One could go on indefinitely citing examples of how the development of our modern industrial economy has multiplied the tasks of government and made them a thousandfold more complex.[1] Laissez faire has almost everywhere had to give way to governmental supervision. The likelihood of accidents arising from the reckless driving of a horse and buggy is so slight that society can afford to allow the pedestrian to take his chances on the highway, but the ubiquitous high-speed motor car has had to be subjected to many regulations for the sake of travelers on foot. In similar fashion government has been compelled to step in to safeguard

[1]See Charles A. Beard, *Public Policy and the General Welfare* (this series).

the welfare of the individual in countless different ways.

It is not surprising that the traditional machinery of government has proved entirely inadequate to the new tasks. Courts and legislatures have been modified to some extent by changing conditions, but the branch of government which is known as "administration" has come in for the greatest transformation. In the study of government, consequently, more and more attention is given to administrative agencies and processes, an emphasis which will be noticed in most of the contributions to the present series. But the new stress on administration calls, in turn, for a new emphasis in the treatment of the legal aspect of American government. The relationships between law and administration form a vital link in the complete design.

The present study is also closely related to the volumes which deal with *Government and Business, Government and Labor, Government and Agriculture, Government and the Investor,* and *Government and Social Security.* Cutting athwart each of these "functional studies," it shows the problems that arise when complicated and dynamic economic and social situations are brought within the regulatory domain of constitutional government.

Preliminary Definitions

The word "law" need not be defined here with scientific exactitude. In general it refers to rules of conduct which are enforceable through the courts. In this country we have national (or "federal") laws, state laws, and local laws (commonly called "ordinances"). Also we have laws which are embodied in written constitutions, known collectively as "constitutional law," statutory laws, which are enacted by legislative bodies, and common law, which is the product of custom and judicial decisions. In addition, certain admin-

istrative rules are enforceable in court and so may be spoken of as part of the law, although they are not generally referred to as "laws."

The word "administration" requires a little fuller explanation. A great deal of confusion arises out of the fact that the words "executive" and "administrative" are sometimes used synonymously and sometimes not. The whole of government is traditionally divided among the legislative, judicial, and executive (or administrative) branches, the last-named being that which carries out and enforces the will of the legislative, as interpreted by the judicial branch. "Administration" then refers to that which executes (or administers), or to the process of carrying out the so-called will of the state.

But there is also a sense in which the word "administration" and its derivatives have a different connotation from "executive." Thus we tend to use the word "executive" when referring to the organ which stands and speaks for the government as a whole, and we may also use it for the organ which performs functions especially enumerated in the Constitution as belonging to the executive. Under one or the other or both of these headings come the functions of carrying on our relations with foreign nations: the negotiation of treaties and the protection of our citizens abroad, the direction of our naval and military forces, the making of appointments, and the direction of the law-enforcing machinery, especially where that is largely a matter of detecting and apprehending violators of the law and bringing them to trial.

In other cases, generally dealing with more specialized aspects of government, we tend to use the word "administrative." More particularly this word is used to apply to the conduct of the "business" of government as well as to government businesses or commercial undertakings. Under these headings would come the task of raising revenue to support

the government, the organization and management of the machinery of the executive branch to insure its efficient operation, and the conduct of the postal system. The term is also widely used to refer to those parts of the whole executive branch to which the legislature has delegated discretionary powers, those which dispense specialized services, and those whose functions are largely investigatory in character. Thus the negotiation of a reciprocal trade agreement would probably be thought of as being performed by the executive, but the agency which makes the extensive preliminary studies, supplying the negotiators with the requisite data, is an administrative agency. The appointment of the postmaster general is an executive function, but the direction of the day-to-day operations of the Post Office Department is an administrative task. The Interstate Commerce Commission is an outstanding example of an administrative agency which has been given wide discretionary powers by the legislature.

In fact usage is so confused that we cannot hope to arrive at categorical definitions of terms. It will be apparent from the preceding paragraph that even the narrower meaning of "administration" itself includes quite different usages. For instance, the word "administrative" is frequently employed much as the courts use the word "ministerial"—to cover routine acts performed in accordance with some law or binding instructions which allow practically no discretion to the performer. On the other hand, the word is just as commonly used to mean quite the opposite—that is, to designate acts in the performance of which the administrator has a large area of discretion. Thus, on the one hand, the preparation of pay roll checks may be spoken of as an administrative function, while another writer will refer to the power of determining what constitute "reasonable" rates as the very epitome of the administrative process.

Another distinction, which the reader should also bear in mind, is that between administration as management and administration as regulation. A government *manages* its own affairs in much the same way that a private business does. It performs, that is to say, what was referred to above as the "business of government." Problems of organization, co-ordination, personnel, and the like, characterize this field. This is essentially the same thing, although it may take somewhat different forms, where government embarks upon commercial undertakings. Quite different from this, however, is the *regulation* of affairs which are under private management. In this category one thinks first of the regulatory commissions, but they are by no means the only agencies of government which regulate private undertakings.

We shall give some consideration here to law and administration in the broader sense.[2] The word "administration," however, will generally be used in one of the narrower senses, as the context will indicate. In fact our major concern will be with administration in the sense of regulation, for it is here—where official discretion is broadest and private rights are most affected—that the relationship between law and administration assumes the greatest importance for the average citizen. It is also here that new problems are most rapidly emerging.

Regulatory administration is more complicated than the traditional "executive" activities. It involves much more room for the exercise of individual judgment or discretion.[3] The

[2]Certain aspects of the subject, such as "martial law," are arbitrarily omitted from consideration for lack of space. Others, such as the legal control of expenditures, are not treated here because they fall within the province of other volumes in this series.

[3]For a careful analysis of the nature and types of administrative discretion, see Ernst Freund, *Administrative Powers over Persons and Property* (Chicago: University of Chicago Press, 1928) 71–74. "When we speak of administrative discretion," writes Professor Freund, "we mean that a

scope of "administration" in this sense has had such a tremendous development that the mode of its conduct vitally affects us all. It tends to outgrow both the legal checks and the patterns of custom which once circumscribed it and facilitated control. Consequently the relationship of administration to that body of law which presumably represents the will of the people—the Constitution and the acts of Congress, in the case of the national government—assumes a crucial importance today.

The Problem in General

Although Plato praised the unfettered discretion of the wise man as the ideal form of government, and Aristotle, his pupil, declared that "he who bids the law rule, may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast,"[4] there is a very real sense in which both were right. The problem of the relative merits of the certainty and impartiality of the settled rule, as against the greater flexibility and potential nicety of adjustment of official discretion, must be almost as old as government. The question must have always been in the past, as it is today, one of where to draw the line between these two. A choice of either, to the exclusion of the other, is, practically speaking, impossible.

Anthropologists have revealed that even the most primitive tribes were less completely bound by inflexible and inexo-

determination may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof. A statute confers discretion when it refers an official for the use of his power to beliefs, expectations, or tendencies instead of facts, or to such terms as 'adequate,' 'advisable,' 'appropriate,' 'beneficial,' 'convenient,' 'detrimental,' 'expedient,' 'equitable,' 'fair,' 'fit,' 'necessary,' 'practicable,' 'proper,' 'reasonable,' 'reputable,' 'safe,' 'sufficient,' 'wholesome,' or their opposites." *Ibid.*, p. 71.

[4]Aristotle, *Politics* (transl. by B. Jowett). Bk. III, Chap. 16, p. 140.

rable customs than was once thought. Customary law admitted of many exceptions; and in its application there must have been many opportunities for someone in a position of authority to make decisions based upon what we call "judgment" rather than upon a simple rule. It may be that in such societies these "discretionary" decisions were generally made by the same persons who interpreted and applied the laws—the judges. At an early stage, however, as the task of government grew more complex, it became necessary to resort to division of labor. This led to a distinction between judges and "administrators." For instance, sheriffs, constables, and their prototypes must frequently use their own discretion in meeting unique situations. It is only after this division of function has taken place that the problem becomes visible, for then comes the question of what the sheriff has the "authority" to do. The issue of competences emerges. From that point on the problems of rule versus authority, on the one hand, and of the respective competences or "jurisdictions" of various officers and organs of the government, on the other, remain distinct, though closely related. The question of whether to have an automatic traffic light or a policeman at a certain intersection involves a choice between rule and discretion but no problem of competences. Similarly the choice between setting an absolute speed limit at forty miles per hour or merely prohibiting "reckless driving" is one between rule and discretion. It does not involve the matter of competences because presumably both "laws" would be applied by a court, just as in the preceding example an administrative device would be resorted to in each instance. But another example will illustrate how these problems are generally intermingled. An examining officer, let us say, refuses to grant Mr. Smith a driver's license on the ground that his vision is impaired. Smith drives without a license, is arrested, and brought to trial before a court for violating

the law requiring that drivers be licensed. He contends in defense that he was illegally prevented from obtaining a license, asserting that in fact his vision is not impaired and offering to prove his assertion to the judge and jury. The question here is what issues are to be decided finally by courts and what by administrative officers. But if he contends that he has been discriminated against, alleging that his vision is better than that of Mr. Jones, who was granted a license, it becomes apparent that the problem of rule and discretion is also not far removed.

The subject of the rule of law and the administrative process, however, is broader than the problem of the relationships between the courts and administrative agencies, important though that problem is. It is even broader than the one of rule versus discretion. Law is not merely something which sets limits to the actions of administrative agencies or which supplies an ideal toward which administrators should aspire. To a very important extent today law is the creation of administrative officials. What are the appropriate fields for administrative law- or rule-making? To what checks should it be and is it subjected? These and allied questions are also within the field to be considered here.

The American Setting

THE "RULE OF LAW"

What has been said thus far is as true of one country as it is of another. Since the government of every modern state has both laws and administration, each has its problem of deciding on the extent to which the laws should govern the administrators and, conversely, on the extent to which the administrators should make the laws or should exercise discretionary authority. The sphere to be committed to the courts is also almost sure to be a problem. But in this country

there are certain special conditioning factors to be taken into account. First of these is the doctrine of "the rule of law." Our deep-rooted devotion to this idea is illustrated by Article XXX of the Massachusetts Constitution of 1780, which establishes the separation of powers "to the end that it may be a government of laws and not of men." The idea behind this doctrine is that in some sense the regime of law—the system of laws under which we live—is complete and all-pervasive, extending to every act of government, so that no man's rights may be subject to the arbitrary whim of anyone else.

But neither a rule of law nor such a body of law as may be dignified, not to say deified, by the title "Constitution" can act of itself. Unless the law is supported by something other than the paper or parchment upon which it is written, it has little chance of prevailing when it is met by an arbitrary act. Consequently, in the Anglo-American tradition to which we belong, the courts have been seized upon as the special guardians of the rule of law. It was A. V. Dicey, an eminent English professor of law of the last century, who set forth the principle of the rule of law in what has become its classic formulation. "We mean, in the first place," said Dicey, "that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[5] It follows that everyone, regardless of his official position, and whether or not he is acting in obedience to the command of a superior, is governed by the (same) ordinary law.

[5]A. V. Dicey, *The Law of the Constitution* (8th Ed., London: Macmillan and Co., 1915) 183–84.

It must be pointed out at once that this rigid statement of the rule of law is no longer true either of England or of this country, if indeed it ever was completely true. As will be indicated in detail later on, there are countless instances in which men can be "made to suffer in goods" for breaches of law established in other ways than "in the ordinary legal manner." In fact, Dicey's formulation is so out of step with the times that an eminent justice of the United States Supreme Court attempted to restate the principle in terms which would preserve the essence of the old rule while comporting with modern practice. This revised version of the rule reads as follows: "The supremacy of the law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."[6] But it cannot be said that even this version expresses the modern constitutional doctrine on the subject. It is quoted merely to give some idea of the possible variations of the rule that still may be alleged to be compatible with the essential principle of a "government of laws, not men."

It must not be assumed that because Dicey's theory no longer fits the facts it is without influence. Far from it. The influence of Dicey's enthronement of the principle of the rule of law as he interpreted it, with its apotheosis of the ordinary court of justice, is still very much alive and active in directing—many would say "misdirecting"—the course of legal development. It is also significant that Dicey's firm belief in the great superiority of the English rule of law over the French system of administrative law—*droit administratif*—still is strongly held, especially among lawyers. It has, however, been pointed out that there are two important

[6]Brandeis, concurring in *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38 at 84 (1936).

loopholes in the Anglo-American rule of law which are unknown to the French system. These arise out of the facts that the state itself, under our system, may not be sued, and that judges are also immune from suit for acts performed in their official capacity. Careful study of the operation and decisions of the special system of courts provided in France for the application of the law to administrative officials has thoroughly upset Dicey's easy assumption that such a system would result in hardships and injustices for private citizens.[7] But the prejudice lives on and serves to haunt every new proposal for expanding the range of administrative law or for establishing administrative courts in this country.

THE SEPARATION OF POWERS

The second special conditioning factor which must be taken into account is more peculiarly American. It is also a constitutional doctrine and one that is familiar to all—the theory of the separation of powers. The Massachusetts Constitution declares: "In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers or either of them: the judiciary shall never exercise the legislative and executive powers or either of them. . . ." This formulation is more precise and explicit than will be found in the constitution of the federal government or those of many of the states, but the courts have regularly held that this meaning

[7]Among the many valuable references on *droit administratif*, the student would do well to consult the following: J. W. Garner, "French Administrative Law," 33 *Yale Law Journal* (April 1924) 597–627 (also in 4 *Selected Essays on Constitutional Law* [Chicago: The Foundation Press, 1938] 136–67); Frederick J. Port, *Administrative Law* (London: Longmans, Green & Co., 1929) Chap. VII; and S. Riesenfeld, "French System of Administrative Justice; a Model for American Law?" 18 *Boston University Law Review* (January–April 1938) 48–82, 400–32.

is implicit in all of them. Of course such a general statement must give way wherever in specific instances constitutional provisions violate the principle of the separation of powers. These violations—for instance, the executive's veto power and the senatorial power over appointments—are important but few in number.

The question of the source of this pervasive doctrine of American constitutional law need not be considered here. By scholarly tradition it is attributed to the French political theorist, Montesquieu. The fact would appear to be, however, that a goodly measure of the practice, if not the doctrine, of the separation of powers had developed in this country out of the dialectic of practical politics long before the publication of the Frenchman's treatise in 1748.[8]

However that may be, it is essential to the understanding of the doctrine to realize that it is an amalgam of two elements: one an analysis of governmental processes and the other a generalization as to human nature with particular reference to political behavior. From these two elements, plus a preference for political liberty over despotism, came the famous formula. The processes of government, it is alleged, fall naturally into three categories: legislative, or law-making; executive, or law-applying and -enforcing; and judicial, or law-interpreting. Any government, primitive or civilized, despotic or democratic, must perform these functions; and all the acts of government fall under one or another of these three heads. This is the first part of the theory.

The second part of the theory is based on the assumption that human beings seek after ever more and more power, so that there is in governments an inevitable tendency toward

[8]See Benjamin F. Wright, Jr., "The Origin of the Separation of Powers in America," 13 *Economica* (May 1933) 169–85; and Malcolm Sharp, "The Classical American Doctrine of the Separation of Powers," 2 *University of Chicago Law Review* (April 1935) 385–436 (also in 4 *Selected Essays on Constitutional Law, op. cit.* [above, n. 7], pp. 168–94).

the concentration of political power in the hands of one man or a small group of men acting as a unit. But if power can be so divided that one man's thirst for it serves as a check upon that of another, a balance may be achieved that will prevent despotism and preserve a large degree of liberty. It happened that the mere requirements of the division of labor led governments to set up separate organs more or less corresponding to the functions or "powers" enumerated above. This provided a ready-made basis for putting the theory into practice.

Both of the constituent elements of this theory have been subjected to vigorous criticism. It is contended, on the one hand, that the basic functions or powers of government are really two in number rather than three. The first has to do with the expression of the will of the people and the second relates to its execution. The first may be called "politics," and includes everything up to and including the formulation and promulgation as law of the opinion of the effective governing force of the state. The second is best known as "administration," and in addition to the general supervision of the execution of the laws it includes the judicial function of applying the law to concrete cases where controversies have arisen, and also the performance of the scientific, technical, and commercial activities of government which are nowadays more specifically spoken of as administrative functions.[9]

The orthodox classification, however, is not without its modern defenders, who contend that judicial power is just as distinct as the other two. Legislative power makes general decisions and commands, applying to a more or less numer-

[9]For the classic statement of this classification of the operations of government and also for a defense of the theory of the separation of "politics" and "administration," see Frank J. Goodnow, *Politics and Administration* (New York: The Macmillan Company, 1900) 9 ff.

ous class of cases and looking to the future as well as the present; executive power makes specific decisions and commands; and judicial power transforms the general into the specific.[10] The importance of the controversy is easily exaggerated: whether the executive and judicial powers are to be thought of as generically different or as two subdivisions of a larger whole is largely a matter of the point of view. The functions of government *might* be classified according to whether or not they are performed by men in uniform. It is more important to note that even the proponents of the twofold classification defend the practice of treating the judiciary as distinct to the extent of allowing its members a large degree of independence from control by either the legislature or the executive.

On the other hand, the second element of the theory, that of checking power by dividing it against itself, has come in for even severer criticism. It is said that political power has been so atomized that it has been destroyed. Checks and balances are appropriate only to a time and place when it can truly be said that "that government which governs least governs best." So say the critics. Nowadays, when the "new imperative" under which all governments operate involves the assumption of responsibility for the general economic, social, and political well-being of all the people, governments operating under such restrictions are hopelessly handicapped. No business organization would tolerate for a minute the cumbersome procedures by which American governments must act. And while the functions of government are quite different from those of business, it is undeniably true that the modern "service" government partakes much more of the

[10]See Carl J. Friedrich, *Constitutional Government and Politics* (New York: Harper & Brothers, 1937) Chap. XI, and especially p. 154; and Frederick Green, "Separation of Governmental Powers," 29 *Yale Law Journal* (February 1920) 369–93 (also in 4 *Selected Essays on Constitutional Law, op. cit.* [above, n. 7], pp. 195–218).

nature of a business concern than did the state at the time when our constitutional separation of powers and checks and balances were devised. Furthermore, it is urged that the development of political parties, which is of recent origin, has provided a protection against tyranny more effective than mechanical checks and balances and far more consistent with positive governmental action for the benefit of the majority. It should be pointed out, however, that it is precisely the power of the majority to pursue policies highly detrimental to minorities that is feared by the defenders of the separation of powers.

This difference of opinion cannot be resolved as easily as the one discussed above; it is more fundamental. Fortunately, however, it does not have to be resolved wholly in favor of one side or the other. Whatever may be true under totalitarian forms of government, few if any people in this country would support a complete concentration of powers in the hands of a single person or body. The question is one of degree. Furthermore, the dogmatic assertion may be made here that it is a question much more easily solved in terms of the concrete circumstances of a particular situation than in terms of the abstract.

Frequently the logic of the facts is more persuasive than abstract analysis. The last half century has seen a rapidly increasing resort to agencies of government which do in reality exercise more than one—frequently all three—of the powers of government. This development will be treated in more detail in the following chapter. Here it will suffice to give one or two examples. The instances most frequently cited are regulatory commissions, such as those to which is committed the control of public utilities—public service commissions, as they are often called. These agencies lay down general rules, issue specific commands, and adjudicate in cases of controversy with particular utility companies as to the proper

application of the law. Nor is it only boards and commissions which thus defy the separation of powers. Individual officers not infrequently have vested in them powers just as diverse. For instance, the insurance commissioner, an important official found in practically every state of the union, exercises a similar variety of functions. Professor Patterson, who has made a thorough study of this office, writes as follows: "We may as well recognize that sometimes the insurance commissioner is an official clerk, sometimes he is a judge, sometimes he is a law-giver, and sometimes he is both prosecuting attorney and hangman. He is partly executive, partly judicial, and partly legislative; and yet he is not confined within any of these categories. I defy anyone to tell me when he stops legislating and begins to judge, or where he stops judging and begins to execute."[11]

The existence of a given situation, to be sure, does not prove its desirability. Because the principle of the separation of powers is in fact disregarded, it does not necessarily follow that it ought to be. But the persistence of this tendency of political institutions to develop in defiance of the prevailing theory gradually establishes a presumption that the theory has become outmoded.

It would be entirely too hasty, however, to conclude that the theory of the separation of powers should be relegated to the scrap heap. Properly interpreted, there is plenty of life in the old dogma yet. It holds that the different powers of government should, subject to certain exceptions, be committed to separate and mutually independent organs in order to prevent the evils of despotic government. It should be clear, then, that the fundamentals of the doctrine are not endangered by allowing the powers to be mixed in certain *subordinate* agencies of government. Provided the exercise

[11]Edwin W. Patterson, *The Insurance Commissioner in the United States* (Cambridge: Harvard University Press, 1927) 5.

of the various powers by these agencies is subject to the legislature, the executive and the judiciary in appropriate cases, the principle is preserved.[12] Doubtless this line of reasoning could be pushed so far as to defeat the purpose of the original doctrine; but, short of that, it may enable the theory to serve a new day of usefulness in a world too complicated for Montesquieu's simple mechanism.

The effects of the doctrine of the separation of powers have thus far been referred to in only the most general way. One of its consequences is that courts may not be charged with functions which are "administrative" rather than judicial. It is on this ground that the Supreme Court of the United States has generally refused to allow Congress to vest in it or in any of the federal "constitutional" courts powers which are not judicial in nature.[13] Thus the Court will not render advisory opinions because it is held that the judicial power is confined to rendering "legally binding judgments." Nor would the Supreme Court hear appeals from the Federal Radio Commission as to the exercise of its discretionary power to grant or withhold broadcasting licenses, until the statute was amended to limit the scope of review in such a way as to make clear that the Court was not called upon to exercise administrative discretion. Similar decisions are to be found in the field of state constitutional law. Thus an Illinois old-age assistance act attempted to provide that dissatisfied applicants for assistance could go to court and obtain a judicial determination as to their

[12]See also Chap. VI, n. 13.

[13]It is true that these decisions frequently find support for their definition of "judicial power" in the reference in Article III of the Constitution to "cases" and "controversies." However, the Court's original insistence that no powers other than "judicial powers" may be given to the "constitutional" courts finds support in the doctrine of the separation of powers. See, for instance, the opinion written by Chief Justice Taney in *Gordon* v. *United States*, 117 U.S. 697.

right to assistance and the amount they should receive. The Illinois Supreme Court declared this portion of the act void on the basis of reasoning similar to that used by the United States Supreme Court in the broadcasting case. The court remarked that whether an applicant is eligible for assistance or not "is a question to which a categorical affirmative or negative answer is rarely possible."[14] The insurance commissioner also provides us with an interesting example: in some states provisions for full judicial review of this officer's rate-fixing power have been declared void on the ground that such a power was legislative in character.[15]

Although these consequences tend to free administration from judicial supervision, the most important effects of the doctrine are in the opposite direction. For instance, there is the doctrine that legislative power cannot be delegated, a corollary of the principle of the separation of powers. A full exposition of it must be reserved for a later chapter.[16] Suffice it to say here that in this country, in applying the principle of the separation of powers, the courts have placed limits upon the extent to which legislatures may delegate to administrative agencies their lawmaking power.

Most important of all, the doctrine of judicial review itself rests in part upon the theory of the separation of powers.[17]

[14]*Borreson* v. *Department of Public Welfare*, 368 Ill. 425 at 431 (1938).

[15]Such a provision has been upheld, however, in Massachusetts.

It should be pointed out that the courts in this country, both federal and state, regularly exercise certain administrative functions. A notable example is furnished by court appointment and supervision of receivers-in-bankruptcy. Such situations, anomalous from the point of view of the separation of powers, probably escape judicial censure because they are sanctified by tradition, dating back to a period long before the theory of the separation of powers was accepted or had even been enunciated.

[16]Chapter IV.

[17]See Robert K. Carr, *The Supreme Court and Judicial Review* (this series). The concept of administration as in some way distinct from the executive appears to arise out of the fact that many administrative agencies

It is this doctrine which puts the courts in a position to decide what administrative devices and practices do and what do not accord with this theory. Thus the doctrine of the separation of powers is made to fit in very closely with the strict version of the rule of law, toward which the courts tend to be prejudiced both by training and natural inclination. That is, the courts are placed in a position to insist, if they like, that all judicial functions should be performed by ordinary courts of justice rather than by administrative agencies.

The courts are not wholly blind, however, to the practical exigencies of government. In fact they frequently exhibit a remarkable ingenuity in the art of putting new wine into old bottles. They have accommodated themselves to a spectacular growth of agencies and practices which seem to defy both the separation of powers and the strict formulation of the rule of law. Unfortunately for the student, they have frequently proceeded by means of such juristic formulas as "quasi-judicial" and "quasi-legislative," which for analytical purposes are often more confusing than helpful.

OTHER FACTORS

Finally, in addition to these constitutional and doctrinal factors, there are certain practical considerations which must be taken into account in studying the problem of law and administration in the United States. Chief among these is the fact that until recently the functions of government have been few in number and confined to relatively simple tasks. "Administration" in its modern connotation hardly existed before the Civil War. Now it plays such an important role and so obviously does violence to a strict application of the separation of powers that it is frequently referred to as a

exercise powers which partake of the nature of legislation and adjudication and also out of the fact that they receive these powers from and are themselves established by the legislature.

"fourth branch of government."[18] It should not be a matter of surprise that such a rapid development has produced results that cannot be described as orderly or systematic, either from the point of view of constitutional doctrine or from that of political theory.

Summary

So far we have examined tentatively the nature of the problems involved in administration under a regime of law, with particular reference to this country. Essentially they derive from the universal problem of bridging the gap between the general and the particular. A general rule cannot be equally applicable to all cases; but unlimited discretion is the definition of despotism and the essence of tyranny. That is the problem in a nutshell. It always exists in some degree, but under the conditions which prevailed in this country in the nineteenth century it was not a major issue. The framers of our state and federal constitutions had solved the problem for that period remarkably well. It remains to be seen whether these frames of government can be adapted to the needs of the twentieth century. The positive government of a dynamic, industrial society, such as we have today, must be strong, active, and flexible. Democracy, if it is to endure, must meet the challange of totalitarian regimes

[18]The phrase was used by the President's Committee on Administrative Management to refer particularly to the independent regulatory commissions. The committee called them "a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence," it continued, "to the basic theory of the American Constitution that there should be three major branches of the Government and only three." President's Committee on Administrative Management, *Report with Special Studies* (Washington, D.C.: Government Printing Office, 1937) 40. For a fuller discussion of administration as "a distinct branch of government," apart from legislative, executive, and judicial, see W. F. Willoughby, *Principles of Legislative Organization and Administration* (Washington, D.C.: The Brookings Institution, 1934) 8–9.

claiming to be more efficient. Human and technological imperatives[19] demand a government which will perform new tasks and perform them well. This demand must and will be met. The question is whether or not it will be met in a fashion which is compatible with freedom and democracy. If we would preserve the liberal-democratic way of life, we must find means for allowing wide range to administrative discretion without permitting the exercise of power to become arbitrary or irresponsible.

[19]See Ernest S. Griffith, *The Impasse of Democracy* (New York: Harrison-Hilton Books, Inc., 1939), especially Chaps. II and III.

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Chapter II

The Trend of Events: Fact versus Fiction—I

THE large-scale development of administrative agencies combining two or more of the traditional powers of government, or exercising powers which defy the orthodox classification, is, as has been indicated above, a comparatively recent phenomenon. In this chapter and the next we shall describe that development in considerable detail and consider its implications for the rule of law. First, however, it is well to recall that administrative power itself is not new, even in this country. The developments to be traced here consist partly in the growth to immense proportions of functions and activities which have long been carried on in lesser degree, partly in a shift of administrative activities and agencies from local to central government, and partly in a change in the nature of administration.

Nature and Development of Administrative Discretion

Administrative discretion, it should be observed at the outset, may be exercised either as enabling power or as directing power.[1] In the first case, it is a matter of granting

[1]On the whole subject of discretionary authority and the police power, see Freund, *Administrative Powers over Persons and Property, op. cit.* (Chap. I, n. 3), and Leonard D. White, *Introduction to the Study of Public Administration* (New York: The Macmillan Company, 1939) Chaps. XXXI and XXXII.

permission to do something which would otherwise be proscribed. This generally takes the form of the issuance of a license or a permit. In the second case, the administrative officer requires the private individual to take certain action. He does this by issuing an administrative order, as it is called. In either case, the administrative authority sometimes issues general rules establishing the conditions under which particular orders will be issued or licenses granted. This is referred to as the rule-making authority.

TRADITIONAL SCOPE OF ADMINISTRATIVE POWER

From time immemorial judicial and administrative functions have often been lodged in the same persons. This used to be the case with the justice of the peace, but now he has been relieved of nearly all but his judicial functions. Courts, too, were frequently charged with nonjudicial functions, such as the administration of trusts, the laying out of roads, and the appointment of constables; but this practice is being gradually curtailed. The power of appointing guardians and receivers remains as a vestige of the former state of affairs. Although the agencies which are primarily judicial are tending to lose their administrative functions, as will presently appear, it does not follow that administrative authorities are ceasing to perform functions which partake of the nature of the judicial.

For centuries the exercise of the general police power of the state—the power, that is, to look out for and protect the health, safety, morals, and general welfare of the community—has involved the granting of discretionary authority to administrative officials. Market inspection to establish the quality of certain kinds of food and to enforce sanitary regulations constitutes an early example of this type of administration which was widely adopted among the American states. The standards by which inspectors are governed may

be so precise that there is no problem of controlling the exercise of discretion within the law. Such would be the case, for example, with inspection of weights and measures. More frequently, however, the standard of public policy laid down for the guidance of the administrative officer allows for more latitude, as in the case of food inspection. These laws are generally supported by provisions for positive enforcement of certain minimum standards. When inspection reveals that the standards are not being met, the enforcement agency is called into action. But this is not universally the case. Publication of the results of inspection is sometimes sufficient disciplinary action. This may take the form of marking food, for instance, with a definite grade. The effectiveness of inspection alone is even greater in the case of certain modern regulatory agencies which deal with economic activities, such as the sale of securities, which must enjoy the confidence of the public.

Another traditional type of discretionary administrative power—this time one definitely involving direct control—is that of administrative licensing. In fact, this type is often combined with provisions for inspection. The degree of discretion left to the licensing authority is sometimes almost limitless and sometimes almost nonexistent. Among the earliest uses of this power is its application to the learned professions. Thus the state of New York for over one hundred years has made the practice of medicine contingent upon the securing of a license. Although the present law sets forth in considerable detail the state requirements regarding educational and other qualifications for admission to the examination for the license, a considerable range of discretion still remains to administrative officers, not only in drawing up and grading the examinations but in interpreting many of the standards laid down in the act. The sale of alcoholic drinks has long been considered so intimately related to the morals

and good order of the community that it is subject to the discretionary regulation of some official in the community. State laws providing for the licensing of restaurants supply another example of this common power. Thus the Massachusetts statute requiring "common victuallers" to be licensed provides that licensees must at all times be provided with "suitable food for strangers and travelers," must have on their premises "the necessary implements and facilities for cooking, preparing and serving food," and must not conduct their business "in an improper manner." There are no other express qualifications, but the law adds that licensing authorities need not grant a license "if, in their opinion, the public good does not require it."[2]

The exercise of police power may take the directive as well as the enabling form. In this form also it may involve a wide range of administrative discretion. Public health legislation frequently confers upon some administrative official the power to issue orders requiring the abatement, removal, or discontinuance of what are believed to be sources of disease. As early as 1852 a federal statute gave steamboat inspectors the power to direct the making of specified repairs. This replaced the ineffective provision of earlier legislation designed to protect seamen against unseaworthy ships, legislation which relied entirely upon judicial action without administrative aid. So common, in fact, has the directive exercise of administrative authority become that the administrative order is now an integral part of the machinery for administering most regulatory legislation.

Aside from the police power, the conduct of the business of government itself often calls for the blending of judicial

[2]Fritz Morstein Marx, "Comparative Administrative Law: A Note on Review of Discretion," 87 *University of Pennsylvania Law Review* (June 1939) 954–78 at 956–57.

and administrative functions. Thus revenue legislation in the past has been, and still is, a prolific source of broad administrative power. The standards of valuation by which tax assessors and customs appraisers are presumed to be governed are somewhat more exact than those which are provided in many police power regulations. But this difference may be more apparent than real, for courts habitually treat the rulings of such officers as virtually conclusive. Thus if taxing officers appraise property for more than it can in fact be sold for, that is generally within their power and the courts are loath to intervene.[3] The dispensing of public lands, and of pensions, unemployment compensation, and the like, the control of immigration and the administration of the deportation laws all furnish additional instances in which administrative authorities not only interpret the law in the first place but also settle controversies arising out of such interpretation.

An important distinction with reference to these administrative powers remains to be made. Ordinarily they must stop short of the exercise of force against persons or property. If the end in view cannot be attained without the use of force, it is necessary to resort to the courts and obtain judicial warrant for such action. There are, however, a number of exceptions to this rule, where administrative officers possess what are known as "summary powers." Such exceptions are recognized at common law in a variety of cases where the need for prompt action is controlling or where the demands of the government are considered to be supreme. In most jurisdictions there have been various statutory enlargements of such authority. Summary powers are provided with regard to immigrants, and, in certain cases, for the control of

[3]See below, pages 168–69. There is generally an administrative review by a tax equalization board, or its equivalent. Some states make special provision for judicial review.

navigation (a ship which has been denied clearance papers may be forcibly detained from leaving the port). The collection of revenue is another function in support of which summary powers are supplied. The property of delinquent taxpayers may be seized by the government without resort to judicial process. Statutes frequently provide for summary action in abating or removing nuisances where there is imminent danger to the health or safety of the public.

NEW APPLICATIONS OF ADMINISTRATIVE POWER

Most of the examples of administrative power noted above have been known to the law for a long time. But the number of instances in which governments have come to rely upon this method has multiplied in recent years. In the law as elsewhere there is an increasing resort to prevention. Better to prohibit the use of an automobile to a man whose vision is faulty than to take action only after he has injured or killed someone. Not only are most professions now subject to a state licensing system, but also many other technical occupations are subject to administrative control as to the applicant's qualifications. In some states even "hairdressers" are placed in this class. The federal government has also resorted to this device. The licensing of ships and seamen, for instance, has been required almost since the beginning of the republic. Much more recently the erection of dams for the production of hydroelectric power on the public domain and in navigable rivers, and the commission men in the great livestock markets of the country and on the grain and other commodity exchanges, have also been subjected to federal regulation by this means. So also with broadcasting, the sale of securities, the operation of interstate bus and truck lines, and the sale of munitions abroad.

This expansion of discretionary authority has pushed the frontiers of administrative regulation into new areas. It is

no longer merely a question of the multiplication of situations similar to those which called forth the use of discretionary power in the last century. Nor is it only a matter of transferring to the state or federal governments functions that were once performed locally. Governments have extended their regulations much further into the territory which used to be known as "private." In the regulation of the relationships between employer and employee, for example, they have ventured into "social-conflict" situations with a view to much broader considerations than the old traditional objects of police legislation—health, safety, and morals.

This introduces a whole field of governmental activity that has grown rapidly in recent years and which uses many devices besides inspection and licensing. Most instances of this kind involve extensive grants of discretionary powers. Thus early in the history of American railroads it was found necessary to submit their charges and certain other practices to governmental regulation. At first this function was performed by the states. In some cases the legislatures attempted to put in statute form the complete code of regulation. This method entailed the minimum of "administration," all questions of interpretation being settled by the courts. Other states soon felt the need for a more flexible and a more expert method of dealing with such a complicated problem. Consequently they committed the administration of their regulatory statutes to specialized commissions which were granted a certain amount of discretion in the administration of the law. Soon, however, the problem proved too vast for the states to cope with successfully, regardless of their method. As the railroad system was national in scope, so also it proved expedient to commit the regulation of that system to the national government. When, in 1887, the federal government assumed this responsibility, it profited

by the experience of the states and had resort to the administrative method of handling this complicated task. That is, it did not merely lay down general rules the violation of which was to be enforced in the traditional fashion, by resort to the courts, but it established the Interstate Commerce Commission to supervise, and implement, the rules laid down by Congress. The powers of the commission were neither purely judicial nor purely legislative, but combined some of each along with executive powers. In short, the commission was given broad "administrative" powers.

It is interesting to note that this development encompasses all three of the varieties of growth of administrative power enumerated at the beginning of this chapter. Public conveyances had long been subjected to a certain amount of governmental regulation. The coming of the railroads and the extension of regulation to them tremendously enlarged the field for such control and the attendant "administration." The increased complexity of the problem resulted in the delegation of discretion to a body of experts—a change in the nature of administrative activity. Finally, the shift to centralized control increased the power, and hence the importance of the administrative agency concerned.

When the federal government first decided to legislate on the "trust" problem, it did so in the way that had been in use by the states up to that time: legislative prohibition of certain practices without any specialized administrative machinery to enforce the prohibition. This was the method employed by the famous Sherman Antitrust Act of 1890. But after more than twenty years of rather unsatisfactory experience with this act, the second great federal regulatory commission was established in an effort to make our antitrust policy more effective. This was the Federal Trade Commission, created in 1914. This agency was given authority to make investigations, adjudicate controversies, and issue

orders to businessmen to "cease and desist" from certain practices.

Since then both the states and the federal government have had occasion to create agencies—generally commissions, but not always—for this kind and similar kinds of regulatory activity, in ever-increasing number. In a sense, it may be said that these regulatory bodies are little subordinate governments in themselves, containing all the usual governmental powers combined in one agency. The qualification "subordinate" must be emphasized, however, for these bodies are always subject to control by the government which creates them. Among the most important federal regulatory agencies are the following:

Interstate Commerce Commission (1887)
Federal Trade Commission (1914)
U.S. Shipping Board (1916), replaced by the U.S. Maritime Commission (1936)
Federal Power Commission (1920)
Secretary of Agriculture acting under the Packers and Stockyards Act (1921)
Federal Radio Commission (1927), replaced by the Federal Communications Commission (1934)
Securities and Exchange Commission (1934)
National Labor Relations Board (1935)
Commodities Exchange Commission (1936)
Civil Aeronautics Authority (1938), title changed to Civil Aeronautics Board (1940)

It is notable that nearly half of these agencies have been created since 1933. In part this reflects the recent and rapidly growing need for this type of control. It is also symptomatic of the fact that prior to the New Deal such functions, when performed at all, had generally been left to the states. Recently, however, the expansion of federal power, especially by means of the liberalized interpretation of the commerce

clause,[4] has made possible the enactment of federal administrative controls where previously they appeared to be forbidden by the Constitution. Similar lists for most of the states would indicate a more gradual development over a longer period of time. The following agencies are typical of those which would be found on such lists: industrial accident commission, public utility commission, insurance department, banking commission, board of game commissioners, water and power resources board, milk control board, securities commission, aeronautics commission.

An enumeration of some of the legislative standards provided by law for federal regulatory authorities will give some conception of the range of administrative discretion that is committed to them. They include "reasonable rates," "public convenience and necessity," "unreasonable discrimination," "action necessary or desirable in the public interest," "adequate facilities and services," "maintenance of a fair and orderly market," "manipulative or deceptive devices," "unfair methods of competition," "unfair labor practices [which] interfere with, restrain, or coerce employees [or] dominate or interfere with any labor organization."[5]

Governmental participation in business or commercial enterprise operates still more to mix governmental powers and the bestowal of wide discretionary authority.[6] Examples

[4]See Robert K. Carr, *The Supreme Court and Judicial Review* (this series).

[5]Robert M. Cooper, "Administrative Justice and the Role of Discretion," 47 *Yale Law Journal* (February 1938) 577–602 at 582. This whole number of the *Journal* is devoted to the subject of administrative law and it contains several valuable articles.

[6]The case of *Springer* v. *Philippine Islands*, 277 U.S. 189 (1928), well illustrates the anomalous situation from the point of view of the separation of powers which arises when governments, using the device of the corporation, embark upon business enterprises. The Philippine legislature had created the "National Coal Co.," practically all the stock of which was subscribed to by the governor general on behalf of the government. The act provided that the voting power of this stock should be vested exclusively

are numerous. One thinks first of the post office and of municipal gas and electric plants. Public waterworks, street-car lines, and even gasoline stations are also on the list. Today the federal government alone has set up over ninety governmental corporations, most of which are in the nature of business undertakings and all of which involve the delegation of extensive administrative power. The problem with which we are specifically concerned—that of the control of administration by law—does not arise in such acute form in the case of these agencies, however, because of the comparative absence of any private rights which can be injured.[7] It is administration as manager rather than as regulator which is here involved.

SIGNIFICANCE OF RECENT DEVELOPMENTS

Thus it is apparent how the great increase of governmental activity and the exercise of powers of government hitherto unexercised have rendered the old separation of powers doctrine increasingly difficult to apply and have brought to the front the problem of the subordination of administration to law. The fact is that the profusion of powers has led to the confusion of powers.

in a committee, consisting of the governor general, the president of the Senate, and the speaker of the House of Representatives. In a rather embarrassed and awkward opinion, the Supreme Court of the United States decided that the power to vote this stock was clearly neither judicial nor legislative and that therefore it must be executive (thus assuming that all governmental power must be one of the three). Therefore the act was void because it vested executive power in the hands of officers of the legislature. Justices Holmes and Brandeis protested in vain that it was impossible to "carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments." *Ibid.*, p. 211.

[7]Persons whose business is injured by competition from a government enterprise do not constitute an exception because they have no legal right to be free from such competition. *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118 (1939).

This situation is not so bad as it sounds—or as it can be made to sound. In fact there are many ways by which the new and invaluable tools of government can be kept from invading legitimate rights. But it is also clear that the combination of the various powers into one agency without the proper safeguards may be very dangerous indeed. An example is the horse racing division of the Department of Taxation and Regulation of the state of Rhode Island. Even in controversies in which large financial interests are at stake, the chief of this division who is appointed by and responsible to the governor, together with his two subordinates, acts substantially as a court. He has even served in this capacity in cases where both the governor and the chief himself were far from being disinterested bystanders. The division also exercises important rule-making powers and performs a variety of executive functions such as the employment of inspectors, the issuance of licenses, and the collection of taxes. It is no mere theoretical statement to say that this situation invites abuses. In a recent *cause célèbre* this union of powers was used, in defiance of elementary principles of justice, to prosecute a personal feud between the governor and a race-track manager.[8]

Finally, we should remind ourselves of the point made at the outset of this section—that substantially unfettered administrative discretion is no new thing, although the occasions for its exercise have multiplied. What is new is that such discretion is now frequently reposed in agencies of government having many more persons and far larger material interests within their ambit than was the case with the policing authorities of earlier days. Among the new developments also

[8]For a full account of this amusing and instructive episode, see Zechariah Chafee, Jr., *State House versus Pent House: Legal Problems of the Rhode Island Race-Track Row* (Providence, R.I.: The Booke Shop, Dorr Pamphlet No. 1, 1937). Never was a better situation offered for a comic treatment of a serious subject, and Professor Chafee makes the most of it.

is the fact that private property rights, which have always been recognized to be held subject to the requirements of the health, safety, and morals of society, are now regulated with reference to the general welfare more broadly considered. Men who willingly concede that the practice of the law should be conditioned upon a demonstration of competence and good character often "view with alarm" the application of the preventive technique to, say, the sale of securities. The alterations in the type of agency exercising administrative discretion and in the kind of issues entrusted to them constitute the changes in the nature of administration referred to at the beginning of the chapter. The centralization in the federal government of functions previously performed locally, as in the case of railroad regulation, has also served to focus attention upon administration.

Administration as Lawmaker

DEFINITION AND CLASSIFICATION OF ADMINISTRATIVE LEGISLATION

Nowadays, in the exercise of the discretionary powers which have been committed to it, the administrative branch of the government makes wide use of the device of issuing general rules and regulations.[9] This is known as administrative rule making or administrative legislation, and is also referred to as sublegislation or delegated legislation. The resulting rules are prospective in effect; that is, they look to acts as yet

[9]On this whole subject, consult James Hart, *The Ordinance-Making Powers of the President of the United States* (Baltimore: The Johns Hopkins Press, Johns Hopkins University Studies in Historical and Political Science, Series XLIII, No. 3, 1925); John P. Comer, *Legislative Functions of National Administrative Authorities* (New York: Columbia University Press, 1927); Frederick F. Blachly and Miriam E. Oatman, *Administrative Legislation and Adjudication* (Washington, D.C.: The Brookings Institution, 1934); and James Hart, "The Exercise of Rule-Making Power," in the President's Committee on Administrative Management, *Report with Special Studies* (Washington, D.C.: Government Printing Office, 1937) 309–55.

unperformed, and apply to a class of acts rather than to a single act. Thus they are to be distinguished from administrative judgments and certain kinds of administrative orders, but it is not necessary or perhaps even possible to draw the line with precision. For our purposes we may define rule making as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations."[10] Administrative rule making is thus the issuance of such regulations by an administrative agency. Unfortunately there is no consistency in the use of terminology in this field. The products of administrative legislation are known variously as "rules," "regulations," "rulings," "administrative orders," and "proclamations." Distinctions are made from time to time among these terms, but none of them is consistently adhered to. Some administrative legislation has exactly the same force and effect as the laws under which it is issued. Other types have legal effect but are backed by milder sanctions than the main body of the law. Still others have no legal force whatsoever,

Broadly speaking, administrative legislation is either contingent or supplemental in character. The first type is less common than the second but may be of great importance. It covers those cases in which someone, usually the chief executive or a department head, is given the power to bring certain legislative provisions into effect when he finds that a specified situation exists. It is perhaps most frequently used in the field of foreign relations, especially with reference to commercial intercourse. Under the Neutrality Act of 1935, for instance, the major provisions of that law were to become effective upon a finding by the President of the United States that a state of war existed between two or more

[10]Ralph F. Fuchs, "Procedure in Administrative Rule-Making," 52 *Harvard Law Review* (December 1938) 259–80 at 265.

foreign countries. Other provisions were to come into force when the president found that the aim of keeping this country out of war would be served thereby. Similarly, under the "antidumping" provisions of our tariff legislation, if the Secretary of the Treasury finds that exporters of foreign goods sold in this country are being directly or indirectly subsidized, he may levy special compensatory duties upon them. Thus on March 18, 1939, Secretary of the Treasury Morgenthau invoked the provisions of this act against Germany. Supported by an opinion by the attorney general, he declared that Germany was in effect granting subsidies to her exporters by her use of "blocked" marks and other financial devices. Consequently, he decreed an increase of all duties on imports from Germany by 25 per cent of the normal rates. Another flexible provision of our tariff legislation was invoked in February, 1931, when Secretary of the Treasury Mellon placed an embargo on the importation of Russian pulpwood on the ground that it was being produced by convict labor.

Supplemental regulations may be subdivided as to type. Many of them deal solely with the internal organization and functioning of the governmental machinery. This type of regulation usually affects only government employees. In general supplemental regulations do not involve important problems of the subordination of administration to law and they will not be further discussed here. Others deal with the procedures to be followed in certain dealings between private citizens and the government agency in question. Thus the various regulatory agencies ordinarily publish their "rules of practice and procedure." In some cases these provide in great detail the exact steps to be followed both by the government and by the private individual in the proceedings concerned.

Another type of regulation, one which is of great impor-

tance and is widely used, is the interpretive ruling or regulation. As the name implies, this is an administrative interpretation of law. To quote Freund, "A ruling does not, like other regulations, deal with matter left open for variable disposition, but defines the meaning of statutory terms and provisions."[11] This type of regulation might be denied to be of "legislative" character, because normally and in the strictest sense, it has no legal force. But such interpretations are very helpful in enabling persons affected by an act to know what action to expect on the part of the enforcing authorities. And they are of great practical consequence, for even though they may strain the interpretation of the law, they may never be contested before the courts and so they remain for all practical purposes legally effective. Furthermore, the courts themselves consider the administrative interpretations when they are called upon to interpret the law, and incline to give them some weight. There are even cases in which the statutes give the administrative rulings qualified legal status by making them binding upon administrative subordinates or successors in office, until they are reversed or modified.

Finally, there are what might be called the substantive regulations. These go beyond matters of procedure and, by determining the content or substance of the legislation, affect the rights, duties, and interests of private citizens directly. They represent administrative legislation in its highest form. Here would come rules governing the licensing of aircraft, regulations concerning the conditions under which milk may be produced for sale, and administrative restrictions upon the conduct of stock exchanges. It is this category of the rule-making power with which we are chiefly concerned here.

[11]Freund, *op. cit.* (Chap. I, n. 3), p. 215.

EXTENT OF THE RULE-MAKING POWER

There are said to be well over 100 federal administrative agencies exercising a rule-making power which affects private individuals. The American Bar Association's special committee on administrative law stated in 1936 that there were at that time approximately 1,300 instances of delegated legislative power in the federal statutes, and that as of January 1, 1935, there were in the neighborhood of 192 instances of power conferred upon an administrative agency to make regulations "to carry out the purposes of the Act."[12]

Except for instances of contingent legislation, this is chiefly a recent development. Even now one cannot tell from the mere existence of a specified authority to make regulations "to carry out the purposes of the Act" how extensive a grant is really involved. This is because Congress still follows the American practice of writing all sorts of legislative and even administrative detail into the laws themselves—material which most European legislatures would never dream of incorporating into their statutes. Under such circumstances there may be very little room left for the exercise of discretionary authority. Rule-making power may be provided for chiefly to take care of contingencies which the legislature has overlooked. Nor is a cursory glance at the compilations of rules and regulations issued by the various agencies sufficient to reveal the extent of substantive administrative legislation. For not only are many of the regulations "internal" and procedural in nature, but also many do little more than restate in clearer and slightly more explicit terms the provisions of the acts. Many so-called regulations, too, such as most of those of the Bureau of Internal Revenue are really interpretive rulings.

[12]61 *Reports of the American Bar Association* (Chicago: The Association, 1936) 769 at 778.

When all these qualifications are made, however, it still remains true that the volume of substantive administrative legislation is very great, many times exceeding that of the statutes from which such administrative regulations derive their legal basis. Thus the Securities and Exchange Commission alone has issued regulations covering more than two hundred pages. Perhaps the best way for the student to appreciate something of the extent and nature of these regulations is to thumb through the pages of *The Code of Federal Regulations,* or of a volume of *The Federal Register,* in which all such rules and regulations must be published as issued. A mere perusal of the index of one of these volumes is highly instructive. There one will find, under the Department of Agriculture, for instance, all sorts of regulations setting forth the conditions under which benefits will be paid to farmers under the agricultural conservation program. There too appears the determination of the price to be paid for sugar in Louisiana by processors who, as producers, apply for benefits under the Sugar Act of 1937. While theoretically these regulations do not affect private rights because they can be avoided by the simple process of foregoing federal benefits, that statement is not true of the regulations issued under the Perishable Commodities Act—seven large pages of fine print setting forth the requirements governing dealers in such commodities—or of the sometimes long and detailed marketing regulatory orders. Various quarantine regulations also belong to the compulsory category.

Proceeding down the alphabet one finds in quick succession regulations concerning the extension of credit by stockbrokers (margin requirements), promulgated by the Board of Governors of the Federal Reserve System; air traffic rules and many other regulations governing civil aviation, such as minimum specifications of airworthiness for airplanes;

general rules and regulations regarding the construction and equipment of passenger and freight vessels; a system of uniform accounts to be used by telephone companies; rules and regulations governing the marketing of bituminous coal; regulations governing the transportation of explosives on interstate common carriers and fixing the maximum hours of service for employees of motor carriers; geographical and occupational variations from the minimum wage and maximum hour standards provided by the Fair Labor Standards Act of 1938; a series of presidential executive orders certain of which are in the nature of general regulations, such as those relating to the civil service; and a revision of the regulations governing the adjudication of veterans' claims.

A similar situation exists in the states. There, too, the extensive resort to delegation of legislative power is a comparatively recent development, being largely a product of the modern regulatory type of legislation. In the main, it is a twentieth-century development. Its utility first became apparent in the field of health legislation, where it was used, for example, in the establishment of quarantines. Later the regulation of public utilities, and the broad and ever-broadening field of labor legislation furnished opportunities for its use. Today laws relating to milk production and distribution, the conservation of natural resources, and the provision of public services all generally require implementation by administrative rules and regulations.

The developments in the field of labor legislation have perhaps been most striking.[18] The movement began in Massachusetts, in 1907, when, following two serious boiler explosions, the legislature provided for the 'administrative formulation and promulgation of safety regulations. Other

[18]See the full treatment of this subject in John B. Andrews, *Administrative Labor Legislation* (New York: Harper & Brothers, 1936), on which the statements in the text are largely based.

states soon followed suit. It was found that safety laws written in general terms were not uniformly or strictly administered. On the other hand, laws which attempted to specify regulations in detail often resulted in great hardships in particular cases. They also became obsolete in a very short time. In 1911 Wisconsin went a step further than Massachusetts by delegating to its Industrial Commission broad rule-making powers covering a large part of the field of labor legislation. This example was taken up by others, so that by 1935 twenty states had similar legislation on their books. Some measure of authority to issue legally enforceable administrative regulations in the field of labor legislation is granted in over thirty states.

Typical of the safety codes resulting from such delegations are the following titles: "engine safety orders," "general lighting safety orders," "mine safety orders." Twenty-five of these have been adopted by the California Industrial Accident Commission, for example. The same state has issued codes governing wages and hours and related matters for a varied list of industries. Unemployment compensation commissions determine by regulation such important matters as whether employers must report earnings records for all employees or only for those who become unemployed, the means by which persons claiming benefits must prove that they are unemployed and able and willing to work, special provisions for part-time workers and seasonal workers, and many other matters. In Kansas the state social welfare board has the power "to determine the general policies relating to all forms of social welfare which are administered or supervised by it, and to make the rules or regulations therefor," subject only to the proviso that "no rule or regulation shall be adopted which will require partiality. . . ."[14]

[14]"Legislative Functions of Administrative Agencies," preliminary report of the Research Department of the Kansas Legislative Council (November

INEVITABILITY OF RULE MAKING

The general reasons for the development just described have already been set forth. Perhaps the very enumeration of the uses to which administrative rule making is put would be sufficient to indicate the inevitability of the trend. Attacks upon the general practice of delegating legislative power fly in the face of necessity. Anyone who cares to criticize the growth of governmental regulatory activity may, but such criticism ignores the fact that in practically every case governmental interference has been prompted by abuses so striking that their continuance could hardly be tolerated.

Superficially, a more tenable position can be maintained by attacking the substitution of positive regulation in behalf of the general welfare for the indirect promotion of the latter by the adjustment of private rights.[15] Indeed, the only real alternative to the current increase of administrative legislation would be a return to a much more individualistic legal system than we now have. But here, too, a glance at the facts is sufficient to indicate the unreality of the proposed alternative. Administrative legislation is no mere accidental excrescence upon the modern body politic; it is an inevitable part of modern government. The method of regulating individual activities by establishing rights which will enable other individuals to bring suit against them in the courts, under certain conditions, is founded upon assumptions which are outmoded. This theory is based, for instance, upon the assumption that all individual acts which are harmful to the public will be so obnoxious to some individual that

1938, mimeographed) 18. See this whole pamphlet for a case study of administrative legislation in a particular state.

[15]This is the method strenuously advocated by Walter Lippmann. See his *The Good Society* (Boston: Little, Brown & Company, 1937) Chaps. 12–13.

he will take it upon himself to sue the offender. But an automobile which is parked so as to obstruct traffic should be removed *before* it has become the source of injury to some other motorist. Nor can the requirements for the regulation of parking in a great metropolis be met by statute alone. Rather, some administrative agency must have the authority to make and alter the parking regulations. The same complexity which makes it impracticable to rely upon individual suits for enforcement also requires that the regulations must permit easy adjustment from time to time to fit changing conditions. Similarly, as appeared above, the use of the rule-making power in the administration of safety laws is the only alternative to uncertainty as to the law and inequality in its administration.

ADVANTAGES

Administrative legislation is inescapable. Moreover, it should not be thought of as an evil, even though a necessary one. It possesses many and important practical advantages. In summary, these advantages may be enumerated as follows: it saves the time of the legislature; it makes possible regulation of highly technical matters by those who are competent to handle them; and it makes the law flexible. These advantages will now be considered in some detail.

First of all is the matter of the time of the legislature.[16] When it is considered how crowded our legislative calendars are today, it is apparent that it would be out of the question to multiply the volume of legislative output to the extent that would be required to encompass the ground now covered by administrative legislation. If the attempt were

[16]For a discussion that has become classic of the proper province of the legislature, see John Stuart Mill, "On Representative Government," in *Utilitarianism, Liberty and Representative Government* (New York: J. M. Dent and Sons, Everyman's Library No. 482, 1910).

made, either many important matters would be completely neglected or vague legislative standards would be left to the courts to interpret and apply, thus imposing an impossible burden upon them. Imagine, for example, the task of a court which had to apply laws providing that all machinery must be "so constructed and maintained as to comply with reasonable standards of safety"!

The example just cited suggests an even more important reason why such matters cannot safely be left either to legislature or judiciary. They are highly technical. In many cases, such as the prescription of safety standards of bridges, it is unthinkable that anyone but a person trained in the particular technique or science involved, and devoting his full time to that subject, could be charged with the task of formulating the regulations designed to accomplish the broad policy laid down by the legislature. Similarly, one dreads to think what sort of an accounting system the various public utility corporations of the country might have to struggle with if they were prescribed by Congressmen and state legislators! Congress may decide that it wishes to outlaw "manipulative practices" upon the stock exchanges of the country; but such are the intricacies of the stock market game that the Securities and Exchange Commission with a staff of experts requires months to work out an adequate implementation of this provision.

Furthermore, flexibility in the law is often of great value. The specific means required for the attainment of given ends has a way of varying from time to time. The banning of certain "manipulative practices" may give rise to others which the inventive genius of speculators had not evolved until necessity knocked at the door. Edmund Burke long ago observed that the prohibition of evil practices may give rise to new evils. While the great "philosophical conservative" meant this as a caution for eager reformers, the modern

student of the science of government is more likely to use it to point a different moral. The answer, he will say, is to provide the means of meeting each new contingency as it arises.

Other kinds of future developments than the invention of "dodges" by those against whom legislation is directed may arise to plague the administrator. Railroad rates must change with changing economic conditions, safety appliance requirements must keep up with advancing technology, Federal Reserve System rediscount rates must be altered with the progression of the business cycle, and the outbreak of an epidemic may call for revised health regulations. Frequently the urgency of the need, not to mention other considerations, demands administrative action. Variations may need to be local as well as temporal. Rediscount rates vary from one Federal Reserve district to another. The highly involved "marketing orders" which the Agricultural Adjustment Administration is now promulgating for certain agricultural products apply only to specified market areas. Japanese beetle quarantine areas—to take but a single instance—must be designated and redesignated from time to time as the pest shifts its locale.[17]

In short, the exigencies of modern government require a high degree of flexibility. Sometimes these exigencies require

[17]Any great national emergency tends to call forth new delegations of legislative authority. The periods of the Napoleonic Wars, of our own Civil War, and of the World War brought great expansions in this direction, most of which were only temporary. Similarly, the early New Deal emergency legislation involved widespread resort to delegated power, much of which has since expired or been abolished. The greatest single example was that of the code-making authority given the president under the National Industrial Recovery Act. Hardly less striking were the extraordinary powers over the value and supply of money. However, the examples which have been used in this chapter have been taken from legislation which is not of an emergency character and which, according to all indications, will remain as a permanent part of our governmental controls.

a resort to the power of discretionary action in individual cases, subject to certain legal checks. Frequently, however, they are not incompatible with procedure by general regulations, if those regulations are in the hands of experts and are subject to change as occasion demands.

Another advantage of administrative legislation has to do with effective enforcement of the law. Particularly in the case of regulation of practices which have not previously been subjected to governmental control, the attempt suddenly and rigorously to impose a new law may provoke stout resistance. It may even arouse such hostility as to render the statute practically unenforceable or to result in its early repeal. If, on the other hand, administrative authorities are permitted to specify by general rule the practices which are to be followed in pursuit of the general legislative policy, the latter may be advanced, step-by-step, in such fashion that the opposition is minimized.

Mr. John B. Andrews's conclusion regarding administrative legislation in the field of labor law is typical. Following a discussion of safety regulations, health regulations, and rule making under minimum wage laws, he writes: "The original advocates of administrative regulations believed that these rules would be superior to earlier legislation because of their speed of formulation, definiteness, and flexibility. All of these results have been achieved in large part, sometimes with notable success."[18] The case for the widespread use of this medium of modern administration is unanswerable.

DISADVANTAGES

This is not to deny, however, that there are disadvantages or even dangers attendant upon the delegation of legislative power to administrative officials. It is contended variously

[18] Andrews, *op. cit.* (Chap. II, n. 13), p. 24.

that administrative legislation is undemocratic, that it brings sound programs of reform into disrepute by going too far in advance of public opinion, and that it makes it more difficult for affected parties to find out what the law is.

The charge that administrative legislation is undemocratic deserves careful analysis. The mere fact that administrative agencies are subordinate to the legislature is not a sufficient answer to this objection. This view, as Freund says, "fails to take into account the inherent tendencies of different forms of governmental organization."[19] The public committee hearings, the debate in the legislative body where party politics guarantees thorough criticism, and the prevalence of political considerations all make for a responsiveness to public opinion on the part of the legislature which can hardly be expected to characterize other branches of the government. The agencies possessing powers of administrative rule making, as we have seen, are very numerous. Inevitably, less publicity attends their proceedings than those of the legislature. Furthermore, even though an important section of public opinion is aware of what is happening, and disapproves, there may be little that it can do. Appointive administrative officials are likely to be much less sensitive to public opinion than are elected members of a legislature.

More than this, it may be that the administrators will be too easily influenced by certain specially interested groups to the exclusion of other interested parties or at the expense of the general welfare. Forces that have fought and lost on the legislative field may slink back under cover of the obscurity of the agency charged with administration of the law and strike a fatal blow.[20] Again, it may be that, quite apart

[19]Freund, *op. cit.* (Chap. I, n. 3), p. 220.

[20]Consult E. Pendleton Herring, *Public Administration and the Public Interest* (New York: McGraw-Hill Book Company, 1936) for a full account of the influence of pressure groups upon administration. See especially

from the influence of special interest groups, the delegation of sublegislative authority to a few people, or perhaps even to a single bureau head does not allow for the representation of enough points of view. The administrator may act arbitrarily. He may reach his own decisions contrary to the advice of members of his staff, he may insist upon his own point of view and pursue a policy different from that intended by the legislature, or his administrative actions may be nothing more than a vent for some personal idiosyncrasy.

Looked at from a different angle—that of the reformer who would secure "progressive" government action rather than from that of the democrat who is interested solely in registering the will of the people—administrative legislation runs the risk of violating the canons of political expediency. Specialists are likely to become such enthusiastic supporters of certain types of activity that they lose touch with the public. They may fail to realize how their schemes may impress those who are less familiar with the facts than they, or who see them differently. Careless or unconscious of public opinion, these administrative specialists sometimes invite a political reaction which may be severe enough to wreck the whole program on which they are engaged.

There are other difficulties which may prove bothersome but which are fundamentally of less importance. For instance, if the rule-making power is scattered among a great many different authorities, the resulting sublegislation is likely to be similarly scattered and disorganized. Under such circumstances it is not unlikely that the rules issued by one agency will so conflict with those issued by some other rule-making authority that no one can be quite sure what the law is.

Chap. IX on "The Federal Power Commission" for an instance of the exertion of pressure upon a rule-making authority to subvert the policy which Congress had enacted into law.

SAFEGUARDS

Are we then faced by a dilemma? Is modern government forced to make increasing use of a practice that is beset by dangers and attended by serious disadvantages? Is the "rule of law" to be made ineffectual and the democratic basis of our government undermined? These questions suggest the opportunities for oratorical denunciation by the undiscriminating critic of "bureaucracy." But the serious student will look further. Dangers, to be sure, there are. But careful study and a desire to get at the truth rather than to support a preconceived idea reveals that there are also remedies and safeguards. New benefits bring new disadvantages; but at least in this field human ingenuity seems quite capable of coping with them as they arise.

The most serious danger has to do with the undermining of the democratic process by the legislative abdication of policy making to practically irresponsible officials. A safeguard against this threat already exists. The legislature must retain its function of laying down general policies. Nothing in the situation described demands otherwise, and in this country we have in the courts an appropriate means for the enforcement of this principle.[21] Students of the subject who accept the democratic premise are generally agreed that administrative legislation should be confined within limited areas, that the legislature should lay down the general policy, and that it should also, wherever possible, prescribe standards for the guidance of the administrator in filling in the details.[22] Conscientious administrators, in fact prefer such

[21]For a discussion of the constitutional limitations upon delegation of legislative power, see Chapter IV.

[22]See the *Report of the Committee on Ministers' Powers* (London: His Majesty's Stationery Office, 1932); and the report of the Special Committee on Administrative Law of the American Bar Association in 61 *Reports of the American Bar Association* (1936) 720–94.

a legislative policy. Dean Landis, former Chairman of the Securities and Exchange Commission, has said that it is greatly to the advantage of the administrators themselves to have clearly expressed legislative standards. If these criteria are too vague, the administrative agency is likely to become bogged down in a hopeless quagmire.[23] The experience of the Federal Trade Commission, in its efforts to administer an act based upon the vague standard of "unfair methods of competition," illustrates the pitfalls that await an administrative agency which is not provided with adequate legislative guidance.

But where to draw the line? That is the question—and a difficult one. Just how much may properly be left to the discretion of the administrative rule-making authority? Authorities differ on this point, and probably will continue to do so. In any case, various situations are so different in their requirements that it is almost impossible to obtain a formulation of general principle which would even be satisfactory to any one person in all its applications. Although recognizing the difficulty of the undertaking, Freund hazards the observation that "with regard to major matters the appropriate sphere of delegated authority is where there are no controverted issues of policy or opinion. . . . Practically equivalent to the absence of controverted issues," he continues, "is their obscurity or non-recognition or non-formulation in the public mind or in the minds of the parties affected."[24] In other words, delegation "presupposes that regulation is conceded to be desirable, that there is agreement upon having the best rule prevail, and that the best rule is [a] matter of technical ascertainment."[25]

[23]James M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938) 55–60.

[24]Freund, *op. cit.* (Chap. I, n. 3), p. 218.

[25]*Ibid.*, p. 221.

His examples will clarify his presentation of these principles. Fixing the hours of labor of women workers, he feels, involves too sharp a conflict of interest and opinion to be left to administrative officials. On the other hand, when it comes to rate regulation, the factors are so obscure that the administrative method is acceptable. Still following the obscurity test, he suggests that even the matter of the principle of valuation might be left to a commission; but the fairly simple and equally vital matter of the rate of return to be allowed on the investment should be a matter for legislative determination.

But some would take issue with Freund; others would not agree to the application of the formula to a given situation, for "obscurity" is a relative term. What constitutes a matter of "policy" is largely a question of degree. The choice between two techniques for the execution of an accepted program may involve other questions of policy on a lower level. Thus the selection of the method by which employers must report the earnings of their employees for social insurance purposes involves more than purely administrative considerations. The answer will depend partly upon whether primary emphasis is to be laid upon paying every penny of benefits due or whether the burden imposed upon employers by the reporting requirements is to be considered an important factor. Even if the statute goes so far as to indicate where the primary emphasis should be, there will be borderline cases which call for administrative discretion.

Furthermore, there may be times when the commitment of important policy determinations to administration may be the best even if not the ideal solution. Freund hints at a limited recognition of this necessity. Thus he declares that "it may be, however, that after the practice of delegation has once become as firmly established as in the regulation of public utilities, its continued and even expanded applica-

tion will come to appear politically preferable to the perils of sectionally influenced legislative intervention. . . ."[26] That is to say, political rather than technical and administrative considerations may counsel delegation. The legislature may "pass the buck" by giving to the chief executive the task of making certain decisions that are bound to be unpopular. A similar situation is involved in the delegation of tariff-making powers to the president in order to avoid sectional and group pressures upon Congress. In other cases the legislature may be frankly unable to formulate anything more than the most general characterization of the policy it wishes pursued. In such instances it may charge a body of supposed experts with the task of administering the law in the hope that in the process of administration more definite standards may be worked out. Such was more or less the situation when the Federal Trade Commission was created to eliminate "unfair competition." Finally, emergency situations, such as wars and periods of economic collapse, frequently compel the slow and lumbering process of legislation to give way to speedier and more flexible executive action. Thus, to take an example from the emergency legislation enacted in the first hundred days of the Roosevelt administration, it was provided that the president may in time of war, or other national emergency, license or prohibit transactions in foreign exchange, payments by banking institutions, and the export, hoarding, melting, or earmarking of gold and silver. It is sound practice—regularly followed in this country—to provide that such grants shall terminate at the end of the war or, if no war is involved, after not more than two years, unless renewed.

Thus, to return to our starting point, it appears that the potentialities for the abuse of administrative rule-making power can be kept fairly well in hand, while still allowing

[26] *Ibid.*, p. 219.

for a full utilization of the advantages of the device, by an insistence upon legislative determination and definition of policy. This question now arises: To what extent have we in this country maintained this ideal division between legislative and administrative functions? An entire volume would be required to survey and analyze the statutes, federal and state, from this point of view. Such a study probably would not reveal many serious departures in the direction of too much delegation.[27] This is particularly true in the field of administrative rule making as distinguished from other grants of discretionary authority, such as licensing, which in the broad sense might be referred to as involving legislative power. The field of rate making, which is at least judicially considered as a legislative activity, like that of licensing, should perhaps be excepted from this broad statement.[28]

Among other safeguards against the abuse of delegated authority, the selection of competent agents to exercise the power ranks high in importance. The question of whether such agents should be fully responsible to (i.e., removable by) the executive is reserved for treatment in another volume of this series.[29] Its relevance here, however, must be noted. Similarly, the matter of improvement of personnel standards comes in for discussion elsewhere;[30] but it should be clear that competence and integrity on the part of the administrators will always be more important than legal and technical checks in producing good administration.

[27]Important limits are set by constitutional restrictions, to be discussed in Chapter IV.

[28]The general policy as to rates is usually expressed by the legislature, but many authorities consider that the situation would be improved if the statutes would go further in the direction of laying down definite rules regarding such questions as the allowable rate of return, or even the principle of valuation—reproduction cost or prudent investment, for example —which should be used. But this is debatable ground.

[29]Wallace S. Sayre, *Personnel Policies and Public Management* (this series).

[30]*Ibid.*

The complaints that administrative legislation is irregularly issued, of various forms, difficult to find, and frequently in conflict with rules issued by some other authority clearly do not derive from inherent difficulties. There is a serious need in the federal government and even more in the states for regularization of the processes of administrative rule making. It has been proposed that this should begin in the legislature itself; that there should be a special legislative committee to which all legislation involving delegated authority should be submitted for the purpose of bringing about uniformity and compliance with accepted principles in this matter. It would not be the function of such a committee to concern itself with the merits of the legislation concerned. As a next step, the procedures by which administrative agencies exercise their rule-making power might well be regularized by the chief executive, allowing for such flexibility as differing situations would seem to demand. Finally, each rule-making authority—or, perhaps, in the case of states, the government as a whole—should have a special agency to which all rules and regulations would be submitted before promulgation, to check their form and legality.

In the case of the federal government, the initial step in this direction has already been taken. Executive Order No. 7298 requires that all executive orders and proclamations must be cleared through the Bureau of the Budget, the Attorney General, and the Director of *The Federal Register.* At the first stage they are checked for consistency with previous orders. At this point reference is made to other agencies which might be affected, if there are such. At the second stage their legality is reviewed. The Director of *The Federal Register,* in turn, is concerned with matters of form. Ordinary departmental rules and regulations do not go through this procedure, but they are normally checked for form and legality by the legal staff of the issuing department or by an

independent agency. No general study of the situation in the states has been made, but it is safe to say that in most of them it is fairly chaotic.

Sometimes, where rule-making power is accorded to a bureau head or similar official, the approval of a higher authority, presumably possessing a broader view, may be required. Thus the Secretary of the Treasury must approve the regulations of the Commissioner of Customs.

Hearings and related devices are of special importance for they are highly relevant both to the preservation of the essentials of democracy and to securing the formulation of rules in the light of all pertinent regulations. Nowadays when so much legislation particularly affects special groups, and when most groups are organized and have their representatives at Washington and frequently at the state capitals, it is feasible as well as desirable to extend the democratic process into the administrative sphere. In the formulation of their rules and regulations rule-making agencies may choose from a variety of procedures.[31] They may, of course, rely purely upon their own internal resources, which may include the best experts in the field; or they may extend their consultations, informally, to recognized experts outside of the government service. If the work of the agency affects sizable economic groups, these may easily be consulted; and such groups are likely to see to it that they are heard. In many cases this procedure is regularized by the creation of an advisory committee representative of the various interested groups. The next step beyond such consultative procedures is that of holding formal, announced hearings, at which interested parties may appear and have their say. Another device which is occasionally used and which may be

[31]The following discussion of types of rule-making procedure and of the considerations relevant to the selection of a procedure is largely based upon the excellent analysis in Fuchs, *op. cit.* (Chap. II, n. 10).

combined with the use of hearings and consultations is that of the publication of draft regulations for the purpose of eliciting comment and criticism.

There are certain situations in which an ordinary hearing may be expanded into what is known as an "adversary procedure." Under this method interested parties are notified and given the opportunity of being heard, and certain other of the normal incidents of judicial proceedings are also observed. For instance, the governmental agency may be required to make known its provisional ruling or rulings, together with the evidence on which they are based, in time for interested parties to present evidence designed to support a different result. And the final order may be required to be supported by "substantial evidence." This procedure is utilized most frequently in cases of rate regulation, and there is considerable doubt among students of the subject whether it is desirable to extend it much further.

Generalization about actual practice is difficult if not impossible.[32] Notice and hearing preceding the issuance of regulations have, until recent years, been very rare. The Interstate Commerce Commission, perhaps because much of its work has been of a judicial nature and has tended to set a precedent for its other activities, is an outstanding exception. Many administrative agencies—and this is particularly true in the states—still do not make use of hearings in the formulation of regulations. The trend, however, is definitely toward the use of hearings and of the other safeguarding devices discussed above.[33] Certain Supreme Court

[32]See A. H. Feller, "Prospectus for the Further Study of Federal Administrative Law," 47 *Yale Law Journal* (February 1938) 647–74.

[33]One of the most prolific fields for the exercise of substantive rule-making power in the states is that of safety codes. Mr Andrews lists the following steps as "the essentials of procedure designed to secure practical and legal reasonableness" in the development of such codes: investigation, representation of interests in drafting, public hearing on tentative rules, and provision for

decisions, to be dealt with at length later on,[34] have greatly accelerated this development. Several recent acts of Congress that call for administrative rule making specifically require hearings. Congress has even moved in the direction of requiring "adversary" procedure in certain cases. Thus the Bituminous Coal Act of 1937 provides that "no rule or regulation that has the force or effect of law shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded interested parties an opportunity to be heard, and unless it has made findings of fact."[35]

All of the safeguards against abuse of the rule-making power discussed so far have their application before the final promulgation of legally binding rules. Others come after this stage. Professor Hart has aptly designated the two classes of safeguards as prenatal and postnatal.[36] To turn now from the former to the latter, the foremost among these postnatal safeguards is publicity. Not only the content of rules affects individuals; they may suffer through ignorance of the rules and find it difficult and expensive to discover later just what the rules contain. We have been very laggard in this respect, but the Federal Register Act of 1935 greatly improved the situation in regard to the federal government.[37] This act provides for a daily publication, known as

review and modification. Although not all of the state laws by any means follow this model, some do and in many other states administrative practice runs ahead of legislative requirement in this regard. See Andrews, *op. cit.* (Chap. II, n. 13), Chap. 4. The quotation is at p. 72.

[34]See Chapter V.

[35]50 Stat. L. 72 (1937). Similar provisions are contained in the Food, Drug, and Cosmetic Act of 1938, 52 Stat. L. 1040 at 1055; and in the Fair Labor Standards Act of 1938, 52 Stat. L. 1060 at 1064–65.

[36]Hart, "The Exercise of Rule-Making Power," *op. cit.* (Chap. II, n. 9), p. 337.

[37]A codification of all federal rules and regulations is now being prepared. Several volumes have already been published under the title, *The Code of Federal Regulations.*

The Federal Register, in which must be printed all executive orders, proclamations, rules, regulations, and other orders having general applicability and legal effect and touching private individuals. As far as can be ascertained, no state except New York makes similar provision. The Department Reports of the State of New York, advance sheets of which are published semimonthly, purport to contain "the decisions, opinions and rulings of state officers, departments, boards and commissions." Although some rules and regulations do find a place in this publication, it appears that not all rule-making agencies report to it. This is at least a move in the right direction which other states would do well to emulate.

The practice of requiring the submission of administrative legislation to the legislature, although widely used in England, has not found much favor in this country. Curiously enough, the only instances of its use here have not involved the rights of private persons. They have been confined to the delegation to the president of authority to reorganize by regulation the administrative branch of the government. The Reorganization Act of 1939, for example, provided that orders issued under it must be submitted to Congress and must lie before that body for sixty days before becoming effective.

Finally, there is judicial review. The whole question of the judicial enforcement of the rule of law as against administration is of such importance and complexity that four separate chapters will be devoted to it.[88] Suffice it to say at this point that, where the rights of private individuals are affected by the application of a rule or regulation, the matter can always be brought before a court to determine whether or not the issuance of the rule was within the authority delegated by the legislature to the administrative agency and

[88]See Chapters IV–VII.

whether that authority has been legally exercised. Statutes delegating rule-making power may and sometimes do go beyond this by providing for judicial review of rules and regulations at the instance of interested parties as soon as they are issued. The pros and cons of such provisions will be discussed later.

No general rule can be laid down specifying any particular set of safeguards as "correct" or "best." Proposals to fasten upon all administrative agencies the obligation, say, to hold hearings before adopting rules or regulations ignore the infinite variety of situations confronted by administrative bodies and the consequent need for flexibility of procedure.[39] Various considerations should be taken into account before deciding upon the procedure to be used in a given case. How many parties are affected? Are they identifiable? Are they organized? What is the nature and extent of the rights or interests involved? Is official discretion limited solely to technical considerations or do elements of policy enter in? It is relevant, too, to consider the character of the administrative agency—whether it is composed of experts and whether it is itself representative of the interests affected. Thus, for example, unemployment compensation commissions are frequently made up of one representative each of the public, employers, and employees. Under such circumstances the use of a representative advisory committee, for example, may be superfluous.

Conclusion

The growth of administrative power in this country has been continuous and increasingly rapid. Old types have been multiplied and new types have put in their appearance. Along with this development has gone an increasing dif-

[39]This subject is discussed more fully in the concluding chapter.

ferentiation among the various forms for the exercise of administrative authority. The practice of issuing administrative rules and regulations, which has been given special attention in this chapter, has become of great importance.

In summary, it may be said that, even though the profusion of powers does sometimes result in the confusion of powers, when that confusion takes the form of administrative rule making there is much to be gained. True, there are dangers as well, but effective safeguards are available. Although the variety of the scene makes generalization dangerous, it is safe to say that the trend is definitely toward the increasing use and improvement of these safeguards. They have already been widely adopted by the federal government. The critic should direct his attention toward the advancement of this movement rather than spend his energies in futile opposition to an inevitable trend toward administrative control. He will also do well to recognize that many of the most effective checks against the possible abuses of administrative rule making are themselves administrative in nature—that is to say, they are "internal," as contrasted with the "external" check, say, of judicial review.

The trend of events which we have been describing presents a challenge to the doctrine of the separation of powers in its old form. Specifically, the theory that all legislative power must be exercised by the legislature is increasingly belied by the facts and reduced to the status of a legal fiction. The next chapter will indicate that other aspects of the doctrine of separation of powers are suffering the same fate.

Chapter III

The Trend of Events: Fact versus Fiction—II

THE preceding chapter dealt generally with the uses of administrative discretion, the increasing need for it under modern conditions, and the development of new forms for its exercise. It was pointed out that administrative agencies often exercise powers that cannot properly be classified as purely legislative, executive, or judicial. The growth of the administrative arm of the government has made this fact more apparent. Furthermore, the relaxation of the old, fairly narrow and rigid concepts as to the limits of governmental activity has quickened the perception of those who are most critical of governmental functioning. For both of these reasons, attacks upon the mixture of governmental powers seem to be the order of the day.

In more specific fashion the preceding chapter studied the function which is today known as administrative legislation. The present chapter will continue the analysis of the facts that defy the legal fiction (as it tends to become) of the separation of powers, by giving careful attention to the judicial functions of the administrative branch, to situations where administrative power is applied directly to particular individuals rather than by general rule, and to those regulatory agencies in which legislative and judicial powers are inseparably fused. The possibilities of abuse of administra-

tive power are even greater where it is particular in application than where it is general, because in such cases there is more opportunity for favoritism and unfair discrimination. Consequently this chapter brings us to the very heart of the problem of the control of administrative action.

Many administrative functions involving large areas of discretion are neither legislative nor judicial in the strict sense. This type of activity today often takes the form of an "administrative order"; it plays a very important role in the administration of modern regulatory legislation, and has in fact been described as "the heart of the regulatory process."[1] These orders[2] often deal with single, concrete situations, and yet look to the future and create new rights and duties. Thus they combine characteristics of legislation and adjudication. Since they clearly involve problems of the subjection of administrative discretion to the rule of law, they will be discussed here, in connection with the regulatory commissions, as well as in the chapter on judicial control of administrative action.

[1]"United States Court of Appeals for Administration," Hearings before a subcommittee of the Committee on the Judiciary, United States Senate, on S. 3676, 75th Congress, 3rd Session, April 1, 5, 6, 19, 21, May 12, 14, and June 1, 1938; testimony of Dr. Frederick F. Blachly (Part I). See also Dr Blachly's elaborate assemblage and classification of materials on federal administrative orders in "Administrative Law," Hearings before subcommittee of the Committee on the Judiciary, House of Representatives, on H.R. 4236, H.R. 6198, and H.R. 6324, 76th Congress, 1st Session, March 17 and April 5, 1939, 169–90, much of which is reprinted in the appendices of Frederick F. Blachly and Miriam E. Oatman, *Federal Regulatory Action and Control* (Washington, D.C.: The Brookings Institution, 1940).

[2]Such as "cease-and-desist orders," "stop orders," "rate orders," "safety orders," orders granting or refusing certificates of convenience and necessity, and orders granting, revoking, or suspending licenses.

General

DEFINITION AND CLASSIFICATION OF ADMINISTRATIVE ADJUDICATION

The meaning of administrative adjudication, like that of administrative legislation, is essentially quite simple. It has to do with the settlement by administrative agencies of disputes or controversies in concrete cases arising out of the execution of the law. No watertight definition will be attempted, for, as in the case of administrative legislation, there are borderline instances which are difficult to classify. Even administration pure and simple involves the interpretation and application of law. This is true, for instance, when an immigration official decides that an alien who is applying for admission to this country is not eligible, or when a deputy administrator of a state unemployment compensation commission decides that a certain applicant for benefits is disqualified because he refused an offer of suitable employment. But when an affected party challenges the result reached by the administrator, and if the decision is then reviewed by an administrative official, even though it be the same official who made it originally, this is an instance of administrative adjudication. Normally, administrative adjudication involves a hearing. But the existence of a hearing is not in itself a sufficient test.[3]

The problem of drawing the line between administrative and "judicial" adjudication is even more difficult. It may be noted that judicial action is personal, while administrative

[3]Where official discretion is quite broad and the determination of particular cases turns chiefly upon questions of policy or expediency rather than upon the interpretation or application of the law, acts are sometimes considered administrative even though there may be a hearing granted to interested parties, as in the case of granting a license or selecting a site for a new highway. *Cf.* Frank J. Goodnow, *The Principles of the Administrative Law of the United States* (New York: G. P. Putnam's Sons, 1905) 9–10.

action is normally delegated to staff officers below the chief, who is ultimately responsible for the decision. Thus Freund remarks: "The difference between administrative and judicial action in this respect may be put in a way disparaging to the former by saying that it involves a habit of assuming responsibility without personal cognizance; it may be given a much more favorable aspect by saying that it presupposes the organization of a staff of experts acting under responsibility to an official chief."[4] But this is far from being an infallible criterion. Judicial decisions are those rendered by "judges" sitting in the "ordinary" courts of justice. Thus in the vast majority of cases there is no difficulty whatever in distinguishing adjudication. But there are tribunals like the Court of Claims and the Board of Tax Appeals that are very hard to classify. In fact, if we desire to define a court we can do little more than specify certain normal judicial standards. These may be enumerated as follows: the tribunal should be composed of persons trained in the law; the tenure of the judges should be such that they are politically independent; there should be legal rights to be decided, and the courts should have the power to render legally binding judgments; the decision should be governed by the impartial application of principles which are known and established; the parties to the controversy should be fully and fairly heard; and the trial should be public. It must be recognized, however, that many of these standards frequently apply to administrative tribunals as well, while most of them are subject to exceptions even in the case of ordinary courts.

The nature of administrative adjudication can be clarified by considering specific examples and by classifying the various types.[5] The following classification is based upon the

[4]Freund, *op. cit.* (Chap. I, n. 3), p. 33.

[5]On the whole subject of administrative adjudication see Blachly and Oatman, *Administrative Legislation and Adjudication, op. cit.* (Chap. II, n. 9),

nature of the tribunal and its relationship to other agencies. First there are what might be called full-fledged administrative courts. These are essentially judicial organs of control over public administrative agencies and actions. The Court of Claims, the United States Customs Court, the Court of Customs and Patent Appeals, and the Board of Tax Appeals may be cited as examples. These agencies are, to all intents and purposes, like courts in their procedure and in the nature of the questions with which they deal. Several of them, it will be noted, are called "courts." For one reason or another, however, they are denied standing as "constitutional" courts and are consequently known as "legislative" courts.[6] Others are known as "boards," or the like.

The second type of administrative tribunal is itself actually employed in the administrative process apart from its adjudicatory work. It is what is known as a "regulatory authority"; that is to say, it is engaged in imposing a system of regulations upon some industry, or on all industries with respect to some particular phase of their functioning. Generally, but not necessarily, these tribunals are independent commissions, like the Interstate Commerce Commission. The Secretary of Agriculture falls in this group by virtue of his duty of administering certain regulatory statutes such as the Packers and Stockyards Act.

The third category according to this classification includes

Chaps. V–XI; and their *Federal Regulatory Action and Control, op. cit.* (Chap. III, n. 1). For a careful classification of administrative adjudicatory agencies of the federal government, according to three different bases of classification, see "Working Papers on Administrative Adjudication," prepared by Frederick F. Blachly and published as a "Committee Print" for the use of the Senate Committee on the Judiciary, 75th Congress, 3rd Session, in connection with the hearings on S. 3676 (above, n. 1). See also Feller, *op. cit.* (Chap. II, n. 32) 650 ff., for a classification of types of administrative agencies exercising either legislative or adjudicative powers.

[6]The basis for and significance of this distinction are discussed in Carr, *The Supreme Court and Judicial Review* (this series).

tribunals that form part of agencies which are primarily administrative. They will be designated here, for want of a better term, simply as "administrative agencies of adjudication." Frequently the administrative agency itself constitutes the final administrative tribunal. Thus the Administrator of Veterans' Affairs reviews decisions of the Insurance Claims Council in the Veterans' Administration. The Secretary of the Interior reviews the decisions in disputes adjudicated by the Land Office. A similar situation exists in most of the regular departments.

Some tribunals in this group deal with controversies between private individuals, to which the government is neither directly nor indirectly a party. However, it is still considered exceptional to try controversies between private individuals in any other way than in the regular courts. The best-known example of this class of cases is furnished by employers' liability legislation, the administration of which will be described more fully later.[7]

Finally there is a group of anomalous agencies, such as the Tariff Commission (which is chiefly a fact-finding body but has certain adjudicative functions), the Grain Futures Commission (consisting of three cabinet officers), the General Accounting Office, and the National Munitions Control Board. None of these is very important from the point of view of the subjection of administrative discretion to the rule of law except the General Accounting Office.[8]

Administrative adjudication may be classified in other ways than according to the type of tribunal. Thus a line may be drawn between the administrative settlement of controversies between two private individuals and the commoner instance of adjudication between a private individual

[7]See pages 103–4.

[8]See Philip L. Gamble, *Governmental Revenues and Expenditures* (this series).

on the one hand and a government agency on the other. The latter may arise either out of the exercise of the directive power, or out of the denial or revocation of a permission. That is to say, an individual may object to the issuance of an administrative order, or he may protest against a decision regarding his application for a license or permit. In many cases, especially before the larger regulatory agencies, his original application will be treated in a semijudicial fashion. In the case of administrative revocation of a privilege, the proceedings are likely to be even more judicialized.

There is also a large and growing number of instances in which administrative agencies are directed to make certain findings of fact having important consequences which may be of a legislative or judicial nature. These findings are generally subject to some sort of judicial review. They are frequently, but by no means always, made by regulatory commissions. A recent study reveals that a single session of the Pennsylvania legislature enacted or amended thirty statutes conferring power on administrative agencies to make findings subject to some measure of judicial review. They dealt with such varied subjects as banking and insurance, utilities, intoxicating liquors, labor and wage fixing, price fixing, licenses for proficiency, eminent domain, taxation, and zoning.[9]

EXTENT AND SIGNIFICANCE OF ADMINISTRATIVE ADJUDICATION

It is difficult to find any adequate measure for the extent of administrative adjudication. Statistics as to the numbers of controversies are not always available, and even if they were would not be very meaningful unless account was also taken of their importance. As far as the federal government is con-

[9]Albert S. Faught, "The Multiplication of Administrative Agencies and Problems of Judicial Review in Pennsylvania," 13 *Temple Law Quarterly* (November 1938) 30–54.

cerned, however, it is safe to say that administrative agencies settle many times more controversies than do the courts. Thus the Treasury Department alone in the year 1936 passed upon over 600,000 controversies, of which 99,185 were reviewed on appeal by tribunals within the Department. This may be compared with 20,642 cases decided by all the federal courts, including the legislative courts, in the fiscal year 1935-1936.[10] In the states the thousands of petty disputes settled by magistrates and justices of the peace tend to increase the proportion of judicial decisions. Against this, however, must be placed the great expansion of administrative adjudication in the states which has been occasioned by the enactment of unemployment compensation legislation and by the requirement that hearings be granted in contested claims for old-age assistance.[11] Thus it is abundantly clear that, in the country as a whole, many more controversies are adjudicated outside of the regular courts than in them.

All this is highly significant for the doctrine that the rule of law requires "that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land." It is true that probably the greater proportion of administrative adjudications do not involve individual "breaches of the law," nor is there a question of punishing anyone—frequently not even of making him "suffer in body or goods," except by depriving him of advantages which he might otherwise enjoy. But today, when

[10]A list of federal administrative adjudicatory agencies is to be found in Frederick F. Blachly's "Working Papers on Administrative Adjudication" (above, n. 5). For a partial list, see below, n. 59.

[11]In Pennsylvania a recent survey disclosed forty-four administrative agencies exercising judicial or quasi-judicial powers affecting private rights and having state-wide jurisdiction. Several of these agencies exercise such powers with respect to two or more different subjects. "Report of the Administrative Law Committee," 45 *Pennsylvania Bar Association Reports* (Philadelphia: The Association, 1939) 273–346, especially 281–302.

governments deal out so many "advantages," this becomes exceedingly important. The farmer who fails to receive "soil conservation" payments after having gone to additional expense in the purchase of lime or fertilizer in order to qualify for such benefits is just as effectively injured as his neighbor who is fined for speeding. Were Dicey writing now he might expand his formula so that the even hand of justice would apply to the distribution of benefits as well as to the exaction of fines.[12] On the basis of the economic test, then, the importance of the mass of administrative adjudications can hardly be exaggerated. Hence the necessity of submitting this method of deciding cases to critical appraisal.

Administrative Courts

The oldest of the "full-fledged administrative courts" is the Court of Claims, created in 1855. As its name suggests, it has jurisdiction over certain claims of private individuals against the United States. Prior to its creation all such claims had to be settled by special acts of Congress, for the government may not be sued in the courts, except by its own consent. There are still many exceptions to the types of claims for which one may sue the government even in the Court of Claims. Chief among these excepted categories are pension claims and most suits in tort.[13] This means that the jurisdiction of this court is restricted to cases arising out of contracts, expressed or implied. In many pension cases, and tax and customs cases, other special administrative tribunals

[12]Where government agencies have valuable privileges at their disposal, the power which they can exercise through attachment of conditions to the disposition of these privileges is often very great. An instance is supplied by the recent case of *United States* v. *Lowden,* 308 U.S. 225 (1939).

[13]Tort claims are those arising out of private wrongs or injuries independent of contracts. They include such matters as claims for damages for injury attributable to negligence, assault, false arrest, and the like. All legal wrongs are either crimes, breaches of contract, or torts.

have been provided. But if one is so unfortunate as to be injured by a careless driver of a postal truck, the law of the land still provides no means by which the United States government may be held accountable. The only means of redress (barring the unlikely possibility of recovering damages from the driver himself) is to get a congressman to introduce a special bill for "relief." Thousands of such bills are introduced and many of them passed every year.

The Court of Claims is made up of five judges, appointed for good behavior, and five commissioners. The commissioners assist the judges by taking evidence and examining witnesses, on the basis of which they prepare findings of facts. These findings, together with the evidence upon which they are based, are then presented to the court for its guidance. Petitioners are free to note "exceptions" and dispute these points during the course of the trial. In general the Court of Claims follows a procedure similar to that of a regular court. It may certify questions of law to the Supreme Court and its decisions are subject to review on writ of *certiorari* by that tribunal. It is classified as an administrative court for two reasons. First, it is a specialized tribunal dealing solely with controversies between citizens and the government. Thus it deals with administrative justice in the sense that it adjudicates disputes arising out of acts or omissions of administrative and executive officials. It forms part of the network by which these officials are kept under the rule of law. Second, it is not in the full sense of the word an "ordinary court of justice" in that it has been held to be a "legislative" rather than a "constitutional" court.[14]

The state of New York has created a similar Court of Claims. No such provision seems to have been made by

[14] *Williams* v. *United States*, 289 U.S. 553 (1933). The Court reached this conclusion on the ground that the Court of Claims does not deal with legal rights, since Congress has the power to deny all redress in the class of cases to which this court's jurisdiction extends.

other states, although in special instances, such as the case of highway departments, some states permit suits arising out of contracts to be brought in the regular courts.

The United States Customs Court, created first in 1890 as the "Board of General Appraisers," is in most respects, like the Court of Claims, a purely judicial court. Its nine judges, appointed for good behavior, sit in panels, or groups of three. It is the court of first instance for practically all legal controversies arising between importers and the government. Appeals from it are heard by the Court of Customs and Patent Appeals, another administrative court which is all but a regular constitutional court.[15] The five judges of the latter tribunal, created in 1909, also hear appeals from the Board of Appeals in the Patent Office, and from the findings of the Tariff Commission in cases of complaints of unfair practices in the importation of merchandise.

The United States Board of Tax Appeals was established in 1924 as an independent agency to hear the appeals of dissatisfied taxpayers.[16] Its sixteen judges hold office for twelve-year, overlapping terms. They hear and decide most cases singly, subject to appeal to the full bench. The members of the board are not required to be lawyers but they have been so in practically all cases. The procedure of the board is that of a court, and it is required to follow the rules of evidence used by the equity courts of the District of Columbia. Originally cases which it decided could be retried before a court; but at present its decisions are final, subject only to appeal on questions of law to the Circuit Courts of Appeals or the Court of Appeals of the District of Columbia. Following this change, the procedure of the board was made more formal, a

[15]See *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), holding that it is a "legislative" court, on grounds similar to those relied upon in the case of the Court of Claims.

[16]See J. Emmett Sebree, "The United States Board of Tax Appeals," 7 *Temple Law Quarterly* (June 1933) 428–45.

written record of all testimony and proceedings was kept, and in other ways procedural protections characteristic of the judicial process were adopted. The quality of the board's work is attested by the fact that there are relatively few appeals from its decisions. Furthermore, its record on such appeals is excellent; only about 1 per cent of its decisions have been reversed. While the board has been held to be an administrative body and not a court, it certainly is a court in all but name and legal status.

Regulatory Authorities

The regulatory commissions (which comprise the bulk of the regulatory authorities) constitute another type of administrative tribunal. As a class, this group of agencies has probably received both higher praise and more bitter condemnation than any other type of adjudicating authority. The federal regulatory commissions have three characteristics in common. They are all collegiate in form; that is, they are made up of several officials with co-ordinate powers. They are independent of the regular departments and, at least in most cases, their members are not removable except for cause. Finally, they are not merely agencies of adjudication but exercise a mixture of legislative, judicial, and executive powers. Some of the more important federal agencies will be described in the following pages and their significance from the point of view of the rule of law discussed.

THE INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission, created by act of Congress in 1887, is the oldest of the federal regulatory commissions.[17] It consists of eleven members, appointed by the

[17]The definitive work on the Interstate Commerce Commission is I. L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative*

president, with the advice and consent of the Senate, for overlapping terms of seven years. Not more than six of the members may belong to the same political party. The tenure of the members is protected against removal without due cause.

Possessed of a staff of nearly 2,500 members, the commission has had a history of steady growth. Its jurisdiction now extends to practically the whole range of commercial transportation of persons or property across state lines, and even to purely intrastate commerce where it impinges upon interstate commerce to the detriment of the latter. The major part of its activities is concerned with the railroads, but, as the prevalence of the white-on-black I.C.C. license tags suggests, its functions have recently been extended to motor carriers as well. Still more recently (1940) water carriers in interstate and foreign commerce have also been brought within its jurisdiction.

Its original grant of power provided only for investigating complaints and initiating action by the courts. By successive enlargements of its legislative authority, it has come to be one of the most powerful agencies of its kind. Foremost among its powers is that of prescribing "fair" and "reasonable" rates. It may, if it deems it desirable, prescribe both minimum and maximum charges. It is directed not only to regulate the general level of rates, but to prevent all sorts of discrimination, whether by means of rates or services. It can compel railroads to establish through and joint rates with other lines, and can regulate the use, control, supply, movement, and distribution of rolling stock. It must grant a certificate of convenience and necessity before a new line may be opened or an old one abandoned. It prescribes the forms for accounts and records which carriers must keep, and

Law and Procedure (New York: The Commonwealth Fund, 1931–37, 5 vols.).

regulates the issuance of securities. It also possesses very extensive powers to make and enforce safety regulations.

At one moment the commission will be legislating, as when it acts upon a petition for a general rate rise; again, it will be adjudicating, although if the controversy turns on the reasonableness of a certain rate the process may be much the same; and yet again it may be performing the executive function of investigation or the "administrative" function of passing upon a request for a certificate of public convenience and necessity.[18] This mixture—some would say "confusion" —of legislative and judicial powers requires analysis. Critics complain that judicial power should be independent, and that legislative power should be subject to political control.[19] Whether or not the policy-making functions of the commission should be subjected to presidential control is an important problem which cannot be treated here. But the question of whether the blending of powers threatens the adequate performance of the judicial function of maintaining the rule of law is highly relevant to the present discussion.

First of all, it should be noted that the job to be done is so varied and complex as practically to necessitate its performance by a single agency which can move quickly and easily from one kind of activity to another, and which can carry out functions that defy classification according to the

[18]The latter is on the border line of the quasi-judicial and may easily cross that line if there is a difference of opinion between the agency and the applicant.

[19]The President's Committee on Administrative Management found that the independent regulatory commissions "suffer from an internal inconsistency, an unsoundness of basic theory. This is because," continued the Committee, "they are vested with duties of administration and policy determination with respect to which they ought to be clearly and effectively responsible to the President and at the same time they are given important judicial work in the doing of which they ought to be wholly independent of Executive control." The President's Committee on Administrative Management, *Report with Special Studies, op. cit.* (Chap. II, n. 9), p. 36.

traditional threefold division of powers. The distribution of the various tasks involved in the regulatory function among separate and mutually independent agencies, according to the nature of those tasks, would almost inevitably lead to such delays, inaction, and inconsistent actions as to stultify the whole process.

The need for a strong, unified organ of control is emphasized by the fact that almost every power and mandate with which the commission is armed leaves it a large area of discretion. Professor Sharfman writes: "Few of the Congressional standards under which it operates have deprived the Commission of a large measure of discretionary power. In the most important channels of regulation, the standards of 'justness,' 'reasonableness,' 'public interest,' and similar considerations involving complex judgments of social expediency constitute in essence the only ultimate guides by which it is controlled."[20] Thus it is apparent that, when the commission is called upon to adjudicate a controversy, it must be equipped with both the legal authority and the staff of expert assistants necessary to make a thorough investigation and to assemble and appraise the technical information requisite to the proper application of such standards. Another example showing the complexity of the judgments which the commission must make is to be found in the rate-making rule. The commission, in determining what is just and reasonable, is to consider among other factors the effect of rates on the movement of traffic, the need in the public interest of adequate and efficient railway transportation service at the lowest possible cost, and the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

It is important to note the recurrence of the phrase "the public interest." It is characteristic, not only of the regulatory

[20]Sharfman, *op. cit.* (above, n. 17), Part I, p. 288.

commissions, but in varying degrees of most administrative adjudicating tribunals, that they should be charged with consideration for the public interest as well as for the interest of the contending parties. This tends to enlarge the sphere of administrative discretion. To quote Professor Sharfman again: "In carrying the legislative standards into effect under such circumstances the free exercise of informed judgment becomes indispensable. The public interest is dependent," he continues, "upon a great complexity of considerations, and it cannot be furthered intelligently and effectively without a flexible exercise of discretionary authority."[21] A court could in some fashion or other apply the old remedy of injunction against unreasonable charges, upon suit by the injured shipper. But when the government undertakes to see that such private wrongs shall be redressed in the light of the effect of the proposed settlement upon the whole rate structure and upon the public at large, the task is beyond the capacity of an ordinary court of justice. Because of this accent upon the public interest, the commission must have the power, as it does, to initiate investigations on its own motion and, if the findings justify, to take whatever action is demanded, without waiting for some private party to bring a case.

In effect, the exercise of the commission's broad discretionary power, both in the adjudication of controversies and in the issuance of orders of particular application, often requires action which is essentially legislative in character. In making the particular decision or order the commission works out and establishes the standards by which it will be guided in similar cases in the future. For while administrative agencies are not, like courts, bound by precedent, they inevitably tend to follow their previous decisions if only to avoid the laborious process of working out standards and

[21] *Ibid.*, Part II, p. 353.

rules each time anew.[22] It may be noted in passing that it is just such practical considerations which often serve to prevent the arbitrary exercise of apparently unchecked administrative discretion. The pressure of public and congressional criticism is often an even more potent check.

It is not only that the judicial acts of the commission have legislative implications. More than this, the fact of the matter is that the functions of the commission which we have been referring to as "judicial" are so only in an extended sense of the term.[23] The courts recognize this fact by calling them "quasi-judicial." (Similarly, they refer to the limited legislative powers of the commission as "quasi-legislative.") In carrying them out, as has already been indicated, the commission focuses its attention upon the public interest—that is upon policy—rather than upon private rights alone. Furthermore, the fact that most of its actions arise out of controversies, and that even where this is not clearly the case the commission commonly employs the "adversary" procedure, must not blind us to the further fact that general rules of future conduct are being laid down. The functions of the commission are primarily of a legislative nature, and its

[22]Professor William H. Pittman, who has made a careful study of the Interstate Commerce Commission's use of precedents, concludes that in this respect, "it is doubtful whether the Commission decides cases in a manner fundamentally different from that of traditional courts." William H. Pittman, "The Doctrine of Precedents and the Interstate Commerce Commission," 5 *George Washington Law Review* (March 1937) 543–79 at 579, and reprinted in 4 *Selected Essays on Constitutional Law, op. cit.* (Chap. I, n. 7), pp. 811–41 at 840. A study which has been made of the New York Public Service Commission indicates that precedents tend to be followed by that body also, although it would appear that the tendency is less pronounced than in the case of the Interstate Commerce Commission. Charles S. Hyneman, "The Case Law of the New York Public Service Commission," 34 *Columbia Law Review* (January 1934) 67–105, and reprinted in 4 *Selected Essays on Constitutional Law, op. cit.* (Chap. I, n. 7), pp. 841–79 at 879.

[23]The truly judicial function of passing upon claims for "reparations" forms no essential part of the commission's work.

quasi-judicial functions are ancillary to, and an integral part of, the legislative process.[24] It is therefore highly desirable that they should be performed by one and the same agency.

Another feature which distinguishes the commission from a court is that it is not bound by common-law rules of evidence. This characteristic it shares with practically all administrative tribunals. Such rules may be well advised for the purpose for which they were developed, but they would be hampering in the extreme in the highly complex factual situations with which administrative tribunals are confronted. Nor does it necessarily follow that individual rights are thereby sacrificed to expediency. The protections devised to prevent simple-minded and often ignorant jurors from being misled may well be somewhat relaxed in the case of commissions manned by trained and competent experts.[25]

[24]Thus Professor Sharfman writes: "The Commission is an agency of the Congress, charged primarily with the exercise of legislative functions in execution of prescribed guiding standards; and if Congressional lawmaking is to serve as an effective means of establishing regulatory policies of positive control under the economic complexities of the modern world, such exercise of legislative functions, whereby the general criteria formulated in statutes are translated, after hearing and investigation, into concrete arrangements applicable to particular situations, is indispensable." Sharfman, *op. cit.* (above, n. 17), Part IV, p. 267.

Note also the testimony of Interstate Commerce Commissioner Joseph B. Eastman before the Senate Select Committee on Government Organization. He said in part: "The need of a Commission arises, it seems to me, when the legislative body finds that particular conditions call for continual and very frequent acts of legislation, based on a uniform and consistent policy, which in themselves require intimate and expert knowledge of numerous complex facts, and knowledge which can only be obtained by processes of patient, impartial, and continued investigation." "Reorganization of the Government Agencies," Hearings before the Select Committee on Government Organization, United States Senate, on S. 2700, 75th Congress, 1st Session, August 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12, 1937, at 194.

[25]It should be noted also that the common-law rules of evidence are largely taken from criminal jurisprudence. Consequently they indulge every presumption in favor of the defendant.

To guard against abuse, partly by statutory provision but mostly by the commission's own regulations, there has been developed for the commission's use in various types of cases a full code of procedures which serves as adequate protection for the interests of all parties.[26] Thus in an ordinary, formal case, proceedings are initiated by a complaint, which is transmitted to the defendant carriers for the preparation of an answer. The next stage is a hearing of the interested parties before a member of the commission's staff, known as a "trial examiner." The hearing is conducted with the usual provisions for introduction of evidence, examination of witnesses, briefs, and oral arguments. The examiner then prepares a tentative report which is submitted to the parties. If they do not object, the commission will probably make this report the basis of its own decision. If exceptions are filed, however, there will be an opportunity for a further hearing before the full commission or one of its divisions. On the basis of this record a new determination will be made which in turn is subject to rehearing and reconsideration by the commission as a whole. It is to be noted that in the great majority of cases the commission acts as a judge between

[26]A vast store of information regarding the procedures of federal administrative agencies in their actions which affect the interests of private individuals is to be found in the staff reports of the Attorney General's Committee on Administrative Procedure. Several of these studies have been printed as "Administrative Procedure in Government Agencies," Senate Document No. 186, 76th Congress, 3rd Session (Washington, D.C.: Government Printing Office, 1940). Others have been released by the committee in mimeographed form. It should be noted that the committee did not adopt these studies as its own. One of the studies (that of the Federal Communications Commission) has been severely criticized by a practitioner before the commission concerned. He states that the monograph "lacks accuracy and objectivity to such a degree that only with the greatest caution may use be made of its contents." Louis G. Caldwell, "The Federal Communications Commission—Comments on the Report of the Staff of the Attorney General's Committee on Administrative Law," 8 *George Washington Law Review* (March 1940) 749–818 at 816.

private interests—railroads, on the one hand, and shippers or localities on the other.

In short, the functions which are committed to the Interstate Commerce Commission require it to exercise a mixture of governmental powers, and give it wide areas of discretion both as to what it should do and how it should go about it. To be sure the commission, like other administrative agencies, is ultimately subject to certain judicial control.[27] It is interesting to note, however, that although a large proportion of the commission's actions are in effect final, it stands in very high esteem with the parties whose activities it regulates—both carriers and shippers. A justice of the United States Supreme Court has written: "Looking back over the fifty years which have passed since the establishment of the Interstate Commerce Commission, no one can now seriously doubt the possibility of establishing an administrative system which can be made to satisfy and harmonize the requirements of due process and the common-law ideal of supremacy of law, on the one hand, and the demand on the other, that government be afforded a needed means to function, freed from the necessity of strict conformity to the traditional procedure of the courts."[28]

It is important to emphasize that what has been established is, in Justice Stone's phrase, "an administrative system," not merely an amorphous agency exercising broad and vaguely defined powers in accordance with the whim of the moment.

The Interstate Commerce Commission is the oldest, the most powerful, and the most respected of the great regulatory commissions. Much of what has been said about it applies also to other commissions. In treating other commissions more briefly, we shall attempt to show in what ways

[27]See Chapter VII.

[28]Harlan F. Stone, "The Common Law in the United States," 50 *Harvard Law Review* (November 1936) 4–26 at 16–17.

they resemble and in what ways they differ from their prototype.

THE FEDERAL TRADE COMMISSION

The Federal Trade Commission,[29] consisting of five members (not more than three of whom may be members of the same political party) appointed for overlapping terms of seven years, was established in 1914. It was created as a part of the struggle against monopoly and monopolistic practices. Congress had previously attempted with little success to cope with this problem by the older method of outlawing certain kinds of action and leaving the problem of enforcement to the regular law-enforcing agencies.[30]

The Clayton Act,[31] passed at the same time as the act establishing the commission, outlawed a variety of specific practices, such as price discrimination, and empowered the Federal Trade Commission to enforce compliance with these provisions,[32] after investigation and hearing, by the issuance of cease-and-desist orders. The Federal Trade Commission Act[33] itself banned "unfair methods of competition" and

[29]The only thorough study of the Federal Trade Commission from the administrative angle is Gerard C. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* (New Haven: Yale University Press, 1924). Although it is now out of date it is still worth consulting. For a more recent treatment which sheds much light on the difficulties with which the commission has had to contend, see Thomas C. Blaisdell, Jr., *The Federal Trade Commission* (New York: Columbia University Press, 1932). See also Herring, *Public Administration and the Public Interest, op. cit.* (Chap. II, n. 20), Chaps. VII–VIII. Recent amendatory legislation of importance is described under "Legislation" in a note entitled "The Federal Trade Commission Act of 1938," in 39 *Columbia Law Review* (February 1939) 259–73.

[30]The Sherman Antitrust Act of 1890. 26 Stat. L. 209 (1890).

[31]38 Stat. L. 730 (1914). This act has since been amended by the Robinson-Patman Act. 49 Stat. L. 1526 (1936).

[32]The Interstate Commerce Commission has jurisdiction in the case of common carriers subject to the Interstate Commerce Act.

[33]38 Stat. L. 717 (1914).

directed the commission to enforce this provision in similar fashion. (This prohibition has recently been enlarged to include "unfair or deceptive acts or practices in commerce."[84])

In connection with the problem of law versus discretion, it is important to note that one reason for this legislation was that the Sherman Act's prohibition of combinations "in restraint of trade," as enforced by the courts, furnished such an uncertain standard. Businessmen protested that they could not know what acts would be pronounced legal and what would be adjudged criminal. Congress therefore hoped and intended that the new commission would be able to use its powers to develop more settled principles and rules in this field. Many believed that in this way a real "law of fair trade" could be developed. It was hoped that this might be accomplished through the gradual establishment of standards growing out of decisions in individual cases rendered by a body of experts "informed by experience" and devoting their full attention to the problem.

It must be admitted that thus far that aim has not been achieved. There appear to be several reasons for this failure. Some students are of the opinion that had the commission, like the Securities and Exchange Commission, been given authority to implement the broad statement of congressional policy by substantive rules and regulations the result might have been quite different. Certainly the unwillingness of the courts to allow the commission anything like a free hand in the interpretation of the phrase "unfair methods of competition" seriously handicapped it. Others believe, however, that Congress did not give the commission sufficient guidance; administrative discretion, they argue, must have more than an empty formula as a standard if it is to develop a policy in such a large and uncharted field as that of unfair trade prac-

[84] 52 Stat. L. 1028 (1938). The commission also possesses highly important powers of investigation, which are not relevant here.

tices. To these reasons must be added the incompetence and lack of proper training of some of the commissioners and, in some cases, their lack of sympathy with the purposes of the act.[35]

These are reasons enough to account for the fact that the commission has not added that element of certainty to the law which had previously been lacking. Some of them, at least, are remediable, and there is ground to hope that the original goal of the sponsors of the legislation may yet be attained. However that may be, the failure of the commission type of administration to accomplish what the executive and the courts acting in the traditional fashion had previously failed to do clearly furnishes no basis for condemning the former in favor of the latter.

But the major charge which is so frequently leveled against regulatory commissions in general, and the Federal Trade Commission in particular, is that they are at once prosecutor and judge; and that this combination of functions is incompatible with the most elementary concepts of fairness. It would appear that in the case of the F.T.C. the charge has in the past had some basis. Professor Milton Handler declares that the combination of the functions of prosecutor and judge has resulted in bureaucratic tyranny and the presentation of ill-prepared and unlawyerlike records to the courts.[36] In more tempered terms, Gerard C. Henderson writes: "Clearly from the point of view of organization, the Commission's most important and most difficult task is that of maintaining a distinct separation between its prosecuting capacity and its judicial capacity." Furthermore, he continues,

[35]Professor Herring declares: "Conflicting personalities and widely divergent viewpoints among the commissioners must be put down as a basic cause of weakness in the Federal Trade Commission." Herring, *op. cit.* (Chap. II, n. 20), p. 133.

[36]Milton Handler, "Unfair Competition," 21 *Iowa Law Review* (January 1936) 175–262 at 252.

"there is some ground for criticism in the fact that the examiner who presides at the trial in formal proceedings is an employee of the division of the Commission which was responsible for the investigation leading up to the issuance of the complaint."[37]

Neither Henderson nor Handler, however, believed this difficulty insuperable. Thus Henderson recommended that the trial examiners should constitute an independent division in the commission. The commission, in fact, is now organized on that basis. Henderson and others have also suggested that the practice of having the proposed findings for the commission drawn up by the prosecuting attorneys should be abandoned. This suggestion, too, has been acted upon. Tentative findings are now prepared by the trial examiners' division.

In general the commission's procedure is similar to that in use by the Interstate Commerce Commission, and seems to be designed to insure a full and fair hearing to all parties. It is worthy of note that the record of the commission before the courts (which is now excellent) has shown a marked improvement since the correction of the procedural irregularities referred to above. Too many other conditions have also changed, however, to justify, without further evidence, the conclusion that a causal relationship exists.

It must be noted, however, that while the general scheme of the commission's quasi-judicial organization and procedure is similar to that of the Interstate Commerce Commission, its practical operation has been less satisfactory. It is a frequent matter of complaint that the commission's decisions tend to lack precedent value because they do not state in detail the bases of their conclusions. It is charged also that the failure of the intermediate reports, prepared by the trial examiners, to discuss and point up the issues of law renders

[37]Henderson, *op. cit.* (above, n. 29), p. 83.

those reports less valuable both to the commission and to the interested parties to the controversy than they might otherwise be.[88]

THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is a bipartisan, independent commission, consisting of five members, appointed for overlapping terms of five years each. It was created in 1934 to administer the Securities Act of 1933 and the Securities Exchange Act of 1934. Since then the administration of the Public Utilities Holding Company Act of 1935, and the Investment Company Act of 1940 have also been committed to it. Its principal purposes are to prevent misrepresentation in the issuance of securities, to purge the stock and bond exchanges of malpractices, and to effect a comprehensive regulation of the structure and practices of public utility holding companies. It is also charged with the function of advising the courts in certain bankruptcy proceedings, especially in cases involving the reorganization of large corporations, and with the duty of imposing regulations upon investment trusts and investment advisers. It has extensive rule-making powers. For instance, securities may not be offered for public sale in interstate commerce without being first "registered" with the commission; the conditions governing such registration are set forth in the commission's rules and regulations. The commission makes generous use of this rule-making power throughout its fields of activity, and today its rules and regulations fill scores of pages. This is perhaps the commission's most unique and instructive feature from the point of view of the administrative process. However, it should not be allowed to obscure the fact that

[88]See the Attorney General's Committee on Administrative Procedure, "The Federal Trade Commission," Monograph No. 6 (mimeographed), especially pp. 19, 36–41, and 50.

the commission is constantly taking action with regard to particular persons and events. It issues stop orders, consent refusal orders, and withdrawal orders, grants exemptions of one sort or another, and performs various other acts of particular application, which, when contested, become quasi-judicial in nature. It is interesting to note that its decisions are accompanied by carefully prepared, reasoned opinions, occasionally with dissenting opinions as well.

Certain points regarding the commission's procedure are also worth noting.[39] Where it takes "prosecutory" action for the suspension of some privilege (such as that of offering certain securities for sale), its proceedings are of the "adversary" type. Prosecution is conducted by members of the registration division's staff. The hearing is held before a trial examiner designated by the commission itself and responsible to it alone. This examiner reports his findings of fact and recommendations to the commission. The complete record, including transcript of all proceedings, briefs, and the trial examiner's report, then goes to the "opinions" section of the general counsel's office, which is independent both of the trial examiners and of the registration division. On the basis of this record, a member of its staff, who is under strict instructions not to confer either with the trial examiner or with the prosecuting attorney from the registration division, then prepares a draft opinion. The commission studies this opinion, confers with staff members, generally revises it—sometimes quite extensively—and then produces the final decision.[40]

[39]For a fuller account of the commission's procedures, upon which is based most of what is set forth in the text, consult Chester T. Lane's contribution to a "Symposium on Administrative Law" in 9 *American Law School Review* (April 1939) 154–64. Mr. Lane is general counsel of the Securities and Exchange Commission.

[40]Where the commission takes "administrative action" in passing upon an application for the grant of some privilege or relief from some statutory

In general, the work of the Securities and Exchange Commission has been highly praised, and it has been well received by many of those whose business it directly affects. Nevertheless it has not been without its severe critics. Not only are particular decisions condemned, but the commission is charged with creating uncertainty; there are, besides, those who maintain that the judge-prosecutor-legislator combination has resulted in injustices. One criticism has concerned the use of trial examiners from the commission's own staff, even though they are independent of the prosecuting division. Without any actual allegation that the examiners have been unfair, the question has been raised whether the parties before the S.E.C. can be confident that they have received a fair trial under existing conditions. One critic suggests that "perhaps a solution to the problem may be found in the creation of an administrative court or an independent quasi-judicial bureau of trial examiners."[41] Whether or not these particular proposals should be adopted, it is no doubt true that greater precautions against bias are necessary in the case of an agency like the Securities and Exchange Commission, which generally acts as one of the parties to the proceedings, in behalf of the public, than in the case, say, of the Interstate Commerce Commission where the commission generally has to deal with mutually opposed private interests.

Of course, the Securities and Exchange Commission is subject to control by the courts. But judicial control, coming after the event, is always less desirable and frequently

prohibition, its procedure is more informal. If the appropriate staff officials approve the application, the procedure may be greatly simplified; if not, the proceedings more nearly approximate the "adversary" type.

[41]Roland L. Redmond, "The Securities Exchange Act of 1934: An Experiment in Administrative Law," 47 *Yale Law Journal* (February 1938) 622–646 at 643. Mr. Lane also suggested that he would not be averse to considering something like the second of Mr. Redmond's suggestions. Lane, *op. cit.* (above, n. 39), 159–60.

less effective than that which comes from within the agency itself. This is particularly true of the Securities and Exchange Commission. The business of selling securities depends for its success upon the confidence of the buying public. The announcement of the initiation of proceedings by the Securities and Exchange Commission to prevent a certain issue from being offered to the public is almost as effective as a stop order. Even if in the end the proceedings are discontinued in nine cases out of ten the damage will have been done; that is, the unfavorable publicity will have rendered impossible the marketing of the securities in question. Again, the actual "delisting" of a security has far less effect on the market than the original announcement of hearings. Here is an important opportunity for administrative arbitrariness which can be reached only by internal checks. Nor will the separation of judge and prosecutor help in this respect, for the power to initiate proceedings rests entirely with the prosecutor; this situation would be unchanged if prosecution were lodged in the hands of the Department of Justice, except for the fact that the latter, being less expert in the matter at hand, would be more likely to err.

The comments regarding the separation of prosecutor, judge, and legislator made by Chester T. Lane, the general counsel of the Securities and Exchange Commission, are of interest:

> Rule-making and enforcement cannot be separated from interpretation and adjudication without sacrifice of efficiency and of the public interest sought to be protected or advanced. I venture to assert dogmatically that the regulatory function of any board or commission would suffer irretrievably if enforcement and policy-making were completely divorced. If a rule is simple in its form, and easily understandable in its application, its enforcement may be left to the courts by prohibition and punishment. But business and industry are no longer simple, and the

rules required for their control are exceedingly complicated; they are no longer rules, indeed, but codes of regulation, as ramified as the business they regulate. Administration, therefore, no longer entails mere prohibition, but the sympathetic understanding of complicated business facts, uniformity of approach, and a constant time-consuming supervisory interest. . . . To require that the rules and regulations under the Securities Exchange Act regarding the solicitation of proxies should be drafted by one agency and interpreted by another is to deprive those who are subject to regulation of the thought, the experience, and the understanding of those who know the most about the rules—the draftsmen.[42] [By "draftsmen," it should be observed, Mr. Lane means those responsible for the content of the rules.]

It has already been noted that there are degrees and degrees of division of labor and even of separation of powers. Consequently, Mr. Lane's statement indicates a situation which any realistic proposal for modifying existing procedure must take into account. It cannot be accepted as a blanket defense of the *status quo.*

THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, created in 1935, consists of three members appointed for five-year, overlapping terms.[43] It has been the center of a great deal of controversy more because of the conflicts of interests inherent in the law which it administers than on account of anything peculiar about the board as an administrative agency. In organization, powers, and procedure it adheres closely to the now familiar pattern.

Like the Federal Trade Commission, the National Labor Relations Board deals with a certain aspect of business generally rather than with a particular industry. Its function is

[42]Lane, *op. cit.* (above, n. 39), p. 163.

[43]The usual provision for bipartisan membership is omitted.

the prevention and suppression of certain, specified "unfair labor practices." Unlike the Federal Trade Commission, it has no general authority to develop the concept of unfairness.[44] Nevertheless, some of the acts which it is empowered to prevent are not so narrowly specific as to prevent the board from exercising considerable discretion. For instance, the act lists as an unfair labor practice, "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[45] Furthermore, it is authorized to take "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."[46]

While its procedures vary somewhat for different purposes, in general they follow the usual pattern for "adversary" jurisdiction.[47] The trial examiners are independent of other sections of the board. There has been a great deal of criticism of the board, and many charges that its examiners have relaxed the ordinary rules of evidence unduly and in other ways exhibited gross bias. In a few instances, federal courts in reversing orders issued by the board have charged examiners with bias. On the whole, however, the record of the board before the courts has been excellent; and the most careful study yet made of the work of the board with particular reference to its procedure stoutly defends it against charges of unfairness.[48]

[44]It is to be noted, however, that the board has adopted the commendable practice of formulating the principles developed by its decisions and publishing them in its annual reports.

[45]49 Stat. L. 449 at 452 (1935).

[46]*Ibid.*, p. 454.

[47]See J. Warren Madden in "Symposium on Administrative Law," *loc. cit.* (above, n. 39), pp. 144–54; and compare *Third Annual Report of the National Labor Relations Board, for the fiscal year ended June 30, 1938*, pp. 4–6.

[48]During the fiscal year 1939–40, the courts rendered sixty-nine final decisions involving enforcement or review of board orders in unfair labor

OTHER FEDERAL REGULATORY AUTHORITIES

Space does not permit consideration of additional federal regulatory commissions, except a reference to a recent experiment in the technique of achieving a fair procedure which is being conducted by the Federal Communications Commission. Reversing the general trend toward building up the importance of the trial examiners and of the intermediate reports prepared by them, this commission has done away with these reports and reduced the trial examiner to a mere presiding officer. The new procedure provides that after the hearing, presided over by the examiner, each party files proposed findings and conclusions. The commission, on the basis of these documents, then makes its own tentative findings and conclusions. After interested parties have had an opportunity to take exceptions or demand a hearing the final decision is issued. Before this change in method had been made the commission's procedure had been widely criticized.[49] It is interesting to note that one of the points of

practice cases. The Supreme Court upheld the board orders in 67 per cent of the cases which it decided, and modified the orders in the remaining cases. In no instance did it reverse an order. The Circuit Courts of Appeals upheld the board in full in 35 per cent of the cases, modified the orders in 48 per cent of the cases, and reversed them in the remaining 17 per cent.

The results of the study of board procedure referred to in the text are presented in Walter Gellhorn and Seymour L. Linfield, "Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure," 39 *Columbia Law Review* (March 1939) 339–95. See also hearings and report of the Special Committee of the House of Representatives appointed to investigate the National Labor Relations Board, in compliance with House Resolution 258, 76th Congress, 1st Session, 1939. The hearings contain considerable testimony purporting to cast a less favorable light on certain practices and procedures of the board and its staff than would be indicated by the article cited above. The report of the committee, signed by three of its five members, strongly condemns the Board, charging it with bias and unfairness. *The New York Times,* December 29, 1940, p. 18.

[49]According to the findings of the Attorney General's Committee on Administrative Procedure, "the new examining procedure has effectively cured

criticism was the commission's adherence to the case-to-case, or judicial, method in passing upon applications for broadcasting licenses. It was contended that this led to virtual censorship. A broadcasting company might be denied renewal of its license because of the nature of past programs even though no definition of admissible programs had been published. The plea for greater use of the rule-making power —or at least for careful formulation of the principles and standards by which the adjudicating power is to be exercised—would seem to be especially well founded in this case. There is no indication that the new procedure contemplates any reform in this respect.

Department heads as well as commissions may act as regulatory authorities, but in fact most of the regulatory powers exercised by department heads are in the form of the authority to issue rules and regulations, which was discussed in the preceding chapter. However, the power to issue administrative orders of individual application, involving the exercise of considerable discretion, is vested in cabinet officers upon occasion. Perhaps the best example is that of the Secretary of Agriculture, whose duty it is, under the Packers and Stockyards Act, to regulate the charges of stockyard owners and market agencies. The power of the Secretary of Agriculture to grant, withhold, or revoke licenses to dealers

the evils with which the Commission was previously afflicted." "Administrative Procedure in Government Agencies," Senate Document No. 186, 76th Congress, 3rd Session, Part 3, p. 32. The study goes on to state, however, that the evils which had been manifested were in most respects peculiar to the Federal Communications Commission, so that this experience should not be considered sufficient basis for extending the new procedure to other agencies. Furthermore, the committee suggests that the same improvement might have been obtained by a less drastic alteration in procedure. *Ibid.*, pp. 32 ff. A leading practitioner before the commission, who is also a close student of the commission's procedure, denies that the improvement, if any, is attributable to the changes in the examiner system. Caldwell, *op. cit.* (above, n. 26), pp. 785 ff.

in perishable agricultural commodities also falls in this category. In the performance of these functions, the secretary follows procedures similar to those used by the regulatory commissions.[50]

STATE REGULATORY AUTHORITIES

Our concentration of attention upon the federal regulatory commissions must not lead us to overlook the fact that the states also make use of regulatory authorities. Since its inception in Massachusetts in 1867 and its inauguration in its modern form in Wisconsin and New York in 1907, the state public utility commission (sometimes called "public service commission," or "railroad commission") has become an important instrument of government. It regulates the rates, standards of service, financial structure, and accounting methods of gas and electric companies, water works, and intrastate transportation systems, and requires that like service be rendered to all without discrimination. The commissions range in size from three to seven members. Appointment is generally by the governor, but sometimes by the legislature, while in the Southern and Midwestern states popular election prevails.

On the whole the record of these commissions has not been good. Indeed, one writer describes it as hovering between the tragic and the farcical.[51] This is not the place to discuss that subject in detail, for its bearing upon the problem of law and administration is only incidental. The story must be told in terms of personnel who have been incompetent, untrained for their tasks, and primarily interested in using their positions for political advantage. Inadequate

[50]The secretary was recently compelled to revise his procedure in such cases. See below, pages 191–93.

[51]Austin F. Macdonald, *American State Government and Administration* (New York: Thomas Y. Crowell Company, 1940) 549.

appropriations and the lack of sufficient statutory authority —authority, for example, to deal with holding companies— must also bear a large portion of the blame. Three other factors contributing to the widespread failure of commission regulation should be singled out here for special mention because they bear directly upon the subject of this book. In the first place, the legislative provisions as to commission procedure have frequently been hampering in the extreme, with the result that even able commissioners have become discouraged. A notable example of this weakness is the fact that the laws commonly do not permit the commissions to take the initiative in instituting proceedings against utility companies. Instead, commissions cannot act until some interested individual, group of individuals, or municipality, proceeding at its own expense, initiates proceedings. The second factor referred to is largely the result of this situation: the commissions have come to act as impartial adjudicating authorities for the settlement of controversies rather than as active agents of the public, positively seeking to advance the general interest. Still a third difficulty is to be found in the attitude of the courts, which will be described more fully in a later chapter. Suffice it to say here that the courts have frequently reversed commission findings based upon careful and extensive investigation, and have invalidated methods of valuation believed by commissions to be fairest for all concerned. Here again is a factor which has tended to demoralize the regulatory agencies.[52]

Recently, other types of regulatory commissions have sprung up in many states. Outstanding among these are

[52]On this subject see further, William E. Mosher (ed.), *Electrical Utilities: The Crisis in Public Control* (New York: Harper & Brothers, 1929) Chap. I; C. O. Ruggles, "Aspects of the Organization, Functions, and Financing of State Public Utility Commissions," Harvard University Graduate School of Business Administration, Business Research Studies Number 18, April 1937.

securities commissions, labor relations boards, and milk control boards.

In short, perhaps the regulatory commissions do, as has been said, constitute a "fourth branch of government." But they are subject, constantly, to both legislatures and courts. And, in addition to the checks provided by these organs of government, they have developed others of their own. In any case, fourth branch or not, they are certainly not fifth wheels. Their importance for government in this country can scarcely be exaggerated.

Administrative Agencies of Adjudication

Thus far in this chapter attention has been confined to administrative tribunals that are practically administrative courts, on the one hand, and to regulatory commissions, which combine quasi-judicial, quasi-legislative, and routine administrative functions, on the other. This leaves the third category of agencies of administrative adjudication still to be discussed. These agencies are less like regular courts than the first group studied, and yet more purely judicial, or at least quasi-judicial, than the second. They lack the broad legislative powers of the regulatory authorities. As distinguished from both administrative courts and independent commissions, they are generally located within other agencies which are primarily administrative in character; but in some instances the same body performs the administrative and the adjudicative functions. Their members are not called judges, and in most cases they need not be lawyers, although they often are. Subject to a few exceptions, the members are part of the regular staff of the administrative agency to which the particular board belongs, and in some cases they perform administrative duties when they are not adjudicating. Be-

yond this point their variety defies generalization, as some examples will suggest.[53]

[53]The examples of this type of adjudicatory agency in the federal government are almost innumerable. The most important of those that are to be found in the regular departments, classified by the departments in which they are located, are as follows:

Department of Agriculture
- Board of Tea Appeals
- Board of Grain Supervisors
- Examiners under Perishable Agricultural Commodities Act
- Grading appeals committees
- Authorities dealing with appeals from standards
- Inspectors dealing with appeals from inspection and certification of fruits, vegetables, and other products
- Commodity Exchange Commission and referees
- Review committees under Soil Conservation and Domestic Allotment Act

Department of Commerce
- Marine casualty boards
- Board of Appeals of the Patent Office
- Bureau of Marine Inspection and Navigation

Interior Department
- Board of Appeals of the General Land Office

Department of Justice
- Board of Review of the Immigration and Naturalization Service

Department of Labor
- Public Contract Boards
- Davis-Bacon Law Referee

Navy Department
- Examining Board
- Retiring Board
- Contracts Officer

Post Office Department
- Inspector and Solicitor

Department of State
- Conciliation Committee
- Board of Appeals and Review

Treasury Department
- Federal Alcohol Administration

War Department
- Board of Review
- Retiring Boards
- Courts of Inquiry

THE GENERAL LAND OFFICE

The General Land Office in the Department of the Interior is by far the oldest of these agencies, having been established in 1836. This is not a single tribunal, but a whole series of tribunals, beginning with individual land "registers," located in field offices throughout the country, including the Commissioner of Public Lands, who reviews every action of the registers and also hears formal appeals, and extending finally to the Secretary of the Interior himself, who reviews a small proportion of the cases on further appeal. The commissioner is a political appointee with nothing to guarantee his competence for judicial work, but the actual judicial work of his office is performed by a trained staff of lawyers. Similarly the secretary acts upon the advice of a board of review.

A large variety of cases comes before the Land Office. Many of them involve questions of ownership of land, title to which is derived from a grant by the federal government. These are purely private controversies between individuals. Other cases arise out of disputes between the government and individuals over such questions as whether or not the conditions prerequisite to obtaining title to land from the government have been observed. In addition, the Land Office has many nonjudicial functions to perform. As to the adjudicatory tribunals in the Land Office, it has been said that although they "are not technically courts, the controversies they determine, especially where those controversies are between individual adverse parties, and the procedure by which thy are determined conform more closely to the questions and procedure of typical common law courts, than do those with which some so-called courts, for example, juvenile courts, deal."[54] After a careful analysis of the operation

[54]H. L. McClintock, "The Administrative Determination of Public Land Controversies," 9 *Minnesota Law Review* (April, May, June 1925) 420, 542,

of these tribunals, with special reference to alleged advantages and disadvantages of "justice according to law," the same authority concludes that "on the whole, the Land Department has achieved a large degree of success in attempting to give speedy and cheap adjudication of a vast number of litigated controversies, while at the same time preserving to a very large degree the safeguards of the administration of justice according to law, as developed by our courts of common law."[55]

It is interesting to note that the development of this institution, during the nineteenth century, was prompted neither by a predisposition toward administrative justice on the part of the responsible authorities nor by any peculiarity in the nature of the issues in controversy. The reason is to be found simply in the impossibility of handling by any ordinary court machinery the volume of work involved. It is to be anticipated that the pressure of work will likewise compel increasing resort to administrative adjudication in other fields.

EXCLUSION AND EXPULSION OF ALIENS

The laws regulating the exclusion and expulsion (deportation) of aliens from this country establish another important area of administrative justice. Jurisdiction over this subject is committed to the Immigration and Naturalization Service of the Department of Justice.[56] In both instances (exclusion

638 at 638. Part III of this article is reprinted in 4 *Selected Essays on Constitutional Law, op. cit.* (Chap. I, n. 7), pp. 750–66. On the General Land Office, see also Charles R. Pierce, "The Land Department as an Administrative Tribunal," 10 *American Political Science Review* (May 1916) 271–89; and Milton Conover, *The General Land Office.* Institute for Government Research, Service Monographs of the United States Government, No. 17 (Baltimore: The Johns Hopkins Press, 1923).

[55]McClintock, *op. cit.* (above, n. 54), p. 649.

[56]The Immigration and Naturalization Service was part of the Department of Labor until July 1, 1940.

and expulsion), some administrative machinery is provided for the review of the initial determinations of the administrative officials, when it is demanded. The first review is held in the field. In the case of the exclusion of a would-be immigrant, there is a hearing before a "board of special inquiry" of three, made up of inspectors and clerks. In deportation cases, the inspector himself—he who was responsible for apprehending the alien and entering a charge against him—conducts the hearing. In each case there may be a further appeal to the Board of Immigration Appeals in the office of the attorney general, and, in certain cases, a still further appeal to the attorney general himself.

There are no private controversies in this field; all are between the government and individuals. Furthermore, the individuals have only very limited rights at stake (in the eyes of the law), particularly when it is a matter of exclusion. More is involved in the case of those who have been in this country for some time and have established themselves and who are then threatened with deportation, even though they may have to leave their families behind. Because of the limited rights involved, as well as because of the volume of work, the review procedure in the field is of a summary (abbreviated and informal) nature and lacks many of the accepted safeguards against abuse which usually attend administrative adjudication.

This has been a particular source of criticism in the case of deportation, where it is widely felt that a complete trial should be provided. As a result of a special study it made of this subject the National Commission on Law Observance and Enforcement (the "Wickersham Commission"), concluded that in many instances the administration of the laws had been carried out by methods which were "unconstitutional, tyrannic and oppressive."[57] More recently the Com-

[57]The National Commission on Law Observance and Enforcement, "Re-

missioner of Immigration and Naturalization himself has written as follows regarding practices prior to his regime: "A record number of deportations was the chief objective and the measure of efficiency. Arrests without warrant in violation of law were not the exception but the rule. Illegal raids on peaceful assemblies and forceful detention of those present, alien and citizen alike, were of frequent occurrence. Third-degree methods were employed. Aliens were held in jail for many months awaiting completion of their trial. Bonds were set in unjustifiable amounts."[58]

While recognizing that the criticized practices could be corrected without any changes of structure or powers, the Wickersham Commission felt that the combination of the functions of detective, prosecutor, and judge in one agency (and, in the original instance, in the hands of one man) was too great an invitation to abuse. It therefore recommended the establishment of a system of wholly independent reviewing tribunals, in the nature of administrative courts or commissions. It is notable, however, that only one of the eleven members of the commission recommended turning this function over to the regular courts. Nothing has been done toward providing independent tribunals, but the practices of the Immigration and Naturalization Service have been so reformed since 1933 as to make the commission's recommendation appear less urgent.

One other point of interest emerges from this study. Many of the deportation cases which have called forth the loudest public disapproval—those involving the separation of families and the deportation of aliens on mere technicalities of the law—have come about because administrative discretion has not been legally provided. This is an interesting

port on the Enforcement of the Deportation Laws of the United States," No. 5 (Washington, D.C.: Government Printing Office, 1931) 177.

[58]House Document, No. 392, 74th Congress, 2nd Session, p. 30.

example of the way in which rigid adherence to the "rule of law" may produce injustice. The Wickersham Commission recommended that the administrative authorities be allowed to make exceptions to the letter of the law, at their discretion, when undue hardships would otherwise be inflicted.

COMPENSATION CLAIMS

In the case of veterans' pensions, the Administrator of Veterans' Affairs is given power to make absolutely final determination as to all claims. The theory is that, since the granting of any pension is a matter of grace which the government could withhold if it so desired, no individual ever has a *right* to a pension. Consequently the determination of individual claims is purely an administrative affair. Nevertheless, as a practical matter, and in the interests of justice, administrative machinery for adjudication is provided in this and in similar cases. When the initial determination of a claim is contested, the local office is directed to develop a full, written record of evidence and contentions on both sides. When this office and the claimant are both satisfied that this record is complete it is transmitted to Washington to the Board of Veterans' Appeals. In some cases, by arrangement, hearings are held in the field and the record is sent to the board. Otherwise the board itself hears the case and renders its judgment. During the fiscal year 1938, appellate action was taken on 42,553 issues involving 30,944 appellants.[59]

[59] It must be constantly borne in mind that it is not within the province of this volume to deal with the extent to which administrators are influenced by "political" considerations and personal pressure in their decisions in particular controversies. There is considerable evidence that such influences play an important role in the settlement of veterans' pensions claims. How much this is attributable to the fact that the veterans constitute such a powerful political factor and how much to the fact that the courts are estopped from action in this field, it is impossible to say. Doubtless the two factors themselves are not unrelated.

A far larger task of adjudicating contested decisions as to compensation claims is faced by the Social Security Board in administering the federal old-age insurance system. The fact that the wages of employees are taxed in order to raise funds for these payments strengthens the case for providing ample opportunity for administrative appeals from original decisions and for adequate safeguards in the conduct of such appeals. The system adopted by the board provides that initial decisions on claims may be appealed to individual referees in the field. Disappointed claimants will be granted hearings before these referees, although the review may be based upon written evidence alone, if both referee and claimant so desire. In the developmental stages of the hearing and review system, before a large body of precedents has been built up, the proposed decisions of referees in doubtful cases are to be reviewed by a consulting referee in Washington before they are announced. If the field referee is unwilling to follow the advice of this consultant, the case must go before the central Appeals Council, which will render the final decision. This council is to form a permanent part of the appeals machinery and will review such cases as it sees fit, either upon the request of dissatisfied parties or upon its own motion.

The states are dealing with a very similar problem in administering their unemployment compensation laws. While there are individual variations, the general pattern of the adjudicatory machinery provided by these laws is very similar. Frequently there is provision for an informal hearing and a reconsideration by the deputy administrator who makes the initial determination. In any case the next stage of appeal is almost sure to be to a local "appeals board." These boards generally consist of a representative of employers, a representative of employees, and a member of the staff of the administrative agency who devotes his full time

to this work. In certain cases the decisions of these boards may be final—for instance, if the board is unanimous. Otherwise there is a further administrative appeal to a central "board of review" or to the unemployment compensation commission.[60] It is a matter of debate whether appeals should be heard by a specialized adjudicatory body, which is independent of the administration, or by the body which is most familiar with the administrative problems involved, with the meaning of the rules, and with the policies which it wishes to have pursued.

Common-law rules of evidence are not enforced. Interested parties are notified of hearings, all testimony is taken down, and parties may be represented by counsel, although this practice is discouraged and every effort is made to make it unnecessary. According to the best practice, the record at each stage is made available to the reviewing agency, which, however, may receive or itself gather further evidence if it deems it desirable.

In accordance with the provisions of the Social Security Act, the states now also provide for a hearing in the case of appeals from administrative decisions regarding old-age assistance (often called old-age "pensions").

The experience of the states in the administration of workmen's compensation laws is highly instructive.[61] The system of administrative adjudication generally used is similar to that in use for unemployment compensation except for the omission of the intermediate stage of local appeals boards. The problem, however, is different in this respect: under most workmen's compensation laws the benefits in

[60]Where the central agency is a commission, it generally hears the appeals. Where it is a single administrator, a board of review is provided for this purpose.

[61]Consult Walter F. Dodd, *Administration of Workmen's Compensation* (New York: The Commonwealth Fund, 1936).

the majority of cases are paid to the injured workman by the employer (or, in practice, by his insurance carrier) rather than by the state. Thus, as in the case of the Land Office, the dispute is between private individuals.

Nevertheless, there is general agreement that the administrative method has been highly successful. Where the administration of workmen's compensation laws has been committed to the courts, as it has been in some states, it has been a failure. And even where an administrative agency is set up but all appeals against original determinations go directly to the courts, the results have been distinctly inferior to those under a system of administrative review. The opportunity for prolonged and expensive litigation favors the employer. The tendency is decidedly toward the adoption of administrative review. As Professor Dodd writes: "A procedure which obtains prompt adjudication with the least cost to the employee and which permits each party to present his case without the restriction of legal technicalities is best calculated to effect the aims of compensation legislation."[62] He is supported by another authority who states that "it is the belief of most of those who have had experience with the administration of the workmen's compensation laws by the Wisconsin Industrial Commission, that its methods and results are far superior to those of the common law courts in similar types of litigation."[63]

Advantages, Disadvantages, and Safeguards

This rather extensive account of agencies of administrative adjudication and of regulatory agencies in general, in this country, should serve to indicate more clearly the reasons

[62] *Ibid.*, p. 324.

[63] Ray A. Brown, *The Administration of Workmen's Compensation.* Studies in the Social Sciences and History, No. 19. (Madison, Wis.: University of Wisconsin, 1933) 84, cited in Dodd, *op. cit.* (above, n. 61), p. 323.

for their development and their advantages and disadvantages than any abstract discussion of the subject. It has been seen that where the judicial method is desired but where specialization in the law appears to be in order, administrative courts have been created. Where government is confronted with a complicated problem of regulation which calls for an integrated approach and for modes of action which defy the conventional classification, the natural result is the regulatory commission. Finally, where particular types of controversies between government and its citizens demand prompt and efficient settlement on the basis of a consideration of the effect of such settlements upon administration and the public welfare as well as upon the individuals concerned, departmental boards for administrative adjudication appear to furnish the logical solution. At the same time there is a question whether legitimate rights of individuals have been sacrificed or overlooked in the quest for administrative workability. With this background in mind, it may be helpful to consider a generalized formulation of the advantages of administrative adjudication, of its disadvantages and dangers, and of possible remedies for those disadvantages.[64]

ADVANTAGES

Consideration may first be given to the advantages of this device where it is used as a part of the administrative process, whether in the case of regulatory commissions, administrative boards, or ordinary administrative bureaus or departments. Here the keynote is to be found in the development of policy. Precisely because it is most intimately acquainted with the policy it is endeavoring to pursue the

[64]For the following paragraphs the author has relied heavily upon Blachly and Oatman, *op. cit.* (Chap. II, n. 9), Chaps. X–XI. See also Landis, *op. cit.* (Chap. II, n. 23), Chap. III.

sanitary authority that grants licenses for the sale of milk, for example, may be the best agency for settling disputes as to the revocation of a license or refusal to grant one. In other words, administrative adjudication and administrative discretion are in some cases almost inseparable. Again, the importance of the policy aspect of the quasi-judicial determinations of the Interstate Commerce Commission and the Federal Trade Commission has been demonstrated. Similarly, when an unemployment compensation commission decides whether a worker's refusal to accept a job paying 50 per cent less than he had been used to getting should disqualify him for unemployment benefits, it is making an important policy determination. Its policy, as expressed in a series of such decisions, may have a significant influence upon wage rates.

The last example suggests a second advantage of administrative adjudication: that it permits the development of standards by the trial-and-error method. In complicated and controversial fields of economic and social regulation this is frequently a necessary supplement to the legislative process. In this way, the National Labor Relations Board is endeavoring by the case-by-case method to develop standards as to what constitutes "collective bargaining." The complexity of modern civilization tends to make pragmatists of us all. It also leads us to resort to regulating such intricate business processes and relationships that, as appeared in our examination of the Securities and Exchange Commission, the whole task must be in the hands of a single organization made up of persons thoroughly familiar with the problems of whatever is being regulated and able to adapt their method of approach to the needs of the case.

Furthermore, when new social philosophies are being developed which tend to clash with certain of the older, private "rights," it is often not wise to commit their enforcement

to the courts even though the policies are clearly defined. This is because the judges are instilled by early training and by the nature of most of their work—the settlement of private controversies regarding rights—with an individualistic philosophy. Experience shows that this often leads them to pervert the meaning of legislative enactments—sometimes to the extent of completely nullifying them. This was one of the difficulties with the enforcement of the Sherman Antitrust Act.

Finally, in connection with certain police power regulations, prompt, preventive action calls for summary adjudications by administrative officials. And preventive action is always preferable to action after the fault has been committed.

Quasi-judicial agencies that are distinct from administration proper—that is, which merely adjudicate and control —also have advantages. The Board of Tax Appeals and state unemployment compensation appeals boards may be thought of as two quite different examples of this type of agency. As contrasted with courts, such agencies have some of the advantages noted above. They are free from the excessive individualism of the common law; they are more likely than courts to develop the law with reference to considerations of the general welfare as well as of private rights; and they need not abide by the technical rules of evidence and procedure. At the same time they have an important advantage over the ordinary court of general jurisdiction in that they become specialists in a certain branch of the law. As opposed to agencies that both administer and adjudicate, on the other hand, they make possible a greater independence of judgment. They are free from either the bias of the prosecutor or the prejudice of the fact finder in favor of the validity of his own findings. Furthermore, if the administrative tribunal has control over more than one admin-

istrative agency it may perform a valuable function in developing a consistent body of administrative law.

Other advantages are common to administrative adjudication whether conducted in connection with administration or separately. Foremost, perhaps, is the advantage of having decisions made by persons who are thoroughly familiar with a particular subject matter.[65] The specialized knowledge that is needed may be legal in nature, as in the case of the members of the Board of Tax Appeals, or it may have to do with the subject regulated, as in the case of the Securities and Exchange Commission or a state public utility commission. Or it may be of a nature that anyone who could concentrate his full attention on a particular type of case would quickly acquire. An example is the administrative adjudication of disputes arising under the Walsh-Healey Act. (This act provides minimum wage and maximum hour standards to be adhered to by persons and corporations who make contract sales exceeding a certain amount to the federal government.) A recent study of this field of administrative adjudication argues as follows: "No contention could be made that the issues which are explored in the Walsh-Healey cases involving violation of stipulations would be beyond the competence of even the most pedestrian judge. What is gained by the isolation of these cases from the general mass is not that they will thereby receive *expert* attention, but that they will receive *special* attention. The government acts here in an investigatory way in order to

[65]It is not meant to imply, of course, that all agencies of administrative adjudication are expert. But they are not prevented, as are courts, by the multifarious nature of their duties from being so. And in fact the tendency is definitely in that direction. In the case of the federal government, at least, the ideal is fairly well realized. Even persons with no specialized training can hardly help becoming somewhat expert in the problems involved in a certain type of controversy when they are constantly dealing with such controversies.

effectuate a broad social policy. The individual case . . . rarely involves large sums of money. Its significance as a part of the whole is, however, more likely to be perceived by an administrator, whose complete activity relates to the problem of which the single case is but a segment, than by a judge, who sees the case as an isolated controversy."[66]

Speed, procedural flexibility, and inexpensiveness are three additional advantages of the administrative method of adjudication in many situations. Any number of examples suggest themselves, such as the work of the Land Office, and the settlement of disputed claims for unemployment compensation.

Another closely related advantage is that of having disputes settled from the administrative rather than from the purely legal point of view. The judge of an ordinary court is not familiar with or inclined to give thought to the special considerations that distinguish a dispute between an agency of the government and a citizen from one between private individuals. Thus the problem of deciding whether a given freight rate is reasonable should be decided in the light of an administrator's comprehension of its implications for the task of regulation as well as for its effect on railroads and shippers.

Finally, in situations where the subject being regulated does not admit of the application of rigid rules, it is a great advantage to be free from binding precedents—from the rule of *stare decisis*.

DISADVANTAGES

Despite its undoubted advantages—sometimes even because of them—administrative adjudication also has its

[66]Walter Gellhorn and Seymour L. Linfield, "Administrative Adjudication of Contract Disputes: the Walsh-Healey Act," 37 *Michigan Law Review* (April 1939) 841–73 at 873.

faults. Some are inherent in the nature of the system; others are imperfections, sometimes serious, in its organization in this country. Some can be removed or limited by appropriate safeguards; others indicate the boundaries beyond which this method of settling disputes should not be extended. None, it is believed, is so serious or so devoid of remedy as to make the continued growth of administrative adjudication a thing to be deplored.

Among the more general potential sources of danger, perhaps the gravest is that of incompetent personnel. Both the nature of the evil and, at least in a general way, the remedy are obvious, but the difficulty is enhanced by the fact that administrative adjudications, or at least the essential fact-finding and interpretative processes thereof, are frequently carried out by unidentifiable subordinate personnel. Again, it may be that in some cases the liberalization of procedure and rules of evidence has been allowed to go too far for the adequate protection of private interests. Finally, the tendency often manifested by administrative tribunals not to support their decisions by reasoned opinions or findings of fact produces uncertainty as to what principles are being followed and invites official arbitrariness.[67]

Two of these points need further elaboration. First, there is the matter of personnel. All too frequently (especially in the states) "expert" boards and commissions can show little to merit the appellation. Furthermore, personnel may be worse than incompetent; it may be subject to "political" influence or even be corrupt. Of course this may also be true of courts, but it can hardly be denied that our judicial traditions in this respect are better than those governing administrators. Fortunately, neither corruption nor incompetence is the rule, and the standards of our public service are steadily rising.

[67] See below, page 115, for a fuller treatment of this point.

The point about procedure and rules of evidence really grows out of a larger difficulty with administrative justice as it operates in this country; namely, that it is a typical product of unplanned development. Having grown up in defiance of common-law principles and of the theory of the separation of powers, in response to the demands of particular situations, it is not surprising that it rests upon no comprehensive theoretical basis. The variety of forms and practices defies description. According to Blachly and Oatman

> The result is a scattered and incoherent jurisprudence as to the conditions under which suits may be brought, the manner of bringing them, who may be parties to suits, what pleas may be advanced, the conditions under which various pleas will be received, the rules of procedure, the rules of evidence, the powers of the authority making the decision, the methods by which the decision may be enforced, the administrative and judicial remedies available against the decision, and the appeals which will lie from administrative judicial decisions to higher courts. As a consequence of this confusion, there is an almost complete lack of knowledge, even on the part of lawyers, as to how to attack various kinds of administrative actions. In such a system, also, there is no rhyme or reason in administrative law.[68]

In addition to these general potential sources of danger certain difficulties apply particularly, if not exclusively, to cases in which adjudication is closely combined with other functions, as in the regulatory commissions. Thus it is argued that the location of legislative and judicial powers in the same hands is undesirable. These powers should always be exercised separately, it is said, for otherwise people will be subjected to judgments based upon rules of law which they could not have been aware of, for they were only brought

[68]Blachly and Oatman, *op. cit.* (Chap. II, n. 9), p. 230.

into being by the very judgments in question. But if the two powers reside in the same hands, the argument continues, the temptation to employ them at the same time is not likely to be resisted. Furthermore, legislative power involves policy making and so should be subject to political control. Judicial power, on the other hand, should be politically independent. Thus Blachly and Oatman maintain:

> Policy must be controlled by political methods. Administration must be controlled by administrative methods. Judicial determinations must be controlled by judicial methods. Where all three functions, the determination of policy, the conduct of active administration, and the making of decisions judicial in nature, are in the hands of the same authority, any control attempted by one method must interfere with the proper conduct of either administration, the determination of policy, or the making of decisions.[69]

It has already been demonstrated, however, that there are many situations in which it is impossible to work out strict rules in advance. The best that can be done is to develop standards, and under such circumstances whatever agency applies those standards will in a sense be legislating—whether court or commission. Furthermore, the decisions, and the gradually developing rules which grow out of them, are likely to be much sounder if they are made by men thoroughly familiar with the particular subject matter concerned, and if they are made by the same men who, through the rule-making power, have formulated the standards to be applied.

The contention that policy, administration, and adjudication must each be subject to different kinds of control is also open to criticism. It would be more correct to say that all subordinate officials, regardless of the functions they per-

[69] *Ibid.*, pp. 240–41.

form, should be subject to certain political checks, certain administrative checks, and certain legal or judicial checks. An example is the police force. If it is grossly corrupt or incompetent the mayor may take administrative action to remedy the situation. That is, he may resort to such methods as the dismissal of offending members, demotions, and shifts in personnel from district to district so as to break up local alliances between law violators and the police. But if he fails to do this, the electorate may take a hand at the next election by voting the party in power out of office—a political check. Neither of these devices offers a satisfactory solution in all cases. When a policeman acts in excess of his authority in such a way as to cause injury to an individual, that person's remedy lies in the legal check of a suit for damages in the courts. All of these checks are, in short, relevant to a given situation, but from different points of view or under varying circumstances.

The danger involved in the combination of the functions of judge and prosecutor is much more real. The discussion, above, of the Federal Trade Commission indicated how this may produce undesirable effects even in the case of a large agency where there is considerable division of labor. But our study of the procedures followed by certain other regulatory commissions, such as the Securities and Exchange Commission, indicates how this difficulty may be minimized by giving proper attention to the separation of functions within the commission, and providing the protections of notice and hearing in full detail. There is no doubt room for further experimentation and development here. The office of trial examiner is an especially critical one, and a great deal depends upon the competence and training of these men. It is possible that their tenure should be made more independent of the agency with which they are connected. Their position might be regularized and their findings and

recommendations might be given definite status as original adjudications, subject to formal appeal to the commission.

It is also charged that when an agency is set up for the advancement of some new social policy, it is often staffed by crusading individuals with a fanatic or ruthless temper that has small regard for private rights. Instances of this can undoubtedly be found, but it is as easy to find judges in the regular courts whose insistence upon protection of private rights even at the expense of the public welfare has also approached the fanatical. A more cogent argument here is one that emphasizes the fact that the general safeguards which are available against administrative injustice can be made to keep this particular fault at a minimum.

SAFEGUARDS

Most of the general safeguards or checks against abuse have been referred to during the course of this chapter. It may be well, however, to bring together here a list of those which are most important. For it seems certain that, whether we like it or not, governmental activities and "interferences" with business will continue to increase. That being the case, we can be sure that it will be found increasingly necessary to resort to administrative adjudication. The moral clearly is to learn how to manage this device.

First of all, it is highly desirable, wherever possible, that the tribunal formulate and publish the policies by which it proposes to be guided. If it is impracticable to do this at the outset, then the agency may follow the example of the National Labor Relations Board, which formulates principles on the basis of the decisions which it has rendered.

Of absolutely primary importance is the matter of adequate notice and full hearing, although just what constitutes such notice and hearing will vary somewhat with the nature of the situation. The examples given above serve to indicate

in general the best practice in this regard. The use of trial examiners for regulatory commissions and the matter of possible improvements in their status have just been referred to. It also seems highly important that agencies of administrative adjudication should be required to support their conclusions by findings of fact and written reasons. It is true that some authorities contend that the flexibility and freedom from precedent which the absence of reasoned opinions allows should characterize most, if not all, administrative adjudication. Otherwise, it is argued, these administrative agencies cannot keep pace with changing policies and circumstances; they become bogged down in legalistic formalism. It cannot be denied that dangers lie in this direction. It appears to be the opinion of most authorities, however, that the advantages to be gained by requiring administrative agencies to set forth clearly, in writing, the steps by which they reach their conclusions far outweigh the disadvantages. This practice enables the individuals concerned to discover the principles upon which the tribunals are operating and so to know what decisions to expect in the future. The necessity of presenting to the public a logical justification of their action compels the officials to think through their reasons more carefully and places upon them an added sense of responsibility.

Three other safeguards call for mention. A provision for administrative review is a very valuable asset to a system of administrative adjudication, just as the opportunity for review by a higher court is an established part of regular judicial procedure. Again, no discussion of safeguards against maladministration would be complete without reference to the personnel problem. Indeed, improvement in the calibre of adjudicating personnel is fundamental. Finally, there is the check of judicial review of administrative decisions. (See Chapter IV–VII.)

Appraisal and Summary

To compare the results of the administrative and the judicial methods of settling disputes would be a gigantic task, far beyond the scope of this volume. In view of the growing interest in this subject, however, the solicitor general of the United States has prepared some interesting tabulations. He has taken the decisions of federal administrative adjudicating agencies that have been appealed to the courts and compared the proportion of such decisions which were affirmed by the courts with the similar records of lower federal courts in cases appealed to the higher courts. Although he is at pains to point out the many limitations to which the comparisons are subject, the results are nevertheless worthy of attention. "These tabulations disclose," writes Attorney General Robert H. Jackson (then solicitor general) "that the administrative agencies have a better record of affirmances than the lower Federal courts in the special fields in which these agencies are particularly experienced. They also disclose that even in the more general legal fields not involving administrative orders the lower courts have a less favorable record of affirmances than either the administrative agencies or the lower courts in cases involving administrative orders."[70] Such statistics certainly do not suggest that the administrative arm is running rampant; nor, incidentally, do they give much support to the theory of judicial infallibility!

It is also interesting to note that it is being increasingly urged by students of the subject and by laymen that automobile accident claims could be handled much more satisfactorily by administrative tribunals than by the regular courts. Such proposals find support in the widespread ap-

[70] *Annual Report of the Attorney General of the United States, for the fiscal year ended June 30, 1938*, p. 47.

proval of the manner in which workmen's compensation commissions have operated.

In summary, it may be said that the trend of events is overwhelmingly toward the multiplication of administrative agencies of all sorts and descriptions, including those which most nearly resemble courts; those which, while their task is primarily adjudicatory, are subordinate to larger administrative agencies; and those (the "regulatory" authorities) which combine functions of adjudication with those of legislation and administration in the general sense. This growth means that the doctrine of the separation of powers must be more and more refined, and confined to the top stratum of governmental machinery, while the life blood of the governmental process is increasingly in the lower strata. In some cases this growth of administrative agencies has proceeded haphazardly, with insufficient planning and attention to the development of safeguards, with consequent losses on the side of the rule of law. But these are mere growing pains, subject to rectification largely by methods already at our command. Nor should the mistake be made of attempting to impose a strait jacket upon this growth by attempting too great uniformity. There is need for a great deal of imagination and inventive genius in developing new administrative forms and new procedural and other devices for controlling these forms.[71]

[71]Chapter VIII includes a discussion of certain proposals along this line which have not been considered here because they still remain in the realm of the untried.

Chapter IV

The Courts and Administration: Limits upon Delegated Lawmaking

THE PRECEDING chapters have outlined the general problem of reconciling official discretion with the rule of law, and have indicated the way in which it is made more pointed in this country by the doctrine of the separation of powers and by the great reverence which our tradition maintains for the rule of law, and have discussed the impact of the expanding and changing functions of government upon this problem. These chapters have also described the ways in which administrative officials in effect make laws, render judicial or quasi-judicial decisions, and perform countless individual permissive and directive discretionary acts which affect the rights of private individuals, and, finally, they have examined the methods by which these powers are exercised, and the safeguards which have been invented to prevent their abuse. But the defense of the rule of law by the courts has as yet come in for only incidental reference.

One hardly needs to be reminded that both the federal and state governments are organized under written constitutions. Almost as familiar is the fact that the courts act as special guardians of those constitutions, not hesitating to invalidate either legislative acts or acts of executive or administrative officials if in their opinion these acts conflict with constitu-

tional provisions.[1] These constitutions, as interpreted by the courts, place limitations upon both the existence and the exercise of administrative power. That is to say, legislatures in this country are not free to grant as extensive powers as they may see fit to chief executives or to administrative officers. Limits are set to the range of official discretion that may be provided, although, as will be seen, these limits vary greatly under differing circumstances. Furthermore, and perhaps even more important, the *exercise* of official power, after it has been granted, is subjected to constitutional restrictions, enforced by the courts. In this chapter we shall examine the former of these questions—that of the extent to which legislatures may delegate their powers—and shall reserve the latter for subsequent discussion.

General

From the earliest days it has been a recognized principle of American constitutional law that legislative power may not be delegated to the executive or to administrative officials.[2] Essentially, this principle derives from the doctrine of

[1]See Robert K. Carr, *The Supreme Court and Judicial Review* (this series). It should be understood that the courts will take such action only when it is necessary for the decision of "cases" or "controversies" properly brought before them for decision. *Ibid.*

[2]The United States Supreme Court gave positive expression to this rule at least as early at 1813. (*Brig Aurora* v. *United States,* 7 Cranch 382 [1813]) It was forcefully stated by the Pennsylvania Supreme Court in 1873. (*Locke's Appeal,* 72 Penna. St. 491 at 498.)

In this and the following chapter, which are devoted to questions of constitutional law, space does not admit of anything but a very condensed treatment of the subjects discussed. Not even footnote references can be given to many important cases. By far the most complete and thorough treatise on American constitutional law is Westel Woodbury Willoughby's *The Constitutional Law of the United States* (2d ed., New York: Baker, Voorhis and Co., 1929). See also 4 *Selected Essays on Constitutional Law, op. cit.* (Chap. I, n. 7), Chap. 2.

the separation of powers. The Constitution vests the legislative power in the legislature. It is reasoned that for the legislature to hand over this power to the executive would violate the very basis of our system of government. The common-law doctrine of agency—that power which has been delegated may not be redelegated—is also sometimes relied upon to support the rule that legislative power may not be delegated. This was distinctly a rule of private law, having its rational justification in very different circumstances from those surrounding the relationship between the people and their legislature. Consequently it is of doubtful applicability to constitutional law.

But whatever the basis of the doctrine, there can be no doubt that the courts in this country do impose limits upon the extent to which legislatures may delegate their powers. This is not to say that they may not delegate any power whatsoever, for it was long ago recognized by Chief Justice Marshall, in the case of *Wayman* v. *Southard*,[8] that there are certain powers which the legislature may exercise but which are not in the strictest sense legislative powers. (The actual case involved the delegation to the federal courts of power to regulate their own proceedings.) Such nonlegislative powers may therefore be delegated. For instance, all sorts of regulations regarding the conduct of governmental business—such as working hours, designation of holidays, and the like—fall in this category. This is not the distinction, however, that has generally been relied upon by the courts when cases involving this point have come before it. Emphasis has rather been placed upon the rule that Congress must lay down the policy—must state the law—but that it may delegate to others the task of finding the facts which

[8] 10 Wheat. 1 (1825). The case involved the validity of that portion of the Judiciary Act of 1789 which bestowed upon the federal courts the power to regulate their own proceedings.

call the law into operation. Thus nonlegislative powers may be delegated, and, in addition, legislative powers may be exercised so as to permit delegation of power to elaborate the detailed application of a stated policy. The present status of the rule can best be explained by a brief account of some of the more important cases that have arisen under it.

Contingent Legislation

It was long ago established in the case of *The Brig Aurora*[4] that Congress may declare that a certain statute is to become effective or ineffective upon the fulfillment of certain conditions. (This, as we have seen, is known as "contingent legislation," and is to be distinguished from cases where the power to determine the substance of rules is delegated.) Upon the expiration of the Jeffersonian nonintercourse legislation, Congress had provided that certain portions of that legislation should be revived if either England or France revoked or modified its edicts against neutral commerce and if within three months following such modification the other country had not done likewise. Such revocation or modification was to be proclaimed by the president, thus reviving the act. The cargo of the *Aurora* was seized and declared forfeited to the United States for violation of the revived legislation, an action which was upheld by the Supreme Court against the objection that Congress had unconstitutionally transferred legislative power to the president.

A more careful consideration of the constitutional problem involved in contingent legislation was given by the Court in the case of *Field* v. *Clark*.[5] The Tariff Act of 1890, while putting sugar, coffee, and certain other articles on the free list, provided that, if the president should be satisfied that any

[4] 7 Cranch 382 (1813).

[5] 143 U.S. 649 (1892).

country exporting such products to this country was levying duties upon American agriculture or other products which he deemed to be "reciprocally unequal and unreasonable," he should suspend the act in so far as it operated to permit duty-free entry into this country of the agricultural products of the country in question. The act contained a schedule of duties which were to become effective during the period of any such suspension. The Court upheld the act, stating that it did not, "in any real sense, invest the President with the power of legislation."[6] "Nothing involving the expediency or the just operation of such legislation," the Court declared, "was left to the determination of the President."[7] Again, in the same case, the Court stated: "Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."[8]

Sublegislation

At the next stage in the growth of the doctrine the application of a standard was substituted for the finding of specific facts by the executive. This development goes beyond the practice of contingent legislation and definitely permits the delegation to the executive of the task of filling in the details of the law—of using, within limits, its own independent judgment. This is real delegated legislation, or sublegislation, in the fullest sense. For example, the Court has upheld (*Buttfield* v. *Stranahan*[9]) an act which delegated to

[6] *Ibid.*, p. 692.

[7] *Ibid.*, p. 693.

[8] *Ibid.*

[9] 192 U.S. 470 (1904).

the Secretary of the Treasury, upon advice of a board of experts, the power to "establish uniform standards of purity, quality and fitness for consumption of all kinds of teas." Viewing the statute as a whole and in the light of its legislative history, the Court declared that it "expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior quality, or unfit for consumption, or presumably so because of their inferior quality."[10] Thus interpreted, the statute was held by the Court to have fixed the "primary standard," and so did not delegate legislative power. Interesting, and indicative of judicial confusion, is the fact that the Court remarked that the act "devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute."[11] Thus by the use of the word "executive" for what would normally be termed an "administrative" function, the Court obscured the distinction between the more or less automatic or ministerial application of a law to a set of facts clearly described by the legislature and the highly discretionary or administrative task of developing standards of "purity, quality and fitness" within a broadly expressed policy of excluding the lowest grades of tea. The Court's emphasis upon the practical aspect of the situation is equally interesting. "Congress legislated on the subject as far as was reasonably practicable," declared the Court, "and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."[12]

More recently, in the case of *Hampton* v. *United States*,[13] the so-called "flexible tariff" provision has been upheld. This

[10] *Ibid.*, p. 496.

[11] *Ibid.*

[12] *Ibid.*

[13] 276 U.S. 394 (1928).

gives the president the power to vary tariff rates up to a maximum of 50 per cent in either direction, when, after investigation, he finds this to be necessary in order to equalize the costs of production of certain products abroad and in the United States. The Court continued to rely upon the formula of legislative statement of a "primary standard," however, while also stressing the practical exigencies of the situation. Chief Justice Taft declared that "in determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[14] This is a revealing sentence in that it shows that the Court, in its application of the rule as to legislative determination of a "primary standard," is really guided by its notion of the requirements of "common sense." In this case the Court also expressly recognized that delegated power may and must include discretionary authority.

Within the broad formulas thus developed, the vast delegations of rule-making power described in Chapter II have been accomplished. Without the possibility of such delegation, many of our great regulatory commissions would be rendered virtually helpless. The power of the Interstate Commerce Commission to establish reasonable rates furnishes an obvious example. The authority of the Federal Radio Commission (now the Federal Communications Commission) to grant or refuse licenses for broadcasting and to regulate the frequencies or wave lengths of various stations comes closer to the border of forbidden delegation. The act imposes no specific limitations upon the exercise of this power except to state that the commission must act "as public convenience, interest or necessity requires." Nevertheless, the Court upheld the act, in the case of *Federal*

[14] *Ibid.*, p. 406.

Radio Commission v. *Nelson Brothers,* holding that this requirement "is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities."[15]

In the light of these precedents, it is not strange that a few years ago many students of constitutional law were saying that it was unlikely that an act of Congress would ever be declared unconstitutional on the ground of delegation of legislative power. To be sure no one would have thought, for example, that Congress could give the president power to adjust tax rates in such a way as to balance the budget, without any further directions; but the possibility of such Congressional action would appear to be so slight that it could be safely disregarded.

New Deal Cases

Time and the New Deal, however, soon belied these assumptions. Some of the vast delegations of authority which characterized much of the emergency legislation presently fell under the judicial axe. Whether or not the judges were influenced by personal antipathy to the legislation involved, whether the result might have been different had the great expansion of executive power been accomplished by small stages instead of at one fell swoop are questions of judgment which must be left to speculation. The fact remains that certain of the provisions of the National Industrial Recovery Act (popularly known as the N.I.R.A.) delegated greater and more unguided authority than the Supreme Court was willing to accept.

[15] 289 U.S. 266 at 285 (1933).

The first test came over Section 9 (c) of the N.I.R.A., which empowered the president to ban the shipment in interstate commerce of all petroleum produced or withdrawn from storage in violation of any state production-control law. No restrictions on this power or statements of policy to guide the president were furnished unless it was to be found in the preamble, which read in part as follows: "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; . . . to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, . . . and otherwise to rehabilitate industry and to conserve natural resources." (Sec. 1.) To all of the members of the Court but one (Justice Cardozo) this seemed grossly insufficient. If this section were held valid, declared Chief Justice Hughes, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body."[16] (*Panama Refining Co.* v. *Ryan.*)

The Court was not content to stop at this point. For the first time in its history, it went further and set up another limitation on the delegation of legislative power in addition to the requirement that Congress must lay down the "primary standard." The substance of this new restriction is that

[16] 293 U.S. 388 at 430 (1935). The case is often referred to as the "Hot Oil" case, from the term popularly applied to oil which has been produced in violation of state laws.

the executive, in exercising delegated contingent power, must accompany his order by a formal statement (known as a "finding") setting forth the authority under which he is acting and the existence of the conditions which are prerequisite to such action. This limitation is said to flow from the provision of the Fifth Amendment that no person shall be deprived of life, liberty, or property without "due process of law." It is a necessary procedural requirement, said the Court, for the effective enforcement of congressional policy. Thus far the courts have shown no disposition to review such findings when made, with the idea of ascertaining whether or not they are supported by evidence.

If accepted at its face value, this ruling raises a host of problems. A great many federal regulations have been issued without such findings. Are they all invalid? It is interesting to note that less than a year later the Court upheld an instance of state administrative rule making against an attack under the due process clause of the Fourteenth Amendment despite the fact that there had been no "findings." The Panama Refining Company case was not referred to, so one is compelled to rely upon inference to determine how the cases are to be distinguished in this regard. It has been suggested that the rule of the Panama case regarding findings applies only in the case of contingent legislation, and not to cases of filling in the details of laws.[17] Although there is nothing in either case to this effect, it would seem to be the only way to reconcile the two.

The now famous case of *Schechter Poultry Corp.* v. *United States*[18] followed the Panama Refining Company case by a

[17]See James Hart, "Some Aspects of Delegated Rule-Making," 25 *Virginia Law Review* (May 1939) 810–23, especially p. 817, n. 22.

[18]295 U.S. 495 (1935). The famous statement by Justice Cardozo, which follows, is found *ibid.*, pp. 551–53.

few months. In its decision the Court held the whole N.I.R.A. unconstitutional, partly on the ground of invalid delegation of legislative authority. The case adds very little to the principles and rules already established. The act provided for the adoption of codes of "fair competition" for various industries, which, with the approval of the president, should have the force of law. These codes were to contain a wide variety of provisions, the most important of which regulated maximum hours and minimum wages. Except for one or two prerequisites to the approval of codes, which still left almost unlimited discretion, there was no legislative standard or statement of policy other than the very broad and general provisions of the preamble. This time the Court was unanimous in holding that the provisions in question went beyond the pale of constitutionality. Even Justice Cardozo, in a separate, concurring opinion, declared: "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. . . . This is delegation running riot."

It is interesting to note that in the Schechter case the Court again showed itself to be concerned about matters of procedure. It reinforced its position by pointing out that, while hearings had actually been held before the adoption of codes, such hearings were not required by the act. The N.I.R.A. was contrasted with the Federal Trade Commission Act (for the regulation of "unfair methods of competition"), with the Interstate Commerce legislation, and with the statute regulating radio licensing, all of which provided expert commissions for their administration, and which also went into detail as to requirements regarding notice and hearing, and called for findings of fact supported by evidence. It seems highly probable that in both of the N.I.R.A. cases the Court was substantially influenced by the absence

of any quasi-judicial body of experts for the administration of the act.

An even more recent decision is significant for our discussion. The case (*United States* v. *Rock Royal Co-operative*)[19] involves the validity of the Agricultural Marketing Act of 1937. In addition to providing for the regulation of the marketing of agricultural products by agreement, it also authorizes the Secretary of Agriculture, in the case of certain specified commodities, to issue orders instead of agreements when he finds that the purposes of the act can only be effected in that way. First, however, there must be adequate notice and opportunity for hearing for all parties concerned, and the order must be accompanied by a finding based upon the evidence presented at the hearing that the order will tend to effectuate the policy of the act. This policy is stated specifically as the establishment and maintenance of such marketing conditions as will establish prices to farmers at a certain level as compared with the prices of goods they have to buy. The act supplies a formula for determining what such prices are to be. Furthermore, the order must be approved by two thirds of the producers, in number or by volume of production. Among other things, such orders regulate minimum prices. The law provides the secretary with a variety of alternative methods for classifying milk and for carrying out certain other objectives of the act. The Court held this part of the act, as applied to the milk industry, valid and within accepted principles. The three dissenting justices pointed out that the secretary was given authority to determine "first, what of a number of enumerated commodities shall be regulated; second, in what areas the commodity shall be regulated; third, the period of

[19] 307 U.S. 533 (1939). See also *H. P. Hood & Sons* v. *United States, ibid.*, p. 588, involving the same act and decided the same day. Note particularly Justice Roberts' dissenting opinion.

regulation; and, fourth, the character of regulation to be imposed. . . ."[20] But the majority felt that, because of the fairly precise statement of policy and the liberal procedural safeguards, the scope of discretionary authority did not exceed constitutional limits.

One further limitation upon the delegation of legislative power requires mention, although it needs no elaboration. Legislative power may not be delegated to private individuals, acting either singly or in groups. The N.R.A. codes technically could not be condemned on this ground because, although they were in fact often drawn up by trade associations, their validity depended upon presidential approval. The National Bituminous Coal Conservation Act of 1935, however, provided that, in any district, minimum wage and maximum hour agreements negotiated between producers of more than two thirds of the production in the district, by volume, and a majority of the employees in that district should be binding on all the producers. In the case of *Carter* v. *Carter Coal Company,*[21] the Court again invoked the due process clause in declaring that delegation of power to private individuals to legislate regarding the rights and interests of other individuals whose interests were likely to be antagonistic to theirs was highly arbitrary and therefore unconstitutional.

The narrow scope of this restriction, however, is illustrated by the milk control case discussed above. There the act provided that the Secretary of Agriculture could not make his orders effective without securing the approval of a large proportion of the producers. The Court held that this was not a delegation of power to the producers, but merely a condition attached to the exercise of power by the secretary and was therefore valid.

[20] *H. P. Hood & Sons* v. *United States* (above, n. 19).

[21] 298 U.S. 238 at 311 (1936).

Exceptions

We have been describing the limitations upon delegation of legislative power as though they were the same for all fields of legislation. However, this is not precisely the case. The general rule is subject to exception, or at least to modification, in the fields of foreign commerce and immigration. The constitutional principle of the nondelegability of legislative power takes its origin from a presumed relationship to private rights and interests. That is, it is supposed to contribute to their protection. Consequently, it is only natural that the strictness with which the rule against delegation is applied tends to vary with the nature of the private rights involved. This appears in cases involving foreign commerce, immigration, and, more generally, foreign relations. The theory is that, because the federal government has complete control over these matters, it is subject to less restriction in the way it exercises its powers in such cases than in other fields. Thus the federal government might bar all foreign commerce, or all immigration, and therefore the persons affected have nothing to complain of if it does anything less than that. While the Court probably would not be willing to carry this argument to its logical conclusion, it is influenced by it. The cases of *Field* v. *Clark* and *Hampton* v. *United States,* which were discussed above, bear the marks of this type of reasoning. Normally, the imposition of a fine and the determination of the facts upon which such imposition depends are held to be judicial functions which may not be performed by administrative officials. However, this principle has been held to be inapplicable in a case arising out of the violation of the immigration laws.[22]

Finally, in the recent case of *United States* v. *Curtiss-Wright*

[22] *Lloyd Sabaudo Societa Anonima per Azione* v. *Elting,* 287 U.S. 329 (1932).

Export Corporation,[23] involving the validity of certain of our arms-embargo legislation, the Court appears to hold that the rule against nondelegation of legislative power does not apply—or is of less force—in the field of foreign affairs. Here the Court held that Congress could make it illegal to export arms to countries engaged in the Chaco conflict if the president should find, after consultation with other American governments and such other governments as he might think necessary, that such action would contribute to the re-establishment of peace.

The Situation in the States

All of our specific examples have been taken from the field of federal legislation, but substantially the same principles are applied by the state courts in passing upon the validity of state legislation.[24] The following examples may be taken as typical. In general, state legislatures may authorize boards of health to make legally binding rules and regulations to protect the public health and to prevent the introduction and spread of diseases. Administrative officials may be granted extensive regulatory powers for the establishment and maintenance of standards of food products. However, a California law that delegated to the director of agriculture the power to determine when citrus fruits were frosted to the extent that their shipment would endanger the reputation of the local citrus industry, and to prevent the shipment of such fruits, was held to constitute an unlawful delegation.

[23] 299 U.S. 304 (1936). The Joint Resolution in question made it illegal to export arms to countries engaged in the Chaco conflict, if the president should find, after consultation with other American governments, and such other governments as he might think necessary, and with their co-operation, that such action would contribute to the re-establishment of peace.

[24] A comprehensive annotation of the subject may be found in the "Lawyers' Edition" of the *United States Supreme Court Reports*, Vol. 79, pp. 474–582.

In general, administrative officials cannot be given the power to fix the rate of taxation, but a railroad commission may be authorized, for example, to classify railroad companies for the purpose of imposing a privilege tax. Laws have been generally upheld which grant boards of censors wide powers to ban motion pictures which they consider immoral or obscene.

Conclusion

The rule of nondelegability can be stated only in the most general terms. Legislatures may enact laws to take effect under certain prescribed conditions and may authorize administrative officials to determine when these conditions exist and, in so doing, to put the law into effect. Legislative bodies may also lay down general rules or policies to be implemented by administrative action in accordance with standards prescribed in the laws, providing these standards are as definite as the nature of the case demands. Precisely how definite the standards must be in any particular case is of course a question for the courts to determine. In doing so, they will weigh considerations both of administrative convenience and of individual "rights."

The importance of the rule of nondelegability of legislative power as it has been worked out and applied in this country is very difficult to estimate. No attempt to assess it will be made here. However important this preliminary legal check on administrative power may be, it can at best be but a crude safeguard; this much is certain. Few would deny that in a democracy there are limits to the extent of discretionary authority which it is wise to commit to others than the duly elected members of the legislative body. Although these limits are difficult to define, it may well be that our courts have applied the principle of nondelegability of legislative power in such a way as to prevent those limits from being

seriously transgressed. At the same time, if occasionally they have been overcautious in the limitation of official discretion, it may be argued that this is the price of safety. On such questions as this there will always be differences of opinion between those who chafe at delay and inefficiency and those who are convinced that power corrupts the hands of all who wield it.

Chapter V

The Courts and Administration: Methods of Judicial Control

THE judicial controls which are applied to the exercise of administrative discretion are more restrictive than the limitations upon the delegation of such discretion by the legislature. Before studying what these controls are, however, it is necessary to examine the means by which they are applied and the circumstances under which they operate. This is a highly technical matter, but it is of prime importance, for the extent to which a court will revise administrative action often depends, in part, upon the procedure by which review is sought.

The Rule of Sovereign Immunity

At once one is confronted by what appears to be a major exception to the rule of law. The state itself, as we have seen, is not subject to suit without its own consent. The original Constitution made no reference to this matter, but the doctrine of the nonsuability of the state seems to have been taken for granted by the framers of the Constitution. It was expressly affirmed by such men as Hamilton, Madison, and Marshall.[1] And when, in the early case of *Chisholm* v.

[1]On all this see Robert D. Watkins, "The State as a Party Litigant," 45 *Johns Hopkins University Studies in Historical and Political Science* (Baltimore: The Johns Hopkins Press, 1927), especially Chap. V.

Georgia,[2] the Supreme Court held that a state could be sued by citizens of another state, there was a general outcry. Consequently, the Eleventh Amendment, prohibiting all such suits, was proposed and adopted in short order. This prohibition has been interpreted to extend to suits against a state by its own citizens (*Hans* v. *Louisiana*[3]). Although the amendment made no reference to suits against the United States, the rule would obviously apply *a fortiori* in such a case, and the courts have so ruled.[4] For a long time the doctrine was merely taken for granted as an accepted legal maxim, without attempt at justification or explanation. At present, however, the official theory appears to be that "there can be no legal right as against the authority that makes the law on which the right depends."[5] Although these cases have to do with the federal courts, state courts have regularly applied the same rule.

Exceptions

MUNICIPALITIES

Municipal corporations (that is, incorporated towns and cities, and certain other areas of local government) do not fall in the same category as the state and federal governments in this respect. They are considered as bearing a dual aspect. In so far as they act as agencies of the state, they share in the immunity of the latter. But in so far as they perform what are termed nongovernmental functions, such as commercial undertakings, they are fully amenable to the courts in the same way as any private corporation. The distinction between governmental and nongovernmental

[2] 2 Dall. 419 (1793).

[3] 134 U.S. 1 (1890).

[4] See *United States* v. *McLemore,* 4 How. 286 (1846).

[5] Justice Holmes in *Kawananakoa* v. *Polyblank,* 205 U.S. 349 at 353 (1907).

functions is not an easy one to apply, as might be surmised, and leads to considerable diversity of judgments. The tendency today is to expand the latter category, thus diminishing the area of sovereign immunity from suit.

GOVERNMENTAL PROPRIETARY CORPORATIONS

Furthermore, when the states or the federal government embark upon commercial or semicommercial activities, they commonly adopt the corporate form for the purpose and provide that the corporations thus created shall be subject to suit. So general is this practice that the courts tend to consider that liability to suit is implied even in the absence of an express statement in the law to that effect.[6]

CONSENT TO SUIT

Such statutory exemptions from suability are of course but examples of the broad fact that governments may consent to be sued and that they may express such consent in advance and make it applicable to a general class of cases—or indeed to all cases. In this connection reference has already been made to the jurisdiction of the United States Court of Claims.[7] The attorney general of the United States has recently recommended that the federal government extend its consent to damage suits arising out of the negligence of drivers of government-owned vehicles.[8] (Statutory review, discussed below,[9] may also be considered as an instance of consent to suit.)

[6]See *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381 (1939).

[7]See above, pages 69–70.

[8]*Annual Report of the Attorney General of the United States, for the fiscal year ended June 30, 1938*, pp. 9–10. Although himself unwilling to go this far, the attorney general points out that "at least one State has completely waived its immunity to suit in tort without suffering undesirable consequences." *Ibid.*, p. 10.

[9]See below, pages 143–45

DAMAGE SUITS

The great complement of the common-law doctrine of sovereign immunity, however, is the suit for damages against the offending official. This is the classical remedy for illegal governmental action in common-law countries. It is a suit against the official concerned, in his private capacity, and is often referred to as a "collateral" action. It will be remembered that the "rule of law," according to Dicey, extended to all alike, regardless of official position, and was always to be administered by the ordinary courts of justice. Thus the obverse of the maxim of sovereign immunity, that "the state can do no wrong," is that if a wrong is committed by a public officer it must have been by him as an individual —he must have been acting beyond his jurisdiction, or *ultra vires*. If the act was not illegal, no wrong has been committed; if it was illegal, the person who performed it is liable. Theoretically, at least, it makes no difference whether or not it was in obedience to the command of a superior. The officer performing the act must bear the responsibility. If it is in fact illegal he is liable for either civil action (e.g., an action for damages) or criminal prosecution.

It is true that the rule of nonsuability of the state may not be patently evaded by the device of an action against an official which is in actual effect a suit against the government. Courts have refused to take jurisdiction of actions against officials on this ground. Nevertheless, the tendency to allow such actions has on occasion been pushed a long way.[10]

[10]An interesting and extreme example of this tendency is represented by *United States* v. *Lee*, 106 U.S. 196 (1882). The case involved title to that beautiful example of colonial architecture known as the "Lee Mansion," located in the Arlington National Cemetery, high on the right bank of the Potomac, overlooking Washington. During the Civil War taxes became delinquent on the property, which belonged to the wife of General Robert E. Lee. At a subsequent tax sale, it was sold to a representative of the federal gov-

The damage suit is the oldest form of relief against administrative officers. It was developed with reference to the old type of administrative official who acted without hearings or the other formalities that attend most modern administrative proceedings. A typical instance is that of a health officer who orders the destruction of food which he believes to be a threat to the health of the community. It still has its chief application in this type of case.

Extraordinary Writs

In addition to the ordinary civil action or criminal prosecution, and more effective as against modern forms of administration, are several so-called "extraordinary writs."[11] These are used when the ordinary rules of private and criminal law are inadequate. The word "writ" stands for a formal letter, of official nature; it is a legal document issued to a person for the purpose of obtaining jurisdiction over him or his property, or of compelling his attendance in court —a command. The most important of these writs are those of *mandamus, certiorari, habeas corpus,* and injunction. There are also the writs of *quo warranto* and prohibition.[12]

ernment, despite the fact that a friend of the Lee family offered to pay the back taxes and redeem the estate as provided by law. Some ten years later, after the death of Mrs. Lee, her son sought to recover the estate by bringing an action of ejectment against the federal officials who were in charge. The case was taken to the Supreme Court, where, by a vote of five to four, the contention that this was in reality a suit against the government was overruled. In the course of the opinion, Justice Miller declared: "No man in this country is so high that he is above the law. No officer of the law may set that law in defiance with impunity. All the officers of the government . . . are creatures of the law and are bound to obey it." *Ibid.*, p. 220.

[11]For a fuller treatment of this subject than is contained in these pages, see Freund, *op. cit.* (Chap. I, n. 3), Chap. III, and, for the federal government alone, Blachly and Oatman, *op. cit.* (Chap. II, n. 9), Chap. IX.

[12]These are all common-law proceedings except for the injunction, which is a remedy in "equity."

In general the writ of *mandamus* is used to compel the performance of certain official duties, while the injunction is nearly always a preventive measure. Normally the person seeking an injunction must show that he is about to suffer an irreparable injury from the violation of some right for which there is no other adequate legal remedy. The writ of *habeas corpus* is used to bring the detention of a person before the courts, for inquiry; consequently its use in the field of administrative law is confined almost entirely to immigration and deportation cases. Unless otherwise provided by statute, the writ of *certiorari* ordinarily is issued by one court to a lower court, requiring the latter to hand over ("send up," in legal phraseology) the record of a particular case so that the higher court may review it—to "make more certain," is the literal interpretation of the word. In a number of the states, however, administrative agencies are recognized as being sufficiently judicial in character that the writ of *certiorari* will issue without special statutory provision. This practice is not followed by the federal courts.

LIMITATIONS UPON OFFICIAL LIABILITY

But even with all these general and specific remedies against official misdoing, it cannot be said that the private citizen is completely protected against the agents of the state. Indeed, as long as suits against the state itself are barred, this must almost necessarily be true. There are sound reasons why the courts would, in many cases, tend to protect officials. The agents of the state are human and will inevitably make mistakes. Courts naturally hesitate to hold them fully responsible if they have exercised reasonable care and judgment. Furthermore, they may have acted in response to the command of a superior. To adhere strictly to the doctrine that the command of a superior furnishes no defense runs directly counter to the requirements of

discipline. This is of course particularly true in the case of the military establishment. Furthermore, as we have seen, governments are finding it increasingly desirable to commit large areas of discretion to administrative agencies—frequently with the idea of creating agencies which will be expert at making the particular kind of judgments involved. The very purpose of this practice tends to be defeated if the decisions of the expert body may be revised by an ordinary court.

In the effort to give effect to such practical and equitable considerations as these, the courts have worked out certain more or less artificial rules limiting the liability of administrative officials.[18] This part of the law was also originally developed with reference to damage suits. The courts classified administrative acts according to whether or not the official in question had any choice or discretion in their performance. Thus administrative acts are either "ministerial" (required by law and admitting of no choice) or, on the other hand, "judicial," "quasi-judicial," or "discretionary" (three terms used to mean substantially the same thing).

In general the rule is that, if a wrong is committed in the performance of a ministerial duty, the officer performing it is liable. He cannot plead command of the state, because he was exceeding his jurisdiction. Otherwise he could have done no legal injury. (This rule is applicable chiefly in cases of summary action, for otherwise the individual who is adversely affected would have an opportunity to prevent the

[18]For fuller treatments of this subject, see John Dickinson, "Judicial Control of Official Discretion," 22 *American Political Science Review* (May 1928) 275–300; Thomas Reed Powell, "Administrative Exercise of the Police Power," 24 *Harvard Law Review* (February, March, and April 1911) 268–89, 333–40, and 441–51; and Edward G. Jennings, "Tort Liability of Administrative Officers," 21 *Minnesota Law Review* (February 1937) 263–314 (also in 4 *Selected Essays on Constitutional Law, op. cit.* [Chap. I, n. 7], pp. 1264–1310).

action by seeking an injunction. The failure to apply for the injunction would then be held to prevent the collection of damages.)

But the rule is far from satisfactory. The distinction between ministerial and judicial functions is unrealistic. A great and growing number of administrative acts involve some element of discretion and yet are not properly judicial in nature. Furthermore the rule works on the "all or none" principle, making it difficult to introduce the concept of reasonableness. It tends to instill overcaution in administrative officers in certain situations where prompt and vigorous action would be in the public interest and to allow too much room for abuse of power in others. Sound policy seems to dictate that officers should not be held liable for honest and reasonable errors, although at the same time they should not be granted complete immunity extending even to malicious action.[14] The courts are striving in various ways to get around the rigidity and inapplicability of the old rule and to substitute the test of official negligence, but, it may be said, with only moderate success.

It should be noted that the chief executive, whether president or governor, is presumed to be a discretionary official and so cannot be sued for damages or otherwise subjected to private action for official misconduct. It appears to be fairly clear that, as far as concerns actions for damages, the same immunity extends to the heads of executive departments. Mayors, however, are not *ipso facto* exempt.

Furthermore the courts lay down a general rule—perhaps more honored in the breach than in the observance—that

[14]Thus, where administrative officers have destroyed property which they adjudged to be a "nuisance" (a legal term meaning "anything that unlawfully worketh hurt, inconvenience or damage"), there is a tendency to grant immunity to the officer in a suit for damages if he acted reasonably and in good faith, even though the property in question had since been judicially determined not to have been a nuisance.

they will not revise administrative acts. To do so, they occasionally say, would be to exercise a nonjudicial function and thus violate the separation of powers. But the courts will normally take jurisdiction to determine whether or not an administrative official has acted within his lawful authority. Under the guise of determining the legal question of administrative jurisdiction, they may go a long way in actually revising administrative actions.

In applying this general principle to the use of the extraordinary writs the courts come back to the rules evolved in the damage cases. Generally they will not compel an official to take action where he has discretionary power—certainly not a specified action—but they will do so in appropriate instances if the action is "ministerial." The theory is that if a court should compel a particular use of administrative discretion it would be itself exercising a nonjudicial function; but if it merely checks an illegal act it is operating within its proper sphere. Thus, in general, it is easier to obtain an injunction than a *mandamus.*

Statutory Review

Today it is becoming increasingly common to provide statutory forms of review.[15] That is to say, legislatures displace the common-law and equitable remedies and provide the conditions for review and the scope which it shall take. This makes it possible to avoid the difficulties suggested above. It also provides adequate judicial relief in cases, such as rate fixing, where an action for damages is singularly inept. An additional advantage of this method of providing for judicial supervision of administration is that it makes it possible, within limits, to mark out the issues to be reviewed

[15]This is really a special case of "consent to suit" by the state. See above, page 137.

by the court as distinct from those which are to be decided finally by the administrative agency. In the states such review frequently takes the form of provision for the writ of *certiorari,* which leads to an appeal of the administrative decision before a court sitting without a jury. The federal government, in providing for review of the decisions of administrative agencies, generally chooses either a statutory writ of injunction or, more frequently, a simple petition for review. It should be noted, however, that both of these forms of action presuppose a written record of the administrative proceedings upon which the court's review may be based. Consequently they are not available for the cases of summary action where no such record exists.

One or two examples will serve to clarify the nature of statutory judicial review. The Federal Trade Commission Act, as recently amended,[16] provides that the commission's cease-and-desist orders may be appealed within sixty days to the appropriate federal Circuit Court of Appeals. The court is to be supplied with a full transcript of the administrative record, including all testimony, and is to base its decision upon that record, accepting the commission's findings as to facts "if supported by evidence." No new evidence may be introduced at this stage, except that, if there is new relevant evidence which could not reasonably be expected to have been available for presentation before the commission, the court may remand the case to the commission for the taking of such evidence and the reconsideration of their order in the light thereof before further prosecution of the appeal. If the court upholds the order in whole or in part it issues its own enforcing order. Furthermore if no appeal is made within the sixty-day period, the commission's order becomes final and is enforceable in court by fine, on proof of its violation.

[16] 52 Stat. L. 111 (1938).

Similarly the Pennsylvania Unemployment Compensation Law[17] provides for an appeal to the Superior Court by any aggrieved party from decisions of the Unemployment Compensation Board of Review. All administrative remedies must first be exhausted. A complete transcript of proceedings is to be filed with the court, and the board's findings of fact are to be final if supported by the evidence[18] and in the absence of fraud.

Suit for Enforcement

In addition to statutory review, there is an opportunity for judicial control wherever administrative officials must appeal to the courts to secure enforcement of their decrees. This is the normal procedure where the administrative action is directive rather than enabling in nature, and specific in application rather than general. If the administrative intervention consists in commanding certain action on the part of an individual, he may simply refuse to obey and await prosecution by the government, at which time he may enter the appropriate defense. There are, however, certain instances, particularly in the fields of tax collection and health regulation, where officials have summary powers of enforcing their own orders without resort to the courts. Furthermore the terms of the statute may make a great difference as to the effectiveness of this type of remedy. For instance it used to be the case that the Federal Trade Commission's cease-and-desist orders under the Federal Trade Commission Act were not legally binding until the commission secured an enforcement order from a court. Under the amended statute, however, they have independent binding quality, and the person who violates a final order of the commission thereby incurs

[17]*Laws of Pennsylvania*, 1937, Vol. II, Sec. 510, 2918.

[18]That this may be a large exception will appear in the course of Chapter VII.

a penalty. In suits to enforce such penalties the courts will not question the validity of the order. The statute may also strengthen the administrative order by placing the burden of proof upon one who violates it or by directing the courts to admit no new evidence in enforcement proceedings.

General Limitations upon Judicial Review of Administration

There are certain limitations to which all resort to judicial review of administration is subject. In the first place, it is a fundamental principle of such review, as it is of all judicial review in this country, that there must be an actual "case" or "controversy" involving private rights and parties in adverse interest.[19] Second, and equally important, is the principle of "exhaustion of administrative remedies." As the phrase suggests, the general rule is that the courts will not take jurisdiction unless the parties have first availed themselves of all administrative appeals or other devices, short of judicial review, which may be available. While this is the general rule, it is—like most general rules—subject to exceptions. The law on the subject is highly technical.[20]

Summary

Despite the state's general immunity to suit, there are, then, a variety of ways in which administrative action may be brought before the courts for review. First, administrative action may be called into question by the courts indirectly

[19]See Robert K. Carr, *The Supreme Court and Judicial Review* (this series).

[20]For a discussion and annotation of the subject, see editorial note on "Administrative Action as a Prerequisite of Judicial Relief," 35 *Columbia Law Review* (February 1935) 230–46 (also in 4 *Selected Essays on Constitutional Law, op. cit.* [Chap. I, n. 7], pp. 940–57). For an interesting recent case, involving application of the rule to proceedings before the National Labor Relations Board, see *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U.S. 41 (1938).

in an action for damages against an administrative official for alleged abuse of authority. Second, resort may be had to one of the various extraordinary writs to restrain or compel official action. Third, most administrative orders cannot be enforced except by judicial warrant of some sort, and the question of the legality of the administrative action may be considered by the court before granting this warrant. Fourth, the government may give its consent to suits for damages against the state itself, either generally or in certain types of cases. Fifth, statutory provision may be made for judicial review of administrative determinations. Finally, local governments, when acting in their "proprietary" capacity, are not immune from suit.

The conclusion may be drawn that the opportunities for some measure of judicial control of administrative action are almost as extensive as the field of administration, but it must be added that the remedies now available against certain types of official misdoing are inadequate, and that in other cases they may hamper administration unnecessarily. Furthermore the very complexity of the law is often burdensome both upon administrators and private individuals. How judicial control is in fact exercised, whether the courts revise the acts of administrators too much or not enough—these are questions to which we must now turn our attention.

Chapter VI

The Courts and Administration: Judicial Review in Action—I

JUDICIAL review of administrative action is of great and increasing importance. To be sure, the proportion of administrative decisions which are reviewed by the courts is small, but the ratio of these cases to the total of court decisions is large and growing. The United States Supreme Court, during its 1938–39 term, handed down judgments in 35 cases involving decisions of the lower federal courts reviewing administrative orders. This constituted 23 per cent of all the opinions written by the Court during the term. The effect of judicial decisions in settling the law is such that their importance is out of all proportion to their number.

Introductory

THE PROBLEMS INVOLVED

We shall be concerned here primarily with a study of the actual operation of judicial review of administrative action. Two principal questions present themselves. First, there is the very difficult and important problem of what issues the courts will decide. Second, and of almost equal significance, is the question of what administrative procedures the courts will require. The former resolves itself to the question of the degree of "finality" which is to be attached to the adminis-

trative determination. At one extreme the court virtually repeats the administrative process, reaching its own determination of the case on the basis of evidence produced in court. This is spoken of as a "trial *de novo*," and the administrative decision is not final in any respect. At the other extreme the court merely investigates to see that the administrative agency is acting within the jurisdiction given it by law. On all other questions the administrative decision is final. Between these extremes there are various degrees of judicial review of administrative action. Next to the lack of any judicial review at all comes (1) judicial review only of the question of the legal authority (jurisdiction) of the administrative agency. The following stage extends the scope of review to cover (2) the procedure of the administrative agency to determine its conformity with accepted rules of "due process." Review of (3) all "questions of law" constitutes the next step, which is followed in succession by (4) review of questions of law and also questions of "jurisdictional facts," (5) review of all questions of law and fact on the basis of the administrative record alone, and (6) of all questions on the basis of the administrative record and such additional evidence as the court may choose to admit. (See chart on page 208.) Our examination of the first of the two questions posed above, then, will largely revolve around the courts' attempts to mark out, within these limits, the bounds of their own power.

Our investigation of the administrative procedures required by the courts is closely related to the first question, and the two will be examined together.

We shall analyze these problems, to be sure, not only to discover what is the state of the law in this field, but also to evaluate it. Should the courts broaden or narrow the scope

of their review? Should they emphasize factors other than those upon which they now lay stress? Does an examination of the cases indicate needed improvements in the administrative processes? Or in the composition of the courts? These and similar problems will be discussed more fully in the concluding chapter, but the present discussion of cases will attempt to bring out data relevant to their solution.

GENERAL VIEW OF CONTROLLING CONSTITUTIONAL PROVISIONS

Detailed study of this branch of administrative law may well be preceded by a bird's-eye view of the subject, which will entail an examination of the applicable constitutional provisions, the general lines along which those provisions have been interpreted, and the various, less tangible and less precise factors which influence the courts in their interpretation.

The constitutional provisions of primary importance in this field are the "due process" clauses of the Fifth and the Fourteenth Amendments. To all intents and purposes the two are identical, except that, as we have seen, the former applies to the federal government while the latter applies to the states. The first and most obvious consequence of the due process requirement is that the administrative agency in question must act within its jurisdiction; that is to say, it must act in accordance with a lawful grant of authority. This, as was indicated in the previous chapter,[1] is the traditional approach of the courts in damage suits. Almost any action of an administrative officer or body which affects the legal rights of an individual may be brought before a court for the purpose of testing the legal authority of the administrative agent. If a city official orders a houseowner to repair his sidewalk at his own expense, and the houseowner doubts the authority of the official to issue such an order, to secure

[1]See above, page 138.

a decision on this point he may take the matter to court—or wait until the official takes it to court to get his order enforced. This example also illustrates the fact that questions of jurisdiction merge into more general questions of legal interpretation.

Normally not only jurisdictional questions but any question of law—such as the interpretation of the legal powers under which the official concerned purports to be acting—is subject to judicial determination. Thus, in the example above, the question might not have been whether the jurisdiction of the official extended to the maintenance of sidewalks, but rather it might have been whether the statute giving him such powers meant that houseowners should pay *all* the costs of sidewalk repair. There are cases, however, in which courts may be foreclosed from reviewing even questions of law. For example, in *Reetz* v. *Michigan*,[2] which involved the power of a board of registration to decide whether an applicant for the privilege of granting medical diplomas had been "legally registered," the United States Supreme Court declared: ". . . we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. . . . Due process," the Court continued, "is not necessarily judicial process."[3] A study of the decisions leads one to believe, however, that the Supreme Court will require judicial de-

[2]188 U.S. 505 (1903). On the question of the constitutionality of final administrative determination of legal questions, see J. Warren Manuel, "May Either a State or Congress Vest in an Administrative Tribunal the Conclusive Determination of a Question of Law?" 26 *University of California Law Review* (September 1938) 683–91. And for a fuller defense of the view set forth above, see the author's "Unemployment Compensation and Judicial Review," 88 *University of Pennsylvania Law Review* (December 1939) 137–55.

[3]*Reetz* v. *Michigan*, 188 U.S. 505 at 507 (1903).

termination of legal questions in all but a restricted class of cases—such as those involving pension legislation—in which the theory is that individual rights are not affected. Even in the Reetz case—which involved a matter of "privilege"[4]—the Court pointed out that, regardless of the terms of the law, the complainant had a remedy open to him in the form of a petition for a writ of *mandamus*. It will be remembered that even the modernized formulation of the doctrine of the rule of law offered by Justice Brandeis demanded that there should be an opportunity for some court to decide "whether an erroneous rule of law was applied."[5]

Facts, on the other hand, generally do not need to be judicially ascertained. To find the facts is within the jurisdiction of the administrative officer, in the terminology of the old damage suit cases. "Questions of law" are for the courts; "questions of fact" may be committed to the final determination of administrative agencies, subject, generally, to the qualification that the determination must be based upon "substantial evidence." This is the general rule, the application of which is far more complicated than is at once apparent. In certain instances the power to determine the facts has seemed to the courts so crucial that they have been unwilling to give it up entirely to hands whose impartiality they may mistrust. Thus, for instance, has emerged the troublesome doctrine of "jurisdictional facts," which will be discussed at some length in succeeding pages.

Furthermore the law-and-fact formula admits of varying interpretations. Even though it is an old formula, taken over from the law as to which questions should be left to the jury and which should be decided by the judge, the courts have not always been clear as to its proper application. Thus such questions as what is a "nuisance" or whether a particu-

[4]See below, page 175.

[5]See above, page 10.

lar act or rate is reasonable have long been held to be questions of "mixed fact and law." The courts have been badly divided as to whether these "mixed" issues should be decided by the judge or by the jury. Today, when such questions are settled by administrative agencies in the first instance, the courts are still divided as to whether they should be considered as questions of law, and so subject to review, or as matters of fact, and so subject to final determination by the administrative agency.

The case of *Smith* v. *Hitchcock*[6] is illustrative of the difficulty of distinguishing questions of fact from questions of law. The issue was whether the *Tip Top Weekly* and *Work and Win* were "periodical publications" within the meaning of the postal laws. These publications appeared weekly. Each contained a single story, complete in itself; but the same leading character was carried throughout the series. They included nothing else except (in the words of Justice Holmes) "a page or two of inquiries as to physical culture, purporting to come from readers, with short replies, all more or less incident to the muscular tenor of the tales." The court held that the question involved was legal in nature and that therefore it would have to review the postmaster general's decision. However, it also held that since it was a postal case the presumption was strongly in favor of the ruling of the postmaster general and, after reviewing the evidence, it sustained his decision.

Examples could easily be multiplied. The application of tariff legislation provides many illustrations. Is a tomato a fruit or a vegetable? Is a chocolate soldier a toy or candy? Such questions (which have actually been dealt with by courts on the theory that they were legal in nature) certainly approach the border line between the factual and the legal.

[6] 226 U.S. 53 (1912).

Special mention should be made of the situation in which the law sets up a "standard," such as "reasonableness," for example. The distinguishing feature of a standard is its lack of exact definition. When an administrator decides that a given charge is reasonable, his action may be considered either as a finding of fact (assuming that the meaning of "reasonable" is agreed upon), or as a legal interpretation of the meaning of "reasonable." Courts tend to classify this situation in the latter category, but it is fairly clear that the judgments courts make in interpreting such a standard as reasonableness have far more in common with "common sense" judgments and depend less upon knowledge or ability peculiar to lawyers than is the case, say, with a decision as to whether a certain document constitutes a contract.

In general, then, due process of law requires that administrative tribunals must act within their jurisdiction, and that, subject to certain exceptions, courts must be permitted to review questions of law. On the other hand, administrative tribunals are usually permitted to have the final say on questions of fact, at least if their determinations are based upon "substantial evidence"; but this rule is also not without its exceptions, especially in that twilight area where the factual and the legal tend to merge.

Due process not only governs the extent of the area in which administrative decisions will be accepted as final, it also controls the manner in which these decisions must be made. Whatever the administrative action may be—whether making a rule or regulation, deciding a controversy, or issuing an order—it must employ such procedure as is fundamentally fair and just. What this fundamental conception of justice demands, in the way of procedure, varies greatly according to the circumstances, and is for the courts to decide.

In the course of numerous decisions, certain general rules have been laid down for the guidance of administrative agencies. The proceedings must not be tainted with fraud. Nor may an official performing a quasi-judicial function exhibit bias. Thus an order of the National Labor Relations Board has been set aside and remanded for a new hearing before a different trial examiner on the ground that the record revealed bias on the part of the original examiner.[7] As evidences of bias, the court pointed to omissions from the record of occurrences at the hearing, unfair restriction of examination and cross-examination by counsel for the employer, and a hostile attitude toward witnesses for the employer.

Combining the functions of prosecutor and judge is not, however, considered as necessarily involving bias. Such a holding arose out of the interesting and amusing case of Dr. Brinkley, famous Kansas goat-gland specialist. Dr. Brinkley achieved considerable fame and a large following through the use of the radio and other advertising media. Proceedings were brought by the appropriate medical board to revoke his license on the grounds of malpractice and professional misconduct. Protesting that the board was prejudiced against him, he complained particularly of the fact that some of its members had had a part in conducting the preliminary investigations and in making the original complaint. But the court refused to hold the tribunal disqualified. It declared that the challenged combination of functions in administrative tribunals had never been held unconstitutional. As to the allegation of prejudice on the part of the board, the court admitted the probable existence of such prejudice, but replied that a doctor could not be allowed to obtain a perpetual license merely by committing such acts

[7] *Montgomery Ward & Co.* v. *National Labor Relations Board*, 103 F (2nd) 147 (1939).

as would shock every right-thinking person and so prejudice the judges.[8]

One of the most general requirements of procedural due process is that of giving the parties affected adequate notice and hearing. Thus even an alien (whose rights under the Constitution tend to be less extensive than those of citizens) may not be deported summarily. He must be notified of the nature of the charge in time to prepare his defense, and must be allowed a hearing at which he will have an opportunity to cross-examine witnesses and to produce evidence and witnesses in refutation of the charges against him; and the decision or order must be based upon the evidence submitted at the hearing and upon that alone.[9] But where it is the essence of the public interest that action should be taken immediately, notice and hearing may be dispensed with. In such cases, however, an opportunity may be had afterwards to determine whether or not the administrative action was justified. Even in other than these so-called "summary" cases, administrative hearings are not generally insisted upon if there is an opportunity for a later, judicial hearing on the facts.

It has also been laid down as a rule that administrative agencies, when they act in a judicial capacity, must make findings, regardless of whether it is so required by statute. This parallels the new rule (enunciated for the first time in the "Hot Oil" case[10]) that administrative legislation of the contingent variety must be supported by findings of the facts which justify the exercise of the power.

The due process clause is also invoked to insist upon the use of certain rules of evidence, although just what will be required in this connection depends upon the nature of the

[8] *Brinkley* v. *Hassig*, 83 F (2nd) 351 (1936).

[9] *Whitfield* v. *Hanges*, 222 Fed. 745 (1915). This case contains an excellent discussion of procedural due process.

[10] See above, page 126, and Chap. IV, n. 16.

case and the character of the administrative tribunal.[11] Some relaxation of the common-law rules of evidence is always permissible. The "hearsay" rule and the "best evidence" rule need not be observed.[12] On the other hand, the Interstate Commerce Commission may not base its decisions upon information in its possession but not proved at the hearing. Thus it has been forbidden to use as evidence data taken from annual reports filed with it by the carriers which had not been introduced as evidence at the hearing.[13] In immigration cases the procedure of admitting hearsay evidence without privilege of cross-examination is one of the most criticized departures from common law.

Again to summarize, in enforcing procedural due process, the courts insist upon fundamental fairness rather than upon a rigid code. Certain items, however, are so basic that they may be specified as having general application. Administrative procedure must not be tainted by fraud; it must not exhibit bias; there must be appropriate provision for notice and hearing (administrative or judicial); and judicial determinations by administrative officials must be supported by findings of fact.

Although the due process clauses are by far the most important constitutional provisions in this field, two others call for mention. They are the third article of the Constitution and the "equal protections" clause. Article III, which vests the judicial power in the federal courts, has been interpreted as allowing the federal government less latitude

[11]On this subject, see Harold M. Stephens, *Administrative Tribunals and the Rules of Evidence* (Cambridge: Harvard University Press, 1933).

[12]The hearsay rule prohibits the introduction of testimony based not upon the direct knowledge of the person testifying but upon what he has heard stated by others. The best-evidence rule bans the admission of any evidence when more direct or authoritative evidence is obtainable. For instance, original documents, rather than copies, normally are required.

[13]*United States* v. *Abilene S.R. Co.*, 265 U.S. 274 (1924).

than the states enjoy in permitting tribunals other than courts to make final determinations. It might have been expected that this article, together with the doctrine of the separation of powers, would be construed to prohibit the delegation of judicial power to agencies other than those established under Article III. This would parallel the ban on the delegation of legislative power. Without ever discussing the problem directly, however, the Court has long since tacitly recognized the power of Congress to establish administrative agencies for adjudication. Thus the Interstate Commerce Commission has never been successfully challenged on this basis. Presumably the Court's theory is that Congress may set up such agencies as may seem appropriate for carrying out its legislative powers, just as long as it does not deprive the constitutional courts of any of the federal judicial power. The constitutional issue, therefore, arises only when Congress attempts to provide that the decisions of an administrative body shall be final. In other words, the question does not concern the power of Congress to establish administrative adjudicatory authorities, but the extent of judicial review of the decisions of such authorities. This point is illustrated in the case of *Crowell* v. *Benson* (discussed below).[14]

[14]See below, pages 178–80. State courts have at various times wrestled with the problem. By pointing out that the commission lacked the power to decide jurisdictional questions conclusively, the Supreme Court of Wisconsin dismissed the contention that, in deciding workmen's compensation cases, the Industrial Commission was exercising judicial power. Otherwise, the court remarked, the argument would be "of greater force." (*Borgnis* v. *Falk Co.*, 147 Wis. 327 [1911].) The New York Court of Appeals upheld the constitutionality of the law establishing a public utilities commission as against the contention that it violated the separation of powers and the rule against delegation of power. The court quoted from Judge Story's *Commentaries* on the Constitution as follows: "When we speak of the separation of the three great powers of government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely

In the states neither the doctrine of the separation of powers nor specific constitutional provisions for jury trial in civil cases have been allowed to stand in the way of the establishment of administrative tribunals.[15] The latter have generally been construed to apply only to traditional common-law proceedings. Even compulsory workmen's compensation acts, which establish an administrative procedure in place of an action at common law, have been regularly sustained. The Supreme Court of Missouri recently declared that "our attention has been directed to no decision, and our own research has discovered none, wherein a compensation act, either compulsory or elective, has been held unconstitutional because of the denial of a trial by jury."[16]

The state governments are subject to one limitation that does not apply to the federal government. This is the "equal protections" clause of the Fourteenth Amendment. This provision, which prohibits a state to deny any person "the equal protection of the laws," is generally applied to legislation. It is also applicable, however, to the discriminatory administration of state legislation, and in this way serves to keep government by men subject to the rule of law.[17]

separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the *whole* power of one of these departments should not be exercised by the same hands that possess the *whole* power of either of the other departments; and that such exercise of the *whole* power would subvert the principles of a free constitution." (*Village of Saratoga Springs* v. *Saratoga Gas, Electric Light and Power Co.*, 191 N.Y. 123 at 132 [1908].) For a broader argument, to the effect that the doctrine of the separation of *powers* does not prohibit the commingling of *functions*, and that the executive power may properly exercise all three types of functions, see Ralph F. Fuchs, "An Approach to Administrative Law," 18 *North Carolina Law Review* (April 1940) 183–98, and especially 186–94.

[15]Similarly the federal constitutional requirement of a jury trial has not proved to be an obstacle to administrative adjudication.

[16]*De May* v. *Liberty Foundry Co.*, 327 Mo. 495 at 513 (1931).

[17]See, for example, *Yick Wo* v. *Hopkins*, discussed below, pages 171–72.

OTHER GOVERNING CONSIDERATIONS

The Constitution and the legal doctrines which have been spun out of it do not in themselves supply an adequate basis of analysis for our problem. Consideration must also be given to the various types of cases calling for review. Judicial review in this country is conceived of as a means of determining private rights. Consequently the courts have no general revisory powers over all administrative action, and the extent to which they will review administrative actions is a function of the extent to which private rights may be affected thereby. The cases may be classified from this point of view by putting in one group those in which the government is a directly interested party and is in a favored position; the other group would comprise general "police power" cases and cases dealing with the regulation of business.[18]

The suits in which government is a direct party with a favored position may be further subdivided. First there are situations in which the complainant is seeking some gratuity or favor from the government, such as suits growing out of the free distribution of public lands, immigration cases, and pension cases. In all of these fields the theory is that the legislature could refuse to grant any such favors and that therefore the settlement of the manner in which favors are to be dispensed, and disputes concerning them resolved, is com-

[18]The classification in the text follows closely the treatment of the subject in John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge: Harvard University Press, 1927) 56–62. Mr. Dickinson's excellent volume is the outstanding work in the whole field treated in the present chapter. See also Thomas Reed Powell, "Conclusiveness of Administrative Determinations in the Federal Government," 1 *American Political Science Review* (April 1907) 583–607, and his "Administrative Exercise of the Police Power," *loc. cit.* (Chap. V, n. 13). For a very helpful functional classification of administrative powers, one that is much more detailed than that set forth in the text, see James Hart, *An Introduction to Administrative Law with Selected Cases* (New York: F. S. Crofts & Co., 1940) Chap. VI.

pletely within the legislative power. The legislature may therefore provide for the administrative determination of any or all questions which arise. In the second category are the situations in which the government furnishes a business service to individuals. Here the theory is that, since people do not need to avail themselves of the service, they must accept whatever conditions are attached to it, even if those conditions include the elimination of judicial review. This doctrine is generally applied in postal cases, although the individual's liberty to forego the service in that instance is largely fictitious.[19] The cases in these two groups are frequently referred to as involving "matters of privilege." Finally, there are the suits involving so-called necessary functions of government. Draft cases, civil service cases, and cases involving military and naval regulations are included in this group, but by far the most important are the revenue cases. Here the theory prevails that the urgency and importance of the government's demands justify considerable relaxation of the protections to be afforded the individual. All of these types of governmental action—the granting of favors, the furnishing of business services, and the performance of essential functions of government—but particularly the first two classes, are sometimes spoken of as involving "qualified rights." That is to say, whatever rights the individual parties have are distinctly "qualified," or limited.

In the second major type of cases—those arising out of the police power and the regulation of business—the courts tend to be more strict in defending individual rights, but there is a great deal of variation according to circumstances, and the circumstances are difficult to classify. Much depends upon the legal rights that were recognized at common law. For instance, the courts will be more disposed to lend their

[19]This is especially true in the case of first-class mail because it is illegal to transport such material in any other way than by post.

protection against administrative interference with what was known at common law as a "common calling" than in the case of a business or occupation—such as the practice of medicine—which has been traditionally recognized as subject to special regulations. Similarly, it may make a difference whether the purpose of the governmental regulation has the sanction of usage. The necessity of imposing special restrictions on property and liberty for the protection of health and safety, for example, has long been recognized, and the exercise of administrative discretionary powers in these fields has achieved judicial sanction. But when modern conceptions of the public welfare extend regulation more deeply into the economic field, the courts tend to be more concerned about the way in which the powers are exercised. This is especially true when the property interests at stake are large.

Still other factors are to be taken into account. Mention should be made of the importance of the type of administrative agency and the procedure which it follows. Is it a collegiate body or a single individual? Independent of the executive or politically "subservient"? Does it hold hearings? Does it have facilities for conducting extensive investigations? Such considerations as these often markedly influence the courts as to the degree of finality to be attached to administrative proceedings. How the case arises is also significant, as was suggested in the preceding chapter. For example, courts hesitate to grant writs of *mandamus* against officers possessing discretionary powers. Again, the treatment of the same question in a damage suit against an official may differ from its treatment under a statutory provision for review. In one case the administrative determination may be allowed to stand, while in the other it would be reversed.

Consideration of specific cases will make the operation of all these factors clearer. In the following pages we shall examine more closely the general principles and rules of law

outlined above, as actually applied by the courts. Our investigation will follow the classification as to types of cases which has been outlined, modifying it only to give separate treatment, each, to police power cases and to those dealing with regulatory tribunals. The latter will be dealt with in a separate chapter. In considering each of these categories, attention will be focused, first, upon the application of the law-and-fact formula, with its attendant modifying rules, and, second, upon the requirements which the courts enforce as to administrative procedure.

Cases in Which Only Limited Judicial Review Prevails

In the general category of cases in which only limited judicial review prevails fall all suits arising out of gratuities or favors granted by the government. While at first glance it may seem strange to deal with the exclusion of immigrants under this rubric, this is the way such cases are classified by the courts. The government has the power to exclude all aliens from the country, if it so desires; consequently it is by the favor of the government that any aliens are admitted. It follows logically that the rights of would-be immigrants are limited, or, as the Court sometimes designates them, "qualified." Thus in practice administrative determinations are allowed a large measure of finality in this field, and the administrative agencies concerned are permitted to resort to a highly summary procedure. Doubtless both of these consequences have been further encouraged by the tremendous number of cases involved. Until quite recently it would have swamped both the administrative and the judicial machinery to have allowed excluded immigrants extensive rights of appeal.

Briefly the situation is this: On pure questions of law—at least where the law governing jurisdiction itself is in

question—the courts will review. Matters of fact are subject to the final determination of the immigration officials. (It should be noted, however, that the law provides for an *administrative* review.) The extent to which this rule may go is well illustrated by the case of *United States* v. *Ju Toy*.[20] Ju Toy was denied permission to enter the United States by the immigration authorities and, upon appeal, by the Secretary of Commerce and Labor. He did not contend that he had been denied a fair hearing. What he did argue was that he was a natural-born citizen of the United States, returning to this country after a temporary departure. Notwithstanding this, the Supreme Court decided that the word of the administrative authority was final. "If, for the purpose of argument," said Justice Holmes, "we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial." The decision was attacked in a dissenting opinion on the ground that the officials had no jurisdiction to bar a citizen from the country and that therefore the issue of citizenship was "jurisdictional" and should be decided by a court, even though it turned upon a question of fact. (The whole case depended upon the place of Ju Toy's birth—a pure matter of fact.) The reasoning of the majority that "due process" did not require a judicial trial under all circumstances was based upon cases of governmental favors—cases, that is, where rights were qualified. To say that this was an instance of qualified rights was to beg the question at issue; for if Ju Toy was a citizen his rights were not "qualified." But the decision stands—a high water mark in its class.[21] It has been suggested, probably with

[20] 198 U.S. 253 (1905).

[21] As the case came to the Supreme Court, it raised the question whether the fact of citizenship could be submitted to a court and jury. Whether, if

merit, that the Court may have been influenced by the difficulty of establishing the identity of Orientals in this country and by its desire to keep the courts free from this responsibility. Indeed, the government might well plead "practical necessity" in this situation, for the legal relevance of such a plea has long been recognized.

It is instructive, by way of contrast, to note that in deportation cases the courts are more strict. Doubtless it is recognized that just as in actual fact an alien who is established in this country generally has a greater interest in remaining here than a nonresident has in gaining access to our shores, so in legal contemplation residents, whether or not they are citizens, are entitled to a full measure of "due process of law." Thus in the case of *Ng Fung Ho* v. *White*,[22] which was quite similar to that of Ju Toy except for the fact that it involved deportation, the court reached the opposite conclusion. Here it was held that if the person threatened with deportation could establish a prima-facie case for his citizenship (that is, if he could supply evidence which, if believed, would establish his citizenship), he was entitled to a judicial determination of the question. It appears also that in deportation cases the courts will reverse an administrative determination of fact if it appears manifestly and grossly contrary to the evidence. But this seems to be about as far as they are willing to go.

To return for a moment to the case of the excluded immigrant, the procedural requirements insisted upon by the courts under the due process clause are slight. On such questions as the adequacy of hearings they have granted a wide latitude to administrative officials, although they

the question were properly raised, the court might reverse an administrative finding that had no supporting evidence has never been decided, but the tendency appears to be in that direction.

[22] 259 U.S. 276 (1922).

have on occasion reversed an obvious instance of administrative unfairness. However, the statutes now provide more adequate procedural protections than the courts have insisted upon under the due process clause; and the statutes, of course, are enforceable in the courts.

Cases arising out of the free distribution of public lands come squarely within the category under consideration. The scope of judicial review is even more restricted than in the immigration cases. Except in the rarest of circumstances, it is impossible to attack the administrative decisions directly. The question must normally arise as an incident to a suit between two rival claimants to a given lot of land. Even then the courts will accept the administrative findings of fact as final, and will refuse to examine the record to see whether the findings were based upon "substantial evidence." They will, it is true, correct a patent violation of the law; but if there is room for doubt the administrative decision will be accepted as final, even in a matter of legal interpretation.

In pension cases, the rule operates still more to the advantage of the government. Here there is no opportunity for a collateral suit between private parties. The Economy Act of 1933 apparently abolished the last vestige of judicial review under the soldiers' "bonus" legislation. On the basis of this act, a federal Circuit Court of Appeals refused to review an award of the Veterans' Bureau even though it was alleged to be retroactive and to have been made without notice and hearing.[28]

When the government enters into business or otherwise offers services which no one is compelled to accept, the legal situation is substantially the same as in the cases which have just been discussed. The conduct of the postal system provides examples. The cases arising out of "fraud orders"

[28] *United States* v. *Mroch*, 88 F (2nd) 888 (1937).

are especially significant because of the wide range of discretion left to the postmaster general in determining what constitutes fraud. The statute provides merely that, "upon evidence satisfactory to him that any person or company is conducting a scheme for obtaining money through the mails by means of fraudulent representations," he may deny such person the right to receive letters. The courts have followed the analogy of the land cases, going on the theory that the government was offering a service of which individuals need not avail themselves, and consequently that the individual rights involved were very slight. The result has been to allow decisions of the postmaster general to stand even when they involve questions of law, unless the legal error was gross and manifest. The case of *American School of Magnetic Healing* v. *McAnnulty*[24] illustrates the exceptional instance of judicial revision. Complainants' business was founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof." The postmaster general declared it to be fraudulent, after due notice and hearing, and the complainant sought an injunction against the enforcement of this decision. The Supreme Court held that on no view of the admitted facts did the statutes against fraudulent enterprises cover the business in question. Consequently, the writ of injunction was granted.

The inherent danger, however, in allowing such vast latitude to the postmaster general on the largely fictitious theory that persons need not use the mail if they do not care to is well illustrated by the case of *Masses Publishing Co.* v. *Patten*.[25] The wartime Espionage Act outlawed the expression of certain opinions and made newpapers containing such

[24] 187 U.S. 94 (1902).

[25] 246 Fed. 24 (1917).

material nonmailable. On the authority of this act, the postmaster general barred *The Masses* from the mails. The Circuit Court of Appeals denied relief, holding that the act committed this matter to the judgment and discretion of the postmaster general and that the court would not interfere unless his decision were "clearly wrong." In effect, as Mr. Dickinson observes, this "puts the channels of public opinion at the mercy of the very agency which in theory should be subject to public opinion"[26]—that is, the government.

Cases arising out of the so-called essential functions of government also fall within the category of disputes, in which the right to judicial review of administrative action is at a minimum. In this field, however, it is the necessities of the government rather than the lack of private rights which are held to justify committing a large degree of final discretionary power to an administrative authority. As the principles applied in these cases are similar to those treated above, and the kinds of situations that fall within this class have already been indicated, the attitude of the courts can be exemplified by considering a single type of case, one involving revenue matters.

Taxes may not be collected without some semblance of notice and opportunity for hearing. The courts will enforce this requirement; and they will also intervene to decide the issue where it is charged that the person being taxed is not legally liable to the tax. But the great majority of disputes arise out of the alleged overvaluation of the object taxed and of alleged discrimination as among various taxpayers. In such cases it is exceedingly difficult to get the courts to revise the action of the administrative authorities. They frequently speak of such action as being "quasi-judicial" in nature, or simply "discretionary," and so not subject to review. They may take this attitude whether the matter decided is really

[26]Dickinson, *op. cit.* (above, n. 18), p. 301.

a technical matter of valuation, or whether it includes a large measure of legal interpretation. Furthermore this rule is as likely to give protection to the assessments of a politically appointed and incompetent tax official as to the determination of an expert body. Exceptions to this rule may be found, but they are generally limited to instances of willful error.[27]

It may be said generally of the types of cases treated in this section that the constitutional requirement for judicial review extends only to clear questions of law, and that even with regard to legal questions all doubts will be resolved in favor of the administrative interpretation. In certain situations apparently even this limited measure of judicial review is not necessary. Some sort of notice and hearing may be taken as required, but since the constitutional minimum in this regard is so low that it is seldom violated in practice, the issue does not often arise in the courts.

Ordinary Police Power Cases

GENERAL

The distinction between the police power cases and those dealing with the regulation of business (discussed in the next section) is not a sharp one, but it is important. The tone for the police power cases is set by two significant facts. In the first place, the kinds of administrative action con-

[27]The United States Supreme Court has held, in the case of *Sunday Lake Iron Co.* v. *Wakefield,* that "intentional systematic undervaluation by state official of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." (247 U.S. 350 at 352–53 [1918].) See also *Great Northern Railway Co.* v. *Weeks,* 297 U.S. 135 (1936).

There is considerable variety of practice on this subject among the states. Some states make provision for much more extensive judicial revision of tax assessments than that described in the text.

cerned are generally of an informal nature. There is likely to be no hearing and no written record. Second, they are often damage suits—and even when they are not, the rules applied are drawn from damage suit cases. In general, it may be said that, as a consequence of these factors, courts tend either to sustain the administrative action without examination of the facts, or else to review in considerable detail.

Furthermore police power cases are not all of one kind. On the contrary there are significant differences among them. The most important for present purposes is the distinction between businesses or occupations which are thought of as in some special way subject to public control and dependent upon the state for their right to exist, and those, on the other hand, which traditionally have been thought of as open to all as a matter of right. The latter are sometimes spoken of as "ordinary lawful businesses," while the former are referred to as involving "matters of privilege." In accordance with principles already set forth, the "ordinary lawful business" cases are normally subjected to more rigorous judicial review than those involving matters of privilege. The latter are substantially similar to the cases of "qualified rights," discussed above, and are treated in approximately the same fashion. Consequently they will receive little notice in this section.

PERMISSIBLE EXTENT OF UNGUIDED DISCRETION

In general, our concern in this chapter is with the limitations placed by the courts upon the exercise of administrative discretion. There are certain instances, however, in which the courts have held that the very grant of discretionary authority was so unlimited as to be invalid. These instances involve the delegation of power to make individual decisions, not general rules, and they have been dealt with by the courts under the due process clause rather than under the

doctrine of the nondelegability of legislative power; hence they are considered here rather than in connection with the limits upon the delegation of legislative power.

The leading case on this subject is *Yick Wo* v. *Hopkins*.[28] A San Francisco ordinance forbade anyone to conduct a laundry, except in a brick or cement building, without obtaining permission from a board of supervisors. Yick Wo was denied a permit, despite the fact that fire wardens and health officers had certified that his premises were in safe and sanitary condition. He was convicted of operating his laundry without a permit, fined, and imprisoned for nonpayment. He then sought relief by petitioning for a writ of *habeas corpus* on the ground that the ordinance violated the Fourteenth Amendment. The state Supreme Court denied the petition and a writ of error was issued by the United States Supreme Court. It appeared in the record that of 320 laundries in the city, 240 were owned by Chinese aliens, and that 310 were constructed of wood, as was Yick Wo's. Two hundred Chinese who had applied for permits were denied them, while all but one of the applications by non-Chinese were granted.

First of all the Court held that the grant of discretionary power itself was null and void because there was absolutely no suggestion of a standard by which the authorities were to exercise their discretion. The case was distinguished from those upholding administrative discretion in the licensing of tavern keepers and the like, on the ground that in such cases there is an implied standard of fitness for the guidance of the officers. No discretionary authority but naked and arbitrary power was involved here. "The very idea," declared Justice Matthews, "that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another,

[28] 118 U.S. 356 (1886).

seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[29] The Court therefore held the ordinance void because it must *necessarily* operate in an arbitrary manner. It went on to point out, however, that the facts clearly indicated racial discrimination in the administration of the ordinance. This administrative discrimination was held to constitute a denial of the "equal protection of the laws";[30] for that provision covers not only the statutes themselves but also the way in which they are administered. In this case the administration was so grossly discriminatory against a particular class as to constitute a practical denial of the equal protection of the laws.

The Court was probably influenced in the Yick Wo case by the strong suspicion that the ordinance was *intended* to permit discrimination. Over against it must be considered such cases as *People ex rel. Lieberman* v. *Van de Carr*.[31] The facts of that case were substantially as follows. The sanitary code provided that milk dealers must be licensed by the board of health. Lieberman was convicted for selling milk without a permit. No substantial evidence of discrimination or arbitrary administration was offered. The act as applied was upheld on the theory that it authorized only a "reasonable discretion," and that in the absence of proof to the contrary it would always be presumed that the board had acted reasonably. In this and in other similar cases, the Yick Wo decision was treated as resting upon the evidence of actual discrimination. The state courts have also shown themselves willing to relax the rule and grant exceptions rather freely

[29] *Ibid.*, p. 370.

[30] On a later occasion, in upholding a liquor licensing law, the Supreme Court distinguished the Yick Wo case on the ground that the laundry business, unlike the liquor business, is one that can be carried on "as of right" (that is, it is an "ordinary lawful business"). (*Crowley* v. *Christensen*, 137 U.S. 86 [1890].)

[31] 199 U.S. 552 (1905).

where the public necessity or the impossibility of formulating specific standards seems to them to justify it.

Nevertheless, the rule of the Yick Wo case is still used upon occasion. An example is supplied by *Washington ex rel. Seattle Trust Co.* v. *Roberge*,[32] which invalidated a delegation of unguided discretion to zoning authorities. The law provided that no permit for the erection of a home for the aged should be granted without first obtaining the consent of the owners of two thirds of the property within four hundred feet of the projected home. The discretionary power thus delegated to the property owners was absolutely without guide or limit and for this reason it was declared unconstitutional on the basis of the Yick Wo decision. The state courts also continue to recognize the rule when it seems desirable.[33]

But in general the courts are increasingly inclined to seize upon some excuse for inferring a standard for the guidance of the discretionary power. They are likely to do so where it is a question of personal fitness to conduct a particular line of business or occupation, whether it be that of milk dealer, teacher, dentist, physician, electrical contractor, insurance broker, motor vehicle driver, public accountant, architect, security broker, junk dealer, or peddler. The right to enter the banking business may be made to depend upon the consent of the superintendent of banks, limited only by the injunction that he should not grant permission unless "satisfied that the public convenience and advantage would be promoted."[34] And where a mere privilege is being regu-

[32]278 U.S. 116 (1928).

[33]In *State ex rel. Altop* v. *City of Billings*, 79 Mont. 25 at 35 (1927), the rule is said to be "generally accepted." The court proceeded, however, to note broad exceptions to the "generally accepted rule" and to uphold the ordinance in question.

[34]*Bank of Italy* v. *Johnson*, 200 Cal. 1 (1926), cited in "Discretion to Grant or Refuse Licenses and Permits, and Power to Make Rules," 15

lated it is generally agreed that no express guides to administrative discretion are required.[35]

SCOPE OF JUDICIAL REVIEW OF VALID GRANTS OF DISCRETION

Normally, in the class of cases under discussion, once the grant of discretionary authority itself is upheld, the judicial review which may be obtained as of right is limited to establishing that the administrative authority is acting within the law, and has not exercised its discretion in such a way as to discriminate arbitrarily against some person or group of persons. The discretion is frequently so broad, the standards so vague, that there is little opportunity for application of the distinction between questions of law and questions of fact. There is, in such instances, no formal finding of facts to which the law is applied. Instead, the two processes are combined, both in theory and practice, as an exercise of discretionary power. Thus judicial review of questions of law in such cases often means little more than a judicial determination that the officer has jurisdiction over the person or thing being regulated and that he has complied with any procedural requirements that may be provided in the law. On the other hand, where the legislature has attempted to provide for a complete *de novo*[36] judicial review of the administrative action, the statute frequently, but not always, has been declared void as violating the separation of powers by encroaching upon the proper field of administrative discretion. Such, for instance, was the fate of an Illinois statute which attempted to provide for judicial revision of decisions on requests for

California Law Review (July 1927) 408–15 at 409 (also in 4 *Selected Essays on Constitutional Law, op. cit.* (Chap. I, n. 7), pp. 352–60 at 353).

[35]See Lewis Allen Sigler, "The Problem of Apparently Unguided Administrative Discretion," 19 *St. Louis Law Review* (June 1934) 261–321.

[36]A *de novo* review is one in which the court completely disregards the record of the administrative proceedings and tries the case as if it were being heard for the first time.

old-age assistance. "Whether a particular individual is needy," the Illinois court declared, "is a question to which the categorical affirmative or negative answer is rarely possible."[37]

The courts will, however, review whatever cases may arise which do involve questions of law. Professor Patterson's study of judicial review of the decisions of state insurance commissioners, who have very broad and extensive administrative powers, is instructive in this connection. He finds that the cases fall into two classes: (1) those in which the question relates to the meaning of technical language in the insurance business; and (2) other legal questions. In cases of the first type the courts appear to uphold the commissioners almost without exception. In the others the commissioners' interpretations are much more frequently overruled.[38] Here, as in the revenue cases, the courts appear to consider that they should respect expert judgment, even when it relates to what is technically a question of law. In other words, the courts recognize that there are some questions of law which lay experts are better fitted to decide than are lawyers.

The "privilege" cases, of course, are treated differently. The Reetz case, discussed above,[39] illustrates the point that even questions of law may be practically committed to the final determination of administrative authorities where the private interest in question is not one which has been traditionally recognized as a "right."

As to matters of fact, Professor Freund concludes: "On the whole, it is clearly possible to speak of a tendency to give to administrative findings of fact, where the authority acts

[37] *Borreson* v. *Department of Public Welfare*, 368 Ill. 425 at 431 (1938). See also *State ex rel. Waterworth* v. *Harty*, 278 Mo. 685 (1919), for a similar decision regarding the work of a state insurance commissioner.

[38] Patterson, *op. cit.* (Chap. I, n. 11), pp. 491–95.

[39] See above, pages 151–52.

semi-judicially, at least the effect of the findings of a jury."[40] Since, roughly speaking, the jury's findings of fact are recognized as final unless they manifestly fly in the face of the evidence, this tendency gives considerable finality to such findings. Since Freund wrote, the tendency to respect the administrative determination has gone even further. Today the trend is toward upholding the decision if it is supported by "substantial evidence," without regard to the evidence on the other side.

We have still to discuss the difficult problem of "jurisdictional facts."[41] A "jurisdictional fact" is one upon the establishment of which the jurisdiction of an officer or tribunal depends. Courts sometimes argue that such facts are so vital that they should be subject to judicial review. Their reasoning is that, if an administrative agency makes an error in establishing the facts which give it jurisdiction over a particular controversy, it may thereby extend its jurisdiction. The effect is substantially the same as though it had reached this conclusion by giving a broad interpretation to the law governing the scope of its actions. From this it is an easy step to conclude that the determination is so closely akin to a legal decision that it should be subject to judicial review. It is this conclusion which is known as the doctrine of jurisdictional facts.

Various factors contributed to the development of this doctrine. It originated in police power cases involving administrative authorities who possessed large areas of undefined discretion, who were not hedged in by procedural requirements, and who made no written record of their pro-

[40]Freund, *op. cit.* (Chap. I, n. 3), p. 295.

[41]See Forest Revere Black, "The 'Jurisdictional Fact' Theory and Administrative Finality," 22 *Cornell Law Quarterly* (April 1937) 349–78. Mr. Black remarks that "the case material to date cannot be reconciled or reduced to a logical system. . . ." *Ibid.*, p. 349.

ceedings or findings. All of these circumstances tended to put the courts on their guard.

The interesting case of *Miller* v. *Horton*[42] provides a classic illustration of the application of the doctrine. Acting under a law which provided for the summary destruction of animals afflicted with glanders, the Commissioners on Contagious Diseases Among Domestic Animals killed a horse which a veterinary employed by them had declared to be afflicted with glanders. The owner of the horse then sued the commissioners for damages, claiming that the horse did not have glanders and offering the testimony of two veterinarians to that effect. The jury decided in favor of the owner, awarding damages. The question, on appeal, was whether the law did—and, if it did, whether it constitutionally could —give the commissioners final power to decide whether a horse had glanders, barring all recourse to judicial review of that question. The court recognized that if it upheld the award of damages the result would be to hamper the enforcement of the law, for commissioners would be very reluctant to run the risk that a jury might disagree with their findings. Nevertheless, the court was even more impressed by the importance of a judicial determination of the question of jurisdiction in a case involving private property. And, as the judges saw it, the commissioners had jurisdiction only if the horse actually had glanders—not merely if the commissioners *thought* it had glanders.

Although the doctrine of this case has been strongly criticized, it has been recognized as valid by the United States Supreme Court,[43] and by other state court decisions.[44] As

[42]152 Mass. 540 (1891).

[43]*North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908).

[44]In *Pearson* v. *Zehr*, 138 Ill. 48 (1891), a case similar in nature to *Miller* v. *Horton*, the court sustained a judgment against a board of livestock commissioners, based on the evidence of farmers and other non-

early as 1883, however, one state court reached the opposite decision in the case of *Raymond* v. *Fish*,[45] which was similar to *Miller* v. *Horton* except for the fact that the statute in question required a hearing. Furthermore, where the legislature expressly declares its intention that the administrative finding in such cases shall be final, it may be said that there is a tendency toward upholding such declarations. In the words of Professor Powell, "The advancing trend of judicial opinion is gradually forsaking the individualistic doctrines underlying the precedents of an earlier generation. . . ."[46]

But the advance is not unbroken. "Legal doctrines," as Justice Frankfurter observed in one of his first judicial utterances, "have, in an odd kind of way, the faculty of self-generating extension.[47] The doctrine of jurisdictional facts, which was a product of the days when the acts of administrative officials could normally be reviewed only by means of collateral actions, has been taken over into the law of modern administrative tribunals where direct judicial review is provided for by statute.[48] This tendency is best illustrated by the case of *Crowell* v. *Benson*.[49] After a full

veterinarians. Thus, as Professor Powell remarks, "it would seem that the opinions of experts may be outweighed by the conclusions of the untrained, and that those who endeavor honestly and carefully to perform the duties entrusted to them by law to protect the community against danger may be subject to the findings of a jury with respect to matters frequently arousing popular passion and prejudice hostile to the enforcement of the law." Powell, *op. cit.* (Chap. V, n. 13), p. 447.

[45]51 Conn. 80 (1883).

[46]Powell, *op. cit.* (Chap. V, n. 13), p. 458.

[47]*Texas* v. *Florida*, 306 U.S. 398 at 434 (1939).

[48]Mr. Dickinson writes: "The doctrine of jurisdictional fact is the most unfortunate heritage from the older type of indirect review to the newer types of direct appellate review." Dickinson, *op. cit.* (Chap. V, n. 13), p. 295.

[49]285 U.S. 22 (1932).

hearing, accompanied by most of the procedural protections commonly attendant upon workmen's compensation administration, the United States Employees' Compensation Commission awarded compensation to an injured longshoreman, to be paid by his employer. The employer brought suit to enjoin enforcement of the award on the ground that the workman was not in his employ when injured. No question of the definition of "in his employ" was involved; it was a pure question of fact. The statute provided that the commission's decisions should be final except as to questions of law. Nevertheless, the Supreme Court, relying upon the doctrine of jurisdictional facts, held that the fact of employment must be established judicially, and that in making such a determination the courts need not confine themselves to the record made in the administrative hearing, but might admit new evidence. (That is, the court permitted a trial *de novo* of the facts upon which jurisdiction depended.) To allow administrative finality in such cases, declared Chief Justice Hughes, would in effect be to allow administrative finality as to law; and "that would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system. . . ."[50]

This is a good example of the way in which the old doctrine that jurisdictional matters are of prime importance and must be settled by the courts has muddied the thinking of the courts with reference to the law-and-fact distinction. The statute in the Benson case lays down all sorts of limiting provisions which are not jurisdictional. In each case the application of the limiting provisions depends upon determinations of fact; and so in each case the way in which the facts are determined may have the same effect as would a different interpretation of the law. For example, injuries

[50] *Ibid.*, p. 57.

sustained by a workman who is intoxicated are not compensible. If the commission awards compensation in such a case by finding that the workman was not intoxicated, though "in fact" he was, the effect is the same as though it altered the meaning of the statute.[51] Yet even Chief Justice Hughes denies that this would be a matter for judicial determination. He refuses, that is to say, to accept the logical consequences of his own reasoning.

It is important to note that the holding in this case was not made to rest upon the due process clause. Rather it is the grant of "judicial power" in Article III of the Constitution which is said to contain an implied prohibition against depriving the courts of the right to ascertain jurisdictional facts for themselves on the basis of evidence taken in court. Consequently the decision is not controlling where state legislation is involved; and no tendency has been observed for a similar rule to be developed by the state courts in construing state workmen's compensation laws. The federal courts themselves have shown an inclination to keep the effects of this decision within strict limits.[52] It may even be doubted whether the Court as now constituted would consider the precedent binding in any situation.

REQUIREMENTS AS TO ADMINISTRATIVE PROCEDURE

Just what procedural practices are required by the due process clause, in police power cases, is a matter which the

[51]Thus it might be said that the commission's "jurisdiction" did not extend to intoxicated workmen. To be sure, this would be doing violence to ordinary usage. But it serves to show that the question of fact which might then arise would be just as vital as the matter of employment, which was "jurisdictional."

[52]For instance, they respect congressional instructions to limit the admission of new evidence to very exceptional circumstances, and in such instances to remand the case to the administrative agency for the taking of that evidence, rather than to conduct a *de novo* trial.

courts decide in the light of the circumstances of each case as it arises. However, a few generalizations are possible. It is a settled principle that in cases requiring summary action for the avoidance of imminent danger a hearing is not required. Generally, in other types of cases a hearing must be granted either at the administrative level or in a court. Consequently if an administrative hearing is provided there is a better chance that the court will respect the administrative findings as to facts.

Two cases may be used to illustrate these points. *Southern Railway Co.* v. *Virginia*[53] dealt with a statute empowering the state highway commissioner to require railroads to remove grade crossings, partly at their own expense, when in his opinion the public safety required it. In this instance he exerted his authority without giving an opportunity for a hearing or the presentation of evidence. The statute, as interpreted by the state supreme court, made his decision final and not subject to ordinary judicial review, although a suit could be brought in equity to prove that the action taken had been "arbitrary" and so invalid. The Court invalidated the statute, declaring this limited an indefinite opportunity for a hearing inadequate. On the other hand, in *Bourjois* v. *Chapman*,[54] the Court upheld a statute which conditioned the right to sell cosmetics upon receipt of a license and did not provide for an administrative hearing but did provide for an appeal to the courts.

Generalization regarding judicial review of police power cases is even more difficult than it was in the case of the preceding group. One can do little more than recall the factors which will influence the courts. Thus where a ques-

[53] 290 U.S. 190 (1933).

[54] 301 U.S. 183 (1937).

tion of "privilege" enters in, the case for judicial review is weakened. The converse holds where private rights are directly involved. Again the scope which will be allowed to administrative discretion depends to a large extent upon the administrative feasibility of establishing fairly definite standards. Finally, the necessity or lack of necessity for summary action is often a determinant, especially on the procedural side. With these factors in mind two conclusions may safely be drawn. First, judicial review tends to be more extensive in this class of cases than in those involving governmental favors or services, or necessary functions of government. This difference is most apparent in the treatment of jurisdictional facts. Second, more importance is attached to procedural safeguards in police power cases than in the group previously discussed.

Chapter VII

The Courts and Administration: Judicial Review in Action—II

Regulatory Tribunals

GENERAL

MODERN regulatory legislation is usually, but not always, administered by boards or commissions. Such agencies ordinarily adhere to some kind of formalized procedure and keep written records of their proceedings. They are thus to be distinguished from the older agencies of administrative enforcement of police legislation, such as the sheriff. Normally, too, the social and economic interests which they are designed to protect and promote go beyond the traditional trinity of health, safety, and morals. The oldest and most common subject of this type of legislation is the public utilities.

The principles applicable to the judicial review of the decisions of these regulatory tribunals are not strikingly different from those treated above. Differences do arise from the facts that review is generally direct rather than incidental to a damage suit and that full administrative hearings are commonly provided. But the same old problems emerge as to what questions the courts should consider in exercising such review. The solutions to these problems have largely been developed out of the old police power precedents. The same general formula is adopted—that the courts will review ques-

tions of law and accept the administrative verdict as to matters of fact. Here, also, there are two modifying rules. Administrative findings of fact, to be acceptable to the courts, must be supported by substantial evidence. Furthermore, the courts reserve to themselves the right—which they do not always exercise—to pass upon jurisdictional facts. The first of these rules now becomes of increased importance. In matters of procedure, since these agencies rarely deal with affairs necessitating summary action, a full and fair administrative hearing is required, with further specifications as to findings. The elaboration of these rules by the courts can be studied only in terms of particular cases.

THE SUBSTANTIAL-EVIDENCE RULE

The oldest and most highly respected of the federal regulatory agencies, the Interstate Commerce Commission, has furnished the basis for the development of much of the law on this subject. For the very reason that it is the most respected of these agencies, however, it cannot be said to be typical with regard to its relationships with the courts. It has succeeded in establishing itself in an enviable position in this respect, quite different, for example, from that of the Federal Trade Commission.[1] Such was not the case at the beginning. In the early days of the commission the courts reviewed its work so freely as seriously to jeopardize its prestige and effectiveness. But today, partly as a result of statutory restrictions upon judicial review but more as a consequence of the courts' own recognition of the importance of allowing the commission to become an important tribunal in its own right, the situation has changed.[2]

[1]See Carl McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920–1930* (Cambridge: Harvard University Press, 1933).

[2]See Sharfman, *op. cit.* (Chap. III, n. 17), Part II, 347–48.

Over twenty-five years ago the Supreme Court attempted to outline the law on the subject in the case of *Interstate Commerce Commission* v. *Union Pacific Railroad*.[3] Speaking for the Court, Justice Lamar wrote as follows:

> There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based on a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity or the exercise of power.[4]

With the first three of these principles we are already familiar. The fourth will be dealt with later. The sixth is a sort of catchall or "saving clause," any instance of which would probably belong under one of the other headings, notably the fifth, which will be considered here.

Although occasional references have already been made to the fact that administrative findings must be supported by evidence, it may seem strange that more attention has not been given to this principle, for it is obviously one that is subject to quite varying interpretations. The explanation

[3] 222 U.S. 541 (1912).

[4] *Ibid.*, pp. 547–48. For a recent case in point, upholding an order of the National Labor Relations Board based upon conflicting testimony, see *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U.S. 206 (1940).

lies in the fact that it has little application in the class of cases which has been discussed up to this point. In those cases the administrative action is generally rather informal and is accompanied by no written record containing the evidence upon which findings are made.[5] Consequently the issue is whether to uphold the administrative action or to retry the case upon the basis of evidence produced in court. But when it is a question of administrative tribunals which keep careful record of all evidence, the courts may review that record and decide whether it reveals error of law or arbitrary action by the administrative agency.

In this type of case, then, the courts normally confine themselves to the administrative record. They do insist upon the right to inspect this record. The Supreme Court long since rejected the contention that the Interstate Commerce Commission's power to fix rates was final and conclusive. The Court declared that this would permit the commission to make findings which were purely arbitrary, bearing no relation to the evidence. However, it laid down the rule that if the record revealed substantial evidence in support of the findings, the Court would not attempt to weigh the conflicting evidence.[6] On another occasion, the Court elaborated the rule in this fashion: "The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law."[7]

[5]The immigration cases constitute an exception to this statement. It was in connection with those cases that reference was made to this rule in an earlier chapter (page 165).

[6]*Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88 (1913).

[7]*Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268 at 270–71 (1926).

In one form or another the courts practically always give effect to the substantial-evidence rule, although they are not always agreed as to the proper justification for it. By holding that "the legal effect of evidence is a question of law," they sometimes attempt to bring it within the law-and-fact formula, instead of making it a qualification of that formula. Sometimes they say that the requirement of a fair hearing necessitates the substantial-evidence rule in order to make sure that the hearing is more than a mere form. Occasionally resort is had to even more obvious judicial evasions. For instance, in one workmen's compensation case the workman had come home in bad physical condition, told his wife that a three-hundred-pound block of ice fell on him as he was putting it in the basement of a saloon, told the same story to a doctor, and died a few hours later of delirium tremens. The other men who worked on the ice wagon testified that they had put the ice in the basement while he was in the saloon, drinking. The workmen's compensation commission awarded damages on the ground that the injury was sustained "in the course of employment." Although the statute provided that administrative findings of fact should be final, the court held that this was not a finding of fact, but "an arbitrary determination," and reversed the commission.

More generally, however, the courts follow substantially the same rule that governs the respect which a judge is supposed to pay to a jury verdict; that is to say, they uphold the finding unless it is "clearly arbitrary," or unless it is not confirmed by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] But these are not words of precise definition; and a further examination of the decisions reveals that just how strong a presumption will be given to administrative findings varies

[8] *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197 at 229 (1938).

greatly from case to case and depends upon a number of factors. If the courts have confidence in the integrity and impartiality of the agency concerned, that will naturally predispose them to uphold the administrative findings.

The Federal Trade Commission has fared much less favorably at the hands of the courts than has the Interstate Commerce Commission. A recent study of the subject indicates that in the case of the former, the provision of the law that findings, if supported by testimony, shall be conclusive "has been honored by the courts almost as much in the breach as in the observance."[9]

It cannot be said, the author continues, that any matters can be, in all events, conclusively determined by the Commission, for even as to findings involving chiefly questions of physical fact the courts have gone behind the findings of the Commission. Nevertheless, though the provisions of the statutes have been frequently nullified in practice, it may be said that in the majority of instances the findings of the Commission were given due weight and certainly this is true of the later cases, the courts seeming much more prone than formerly to consider the fact findings of the Commission a sufficient basis for orders.[10]

Under the general principle suggested above, a number of reasons may be responsible for this difference. In the past, at least, the procedure of the Federal Trade Commission was less rigorously judicial in nature than that of the Interstate Commerce Commission. Moreover, it has failed to back its decisions by carefully reasoned opinions in which the evidence is marshaled in support of the order. Equally significant are the facts that the Federal Trade Commission has been charged with the application of standards even less

[9]William G. Daniels, "Judicial Review of Fact Findings of the Federal Trade Commission," 14 *Washington Law Review and State Bar Journal* (January 1939) 37–51 at 50.

[10]*Ibid.*, pp. 50–51.

precise than those administered by the Interstate Commerce Commission, and that even the general principles underlying its basic legislation are more controversial.

What constitutes "substantial evidence" must always be a relative term. It is relative, for instance, to the nature of the findings which are to be supported. This consideration goes to the very heart of the law-and-fact formula. There are various kinds of "facts" and differing methods of determining them. Some facts are established directly by testimony of witnesses or the production of documents. Others must be inferred from evidence thus established. This distinction is well illustrated by a recent Supreme Court decision involving the National Labor Relations Board, *National Labor Relations Board* v. *Columbian Enameling and Stamping Co.*[11] The question was whether or not on a certain date the Columbian Enameling and Stamping Company had refused to bargain collectively with its employees, who were on strike. The uncontroverted facts were: that conciliators of the United States Department of Labor had had a conference with the management and had requested them to confer with representatives of the strikers; that the management had agreed to do so; and that a few days later the management had canceled the arrangement. Justice Stone held for the Court that it takes two to make a bargain; that there was no evidence that the management knew that the conciliators were empowered to speak for the strikers (who had previously broken off negotiations with the management); and that therefore the evidence offered by the board in support of its finding that the company had refused to bargain collectively with the employees did not constitute "substantial support" for such a finding. There was strong dissent to the majority opinion, but the merits of this case are irrelevant for our purposes. The point is that many so-called "find-

[11] 306 U.S. 292 (1939).

ings of fact" involve rather complicated inferences or chains of inferences which distinguish them significantly from "facts" which may be more directly established. To take a hypothetical example, it is one thing to find that A and B both sell shoes in the same area. It is another matter to infer that the acquisition of control of Company B by Company A would tend substantially to lessen competition between them. Perhaps A sells only sport shoes while B specializes in formal footwear.

In summary it may be repeated that in reviewing the decisions of regulatory tribunals, courts will accept their findings as to facts, if the administrative record contains substantial evidence in their support, regardless of what evidence there may be to the contrary. Furthermore, it may be said that courts will be especially charitable in interpreting the word "substantial" in the case of tribunals in whose competence and integrity they have confidence. Conversely, if they lack this confidence, they may interpret the term so strictly that they will virtually review the whole administrative determination of facts. Finally, if a finding of fact is based upon inference from other facts rather than upon direct evidence, the courts will examine the processes of inference. This last point will be further illustrated in the following section.

RULES AS TO PROCEDURE

The complexity of the modern regulatory process has led the courts to elaborate their procedural standards in somewhat greater detail. Their failure in the past to recognize the distinction between different kinds of questions of fact has resulted in considerable confusion. As indicated above, however, they are beginning to take account of it and to apply, in the field of administrative law, the distinction between "basic facts" and "ultimate facts," the latter being

removed from the former by one or more stages of inference. (This distinction has been used in the past by appellate courts when setting aside findings of masters or chancellors in equity.) Accordingly the courts are commencing to insist that administrative agencies shall support their orders and decisions (even where they are given final power to determine the facts) by more than a bare finding of the ultimate facts. It is not sufficient, for example, for the Federal Communications Commission to uphold a denial of a license to broadcast by the bare statement that it has investigated and found that "the public convenience and necessity" so requires. It must recite the basic facts upon which that conclusion is founded.[12] Otherwise the courts have no ground upon which to decide whether the evidence furnishes substantial support for the findings.

Thus in matters of procedure there is a reciprocal relationship between administrative agency and courts. As we have seen, in their application of the law-and-fact formula and the substantial-evidence test the courts are influenced by the nature of the procedural safeguards which the administrative agencies provide. Conversely, in order to make the substantial-evidence test more effective, the courts have been led to impose upon administrative tribunals a new procedural rule —the requirement that findings must include the basic facts.

The Supreme Court is also developing more fully the procedural requirements of the due process clause as applied to administrative tribunals. The most striking recent instance of this tendency is furnished by the two cases of

[12]See *Heitmeyer* v. *Federal Communications Commission*, 95 F (2nd) 91 (1937); *Tri-State Broadcasting Co.* v. *Federal Communications Commission*, 96 F (2nd) 564 (1938); and *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, *ibid.*, p. 554 (1938). The Supreme Court has affirmed this decision by denying a petition for *certiorari*. *Gross et al.* v. *Saginaw Broadcasting Co.*, 305 U.S. 613 (1938).

Morgan v. *United States*,[13] which precipitated a somewhat heated, even though indirect, controversy between the Chief Justice of the Supreme Court and the Secretary of Agriculture. The appeals arose out of a rate-fixing order issued by the secretary under the Packers and Stockyards Act. The order was based upon extended proceedings involving written briefs, oral arguments, and thousands of pages of evidence, statistical exhibits, and the like. The bulk of the work for the government was carried out under the direction of a trial examiner. In the first case the district court had overruled the plaintiffs' contention that they had been denied a full hearing, and the question at issue before the Supreme Court was one of the validity of this action on the part of the lower court. Plaintiffs had alleged that the secretary had made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs. The Supreme Court held that, in view of the statutory requirement of a "full hearing," these allegations should have been considered. "The 'hearing,'" declared the Court, in a passage that will probably be frequently relied upon in the future, "is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be bound by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." And again, "The one who decides must hear,"[14] although, as the Court went on to explain and as the later case made clear, this does not mean that he must necessarily hear oral argument or that he must read all the evidence. (The importance of this qualification becomes apparent when it is realized that the transcript of the oral testimony filled 13,000 pages, and the exhibits more than 1,000 pages.)

[13] 298 U.S. 468 (1936) and 304 U.S. 1 (1938).

[14] 298 U.S. 468 at 480–81 (1936).

The case was accordingly remanded to the District Court for further proceedings in accordance with this ruling. That court then heard evidence on the question of the adequacy of the hearing and again dismissed the complaint, thus upholding the secretary. Again the case came to the Supreme Court on appeal. It now appeared that the secretary, over whose name the findings had been issued, had not attended the hearings or read all of the evidence. However, he did keep the record on his desk for a while and "dip into it" from time to time. Furthermore, he read the whole of appellants' briefs and the transcript of the oral argument. He had conferences with his subordinates who had conducted the investigation and declared that his findings represented his own independent reaction to the findings of the investigators. This appears to have satisfied the Court. At any rate it did not decide the case on the basis of the contention that the secretary had not sufficiently considered the evidence. It proceeded to consider the complaint that the examiner had refused to prepare a tentative report setting forth the government's contentions and proposed findings, which could be used as a basis for the complainants' brief and argument. On this issue the Supreme Court ruled against the secretary, saying that "the right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."[15] In other words, at least in such cases as this, the trial examiner must make a tentative report which sets forth both the contentions of the government and the findings which the examiner recommends. In the light of this document, the private parties must then be allowed to prepare written and oral arguments for the final hearing. Other cases make it clear that this is not a rigid mechanical requirement that will be insisted upon under all

[15] 304 U.S. 1 at 18.

circumstances. The court will look to substance rather than form, and if, in some other manner than the preparation of a preliminary report, the contentions of the parties are clearly defined while there is still opportunity for argument and presentation of evidence, the examiner's report may be omitted.[16]

In summary, the regulatory tribunals must of course observe the ordinary incidents of notice and adequate hearing. Where the common device of the trial examiner is used, the authority which is legally charged with making the decision must itself consider the evidence. Furthermore, before the final hearing steps must be taken to acquaint private parties with the contentions of the government and the examiner's recommendations. Finally, regulatory tribunals must accompany their decisions by findings of "basic" as distinguished from "ultimate" facts.

JURISDICTIONAL FACTS AND CONSTITUTIONAL FACTS—RATE-FIXING CASES

This digression into the law of procedure has led us away from our central thesis—the application of the law-and-fact formula. The substantial-evidence test has been examined as it serves to modify that formula; it remains to consider the application of the doctrine of jurisdictional facts to the regulatory tribunals. This can best be observed in the rate cases. Whatever confusion of judicial thought may exist in the material covered thus far is as nothing compared to the difficulties the courts have encountered in the field of rate making. Long ago it was established that legislatures could fix the maximum rates to be charged by public utilities and could delegate this function to administrative commissions. But it was also established that courts might review such

[16]See *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333 (1938).

action to determine whether or not the rates were "confiscatory"—that is, whether they took the property of the owners without due process of law. This was based on the reasoning that the right to property includes the right to the income from it and that property owners must therefore be allowed a "fair return" on the "fair value" of the property.

Manifestly the task of determining the "fair value" of a large public concern is an extremely difficult one. The Court has never ventured to say how this should be done, having confined itself to pronouncing upon how it should not be done. It has attempted, however, to enumerate elements which should be taken into account. In the famous case of *Smyth* v. *Ames*,[17] it declared that "in order to ascertain [fair] value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."[18] Perhaps the variety of factors here enumerated does something to suggest the hazardous nature of the task of valuation. To take one of these factors upon which the courts have laid particular stress—"reproduction cost"—it might be pointed out that this inevitably involves making a choice between varying engineers' estimates as to what would be the cost of reproducing a plant. Worse than this, it is further complicated by the fact that in many cases technological changes have taken place since the original construction, with the consequence that a very different plant would now be built for the same purpose. Thus, as Justice Stone has remarked, any

[17] 169 U.S. 466 (1898).

[18] *Ibid.*, pp. 546–47.

method of valuation that can be used is uncertain enough, and "no court can evolve from its inner consciousness the answer to the question whether the illusion of certainty will invariably be better supported by a study of the actual cost of the property adjusted to price trends, or by a study of the estimates of engineers based upon data which have never existed and never will."[19]

For many years the Supreme Court kept itself reasonably clear of such tangles. It stood on the firm ground of the old rule of substantial evidence. Then, in 1920, came the now famous case of *Ohio Valley Water Co.* v. *Ben Avon Borough.*[20] The company appealed to the Pennsylvania Superior Court against the rates set up by the Public Service Commission, on the grounds that they were confiscatory. The court reviewed the evidence and held that several items in the company's property should have been given a higher valuation and determined for itself what the proper value was. This decision was reversed by the Pennsylvania Supreme Court on the ground that the commission's order was based on substantial evidence. In a very brief and unsatisfactory opinion, the United States Supreme Court reversed the state supreme court, declaring that in cases of this kind, where confiscation was charged, there must be an opportunity for a judicial tribunal to determine that issue "upon its own independent judgment as to both law and facts."

The Supreme Court based its reasoning in the Ben Avon case upon the theory that rate making was legislative rather than judicial in nature, because rates are fixed as a whole and the action looks rather to the future than to the past. In this way the Court sought to escape the effect of decisions dealing with quasi-judicial agencies, and to bring the

[19]Dissenting opinion in *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U.S. 662 at 689–90 (1935).

[20]253 U.S. 287 (1920).

case within certain precedents upholding judicial revision of legislative findings as to fact in cases of alleged confiscation. But these were cases in which the legislature had directly found the facts and set the valuation. Whether the act of rate making be called legislative in character or not, the fact of its performance by an expert commission after thorough study and full hearing differentiates it from ordinary legislation. If such a procedure justifies the courts in granting finality to administrative fact finding in connection with quasi-judicial acts which affect constitutional rights, it is difficult to understand why it should not have the same effect when the acts are legislative in nature. But the Court, apparently, does not see it that way.

The Ben Avon decision upset the whole basis of administrative finality in the field of rate making. If the courts are to revise the work of regulatory bodies on their own independent judgment of both law and facts, the commissions are reduced to little more than evidence-gathering agencies and the courts are loaded with a tremendous burden with which they have neither the time nor the ability to cope. Although the situation is not quite so bad as this, it has moved far—too far, most critics would say—in that direction. It is suggestive to note that in a recent telephone rate case a federal district court had before it 36,893 pages of evidence in addition to 3,324 exhibits, composed of statistical tables and the like. No wonder that, to quote Dean Landis, "a delay of ten or fifteen years, an expenditure of millions of dollars, constant interruption of administrative proceedings by appeals to the courts, have brought the regulatory process into contempt. The practice of appealing to the Court on every issue of fact relating to valuation," he continued, "has transformed what should be a business like proceeding into a bitter, wrangling lawyers' battle."[21]

[21] Landis, *op. cit.* (Chap. II, n. 23), p. 133.

Since the Ben Avon case, the Court has in fact vacillated between the old doctrine of substantial evidence and the newer one of independent judgment. Not until 1936, in the case of *St. Joseph Stockyards* v. *United States*,[22] did it try its hand at reconciling the two doctrines. The case involved rate fixing by the Secretary of Agriculture under the authority of the Packers and Stockyards Act. The district court had upheld the rates set by the secretary on the ground that they were supported by substantial evidence, declaring that it was beyond its province to weigh the evidence and pass upon issues of fact. This was squarely attacked by counsel for the stockyards upon the basis of the Ben Avon decision. Because confiscation was charged the court, it was argued, must weigh the evidence and determine the facts on the basis of its own independent judgment.

Chief Justice Hughes wrote the opinion. "The fixing of rates," he declared, "is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power."[23] To put the matter briefly, the substance of this distinction is that the rule of "substantial evidence" applies to "actions within the sphere of legislative authority," but when the question at issue is whether or not the action transcends the limit of that authority, then the courts must exercise their independent judgment as to both law and fact. What went into the judicial mill as the distinction between legislative and judicial questions emerged in more familiar form as the doctrine of "jurisdictional facts"!

It is an abuse of the concept of "jurisdiction" to say that its exercise in such a way as to violate constitutional rights constitutes action in excess of jurisdiction. When a tribunal

[22] 298 U.S. 38 (1936).

[23] *Ibid.*, p. 50.

which is given jurisdiction over rates uses that jurisdiction so as to violate the constitutional injunction against confiscation, it does not thereby act outside of its jurisdiction; it acts within its jurisdiction but in an unconstitutional manner. If, in a game of baseball, for example, the umpire ruled that batters should be allowed only two strikes, he would be going beyond his jurisdiction. He has no authority to alter the rules. But an umpire who called a strike on a batter when the ball was not over the plate would be acting within his jurisdiction, even though erroneously. Justice Brandeis, in a concurring opinion in the Stockyards case, put the matter clearly when he stated that "the challenge of a prescribed rate as being confiscatory raises a question not as to the scope of the Commission's authority but of the correctness of the exercise of its judgment."[24] Furthermore, Chief Justice Hughes had in effect already broadened the doctrine of jurisdictional facts to fend off this criticism, in *Crowell* v. *Benson*. In that case he invented the concept of "constitutional facts." Any fact, he declared, the determination of which might affect the constitutionality of the action in question is a "constitutional fact." Individuals whose rights are involved may demand that such facts be judicially determined. Thus what began as an exception to the rule of finality of administrative determinations of fact supported by substantial evidence has almost devoured the rule itself, for practically all rate cases involve the question of confiscation, and individuals have a constitutional right not to be subjected to confiscation. If the Court were to push the theory to its logical extreme, there would be very few instances of judicial review of administrative action in which a constitutional fact could not be discovered lurking somewhere in the background.

[24] *Ibid.*, p. 82, quoting from *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 at 336 (1920).

One may be sure, however, that the doctrine will not be pushed so far. To do so would be to tax the courts far beyond their capacity. What is more likely is that the courts will store this weapon away in the judicial armory for use on special occasions, thus contributing to the power of the courts and to the uncertainty of the law.

What accounts for the attitude of the Court in rate cases? It seems to be a combination of three things: the lack of confidence on the part of the Court in the administrative agencies in question; the complexities of the issues and the consequent opportunities, in the processes of finding the facts and making factual inferences, for administrative agencies to weight the scales on one side or the other; and, finally, the extent of the property interests involved.

In connection with the first point it is relevant to note that the decisions of the Interstate Commerce Commission have been treated with far more respect than have those of state public utility commissions. A passage from Chief Justice Hughes' opinion in the St. Joseph Stockyards case is also in point.

> Legislative agencies, with varying qualifications, [he states] work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded.[25]

[25] *Ibid.*, p. 52.

In other words, when the Court is reproached for allowing less finality to the findings of a presumably expert administrative tribunal than is granted to the findings of a lay jury, it may reply that the presumption is in favor of the impartiality of the jury, while as much cannot always be said of the administrative agency. The latter *may* be "subservient" to political demands.

Certainly of equal importance in accounting for the Court's attitude, however, is the matter of the complexity of the issues involved. As has already been indicated, the "value" of a public utility concern is far from being a matter of simple fact. Inference must be built upon inference in order to get from the basic facts of actual cost, estimates of reproduction cost, and the like, to the ultimate fact of "fair value." It may even be said that questions of law are involved, for the notion of "fair value" is a legal concept and, as indicated above, the Court has in the past laid down certain rules regarding its interpretation. For instance, "reproduction cost" must be taken into account. So also must that highly intangible and conjectural element of value known as "going concern value." In this fashion the Court sought, for a number of years, to simplify the matter and to draw a practical line between law and fact by insisting upon adherence to these and other rules of valuation.

But the inadequacy of the rules for many situations became increasingly apparent, until at last the Court was forced to give way. For instance, in protesting new rates, the Illinois Bell Telephone Company used calculations according to which it would have been suffering confiscation even under the rates which had prevailed for the last ten years, although the company had been paying substantial dividends throughout that period. This development moved the Court to declare that "elaborate calculations which are at war with realities are of no avail." (*Lindheimer* v. *Illinois Bell Tele-*

phone Co.)[26] The Court has now almost completely turned its back upon the practice of insisting upon certain methods of valuation. Instead it asserts that it is concerned only with the net *result* of the rate-fixing process, and that if there is no confiscation there is no denial of due process even "though the proceeding is shot through with irregularity or error."[27]

This apparently common-sense conclusion should not be allowed to obscure the fact, however, that the range of court review has been thereby further enlarged, that rule has given way to judicial discretion, and that certainty of law suffers, as does also the area of responsible action allowed to the regulatory commissions. And the doctrines of jurisdictional and constitutional facts remain.

Finally, the extent of the property interests involved merely underlines the importance, from the courts' point of view, of offering their protection against administrative errors. Courts are aware that commissions may be influenced by prejudice against big business and by the possibility of making political capital out of compelling lower utility rates.

Nevertheless, even in the field of rate regulation, there is a definite trend toward leaving a larger area to administrative determination. Increasingly the courts seek to insure justice merely by enforcing adequate procedures, leaving economic theories of valuation to the commissions. The abandonment of the old legal rules of valuation must be viewed in this broader perspective. At least one authority is of the opinion that "as fast as the commissions develop economically sound bases of setting rates, just so fast will

[26] 292 U.S. 151 at 164 (1934). See also *Los Angeles Gas & Electric Corporation* v. *R.R. Commission*, 289 U.S. 287 (1933).

[27] *West Ohio Gas Co.* v. *Public Utilities Commission*, No. 1, 294 U.S. 63 at 70 (1935).

the courts retire from the field of economics and abandon the myth of finding the fact of value."[28]

It should be observed here that the Court as at present constituted is inclined to be more strict in limiting the scope of judicial review than has been the case in recent years. In a case involving the Federal Communications Commission, Justice Frankfurter, speaking for the Court, has given voice to the new philosophy as it applies to judicial review of the acts of administrative tribunals. Pointing out the significant differences between courts and such administrative regulatory authorities as the F.C.C., he denies that the rules governing the relationship between appellate courts and trial courts must necessarily apply to the relations between the courts and regulatory commissions. In the latter case, he argues, the reviewing court should confine itself to a more restricted sphere.[29]

SUMMARY

Regarding the regulatory authorities in general, it appears that the existence of more fully developed administrative agencies, and the consequent procedural protections and complete records, tends to do away with *de novo* court review and, more generally, to extend the finality of the administrative determination. On the other hand, where extensive property rights are involved, where the competence or integrity of the regulatory agencies is open to suspicion,

[28]Frederick K. Beutel, "Valuation as a Requirement of Due Process of Law in Rate Cases," 43 *Harvard Law Review* (June 1930) 1249–81 at 1281 (also in 4 *Selected Essays on Constitutional Law, op. cit.* [Chap. I, n. 7], pp. 1073–1100 at 1100).

[29]*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies," declared Justice Frankfurter. *Ibid.*, p. 146. See also *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940).

and perhaps also where the regulatory legislation in question runs athwart judicial predispositions, the courts go a long way in reviewing highly crucial factual determinations. This is accomplished either through the medium of the doctrines of jurisdictional and constitutional facts or through an extended application of the substantial-evidence test. There is also a marked tendency to insist that the administrative findings must extend to the primary or basic facts and that there must be a reasonable connection between these primary facts and the inferred ultimate facts. This trend corresponds to the increasingly complicated situations with which commissions are called upon to deal.

In the realm of procedure, the courts have evolved new rules designed to guarantee the elementary principles of fair play in the complicated proceedings necessitated by the task of regulating the modern economic machine. By encouraging regulatory authorities to adopt quasi-judicial procedures, the courts no doubt feel that they increasingly relieve themselves of responsibility for reviewing the substance of administrative action.

Statutory Provisions for Judicial Review

We have been considering the constitutional minima of judicial review. Obviously, since these minima are set by the Constitution, they cannot be altered by statutory provisions. But statutes may and often do provide for more judicial review than is constitutionally required. A statute may call for a court review of both law and facts when otherwise the courts might have insisted only upon reviewing questions of law.

With increasing regularity, however, the provisions governing judicial review of administrative action—especially of regulatory agencies—follow a common pattern: judicial review of questions of law and administrative finality as to

matters of fact if supported by substantial evidence. It is often further provided that, if the court finds that important evidence is not in the record, it should stay proceedings and remand the case to the agency for the taking of further evidence and the reconsideration of their decision or order.

But, especially in the states, there remains a wide diversity both in legislative practice and in judicial interpretation.[30] This is often the case even within a particular state. Such a condition makes for confusion. The variety of judicial interpretations makes it difficult to appraise the effect of statutory provisions. Professor Dodd, dealing with workmen's compensation legislation, writes as follows on this point:

> In some states where judicial review is applicable to both law and fact, the courts are reluctant to reverse the administrative finding except in case of necessity; in some, where review of the facts is not expressly required, the courts limit themselves primarily to issues of law; and in those states where administrative determinations of fact are made final by statute, the courts always have the opportunity to discover an issue of law, or to determine that the administrative finding has no support in the evidence or in "competent evidence."[31]

Summary and Conclusion

Normally the courts control the exercise of administrative discretion in particular cases and do not question the original

[30]Regarding legislative practice, see Faught, *op. cit.* (Chap. III, n. 9). Among thirty statutes passed during one legislative session, conferring power on administrative agencies to make findings subject to some sort of judicial review, some were silent as to the legal effect of the findings, some provided for hearings *de novo*, one provided for the taking of additional evidence by the court in certain cases, one provided for remanding to the administrative agency for additional evidence, two barred appeals on questions of fact, and four made findings of fact conclusive if supported by evidence.

[31]Dodd, *op. cit.* (Chap. III, n. 61), p. 381.

grant of discretionary authority. However, in cases of completely unlimited discretion relating to vital rights, where the circumstances appear to invite arbitrary action, courts have been known to invalidate the grant of authority itself.

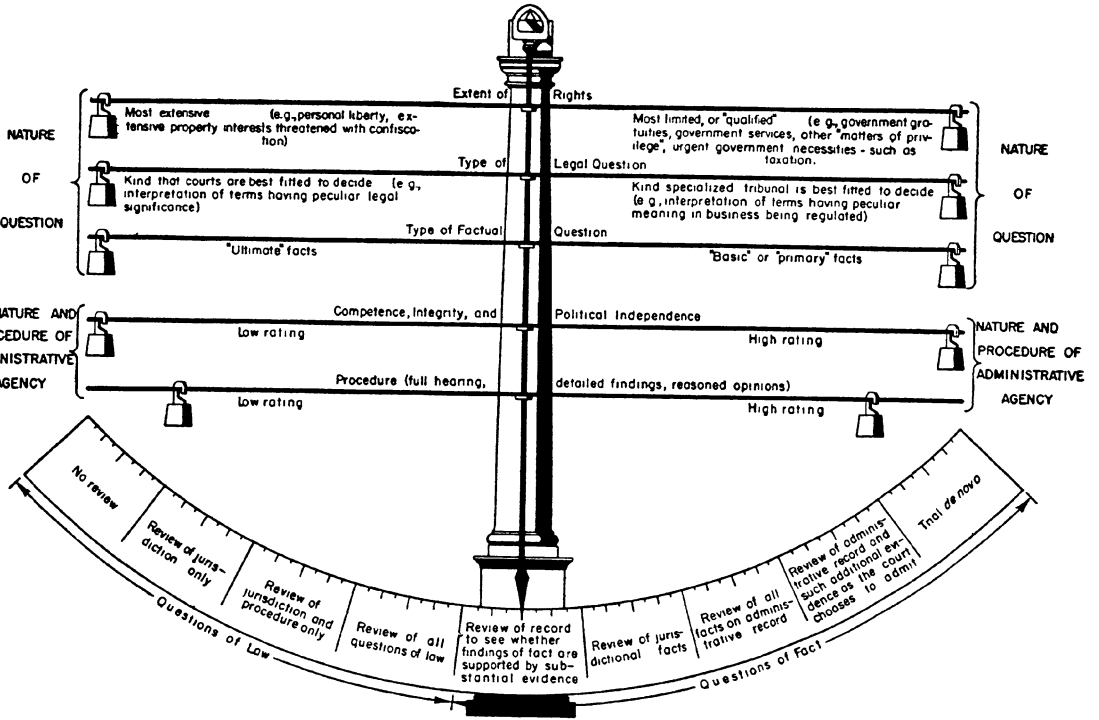
In exercising judicial control over administrative action the courts do not insist upon the rule of law in the strict Diceyan sense. On the other hand, neither do they accept the equally simple formula laid down by Justice Brandeis, according to which they should decide questions of law and allow administrative agencies to determine questions of fact subject only to judicial insistence upon procedural regularity. Instead they cut the cloth to fit the garment. And in so doing they have developed a variety of doctrines or rules which they pull out of the judicial grab bag as occasion demands. In most instances they have not worked out the interrelationship of these rules, with the result that no one can ever be sure what rule will be applied in a particular situation. Thus there is the general rule that courts will decide matters of law and leave matters of fact to the administrative agency, if the findings are supported by substantial evidence. But sometimes even matters of law are subject to final administrative determination. On the other hand, there is the doctrine of jurisdictional facts. This formula acts as an exception to the rule of administrative finality—an exception of uncertain dimensions—which the courts sometimes apply and as frequently disregard. When even this formula proves inadequate to enable the courts to step in where they distrust the administrators, they may invoke the broader doctrine of "constitutional facts." At times we are told that where "legislative questions" are involved the courts must exercise their independent judgment as to both law and facts. But, at other times, where the action of the administrative agency is legislative in character, this seems to offer grounds for allowing it to stand, sometimes by reference to a doctrine

of noninterference with "administrative discretion." Judicial precedents may even be found for such apparently contradictory statements as these: (a) that questions of "mixed law and fact" are not reviewable; and (b) that in cases of "mixed law and fact" the courts must determine the issue for themselves.

It is apparent, however, that if one classifies the cases according to the subjects involved, and if one considers not only what the courts say, but also what they are actually doing as viewed in the light of the particular circumstances in each case, the results make much more sense than do the doctrines. It then becomes clear that there are various considerations which influence the courts in their selection of the appropriate rules for application in a particular case. A list of such considerations would include the existence or nonexistence of a "qualified right"; whether or not the case arises out of the performance by government of a business service or the operation of an essential function of government; the complexity of the factual determinations involved —whether the "findings" are based upon direct evidence or upon inference; the technical qualifications and the impartiality of the administrative agency; the nature of the "question of law" involved—whether it is a matter for legal craftsmanship or the interpretation of a term having a peculiar technical significance in the jargon of the business which is being regulated; the extent of property rights in question; the existence or nonexistence of a question of personal liberty;[32] considerations of judicial convenience; and the exigencies of governmental necessity.

Justice Brandeis has asserted that the cases "show that in

[32]Thus both deportation cases and tax cases fall under the "essential functions of government" classification, but the doctrine of jurisdictional facts has been successfully invoked only in the case of the former, where personal liberty is involved.


Extent of Rights
NATURE OF QUESTION
Most extensive (e.g., personal liberty, extensive property interests threatened with confiscation)
Most limited, or "qualified" (e.g., government gratuities, government services, other "matters of privilege", urgent government necessities - such as taxation.
NATURE OF QUESTION
Type of Legal Question
Kind that courts are best fitted to decide (e.g., interpretation of terms having peculiar legal significance)
Kind specialized tribunal is best fitted to decide (e.g., interpretation of terms having peculiar meaning in business being regulated)
Type of Factual Question
"Ultimate" facts
"Basic" or "primary" facts
NATURE AND PROCEDURE OF ADMINISTRATIVE AGENCY
Competence, Integrity, and Political Independence
Low rating
High rating
NATURE AND PROCEDURE OF ADMINISTRATIVE AGENCY
Procedure (full hearing, detailed findings, reasoned opinions)
Low rating
High rating
No review
Review of jurisdiction only
Review of jurisdiction and procedure only
Review of all questions of law
Review of record to see whether findings of fact are supported by substantial evidence
Review of jurisdictional facts
Review of all facts on administrative record
Review of administrative record and such additional evidence as the court chooses to admit
Trial de novo
Questions of Law
Questions of Fact

EXPLANATION OF CHART

The accompanying figure is a graphic representation of the various possible degrees of judicial review of administrative decisions, the factors operating to govern the extent of judicial review which the courts will grant in particular cases (specific statutory regulations of this matter apart), and the way in which these factors operate. The figure represents a set of scales—perhaps not quite like any scales the reader has ever seen, but at least such as can be conceived without doing violence to the laws of physics. The scales are provided with a separate bar for each of the major types of consideration which, as indicated in the text, govern court decisions in this field. Three of them—"extent of rights," "type of legal question," and "type of factual question"—relate to the nature of the question which has been decided by the administrative agency. The other two relate to the nature and procedure of the administrative agency itself. The type of consideration represented by each bar is designated in the central part of the diagram immediately above the bar concerned. Below each bar, toward the ends, some indication is given of the possible variations bearing upon that consideration which the courts may take into account. The type of legal question, for instance, may be of the kind which courts are best fitted to decide or of the kind which a specialized tribunal can best determine. The diagram doubtless suggests a nicety of distinctions of degree between the extremes which is hardly in accord with the facts; in this as in other respects an overliteral interpretation invites fallacy. Finally, along the semicircle at the bottom of the figure, are indicated various possible degrees of judicial review.

It should be noted that the line between questions of law and questions of fact falls slightly to the left of the center, which constitutes the normal resting place of the pointer. This is intended to indicate that normally the courts will review questions of fact in the sense that they will apply the substantial-evidence test.

It will be observed that as weights are moved toward the right, on either side of the pointer, the tendency will be for the pointer to move toward the left. For example, if the court has a high opinion of the competence, integrity, and political independence of the administrative tribunal, it will be more inclined than it otherwise would to restrict the range of its review. Similarly, other things being equal, the more extensive and vital are the individual rights involved, the more will the court extend the range of its review.

For the sake of symmetry and to avoid offending the reader's sense of balance, the apparatus has been depicted with two weights on each bar. It would be workable as pictured, but a more likely arrangement would be to have only one weight on each bar, which could be placed anywhere along the bar on either side of the pointer.

deciding when, and to what extent, finality may be given to an administrative finding . . . the Court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. . . . The Court has followed the rule of reason."[33] This presents a slightly idealized picture, but it contains a large measure of truth.

At the risk of over-simplification, one may schematize the judicial verbalizations regarding finality of administrative decisions in some such fashion as the following. As a general rule, courts will review all questions of law. This rule is subject to two exceptions. Courts may refuse to review questions of law or insist upon an almost overwhelming presumption in favor of the administrative interpretation of the law (a) in cases of "qualified rights," "matters of privilege," and the like, and (b) where the legal question hinges upon the interpretation of terms having a technical significance in the field in which the administrator is supposed to be expert. As a general rule, again, courts will not review questions of fact. Once more there are two exceptions. Courts will satisfy themselves that administrative findings are supported by "substantial evidence." Furthermore, in certain crucial cases, which they generally contrive to bring within the concept of "jurisdictional facts," they will exercise their own independent judgment as to the facts.

The chart on page 208 is an attempt to present this summary in graphic style.

[33]Concurring opinion in *St. Joseph Stockyard Co.* v. *United States* (above, n. 22), pp. 81–82.

Chapter VIII

In Conclusion: Appraisal and Prescriptions

THE PROBLEM of the relationship between law and administration is perennial, but it presents itself in ever-changing forms. No sooner had Dicey's rule of law[1] become fairly well established in England and the United States than new developments threatened to undermine it. Today the orthodox relationship between law and administration frequently seems to be reversed. Increasingly, that is to say, administration makes "the law." It promulgates rules and regulations with the force of law, it issues both general and special orders affecting private rights, and even its interpretations of statute law are of great significance. Administration not only makes and applies laws, it settles controversies arising out of its own application of the laws. True, in doing each of these things, it is in turn subject to certain legal restraints, but the opportunities for the exercise of administrative discretion are countless and the scope of administrative power defies description.

The reasons for this development have been dealt with in detail in the preceding chapters. By way of recapitulation, four of the most important and most general of those reasons might be reiterated. First, there is a general desire to substitute preventive action for mere punishment of violators

[1]Compare the German concept of the *Rechtsstaat.*

of the law. Sometimes this can be done by precise legislative requirements which do not involve discretionary authority, but more frequently it involves the delegation to some administrative officer of the power to decide what precautions are advisable to guard against a given contingency. Thus the insurance commissioner decides for himself when to examine the books of a particular insurance company and what standards to apply. Second, there is a need for government by experts. Judges and legislators must perforce be Jacks-of-all-trades. They are specialists in the law and in politics, but they cannot be specialists in each of the countless social and economic situations with which today they must deal. Administrators can be specialists not only in administration but also in health problems, labor relations, social insurance, the marketing of securities, soil conservation, banking, or what not. The development of modern administration is thus a recognition of the necessity for an increasing division of labor in government as elsewhere. But, third, there is also a need for unity and continuity of governmental action in dealing with a certain problem or a particular industry. This need makes it much more desirable that the Interstate Commerce Commission, for example, should regulate the railroads than that this task should be divided up among three separate and mutually independent agencies of government. Finally, the complicated problems of modern government demand flexibility of action. Government must be able to deal with changing circumstances and varying local conditions; and where speed and economy are essential it must not be handicapped by the formal procedures of the courts.

Appraisal

Granted the necessity for this development, what is its significance? What does it portend for the future of de-

mocracy? What is its effect upon the rule of law? Does it write "finis" to the long struggle for "a government of laws and not of men"? It must be obvious by now that these problems can be solved. The modern administrative machine, no less than the old, negative, police state, *can* be kept both subject to law and responsive to popular control. Adjustments will have to be made—many of them have been made—and the unending struggle to secure justice and self-government combined will continue on a new plane.

THE PROBLEM OF POPULAR CONTROL

As to democratic control, the first and most obvious answer is that in so far as *administrative officials are appointed and removable by the chief executive,* their works are subject to an ultimate democratic check. Second, the efficacy of this check can be, and in large measure is being, greatly enhanced by giving full and adequate *publicity* to the works of administration. This enables those whose lives and fortunes are most intimately affected to know what is happening in time to express themselves before action has taken final form. Third, *administration itself can be infused with the spirit and the technique of democracy.* The use of advisory councils and committees, submission of draft rules and regulations to the parties affected for comment and criticism, representation of affected interests on administrative boards and commissions—such devices as these are increasingly bringing democracy directly into government far more effectively than could possibly be done through the medium of the legislature alone.

THE PROBLEM OF THE RULE OF LAW

If democratic control is not destroyed, neither is the rule of law shattered by the part now played by administration in

the creation and interpretation of law.[2] A primary and major defense of the rule of law resides in the fact of *legislative prescriptions of policy and of standards,* for the guidance and governance of administration. Where, as is frequently the case, the legislature is unable to do more than state a very general policy, it is one of the major tasks of administration itself to formulate more precise standards growing out of its own experience. Thus administration is able to enjoy the advantage of rules shaped by experts in direct contact with the facts and at the same time protect both itself and the public against the pressures and uncertainty which result from unguided discretion. For instance, an unemployment compensation commission will generally not be satisfied with the legislative injunction to deny benefits to those who have refused "suitable employment." It will develop detailed standards, based upon the analysis of hundreds of possible situations, for the interpretation of this phrase.[3] The fact should not be overlooked, however, that administrative agencies—such as local licensing boards—often neglect to take such steps.

One of the best of available protections against arbitrary action consists in the adherence to *sound procedures.* Dicey's insistence upon the determination of matters affecting private rights in the ordinary courts of law was itself a resort to a procedural device. But there are other procedural expedients which in many circumstances may be made to

[2]Two sober students of administrative regulatory procedure have recently concluded as follows: "In view of all the facts and all the jurisprudence brought together in . . . this study, it appears that the 'tendencies toward administrative absolutism' so feared by certain promoters of the American Bar Association bill are largely non-existent." Blachly and Oatman, *op. cit.* (Chap. III, n. 1), p. 227.

[3]See Social Security Board, Bureau of Research and Statistics, *Principles Underlying Disqualification for Benefits in Unemployment Compensation,* Bureau Memorandum No. 32 (processed) (Washington, D.C., 1938).

serve the same end.[4] Furthermore, many of the practices which characterize court procedure are suitable for adoption by, and adaptation to, the administrative process. And, as has been indicated, this process has gone far in the United States. Insistence upon due notice and adequate hearing wherever these devices are appropriate for the protection of individuals constitutes one of the prime requisites of fair play. Although there are doubtless many instances, especially in state and local government, in which these requisites are insufficiently observed, their use is widespread and growing. And in the most important cases they are insisted upon by the courts as a constitutional requirement. Other practices that are finding increasing favor, especially where the action is quasi-judicial in nature, include the requirement that decisions be supported by detailed findings of fact and by reasoned opinions, and that a modified courtroom technique, known as "adversary" procedure, be used. Even the practice of having original decisions reviewed by a higher body in the same organization may be, and frequently is, adopted by administration. Administrative review, as this is called, is a valuable expedient for improving the quality and consistency of administrative decisions.

It is interesting to note that Professor Patterson's scholarly study of the state insurance commissioner makes the point that "the latitude of his powers is considerably enhanced by the informality of his procedure."[5] It is in the realm of administrative procedure, rather than by an extension of judicial control, that he would recommend certain reforms, such as more adequate hearings and the requirement of written opinions in support of decisions.

[4]Sometimes, indeed, the ordinary courts themselves may prove very inadequate for the protection of private rights against administrative malpractices. See, for example, Marx, *op. cit.* (Chap. II, n. 2), 954–78.

[5]Patterson, *op. cit.* (Chap. I, n. 11), p. 9.

Again, one of the most salient characteristics of the judiciary—its *independence of tenure*—is no longer peculiar to the courts. Many administrative boards and commissions—particularly those which exercise the greatest discretionary authority, whether quasi-judicial or quasi-legislative in nature—are appointed for stated terms and are not subject to removal except for cause. There is even talk of creating a greater degree of independence than now exists for that vital element of the modern quasi-judicial process, the trial examiner. This might be done by making all trial examiners of the various regulatory agencies of the federal government, for instance, responsible to a central bureau of trial examiners. In this way they would cease to be mere agents of the particular authority whose cases they try.

In short, what we are witnessing with the development of the administrative branch of government is not so much a violation of the fundamentals of the separation of powers as a supplementation of that principle by a diverse and complicated system of procedural arrangements. We still have the basic check of an independent legislature free to do what it will with the administrative branch and all its works. The judiciary also retains ample power. But this basic division of powers is far too crude a device to protect against arbitrary action in all the convolutions of the modern governmental machine. That function can be performed only by a continuous application of inventive genius which devises for each new development of administrative power the appropriate method of rendering it both accountable to the public and reasonable in its actions.

This analysis reflects the attitude of the defender of the rule of law against arbitrary action of all kinds. It is quite proper that the student of government should always have uppermost in his mind the importance of introducing the maximum of reason into the management of human affairs

and minimizing the opportunity for the predominance of personal prejudice or arbitrary caprice. On the other hand, he must not lose sight of the fact that there are many situations where the cause of reason and justice is better served by allowing leeway for the exercise of human judgment than by prescribing a fixed rule. This is sometimes true even in the case of procedural safeguards, although here there is more room for resort to general rule than in the case of substantive action. The point to be stressed is that *the administrative process has its own inherent checks.* It would be highly inaccurate to assume that any class of men, including practitioners of the art of public administration, prefer to act arbitrarily rather than reasonably. The opposite assumption would certainly be more nearly correct.[6] Deeply imbedded in most human beings is a desire to attain consistency of action. Other things being equal, particularly in educated men, this drive generally asserts itself. Men try to develop and formulate the principles underlying their acts and to measure their conduct in a given instance against some previous action under similar circumstances. This natural tendency becomes tremendously more effective if the men in question are compelled to state reasons for their decisions, to submit them to public scrutiny, and to give interested persons an opportunity to call attention to their inconsistencies. Here, too, the importance of a professionalized career-personnel makes itself felt; for professional men value highly the esteem of their fellow craftsmen, and consistency is sure to find an important place among the criteria by which men are judged by other experts in their field.

[6]On this subject the student will do well to consult Professor Robson's excellent discussion of the judicial mind, upon which much of what is said above is based. William A. Robson, *Justice and Administrative Law: A Study of the British Constitution* (London: Macmillan and Co., 1928) Chap. V.

Even on the lower level of expediency, action in accordance with reasoned principle rather than arbitrary whim has its patent advantages. For clearly the simplest, easiest way of solving a problem is to follow precedent. Such is the case, at least, if the precedent itself proves to be a satisfactory solution of the problem in question. The natural desire to solve a problem so that it will stay solved and not prove a source of future embarrassment makes for the development of sound rules of action.

It is also an important point, too easily overlooked by both the armchair philosopher and the cracker barrel politician, that the objective requirements of the situation generally serve to narrow the area of administrative choice to quite small dimensions. The problem may defy solution by general rules, but in each concrete case the facts viewed in the light of past experience are likely to point to the "right" decision. Theorists and students of the subject in the abstract may be poles apart, but nine times out of ten, if they are faced with the practical task of administration, they will find themselves impelled to follow courses of action not widely separated. Many people, from the comfort of their own homes, believe that if only those who are on work relief were compelled to find private employment or starve they would not starve. There are doubtless others who, in the light of a different background, believe that all the demands of the Workers' Alliance are justified and should be granted without question. It is safe to say, however, that no one could long share the responsibility of administering work relief, rubbing up against the facts which such a task discloses, and retain either of these ideas without considerable modification.

Finally, if all other defenses of the rule of law fail, *the courts* still can and do play an important part in insuring that laws and not men shall rule. They will continue to

correct the works of usurped authority or of fraudulent or grossly biased officials. They will further insist upon the use of administrative procedures consonant with our traditional concepts of justice and fair play. While this allows for a great deal of variation, according to the circumstances, the constitutional minima in cases where private rights are involved offer a very real protection. Furthermore, they will enforce more elaborate procedural safeguards when legislatures provide for them, as they are doing with increasing frequency. But the courts go beyond these matters of procedure. In all but a minority of cases, touching only limited private interests, they will insist upon their right to pass final judgment upon any matter of legal interpretation that may be involved in the administrative action in question. How far they will go beyond this in revising the administrative application of the law varies greatly. In general it may be said that where private rights are involved, they will intervene where administrative action is "clearly arbitrary."

One further observation is called for with reference to this matter of the relationship between administration and the rule of law. Local and relatively minor administrative officials, rather than the more powerful federal agencies, have the greatest opportunities for abuse. It is also generally true that the older forms of administrative action are less well provided with protections against abuse of their power than are the newer forms. A partial explanation is the fact that in the larger administrative agencies there is greater opportunity for division of function, and with it that degree of protection against abuse that comes with some division of power. It is partly due to the modern tendency to substitute a statutory judicial review, based upon an administrative record, for the old and cumbersome device of a collateral action against the official. And in part it is simply that with the granting of greater powers to governmental officials has

come the consciousness of the need for a corresponding strengthening of the checks upon abuse.

EFFECTS OF SAFEGUARDS UPON ADMINISTRATIVE EFFICIENCY

Emphasis upon the control of administrative power must not be allowed to obscure the facts that such power is of vital importance to modern democracy and that controls which seriously hamper its operation may be as dangerous as the absence of controls. Some of the safeguards discussed in these pages may actually help administration. Legislative specification of standards for the exercise of administrative discretion may be of great assistance, for instance, in enabling the agency to resist outside pressures and to avoid dissension or deadlock within. Even a requirement that hearings be held may lead an administrative body to adopt a wholesome and helpful practice for the avoidance of errors which it might otherwise have neglected. But this example also suggests a danger. Blanket requirements for the holding of hearings and resort to similar procedural devices may become serious impediments to efficient administration. It is difficult to distinguish between those situations in which such devices are needed and those in which they are not. The administrative "record," valuable as it is in many cases, may become so comprehensive, so bulky, that the administrative process loses all its reputed advantage as to speed and inexpensiveness without gaining appreciably in other respects. A member of the Interstate Commerce Commission has recently declared: "The bulk of American administrative controversies is becoming unbearable. There is real need to test administrative procedure in particular cases by resort to fundamentals. Before it can be said that anything is indispensable procedurally in a proceeding before an administrative tribunal, the nature of the particular function must be determined, and the test can then be related directly

to the immediate subject under investigation. No generalization will give a helpful answer."[7]

This clogging of the administrative record with useless material may result from a mere unwillingness to exclude irrelevant matter or it may arise out of an adherence to the traditional rules of evidence. Although administrative tribunals are regularly permitted to depart from these rules, within variable limits, much might be gained if they would assiduously apply a few simple tests especially designed for the purpose.[8]

On the whole, the existing situation does not seem to be one to be "viewed with alarm." Developments, however, are far from uniform. In many situations there is need for more general and rigorous application of the safeguards which have been discussed. Elsewhere these safeguards have already been applied too generously and undiscriminatingly, with the result that administration is seriously hampered.

Nor can any system of mechanical safeguards be foolproof. They can influence the conduct of officials in important fashion, but the caliber of the men themselves must always be of vital importance. Within limits ways can be found to abuse any system. It is also clear that, other things being equal, the greater the powers of government, the greater are the opportunities for abuse—as well as for good.[9]

[7]Commissioner Clyde B. Aitchison, "Reforming the Administrative Process," 7 *George Washington Law Review* (April 1939) 703–25 at 722.

[8]For an excellent treatment of this subject, see Albert E. Stephan, "The Extent to Which Fact-Finding Boards Should Be Bound by Rules of Evidence," 24 *American Bar Association Journal* (August 1938) 630–37 and 665.

[9]Thus the possession of inquisitorial powers, the frequent exercise of which may become very burdensome upon those whose business is being investigated, is capable of abuse. Businessmen may be constrained from insisting upon their rights for fear of the exercise of this power by way of punishment.

Prescriptions

In addition to the safeguarding devices that have already been tried, there are various prescriptions current today for the further improvement of administrative law and administrative lawmaking. Brief consideration will now be given to a number of these, beginning with proposals for the improvement of the processes of administrative legislation (some of which have already been adopted and have been discussed above, but are included here because they form parts of more comprehensive proposals).

ADMINISTRATIVE RULE MAKING

The President's Committee on Administrative Management published among its special studies the report of a member of its staff on the exercise of rule-making power.[10] Professor James Hart, who made this study, divided his recommendations into those which should be given legislative form and those which might be adopted by administration voluntarily as principles of administrative management. Among the former, he mentioned, first, the importance of supplying legislative standards which at once leave room for the exercise of administrative judgment and yet are more explicit than such an empty formula as "public interest, convenience, or necessity." He also suggests, as a contribution to clarity and certainty of the law, that modern regulatory statutes should authorize the agency charged with their administration to issue regulations defining and interpreting the terms of the law. It should be further provided that anyone who acts in conformity with such a regulation shall not be liable to prosecution under the act even though the regulation be later rescinded or invalidated by a court. Such provisions are already embodied in the legislation ad-

[10]Hart, "The Exercise of Rule-Making Power," *op. cit.* (Chap. II, n. 9), pp 309–55.

ministered by the Securities and Exchange Commission.

Professor Hart also recommended that Congress should "investigate the possibility of providing a means of challenging the validity of regulations that affect the public by a simplified procedure, without delay, and at a nominal cost,"[11] and that whenever Congress delegates rule-making power it should consider the advisability of providing such "pre-natal" safeguards as advisory committees, notice and formal hearings, publication of draft regulations, informal conferences with groups affected, and gradual progression from voluntary to mandatory standards. On the administrative side, he advised that rule-making authorities, without awaiting statutory injunction, would do well to make greater use of consultative devices and of means of insuring publicity for their actions. He also suggested that the chief executive could greatly improve the rule-making process by issuing certain standard regulations governing administrative exercise of this power.

The American Bar Association, in adopting the recommendations of its Special Committee on Administrative Law, has gone further than this.[12] Its draft bill provides that no rules and regulations other than those governing internal procedure shall be issued except after publication of notice and the holding of public hearings. It further provides for judicial review of such rules before the Court of Appeals for the District of Columbia. This review could be had, within thirty days of the issuance of the rule, by any inter-

[11] *Ibid.*, p. 317.

[12] See 64 *Reports of the American Bar Association* (1939) 575ff; also Senate Report No. 442, 76th Congress, 1st Session; House Report No. 1149, 76th Congress, 1st Session; and Senate Document No. 145, 76th Congress, 3rd Session. The bill was passed by both houses of Congress, but was vetoed by the President. The veto was sustained in the House of Representatives. A symposium on the bill is to be found in 34 *Illinois Law Review* (February 1940) 641–757.

ested party. The scope of the review would be limited to determining whether the rule was constitutional and in accordance with the law under which it was issued. The court would either sustain the rule or completely invalidate it. The bill also provides a clause, similar to that advocated by Professor Hart, for the protection of persons who have acted in good faith in accordance with a rule later invalidated or rescinded. It extends this protection to acts performed up to thirty days following such rescission or invalidation.

It would appear, however, that the American Bar Association's proposal goes too far in attempting to regulate such matters by general blanket legislation. Thus, with reference to the general requirement of public hearings in the case of all rules and regulations, Professor Hart declares, "Nobody . . . who has even casual appreciation of the variety and complexity of modern administration, and of the need in certain circumstances for speedy action, could possibly support such a blanket requirement of use of this technique."[13] And Mr. C. T. Lane, General Counsel of the Securities and Exchange Commission, explains that such a requirement would be both futile and obstructive as regards the Securities and Exchange Commission. The procedure now followed in the formulation of the regulations issued by this agency, he contends, is far more complicated, more delicate, and more effective than that of a general public hearing. It includes consultation with experts both inside and outside the government, the analysis of thousands of replies to questionnaires, and the submission of draft regulations for critical comment to informed and representative groups throughout the country.[14] Moreover, if the grant of

[13]James Hart, "Some Aspects of Delegated Rule-Making," 25 *Virginia Law Review* (May 1939) 810–23 at 821.

[14]6 *United States Law Week* (February 14, 1939) 778–80. "This bill," declares Mr. Lane, "is an attempt to regulate the works of a wristwatch by

immunity for acts performed in accordance with rules later invalidated were extended for a period of thirty days following such invalidation, administration would be seriously handicapped at times when prompt enforcement of a new rule was important.

Mr. Lane is sharply critical, too, of the provision for judicial review of rules and regulations at the instance of any "interested party" and without reference to any particular "case of controversy." He contends that this would "permit any intermeddling volunteer to present an abstract question of constitutionality to the Court. . . . It would vest the defence of the rule," he continues, "in an office of the federal government [the attorney general] which had had no part in the painful process of self-education which led to the adoption of the rule; and it would call upon the Court . . . to assume a wisdom and an understanding of technical problems which the Supreme Court has continuously been unwilling to assume for itself."[15]

On account of his official position Mr. Lane may not be completely impartial in this matter. It should also be said that there is probably more need for such a provision in the case of certain other agencies than in the case of the Securities and Exchange Commission—at least as it is now being administered. Furthermore it may well be that a blanket

using a mattock." *Ibid.*, p. 778. The reporter for the Attorney General's Committee agrees that in most instances hearings on Securities and Exchange Commission rules would be futile and often harmful. He adds, however, that "there might still remain an area in which hearings are useful and salutary." The Attorney General's Committee on Administrative Procedure, "Securities and Exchange Commission," Monograph No. 26, pp. 298–304, at p. 302. For further criticism of these and other features of the bill, see Ashley Sellers, "Administrative Law—the Extent to which S. 915 or H.R. 4236 Would Affect the Work of the Department of Agriculture," 7 *George Washington Law Review* (May and June 1939) 819–43 and 923–48, also in "Administrative Law," Hearings on H.R. 4236 (Chap. III, n. 1) 75–100.

[15]6 *United States Law Week* (February 14, 1939) 779.

application of this type of judicial review would not be advisable and yet that provision for it in connection with certain statutes or particular administrative agencies might be highly desirable. In any case the subject has passed beyond the stage of mere speculation and into that of actual practice, for several recent federal statutes contain provisions similar to and even more far reaching than those advocated by the Bar Association.[16] They are of such recent date that it is too early to base any conclusions upon their operation. Nevertheless they constitute an important development, perhaps significant for the future.

Typical of these statutes is the Food, Drugs, and Cosmetic Act of 1938.[17] It empowers the Secretary of Agriculture, among other things, to issue regulations establishing reasonable standards of identity, quality, and fill of container for each class of food, to govern the labeling of dietary products, to establish limits of tolerance for the presence of unavoidable poisons in food products, to prescribe strength and purity specifications for drugs, and other similar matters.[18] Such regulations may be issued, amended, or repealed only after a full public hearing of all interested parties, which has been preceded by a notice setting forth the proposals to be acted upon. Furthermore, the secretary must hold hearings upon any proposals set forth by an industry, or substantial part thereof. After the hearings the secretary

[16]The most stringent provisions are those of the Food, Drugs, and Cosmetic Act of 1938, 52 Stat. L. 1040 (1938). See also the Fair Labor Standards Act, 52 Stat. L. 1060 (1938); and the Bituminous Coal Act of 1937, 50 Stat. L. 72 (1937).

[17]52 Stat L. 1040 (1938). Ever since 1921, the state of New York has provided for judicial review not only of the validity but also of the reasonableness of rules issued under its labor legislation. New York Department of Labor, *New York State Labor Law* (c1938) Art III, Sec. 111.

[18]For a fuller discussion of this act, see Ralph F Fuchs, "The Formulation and Review of Regulations Under the Food, Drugs, and Cosmetic Act," 6 *Law and Contemporary Problems* (Winter 1939) 42-69.

must announce his determination upon the proposals which have been considered and "shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings as to fact on which the order is based."

Regulations thus issued, amended, or repealed are subject to judicial review in the appropriate Circuit Court of Appeals upon petition of "any person who will be adversely affected." The review is to be based upon a full transcript of the proceedings and the record upon which the secretary based his order, but "the findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive."

Both the procedural requirements governing the issuance of regulations and the provisions for judicial review obviously follow the pattern which has been set for quasi-judicial administrative action and for such quasi-legislative action (for instance, licensing and rate fixing) as is directed at one individual or at most a few. The attempt has been made in this statute to apply that procedure to general rule making. It is important to note that in the case of administrative action having individual rather than general application the issues to be determined are well defined and relate to a fairly definite transaction or state of affairs. To quote Professor Fuchs:

> These issues can usually be stated with some precision; the relevance to them of offered evidence can be determined in accordance with accustomed logical methods; the parties entitled to be heard can be identified fairly easily; findings can be stated with some definiteness and a decision related to them; and judicial review can center successfully upon the essential points. Each exercise of the rule-making authority which reposes in the Secretary of Agriculture under the new Act, on the other hand, relates to a general condition or to practices in which multi-

tudes of individuals and of transactions are involved. The investigation must range over a wide field and the administrative decision must deal more largely with probabilities and less with established facts than in connection with the other types of functions.[19]

Nevertheless, after a study of what evidence is available, Professor Fuchs concludes that probably the procedural provisions of the Food, Drugs, and Cosmetic Act are well advised—"provided the administrative machine is sufficiently enlarged to carry the load, and provided further that the courts exercise their powers of review with appropriate restraint.[20] Doubtless many would disagree with this conclusion. It should be recognized, however, that it is based upon the particular nature of the problems involved in administering the act in question and especially upon the character of the powerful contending private interests which are involved and which render the task of straightforward administration in the public interest so difficult. It is not intended to be applied to other types of legislation without careful study.

The report of the Attorney General's Committee on Administrative Procedure, which has just been issued as this volume goes to press, advises against the blanket requirement of hearings preceding the exercise of rule-making authority. It also opposes court review of rules, apart from concrete cases. As a partial substitute for the latter proposal, however, it does recommend provision for the issuance of declaratory rulings in concrete cases. Such administrative rulings would have the same force as a final order or decision of the agency, and would be subject to judicial review to the same extent.[21]

[19] *Ibid.*, p. 52.

[20] *Ibid.*, p. 62.

[21] "Administrative Procedure in Government Agencies," Senate Document No. 8, 77th Congress, 1st Session, 30–33, 115–20, and 202.

ADMINISTRATIVE ORDERS AND ADMINISTRATIVE ADJUDICATION

The field of administrative adjudications and other administrative determinations of particular application which have been assimilated to the former next claim attention. Here, too, the existing situation has already been appraised and found disorderly and uneven but far from discouraging. Various prescriptions for reform are in the air. First of all there is the substitution of rule making for the case-by-case exercise of discretionary authority. It is true there must always remain a large sphere for the latter type of activity, but there are undoubtedly many cases in which it could be minimized by greater use of the rule-making power. The advantage of this procedure is twofold. It enables businessmen to know in advance what conduct is legal and what is not. Again, the necessity of acting in accordance with a general rule—even though a self-imposed one—greatly narrows the range of official discretion. As Professor Hart argues, it introduces the rule of law at the administrative level. Many authorities believe that it would be well if the Federal Trade Commission had the power to make interpretive regulations of such phrases as "unfair methods of competition." It may well be that this subject was too difficult to be handled other than by the case-to-case method in the early years, but it would seem that by now the commission could develop rules out of its own experience which would be advantageous to all concerned.

Mention has already been made of the desirability of providing for suits against the state in certain cases of official negligence, and the like. Also important is the provision for statutory judicial review of the determinations of administrative officials. By this means it is possible to lay down in black and white just what record is to be considered by the court and what issues it is to review. Of

course there are limits beyond which the legislature cannot go in foreclosing the courts on these questions, but in general it can in this way accomplish a great deal toward securing for administrative agencies an appropriate sphere of competence free from judicial intervention.

But if courts are to confine themselves to a consideration of the administrative record, it is necessary that that record should be adequate. Today this is often not true, especially in the case of administrative determinations made in the regular departments of the federal government as contrasted with the regulatory commissions. Frequently such machinery as the departments possess for the administrative adjudication of disputes has no statutory basis and proceeds in a very informal manner. Such intradepartmental boards generally lack the power to summon witnesses and subpoena documents and under such circumstances are not in a position to make findings of fact which the courts can be expected to accept as final.

To correct this situation, the American Bar Association's draft bill[22] provides that each governmental agency should set up one or more review boards. These would correspond to the existing nonstatutory Board of Review of the Department of Justice, which reviews exclusion and deportation cases. Each board would be made up of three members, at least one of whom would be a lawyer, appointed from the agency's own staff. They would have the power to compel witnesses to attend hearings and submit to cross-examination; they would also have the authority to require the production of documents. All of the boards' proceedings would be reduced to a written record, copies of which could be obtained by aggrieved parties for a small fee. The boards would make findings of fact and conclusions of law. The department head could approve, disapprove, or modify these find-

[22]Reports of the American Bar Association (above, n. 12).

ings and conclusions, but the original record and findings would be preserved for use in case of an appeal to the courts. The bill also provides for an appeal from such decisions to a United States Circuit Court of Appeals. Such appeals would be based upon the record made before the administrative agency.

Certain principles underlying these provisions are sound enough. There is probably room for improvement in the organization and implementation of agencies of administrative review. Where there is to be judicial review of administrative decisions, it is certainly advantageous to have a fully developed administrative record upon which the courts may base their review. Here also, as in the case of the provisions regarding administrative rule making, the bill is far too sweeping, however, and does far less than justice to the great variety of situations with which administration is confronted. In short, it would fasten upon administration the requirement of a cumbersome, judicialized procedure, of the sort aptly designed for the defense of private rights, for all manner of relatively minor decisions—decisions of the kind that come under the head of normal routine and for which in a private business no involved procedure would be tolerated for a minute. No one would quarrel with the aim of giving a fair hearing to all whose rights are threatened, but the accomplishment of this purpose does not require steps which would tend to stultify the whole administrative process.[23]

[23]See Chester T. Lane, in 6 *United States Law Week* 778–80, and Feller, *op. cit.* (Chap. II, n. 32), pp. 647–74 at pp. 658–59. For defense of the bill, see J. Harold DeNike, "The Businessman's Stake in Judicial Review," 17 *Harvard Business Review* (Autumn 1938) 40–51; and O. R. McGuire, "Administrative Law and American Democracy," 25 *American Bar Association Journal* (May 1939) 393–99 and 435.

A great deal of valuable material is contained in the hearings held by the House Committee on the Judiciary. "Administrative Law," Hearings on H.R. 4236, *loc. cit.* (Chap. III, n. 1).

The Attorney General's Committee on Administrative Procedure has now made recommendations which are designed to accomplish certain of the purposes of the Bar Association's proposals while avoiding the difficulties which they involve. Limiting itself strictly to proceedings involving legal rights and duties where the law requires that the administrative decision be made after there has been an opportunity for a hearing and upon the basis of a record made in the course of such a hearing, the Committee makes certain recommendations designed to regularize and improve the quality of proceedings in such instances. Instead of review boards the Committee recommends "hearings commissioners" who, acting singly, would function in much the same fashion as do trial examiners at present. These officers would be appointed by the Office of Federal Administrative Procedure (the creation of which is recommended by the Committee) on nomination of the agency concerned. They would be appointed for seven-year terms of office and would be removable only for certain specified causes. The recommended procedure for review of decisions of these officers by the board, commission, or head of the agency follows a pattern similar to that advocated by the Bar Association.[24]

Existing procedures for securing judicial review of administrative orders and decisions are greatly in need of simplification and standardization. There is no excuse for the existing diversity of statutory provisions in this field. Opportunity for *de novo* trials in the district courts of the United States, which still exists in certain cases, should be entirely abolished. Direct appeal to the Circuit Courts of Appeals, as is now provided for most of the newer agencies, should probably be made the rule.

This suggests another needed reform. It has previously

[24] "Administrative Procedure in Government Agencies" (above, n. 21) 45–53 and 195–202.

been pointed out that the necessity for appealing to the courts in order to obtain enforcement of administrative orders may result in a multiplication of judicial proceedings. The enforcement procedure, like the appeal procedure, may involve a *de novo* trial. This is again particularly likely to be true when it is committed to the district courts. There is no excuse for such a cumbersome system. After there has been opportunity to test the validity of the original order by the Circuit Court of Appeals procedure, the issuance of a judicial order to compel obedience to the order should be as nearly automatic as possible.[25]

Reference has been made above to the advantage of having cases involving administrative law decided by courts which deal extensively with cases of that type. This consideration and others have prompted many people to favor an even more radical proposal than any that we have thus far discussed. This proposition is to create a special court for the settlement of controversies between the government and its citizens—an administrative court.[26] A current version of this proposition would establish a "United States Court of Appeals for Administration" to hear controversies between the government and its citizens on appeal from final orders of such agencies as the United States Board of Tax Appeals,

[25]For useful charts showing existing systems of statutory review, enforcement procedures for administrative orders, and also the simplified review and enforcement systems under the plan for a Court of Appeals for Administration, see "United States Court of Appeals for Administration," Hearings on S. 3676, *loc. cit.* (Chap. III, n. 1), facing pages 16 and 61.

[26]The literature on this subject is voluminous. The American Bar Association's Special Committee on Administrative Law originally favored a large federal administrative court, containing both original and appellate sections. See 61 *Reports of the American Bar Association* (1936), Report of Special Committee on Administrative Law, Part I, 721–67. For a thorough criticism of this proposal both from the constitutional and practical angles, see Robert M. Cooper, "The Proposed United States Administrative Court," 35 *Michigan Law Review* (December 1936 and February 1937) 193–252 and 565–96. Later the Bar Association Committee substituted a more

the great regulatory commissions, the Secretary of Agriculture, and others. The court would base its action upon the administrative record and would be required to accept the administrative findings of fact if they are supported by substantial evidence. Its decisions would be final except for review by the Supreme Court on *certiorari.*

In brief it is urged in behalf of this proposal that it would have two great advantages. In the first place it would eliminate conflicting interpretations which develop among the Circuit Courts of Appeals. True, those conflicts are now subject to reconciliation by the Supreme Court, but that involves considerable delay; and in the meantime, especially in tax cases, the administration is seriously hampered in the conduct of the business of government, and lawyers are unable to advise their clients properly. Besides, the argument continues, conflicting *dicta,* as contrasted with holdings, are not subject to appeal to the Supreme Court although they create confusion and uncertainty. The second argument is that if all such cases were concentrated in one court, the result would not only be to provide a more uniform body of administrative law but also to secure the development of that law by judges who are specialists in such problems. It is felt by some that much of the confusion in the court opinions dealing with administrative cases could be eliminated in this way. Furthermore a point might be made of including among the judges persons who had had administrative experience and who would consequently be particularly well prepared to review administrative decisions.

modest proposal for an administrative appeals court as discussed in the text above. This proposal is set forth, together with testimony pro and con, in "United States Court of Appeals for Administration," Hearings before a subcommittee of the Committee on the Judiciary, on S. 3676, *loc. cit.* (Chap. III, n. 1). Still later the Bar Association gave its backing to a proposal which eliminates entirely the idea of a special court. (See pages 223–24 and n. 12.)

On the other hand there are those who contend, in general, that the alleged flaws of the present system can be eliminated by less radical means, and that the creation of a special court to deal with cases between government and citizen is a dangerous step. This latter argument finds support from two directions. Some, like Dean Pound, dislike the creation of any kind of specialized tribunal. Viewing the history of legal development, they note a persistent tendency on the part of our judicial structure to become complicated and confused by the introduction of new types of courts for handling new types of cases, with a resulting loss of simplicity and eventually in efficiency. A second dissenting argument comes from those who stress the danger that the creation of a special court to pass upon the legality of acts of governmental officials may result in a dual standard of justice: one governing citizens, and one governing administrative officials. The implication is that the latter might be more lax than the former, so that the result would be to weaken rather than strengthen the protections afforded private individuals against governmental agencies.

With reference to these arguments it must be remembered not only that the ultimate unifying force of the Supreme Court would remain but also that we already have certain specialized administrative courts. Thus the Court of Claims and the Court of Customs and Patent Appeals fall into this category in effect, whether or not they are technically constitutional courts. Moreover these courts have made good records. The latter court, indeed, has a far better record on appeals than have the Circuit Courts of Appeals: in the last fifteen years only two of its decisions have been reversed by the Supreme Court.

Indeed some authorities on the subject would favor the development of further specialized administrative courts, such as the two mentioned above, rather than the creation

of one over-all, generalized administrative tribunal.[27] These authorities would lay less emphasis upon the peculiarity of administrative law as such and the importance of obtaining uniformity in this field. On the other hand, they would put greater stress upon the importance of knowledge of the particular subject matter concerned and of the propriety of having slightly different rules of administrative law for different substantive fields. They would argue, that is to say, that it is exceedingly important to have the decisions of the Patent Office reviewed by a court that specializes in patent law. At the same time, proponents of this plan would contend that what constitutes sound principles governing administrative procedure for the determination of patent disputes might be quite different from the best practice in some other field, such as labor law administration, where the nature of the evidence and of the reasoning is quite different.

But one must also beware of the hasty assumption that more and more specialized administrative courts should be established. The ill-fated Commerce Court, which was created to exercise a judicial review of decisions of the Interstate Commerce Commission, was so unsatisfactory that it was abolished after an existence of only three years.[28] Whether or not it may be advisable in the future to create either a series of specialized administrative courts or a single administrative appeals court, the wise plan would seem to be to follow a gradual course of development. There is much to be done, as has been indicated, in simplifying and rendering more uniform our existing appeal and enforcement procedures. Concentration of this type of judicial

[27]See Ralph F. Fuchs, "Concepts and Policies in Anglo-American Administrative Law Theory," 47 *Yale Law Journal* (February 1938) 538–76 at 568–69.

[28]See Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: The Macmillan Company, 1927) 153–74.

activity in the Circuit Courts of Appeals is at least a step in the direction of judicial specialization as compared with the system under which problems of administrative law are dealt with by each of the ninety-four district courts. The further suggestion has been made that one judge on each circuit court might specialize in the field of administrative law. This might provide a desirable compromise.

More important than the selection of the courts to exercise judicial review over administrative orders and decisions is the determination of the scope of such review. It may even be suspected that a good deal of the heat that has been generated in the contest over the administrative court proposal is accounted for by the provisions on this subject rather than by the idea of an administrative court in itself.

There are, as has been explained,[29] several possible provisions for regulating the scope of judicial review, each different from the others with respect to the amount of administrative finality which it provides. At one extreme would be the absence of any judicial review. That alternative is foreclosed under the Constitution, at least as now interpreted. At the other extreme, would be a complete *de novo* retrial of all issues of both law and fact, upon a record made in the courts. Many factors, among which the pressure of work and the technical nature of many of the questions involved bulk large, combine to rule out this alternative in most cases. The practical alternatives, therefore, usually lie within the territory marked out by the extremes of judicial review of both law and facts on the administrative record, on the one hand, and, on the other, judicial review confined to questions of law. What are the broad considerations which should be taken into account in determining the precise extent of judicial review desirable for a particular situation?

[29]See page 149 for a fuller statement of the alternatives.

It has already been pointed out that administrators can act judicially, and that there are various ways in which they can be encouraged so to act. Furthermore, granted the necessity of administrative agencies exercising large measures of discretionary authority, there are several reasons why they should be given as free a hand as possible. To a large degree their effectiveness depends upon the conclusiveness of their findings. If the likelihood of a reversal of their decisions in court is great, there will be a tendency to appeal most decisions. In this way the courts will be overworked and will be forced to perform the very tasks which were to have been delegated to administration. The administrative agencies, in turn, will be reduced to the status of mere auxiliaries to the courts, membership in them will be less desirable than it would otherwise be, and the chances of attracting competent personnel will be greatly diminished. It may be argued that the best way to make administrative agencies worthy of real power is to give them that power. Furthermore judicial review, by its very nature, tends to reduce to fixed rule all that comes within its scope. Administrative tribunals, on the other hand, are frequently created to deal with a subject matter which requires flexibility of treatment and the application of sound judgment unhandicapped by rigid rules. Initiative is checked and the safety of routine treatment is encouraged by close judicial supervision. One writer even goes so far as to declare that "if the concept of an autonomous system of administration is generally considered to be irreconcilable with the indispensable safeguards against unlawful administrative action by reference to the assumption of judicial superiority, popular government will inevitably give way to a more efficient form of political authority."[80]

Considerable misunderstanding arises from what has been

[80]Cooper, *op. cit.* (Chap. II, n. 5), pp. 577–602 at 601–2.

referred to as the "myth of facts in the absolute." The facts which administrative agencies must "find" are frequently incapable of precise determination or absolute proof. Error there may be, in the process of finding them, yet somewhere that process must end and the word of some agency must be taken as final. The question is, should that place be in an administrative agency or in a court? Without attempting to foreclose the issue, it might be remarked that it is fairly evident that courts are ill equipped to make many of the factual determinations which have been discussed in this volume. And if any agency is equipped for making those determinations, it should be the administrative agency which has been created for that purpose.[81]

The arguments on the other side are for the most part familiar and obvious. They rest upon the relative freedom of the courts from influence and political pressure, and upon their training and tradition in the technique of impartial thought. With all the "judicializing" of certain administrative agencies that has taken place, it still remains true that they have not yet developed as favorable a tradition of removal from the hurly-burly of politics and pressure-group activity as that which the courts have attained. This can safely be said even after allowing for the fact that many of our courts fall far short of the standards of impartiality to which they pretend. It still remains true that the conventional mores sanction open "lobbying" of members of administrative commissions, and such activities are constantly practiced.

[81]The matter has been clearly put by Professor Powell in characteristic style. He writes: "Much confusion is due to the nebulous purport of the word *fact*. Judicial interpretation invariably identifies it with something determined to be true in judicial proceedings. A contrary notion sometimes prevails among those who suffer from the findings of blundering juries. We must accept as final the opinion of some designated fallible human beings. A jury is as prone to error as an expert body." Powell, *op. cit.* (Chap. V, n. 13), p. 459.

As one writer has put it, "What would be considered outrageous in the case of a court is of daily occurrence before these tribunals."[32]

It is true, as well, that the administrative technique may overemphasize the importance of the immediate case, and the immediate consequences of the action to be taken, having less regard for more remote consequences and for the importance of acting in accordance with a general rule which will yield just results in other and similar cases. Mr. Dickinson has expressed a profound truth in saying that "as a system of logic, the law may be artificial, inadequate, and harsh; but precisely because it is still a system of abstract logic, it spreads a net of allaying oil over the controversies of the moment and makes necessary an appeal from the claims of particular litigants to the interests of men in general as worked out over a long period into a body of impersonal and artificial rules which command respect."[33] Judges are but men; and they are as prone to error as they are to prejudice and passion. But at least the method that they use and the tradition in which they are schooled is such that, by its very artificiality and rigidity, it tends to minimize the personal element. Administrative justice is desirable for certain types of cases chiefly in so far as it is possible to develop semi-judicial techniques, combining some of the attributes of the judicial with some of those of the purely administrative method. Completely untrammeled discretion is always an evil, even if sometimes a necessary one.

The problem is indeed one of degree in more than one

[32]Max Radin, "The Courts and Administrative Agencies," 23 *California Law Review* (July 1935) 469–81 at 477.

[33]Dickinson, *op. cit.* (Chap. VI, n. 18), pp. 141–42. See also Roscoe Pound, "Justice According to Law," 13 *Columbia Law Review* (December 1913) 696–713 and 14, *ibid.* (January and February 1914) 1–26 and 103–21. The section on "Executive Justice" is reprinted in 4 *Selected Essays on Constitutional Law, op. cit.* (Chap. I, n. 7), pp. 63–75.

respect. The distinction between courts and administrative tribunals is one which in certain instances approaches the vanishing point. Even the difference between courts and the regular branches of the administration may be exaggerated. One of the most brilliant of contemporary legal satirists has put the matter thus: "The distinction between bureaus and courts," he declares, "is important. Courts are bound by precedent, and bureaus are bound by red tape. Of course courts are forced to follow precedent even when it leads to absurd results because of their solemn obligation not to do anything in the future very much different from what they have done in the past. But bureaus in allowing themselves to be bound by red tape do so out of pure malice and lack of regard for the fundamentals of freedom. . . ."[34]

The question of the proper scope of judicial review of administrative decisions is also one of degree. And the extent of judicial review that is advisable differs according to the nature of the case.[35] Thus where the government is offering some gratuity, grant, or special privilege, there would seem to be ample justification for allowing a wide range of finality to the administrative action.[36] Judicial review may well be limited to questions of law alone. Even to allow a strong presumption in favor of the administrative interpretation of the law is not going too far. These same rules might properly be applied to cases arising out of es-

[34]Thurman Arnold, "The Role of Substantive Law and Procedure in the Legal Process," 45 *Harvard Law Review* (February 1932) 617–47 at 624–25.

[35]See Malcolm McDermott, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 *American Bar Association Journal* (June 1939) 453–60. The analysis in the text owes much to Professor McDermott's essay.

[36]The suggestions made in the text as to the proper scope of judicial review are based upon the assumption that the administrative determinations in question would be made in accordance with sound procedural safeguards.

sential functions of government, such as raising revenue. Governmental business enterprises, generally speaking, present a similar situation as far as concerns the scope of judicial review. It would seem that an exception should be made, however, where the government has a monopoly, as in the case of the post office. Here it is a pure fiction to argue that no individual rights are involved, on the ground that no one need avail himself of the service offered. People have in fact no choice; they must make use of the service. Consequently courts should be more careful, in such cases, to guard against arbitrary official action.

The regulation of businesses "affected with a public interest" constitutes a second major category. Certainly courts should at least apply the substantial-evidence test to administrative determinations in this field. It must be admitteed that most public utility rate cases involve such complicated facts and factual inferences and, usually, so much conflicting testimony that the substantial-evidence test is not a very effective safeguard. There seem to be but two alternatives. One is that the courts establish certain rules as to the methods of valuation which commissions must follow. This has been tried in the past and worked so badly that the courts themselves have virtually abandoned it. The remaining alternative is the doctrine of "constitutional facts." The advisability of permitting the application of this doctrine is at least highly questionable. Unless exercised by the courts with a great deal of restraint, it may seriously cripple the work of public utility commissions. It is necessary to bear in mind, too, that it is not only the Supreme Court which we must consider but also the lower courts, which frequently show less respect for administrative tribunals. There will be no completely satisfactory answer to the problem as long as some public utility commissions remain which are not up to the proper standards of competence and integrity.

When it comes to reviewing the work of bodies set up for the regulation of private business (health officials, licensing authorities, officials charged with the elimination of nuisances of various kinds, and tribunals established for the prevention of unfair competition) it may be well to make further distinctions. Some of these functions, such as the licensing of learned or technical professions, require expert knowledge. Unless it clearly appears that the boards in question lack the proper qualifications, their decisions, even on legal questions (especially where technical terms of the trade are involved), should be treated with a great deal of respect. In the case of agencies dealing with less highly technical subject matter, it would still seem desirable to confine review of the administrative determinations to questions of law and enforcement of the substantial-evidence test, at least unless the finding in question was clearly arbitrary or capricious.

Finally, in those situations where the government has provided administrative means for the adjustment of individual controversies, because of some special social policy, we have still another type of case. Workmen's compensation commissions and labor relations boards constitute outstanding examples of this category. It is in this field that the doctrine of jurisdictional facts has been resorted to. For reasons suggested earlier, however, this appears to be undesirable. Whatever may have been the merits of the doctrine as originally employed, there appears to be no excuse for its application to a modern administrative tribunal which is provided with the usual safeguards. The wiser rule again appears to be to draw the boundary line of judicial review short of the examination of facts, in all cases, except to make sure that the findings are supported by substantial evidence.

Perhaps these suggested principles have been set forth too dogmatically. There is certainly room for disagreement among the doctors. For instance, it is of interest to compare

the views of two eminent authorities on administrative law concerning judicial review of decisions of workmen's compensation commissions. On the basis of a thorough study of the experience of many states, Professor Walter F. Dodd concludes that administrative finality as to fact determinations—even of jurisdictional facts—is desirable.[37] He lays particular emphasis upon the desirability of prompt and inexpensive settlement of claims, and points out that court review of matters of fact not only itself involves the delays attendant upon application of the technical rules of evidence but also tends to force the commissions themselves to use these rules in order not to be overruled by the courts. It is implicit in Professor Dodd's argument, however, that he would consider judicial review of matters of law and procedure essential.

Professor Haines, on the other hand, is so convinced of the harm done by judicial review in this field and so skeptical of the possibility of confining the courts to "questions of law" that he thinks perhaps the complete abolition of all judicial review of workmen's compensation decisions would be beneficial.[38] In support of this judgment, he points to favorable results under such a system in Ontario. As an alternative, he suggests a form of review by special administrative courts.

Exactly what are the precise rights and wrongs in these matters is difficult to say. Certain it is that any set of rules which might be laid down and agreed upon should be kept subject to change. The field of administrative law is a rapidly growing one and no greater mistake could be made

[37]Dodd, *op. cit.* (Chap. III, n. 61), pp. 383–84.

[38]Charles G. Haines, "Judicial Review of the Findings and Awards of Industrial Accident Commissions," in Charles G. Haines and Marshall E. Dimock (eds.), *Essays on the Law and Practice of Governmental Administration* (Baltimore: The Johns Hopkins Press, 1935) 127–73 at 162–73.

than to attempt to stereotype any particular set of rules. As new techniques of administration are developed to meet new problems of government, new forms and formulas will have to be invented to control the relations of judiciary and administration.

It is therefore more important that we pay attention to the underlying fundamentals than to any particular set of actual or proposed rules. One of these fundamentals is that the old distinction between law and facts is only the starting point for analysis. There are various kinds of facts; and questions of law are by no means all alike. It has quite properly been suggested that what we are really trying to get at is simply some standard for determining what questions courts are better equipped than other agencies of government to decide. Some questions of law, such as those turning upon the definition of nonlegal technical terms, are better decided by expert administrators than by courts. Some matters of fact may have to be arrived at by such involved processes of inference and interpretation that judicial scrutiny of those processes constitutes a desirable protection of constitutional rights.

But, although we should keep our eyes on the fundamentals and remember that rules must be subject to change, it does not follow that the courts should abandon the search for rules. Nor should they continue to use a variety of conflicting rules, and rules which are capable of many interpretations, meanwhile governing their selection and interpretation of these rules by reference to concepts which are nowhere explicitly declared. As was pointed out in the preceding chapters, this is roughly the situation today. At their best it may be that the courts are moved, as Justice Brandeis said, by "the rule of reason." But they should do all in their power to increase the certainty of the law by developing more precise standards. When they must be content with reasonability as

a guide, they would do well to avow it instead of disguising their action with meaningless judicial jargon.

The courts can, if they set about it, evolve a system of rules governing judicial review of administrative action which will give fairly satisfactory results and at the same time leave less to judicial fancy than is now the case. First of all, they must recognize that the law-and-fact formula is but a rough guide, that there are various types of legal questions, and that the rules must expressly take these different types into account. Second, they must frankly admit the relevance of such considerations as the nature of the right asserted (whether "qualified" or not, personal or property, vital or trivial), and the procedure, character, and composition of the fact-finding body. It will then be possible, in many cases, to include these considerations in formulated rules. Doctrines of "jurisdictional facts," "constitutional facts," "legislative question," "administrative discretion," and "judicial action" may then safely be discarded. No longer need administrative law be a maze of conflicting rules. The rules would be mutually consistent and as precise as could be obtained. Judicial discretion would then be brought out into the open and its exercise limited to the application of the less precise concepts and standards (e.g., that of the "reasonable man") that must perforce find lodgment in some of the rules.

Such a development would reduce to a minimum the objection that judicial review undermines the responsibility of administrative tribunals and interferes with the proper exercise of administrative discretion. It would also maximize the argument for committing decisions—even some decisions involving considerable discretion—to judges.

How can such a change be brought about? Directly, of course, it must be brought about by the judges themselves. But there are various steps which legislatures and execu-

tives may take which would tend to encourage the courts to work in this direction. The experience of the Interstate Commerce Commission and its relative immunity from judicial intervention is suggestive. If administrative tribunals are ably manned and rendered reasonably free from political and other pressure, if they are required to be scrupulously fair in their procedures and to support their decisions by full findings and reasoned opinions, the chief motives for judicial intervention will be removed. Furthermore, if the legislatures are careful to set reasonable bounds to administrative discretion, the courts will feel more disposed to respect the exercise of that discretion.

In Conclusion

It would be out of the question to attempt to summarize even such a small volume as this in a few paragraphs; and the bare conclusions which seem to the writer to be justified have already been set forth in this chapter. Perhaps it will be useful, however, to restate the substance of those conclusions in brief, and place them in a larger perspective.

The great growth of administration, which is the central feature of modern governmental developments and the accretion to administration of lawmaking, decree-giving, and adjudicating powers are phenomena which present a challenge to constitutional government. The time-honored framework of constitutionalism in this country—the separation of powers—appears to be threatened; it is, in fact, considerably shaken. Does this mean that "administrative absolutism" has gained sway? It is unnecessary to repeat the reasons which have been given for answering that question in the negative. But it is important to point out that the devices which serve to maintain the rule of law are not forces in themselves. They are tools. Like fortifications

which are useless if not manned by men with a will to resist an onslaught, these tools of constitutionalism must be wielded by men who have the interests of constitutionalism at heart. This means that the dominant political forces must have the will to maintain constitutional government.

Neither the courts nor administration can be completely isolated from politics. For politics is, after all, the flesh and blood of policy. Both the policy which decrees that administration shall do thus and so and that which insists that it shall do it in accordance with the rule of law must in the final analysis be made effective through politics. But the word "politics" has a double meaning. It may stand for the whole process by which public opinion is translated into law. That is the sense in which the term was used above. But often it means something which is narrower and more petty than this. In this connotation it stands for processes by which the general interest is subverted and particular interests are favored. Politics in this sense is the bane of all government. But, like the poor, it is always with us. One of the greatest dangers inherent in the expansion of governmental functions and the concomitant growth of administration is the increased opportunities which are given for politics, in the bad sense, to function. That is why we hear the growing demand for the separation of politics and administration. The growth of administrative power not only makes it more important to control politics in the bad sense but also increases the opportunity for its operation.

This volume has traced the lines of the continuous struggle to keep administrative power in the service of the general interest rather than in the service of any special interest. This is pre-eminently what the "rule of law" is designed to accomplish. The struggle bids fair to be reasonably successful as long as the scope and powers of administration do not grow so rapidly that they outrun the development of

checks and safeguarding techniques. Perhaps it might be suggested in conclusion that in so far as there is any test for the proper scope of government it should not be an absolute one, but rather it should be—at least in part—a test in terms of the current success of efforts to separate "politics" from administration, to keep administration, that is to say, both democratic and just. When the administrative branch shows signs of becoming more rather than less subject to special pressures and more rather than less inclined to act arbitrarily and inconsistently, that is a sign of maldevelopment. It suggests the desirability of at least temporary retrenchment, until the forces of constitutionalism can catch up with the growth of power which has outdistanced them. It suggests also the need for redoubling efforts to develop improved administrative devices and procedures. This is a task worthy of the best efforts of administrators and of political scientists.

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PROFESSOR PENNOCK, a graduate of Swarthmore College, received a Ph.D. from Harvard University. Since 1929 he has taught political science at Swarthmore. During 1937, 1938, he served the Social Security Board as an Administrative Specialist. Among his publications are "The Private Bond Case as a Postponement of the Real Issue," in 84 *University of Pennsylvania Law Review* (December 1935) 194–211; "Unemployment Compensation and Judicial Review," in 88 *ibid.* (December 1939) 137–55; "From Rule to Discretion," in 25 *Georgetown Law Journal* (November 1936) 3–47; and "Law and Sovereignty," in 31 *American Political Science Review* (August 1937) 617–37.