

## PROPOSED LEGISLATION AS TO FEDERAL ADMINISTRATIVE PROCEDURE

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In a sense the rise of administrative tribunals and administrative adjudication in the United States might be said to begin with the setting up of the Interstate Commerce Commission in 1887. But it had its beginnings in the states at least a decade before. A changed attitude toward administration begins to be manifest in the courts as far back as 1880. It had become necessary with the development of administration in an increasingly urban, industrial society. In our earlier polity, the traditional common-law jealousy of administration, developed in England in the contests between the courts and the Stuart Kings, reinforced by experience in America of royal governors carrying out instructions from England, and kept alive by the distrust of administration in pioneer societies, took form in an over-narrow conception of the separation of powers which proved unworkable in the transition from a rural agricultural to an urban industrial society. The way out was shown by Chief Justice Marshall in 1825.<sup>1</sup> He pointed out that there were governmental powers of doubtful classification, which might be classified properly in more than one of the constitutional departments of government, and that in such cases it was a proper legislative function to assign the power to one of the appropriate departments. He showed this in connection with rules of procedure in the courts. Much later it came to be recognized in connection with rate-making power in regulation of public utilities.<sup>2</sup> More recently application of standards, where discretion or judgment as to reasonableness was involved, came to be committed to administrative agencies by legislation, and the courts gradually recognized that this was within the principle set forth by Chief Justice Marshall.<sup>3</sup>

There was a steady growth of administrative agencies in the states in the last decade of the nineteenth century and

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\* Dean Emeritus, Harvard Law School. An address delivered before the annual meeting of the Indiana State Bar Association, Sept. 1, 1944.

1. *Wayman v. Southard*, 10 Wheat. 1, 42-43 (1825).
2. *Intermountain Rate Cases*, 234 U.S. 476 (1914).
3. *Mutual Film Corporation v. Industrial Commission*, 236 U.S. 230, 245-246 (1915).

the first decade of the present century as part of the rise of social legislation. At first, this produced a certain friction with the courts. Some state courts adhered obstinately to a narrow analytical view of the separation of powers. Not appreciating Marshall's doctrine, they held that every detailed power of government must necessarily be assigned exclusively once and for all to some one department of government. Thus well into the present century legitimate conferrings of power upon administrative agencies were sometimes held unconstitutional. This led many advocates of administrative development to denounce the separation of powers which is fundamental in American constitutional law. Moreover, our common law, as we had received it from seventeenth and eighteenth-century England, was very strict as to tribunals of special or limited jurisdiction. Their jurisdiction was not presumed. The facts giving them jurisdiction had to be set forth with particularity, and errors in not following the procedure prescribed by the statute creating them would invalidate their orders. Unless they complied strictly with these requirements their proceedings might be enjoined.

In consequence, in the last decade of the nineteenth century almost every administrative proceeding or determination of any consequence encountered a suit for an injunction. This situation was aggravated by retarded development of simpler remedies by way of judicial review of administrative adjudication. The common-law remedies for review of the administrative action were not devised for the type of administrative agencies which were being set up, and review by suit in equity, which had to be resorted to in the absence of other adequate remedy, was likely to have the incidental effect of substituting the discretion of the court for that of the administrative agency. What was especially irksome was subjection of administrative agencies to strict adherence to the rules of evidence which had grown up for jury trials and to common-law procedural ideas. Indeed, the condition of legal procedure in the last quarter of the nineteenth century was far from satisfactory in many respects and was not well adapted to review of administrative determinations.

A more liberal attitude toward administrative agencies may be seen as far back as 1880. In the first decade of the present century there began to be a changed attitude toward social legislation and a steady improvement of procedure in

the courts, so that the condition which obtained in the last quarter of the nineteenth century was passing. But the attempts of administrative agencies to achieve independence of law and of judicial scrutiny of their action have gone on as if the legal procedure of the 'nineties and the judicial attitude of the last century still continued.

As we look back on the beginnings of American administrative law we can well understand how it came about that relief was sought from a bad adjustment between law and administration and between courts and administrative agencies. Thus legislatures and administrative agencies went too far, and this led to a growing administrative absolutism which attracted attention under the regime of prohibition and has since become a serious problem. As far back as 1908, a tendency to relieve administrative agencies from judicial review wherever and so far as possible had been noticed. Today exemption from judicial scrutiny of its action seems to be the ambition of every administrative agency, federal and state, and is urged by a group of writers and teachers with increasing insistence. As a result, with the multiplication of these agencies in the federal government, the increasing subjection of every form of activity to administrative regulation, and hostility of administrative agencies to attempts to impose effective legal checks upon them, we have come to a condition of administrative absolutism in practice, and have been moving fast toward administrative absolutism in theory. This is nothing short of revolutionary in our American polity, and some academic teachers of the science of politics do not hesitate to pronounce it a revolution and to praise it as such.

It would be hard to find anything more at variance with American constitutional government than the unlimited authority exercised by many of the federal agencies today and even by their subordinates, as well as by a host of state agencies. As Mr. Justice Miller put it in 1874, speaking for the Supreme Court of the United States, "the theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere."<sup>4</sup> Our legislative process is subjected to effective checks. A bill must be introduced publicly. It is printed and available for public scrutiny. It is discussed in the press. It is referred to a committee and in a matter of any importance hearings are had. It is read three times

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4. *Loan Ass. v. Topeka*, 20 Wall. 655, 663 (1874).

before each house, is discussed publicly in committee of the whole, and after passing both houses is sent to the executive for approval or veto. Everyone whose interests are to be affected has abundant opportunity to be heard and present his objections. Judicial rule-making also provides carefully for taking account of the claims of all who may be affected. Rules of court are drafted by committees of judges, practicing lawyers, and law teachers, or by judicial councils; the drafts are printed and given wide circulation; they are referred for criticism to bar association committees, or to committees of the bar in different circuits; they are discussed before bar associations and in the legal periodicals; and they are only adopted after everyone having an interest has been fully heard. Administrative rule-making is in striking contrast. Often administrative rules and regulations having the force of laws affect interests of as much or even more significance to individuals as those affected by statutes or rules of court. But there are no such checks upon administrative rule-making power. Usually the first knowledge that those affected have of a rule is after it has gone into effect. The first opportunity they have to object to it or to its details is after it is sought to be enforced against them and they may be afforded an opportunity to attack it in the courts. But by this time serious and irreparable injury may have been done to an individual and his business. Moreover, the scope given to administrative rule-making today is so wide that challenging of details in the courts is not easy and often is not effectively available.

Even more serious is the lack of effective checks upon administrative procedure and administrative orders. It is not uncommon for these agencies to give notice or make complaint on one point or ground and, after a hearing in which the respondent directs himself to that point, to make an order upon another. As a general thing, one can know in advance the rules of conduct and policies which will be applied to his case by a court. But it is a characteristic tendency of present-day administrative agencies to use as a ground of decision some idea of policy not to be found in the statute or general law nor in any formulated rule of the agency—to reach its result on some extra-legal basis for the particular case, which it does not hold itself bound to follow in the next case but justifies on some ground or policy no-

where established or declared. Only last year the Supreme Court of the United States had to remind the SEC that before transactions otherwise legal can be outlawed or denied their business consequences they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or some agency to which Congress had delegated the authority. In that case Congress had not forbidden the transaction, it was not forbidden by established judicial doctrines.<sup>5</sup> The commission had made no rule on the subject. But it is not often that action outside of the law appears so clearly on the face of the proceeding. The committee of the Bar Association of San Francisco reported in 1943 that the power of suspension exercised by the OPA was “apparently unlimited.” The report adds: “We have no yardstick established by Congress or by any executive or administrative agency, and Procedural Regulation No. 4 seems to leave the nature and length of suspension to the judgment (and thus to the caprice) of each individual Hearing Commissioner.”<sup>6</sup> Unlimited powers of this sort have no place in the American system of government.

In two volumes of decisions of the federal Circuit Courts of Appeals, covering decisions from June to September, 1943,<sup>7</sup> and two volumes of decisions of the Federal District Courts covering decisions from April to September, 1943,<sup>8</sup> there are sixteen cases, an average of four to a volume, of arbitrary orders or orders going beyond the authority of the administrative agency. Yet we are told by the proponents of unrestrained administrative agencies that things should be left as they are, to work themselves out, or that a few nugatory restraints are all that are required. It must be remembered that the ordinary man can seldom afford the remedies which alone are open to him under present conditions, and hence only the orders which affect relatively large interests get before the courts. This makes the large number of such cases in the reports doubly significant. As the San

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5. *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 92-93 (1943).

6. *San Francisco Bar, December, 1943: Committee Report on the Office of Administrative Hearings of the Office of Price Administration*, 13.

7. 136 and 137 Fed. 2d.

8. 50 and 51 Fed. Supp.

Francisco Bar Association report put it: "There is cause for deep concern in the failure of Congress to impose reasonable limitations on the powers of those administrative agencies."

Recent cases of administrative action without or beyond authority are: A finding of the NLRB held by the Circuit Court of Appeals "merely fiating and not finding;"<sup>9</sup> a mandatory directive order to an employer by the NWLB, made without recommendation to the President and without any direction from the President, whereas the statutory function of the Board is only to make recommendations to the President;<sup>10</sup> an order of the NLRB requiring reinstatement of seamen who mutinied in violation of an Act of Congress, the Board considering this a "technical violation" of law, although the statute did not authorize orders of reinstatement in such cases;<sup>11</sup> an order made without passing on a crucial question of jurisdiction, as to which the Supreme Court of the United States said that the statute "requires the Commission to heed the mandates of the Act and to make expert determinations which are conditions precedent to its authority to act."<sup>12</sup> It should be noted that these are all very recent cases decided by courts friendly to administrative agencies.

There are many cases within the last year in which such agencies made determinations or orders without a basis in the facts. In one case the court enjoined the action of a subordinate of the Post Office Department in destroying a mail order business without authority of law.<sup>13</sup> In another an order of the NLRB was held "without support in the evidence."<sup>14</sup> In another the finding and order of the Federal Trade Commission were set aside as not supported by substantial evidence.<sup>15</sup> In another the Federal Power Commission, in determining value, as the court said, "used a sort of catch as catch can theory," and its disposition amounted

9. *Hutcheson, J. in Oklahoma Transp. Co. v. NLRB*, 136 Fed. 2d, 42, 44 (1943).
10. *Baltimore Fruit Co. v. Flynn*, 50 Fed. Supp. 382, 389 (1943).
11. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).
12. *Douglas, J. in City of Yonkers v. United States*, 320 U.S. 685, 692 (1944).
13. *Jarvis v. Shackelton Inhaler Co.*, 136 Fed. 2d, 116, 122 (1943).
14. *Kansas City Light Co. v. NLRB*, 137 Fed. 2d, 77, 84 (1943).
15. *J. B. Lippincott Co. v. Federal Trade Commission*, 137 Fed. 2d, 490, 494 (1943).

to no more than "guessing off" a substantial item of value.<sup>16</sup> In still another, the Secretary of Agriculture arbitrarily imposed upon a Boston Handler of milk "the obligation to account for milk which it has never seen or touched, which never reached the Boston market, and with the producers of which it had no contractual relationship whatever."<sup>17</sup> Indeed, some at least of these agencies claim authority to disbelieve evidence which is positive, uncontradicted, and not inherently improbable. Thus in effect they claim to decide on preconceived opinions as to the facts and make the hearing a mere farce. As the courts have said over and again, to allow this is to vest triers of fact with authority to disregard the rules which safeguard the liberty and estate of the citizen. The American Bar Association bill has a special provision to meet this situation. In the last few years the courts have been very liberal in sustaining administrative action wherever at all possible. As one federal judge has said: "Administrative agents have become so numerous and government by regulation so extensive that courts, it is to be feared, may gradually yield to their increasing insistence and permit the rights of the people to be destroyed and subject them to control by regulations, which result was never intended by the Constitution, apparently regarded as an out-moded instrument."<sup>18</sup> Thus the number of reported cases (six in three months of 1943) in which federal courts have felt constrained to set aside such orders or to refuse to enforce them is highly significant.

Cases of assumption of powers beyond those granted the administrative agency are very numerous in the reports, although the courts had called attention to this tendency long ago and repeatedly. A few recent examples will suffice. A treasury regulation "enlarged the legislative words" by inserting a clause relied on to exact a tax. The court said: "Congress having imposed the tax upon 'the first domestic processing' the administrative agency proceeded by regulation to broaden the legislative enactment so as to provide

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16. *Hutcheson, J. in Alabama Power Co. v. Federal Power Commission*, 136 Fed. 2d, 929, 933 (1943).

17. *New England Dairies v. Wickard*, 51 Fed. Supp. 444, 448 (1943). It was found that the record was "barren of any evidence" as the basis of the order and that there was no evidence from which an inference of the fact relied on could be drawn (p. 447).

18. *Deaver, J. in Payne v. Griffin*, 51 Fed. Supp. 588, 597 (1943).

for its imposition not only upon the first domestic processing but any subsequent processing which occurred first after the effective date of the act."<sup>19</sup> Another treasury regulation which the courts could not sanction was not only "contradictory of the plain terms" of the statute but "attempted to add a supplementary legislative provision which could only have been enacted by Congress."<sup>20</sup> In another case the administrator limited the area of production, on some theory of his own with what the court pronounced "false and artificial boundaries."<sup>21</sup> In another the Social Security Board made a regulation counter to the statute.<sup>22</sup> Of such things a federal judge said recently that these agencies and their subordinates were showing an "increased ego" and "wish to cow or to boss." He added: "Universality, fairness and justice are the right of all citizens and the duty of all law enforcers toward citizens."<sup>23</sup> The San Francisco committee says: "It seems to be a characteristic of some of the recently established administrative agencies to assume that ordinary citizens have nothing to do but fill out questionnaires and otherwise serve in attendance upon the multifarious demands of the administrative agencies."<sup>24</sup> As one studies these regulations two characteristics, which were also noticeable under the administration of the National Prohibition Act, stand out: (1) Zeal to go beyond the powers conferred by the statute creating the agency, and (2) a tendency to make rules merely for the convenience of the agency or its subordinates at the expense of individual rights.

Some bureaus have contended and succeeded in getting one important federal court to hold that when an administrative agency calls for an injunction to enforce its order the courts are bound to grant it without applying the general principles of equity which would govern in all other cases.<sup>25</sup>

19. *Durkee Famous Foods v. Harrison*, 136 Fed. 2d, 303, 307 (1943).
20. *Helvering v. Credit Alliance Co.*, 316 U.S. 107, 113 (1942).
21. *Hollyhill Fruit Products v. Addison*, 136 Fed. 2d, 323, 325 (1943). See also *Walling v. McCracken County Peach Growers' Assn*, 50 Fed. Supp. 900, 905 (1943).
22. *Kandelin v. Social Security Board*, 136 Fed. 2d, 327, 328-329 (1943).
23. *Atwell, J. in Brown v. Douglas*, 50 Fed. Supp. 877, 880 (1943).
24. *San Francisco Bar Association Committee Report*, 10.
25. *Brown v. Hecht Co.*, 137 Fed. 2d, 689 (1943). The District Courts had divided on this question. Some of the strongest had held that if there was a bona fide attempt on the part of the respondent



The claim made by the bureau in that case would in effect make the courts merely rubber stamps for the bureaus. The Supreme Court of the United States was not willing to go so far,<sup>26</sup> but it left the lower court very little margin for application of equitable principles, merely sending the case back for further consideration instead of reinstating the decree of the District Court denying the injunction.

Without any necessary intention of unfairness, administrative agencies have developed a characteristic unfairness in their operation. Zeal for carrying out the special function assigned to them leads them to look at their special task out of proportion and to consider individual rights, constitutional guarantees, and the law of the land as negligible. This is of long standing. In a recent address a former Attorney General of the United States told of his difficulties with zealous young men in the Department of Justice who felt it their duty to be unfair toward those against whom the Department was proceeding. But the administrative agencies have been encouraged in this attitude by an idea, often asserted by prominent personages, that the law was protecting sinister interests and that the courts were juggling cases instead of getting down to the merits. A leading teacher of administrative law tells us that many administrative agencies were meant to be unfair. No such attitude would be tolerated in courts. They are expected to deal fairly and equally by all.

In a typical recent case Judge Hutcheson (of Texas) said: "We cannot agree with the conclusion of the [National Labor Relations] Board that the respondents have had the fair trial by an impartial and disinterested trier of facts which the law accords them. Whatever ought to be said of the examiner's persistent and partisan efforts to conduct the

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to comply with the law and the regulations, and no disposition to violate them in the future, the court would deny the injunction with leave to apply for one if it appeared later that there was a likelihood of violation. Knox, J. in *Walling v. Casale*, 51 Fed. Supp. 520, 526-527 (1943); *Walling v. Buettner*, 133 Fed. 2d, 306 (1943); *Brown v. Southwest Hotels*, 50 Fed. Supp. 147, 150-151 (1943). The tendency to use power oppressively against individuals who are trying to comply with the law and the regulations is strikingly brought out in some of these cases where constant and rapid turnover of employees interfered with full and meticulous filling out of long and detailed questionnaires.

26. *Hecht v. Bowles*, 64 S. Ct. Reporter, 587 (Feb. 28, 1944). See the concurring opinion of Frankfurter, J. p. 592.

proceedings to a decision favorable to the Board, if the examiner really had been in the position he assumed that he was in, of an agent of the Board to sustain its charges, it cannot be successfully denied that his general attitude was not impartial but partial, not disinterested but partisan . . . Such an attitude, excusable if not commendable in a prosecutor, is a wholly improper one in a judge or an examiner who sits in a judicial place to hear and determine facts, draw conclusions of law, and make reports and recommendations based thereon." The Board had "approved all the acts and conduct of the examiner, completely exonerated him of bias or prejudice, adopted each of his findings, drew conclusions of law, and made reports and recommendations based thereon." The Circuit Court of Appeals vacated the order and sent the case back to the Board "so that respondents may be accorded the fair and impartial trial guaranteed to them by law."<sup>27</sup>

In another late case the court said: "It is difficult to see why the National Labor Relations Board should use its authority in an attempt to require, allegedly in the public interest, that the plaintiff company re-employ one who has been discharged for attempting to operate one of the plaintiff's cars while under the influence of liquor—a fact which stands undenied on the pleadings, briefs, and arguments, except by the self-serving declaration of the employee himself."<sup>28</sup> In still another case the same Board would not allow a laborer what was due him by law because he returned to work pending a strike. In other words, it sought to coerce an employee who thought the strike ill-advised nevertheless to remain on strike.<sup>29</sup> This particular administrative agency has attained a bad eminence in this matter of unfairness. For example, it was shown that a trial examiner of the Board, during a hearing, held an all day conference with the trial attorney, the regional attorney of the Board, and the regional director<sup>30</sup>—as if a trial judge, in the absence of the accused,

27. *National Labor Relations Board v. Phelps*, 136 Fed. 2d, 562, 566-567 (1943).

28. *Baltimore Traction Co. v. Flynn*, 50 Fed. Supp. 382, 389 (1943).

29. *Polish National Alliance v. NLRB*, 136 Fed. 2d, 175, 181 (1943). This part of the Board's order was set aside by the Circuit Court of Appeals.

30. House Rep. no. 3109, 76th Congress, 3d Session, pt. 1, p. 138. See also *National Labor Relations Board v. Washington Dehydrated Foods Co.*, 118 Fed. 2d, 980 (1941); *Stephens, J. in Bethlehem Steel Co. v. NLRB*, 120 Fed. 2d, 614 (1941); *Consolidated Edison*

and during the trial, were to hold such a conference with the prosecuting attorney, the director of prosecutions, and the attorney general. If a judge did such a thing he would be impeached. If it is done by an official of an administrative agency the case is merely sent back to be heard anew. But the NLRB has not been unique in this matter of unfairness. The Report of the Committee of the Bar Association of San Francisco has much to say as to unfairness of the OPA.<sup>31</sup> The Attorney General's Committee on Administrative Procedure, reporting in 1941, found clear unfairness as to issuance of subpoenas in many agencies.<sup>32</sup>

On the whole, there has been little idea of fairness as between the government and the citizen. The interests of private persons are held negligible in the zeal of the administrative agency to get results. The tendency is to weight procedure heavily in favor of the bureaus; to assume that those charged are only filibustering or are malefactors of great wealth, and that hearing their side is a bothersome formality. This attitude has been conspicuous in rules and practice as to subpoenas. They have frequently gone on the assumption that the case against the respondent had been established to the agency in advance and so it was a waste of time to allow him to make his case. However, the San Francisco committee attended a hearing at which the proceeding was against the keeper of a small restaurant in a town of no great size. As the committee points out, so far from being a malefactor of great wealth, the respondent might be the struggling operator of a small sandwich counter. But the regulations the committee was considering were not framed to give him a fair opportunity to make a defense.<sup>33</sup>

In administrative adjudication there is an obstinate tendency going counter to what has always been the first principle of judicial justice, namely, to hear the other side. Indeed, the tendency is to decide without a hearing, or without hearing one of the parties, or after conference with one of the parties in the absence of the other, whose interests are adversely affected, or to treat the statutory requirement of a hearing as a mere formality and decide upon preformed opinions as to the order to be made. Another closely related

31. San Francisco Report, pp. 9-12 (1943).

32. Report of Committee on Administrative Procedure, 124-125 (1941).

33. San Francisco Report, pp. 10-11 (1943).

tendency is to make determinations on the basis of reports not divulged, giving the party affected no opportunity to refute or explain. Another is to make determinations seriously affecting individual rights without a basis in evidence of rational probative force. Another no less widespread but not easy to reach under the statutes and procedure of today, is to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency. It is very easy to say that the public interest demands or justifies activity beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. Usually this is done out of zeal to promote assumed social ends to which the legislative body might or might not agree. It involves a degree of legislative power in administrative agencies which is not given them and ought not to be given them in a constitutional polity. Indeed, the apologists for administrative absolutism do not claim that it consists with our constitutions, state and federal. But they say that we must look at these things "against a background of what we expect the government to do," and apparently in the administrative quest of social objectives it is considered that we do not expect agencies of government to treat the citizen fairly, even if we did when our constitutions were framed. We are told that the separation of powers antedates the rise of administrative attainment of social purposes and must not be suffered to stand in the way.

As Mr. Justice Jackson has aptly put it, "findings cannot be said to have been fairly reached unless materials which might impeach, as well as what will support its findings is heard and weighed."<sup>34</sup> Again, as said in another late case of unequal action by a federal commission, "where one industry out of many in a highly competitive field is singled out and subjected to a tariff not imposed on any other, and under compulsion of an order from the commission is obliged to pay such tariff for a number of years, without action to establish like tariffs for competing industries, the order becomes an instrument of destruction. Such treatment long continued could only mean extinction of the industry so affected. So surely as the power to tax is the power to de-

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34. *National Labor Relations Board v. Indiana & M. El. Co.*, 318 U.S. 9, 28 (1943).

stroy, so is the power of rate regulation when applied inequitably."<sup>35</sup> Again, in setting aside an order of the National Mediation Board, as contrary to law, the Court of Appeals of the District of Columbia said: "As a result the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right of membership nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation."<sup>36</sup> In such cases there is usually departure from the standard set by the statute creating or governing the agency. Of this characteristic of administrative determinations an exceptionally able judge said recently that difficulty in regulation of an industry does not "justify a departure from the standard set by the statute. Under the guise of effecting its policy we ought not to disregard the means to which the realization of the policy is confided."<sup>37</sup>

In effect, often these agencies follow the statutes or their regulations or do not follow them, as they may choose in a particular case. In a recent case where the administrative official denied application of a provision in the regulations because of what he thought an economic reason, the Circuit Court of Appeals said: "An adjustment provision in a regulation has the force of law. . . If an applicant makes out a case within the framework of the adjustment provision, the denial of relief by the administrator must be deemed as an arbitrary act. The administrator is no less obligated to give the relief called for by the adjustment provision because of the discovery through experience that the adjustment provision is ill-advised and inappropriate and embarrasses the general administration of the regulation. If such has proved to be the case, the thing to do is to revoke or amend the adjustment provision."<sup>38</sup> In that case contracts had been entered into in reliance on the adjustment provision.<sup>39</sup> The administrator claimed to leave it where he could apply it when he chose and at the same time disregard it

35. *Wabash R. Co. v. United States*, 51 Fed. Supp. 141, 143 (1943).

36. Groner, C. J. in *Brotherhood of R. & S. Clerks v. United Employees*, 137 Fed. 2d, 817, 820-821 (1943).

37. Learned Hand, J. in *Queensborough Farm Products v. Wickard*, 137 Fed. 2d, 969, 983 (1943).

38. *Armour Co. v. Brown*, 137 Fed. 2d, 233, 240-241 (1943).

39. *Ibid.* 241.

when he chose. This is the royal dispensing power which was supposed to have come to an end in 1688. The administrator conceived he could make rules having the force of law and dispense with them as he saw fit, leaving them in force in case he saw fit to apply them.

It is specially significant to note the obstinate resistance of federal administrative agencies to requirements of hearing, to appeal from their orders, and to stay of their orders pending appeal.

As to the attitude toward hearing, there are numerous examples in the reports of decisions of the federal courts. Examples may be seen also in the monographs submitted to the Attorney General's Committee on Administrative Procedure. There we are told that an investigation by the Railroad Retirement Board "is not necessarily a complete one in that all sides may not be notified."<sup>40</sup> Indeed, the committee unanimously reported that the notice was too frequently inadequate and that administrative agencies frequently failed to apprise respondents fully of what they were to meet, so as to permit adequate preparation of their defenses. But although the report as far back as 1941 urged that notice ought fairly to "indicate what the respondent ought to meet,"<sup>41</sup> when the OPA adopted regulations as to procedure it did not heed this admonition, and in June, 1943, the Committee of the Bar Association of San Francisco reported that the provisions for notice and hearing were seriously inadequate.<sup>42</sup> After that report had been discussed between the committee and representatives of OPA and a final statement had been made in November, 1943, and given much publicity by publication in December, the OPA on March 6, 1944, put out new regulations, modifying its rules to some extent to meet some of the serious possibilities of abuse. But these new regulations were not to go into effect till April 1, 1944,<sup>43</sup> so that the inadequate procedure was retained many months after full notice of its objectionable features. How obstinate this resistance to requirements of fair hearing is may be seen from a case where, although the statute required a hearing, the commission made orders with-

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40. Monographs, pt. 8, p. 11.

41. Report of the Committee on Administrative Procedure, 62-63 (1941).

42. San Francisco Report, 9-11 (1943).

43. 9 Federal Register, 2558, 2561 (1944).

out notice or hearing and sought to obtain a ruling from the court that they were not necessary.<sup>44</sup> Aversion to hearing both sides on the part of federal administrative agencies is fully shown in the monographs prepared for the Attorney General's Committee in the report of that Committee, and in the testimony taken before the Senate Subcommittee on the bills proposed in that report.<sup>45</sup> While the statutes usually prescribe them and the courts require them, the administrative agencies feel that hearings are not to have any controlling influence upon determinations of facts.

Instead of determining upon evidence brought out at a hearing of both sides, there is a tendency to make determinations on the basis of consultations had in private or of reports not divulged, giving the party affected no opportunity to refute or explain. Sometimes these consultations are had by correspondence.<sup>46</sup> It was reported in the monographs prepared for the Attorney General's Committee that the Federal Trade Commission made its decision on a record of the evidence taken, with no report of the trial examiner, and after decision and order referred the case back to the trial examiner to make findings of fact in accord with the decision.<sup>47</sup> But the trial examiner did not hear oral argument nor participate in the decision.<sup>48</sup> The decision was made without findings of fact and the facts were found afterwards by one who did not hear argument. Thus the findings of fact were based on the decision, not the decision on the findings of fact. It stands out in the monographs and in the reported decisions that many administrative agencies have been regarding a hearing as a mere form to create an appearance of compliance with the constitutional requirement of due process of law. This puts the individual and the individual business or enterprise at the mercy of subordinates in the commissions and bureaus.

Naturally the administrative agencies endeavor to cut off or narrowly restrict judicial scrutiny of their procedure.

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44. *Saxton Coal Mining Co. v. Bituminous Coal Commission*, 96 Fed. 2d, 517 (1938).

45. In one case set forth in the Monographs the administrative agency objected to hearings because it feared that if it had to have a hearing it would not have a record to sustain its order if challenged in court. Monographs, pt. 12, p. 26.

46. Monographs, pt. 7, p. 13; pt. 8, p. 23.

47. *Id.* pt. 6, pp. 26-27.

48. *Id.* 27.

In a group of cases in which the National Mediation Board held that one union was represented by another and the statute did not provide expressly for review of this determination, the Supreme Court held the action of the Board not reviewable unless made so by Congress. Mr. Justice Reed (joined by Roberts, J., and Jackson, J. dissenting) said: "It seems more consonant with the genius of our institutions to assume, not that the purpose to apply a legal sanction must be plain, but that in the absence of an express provision to the contrary, Congress intended the general judicial authority conferred by the Judicial Code to be available to a union and its members aggrieved by an administrative order presumably irreconcilable with a statutory right so explicitly framed as the right to bargain through representatives of the employees' own choosing."<sup>49</sup> In another case where Congress was held to have cut off judicial review, Mr. Justice Murphy said: "That an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action, is not in keeping with the high standards of our judicial system."<sup>50</sup> Again, where regulations promulgated by the FCC in the exercise of its rule-making power were challenged as beyond the Commission's statutory authority, the Commission argued that this regulation could not be reviewed judicially till the threatened irreparable injury to the business of the party seeking review had been done. The Supreme Court of the United States, dividing 6 to 2, held a suit to enjoin this regulation maintainable. But the dissenting justices argued that "even if the Commission committed a wrong,"<sup>51</sup> there was no remedy in the courts unless Congress provided it, and such seems to be coming to be the rule.

For a long time it had been the practice of the law officers of the government, when individuals desired to challenge the constitutionality of legislation adverse to their interests, to cooperate in test suits. But under the administrative regime this is not done. A business or enterprise may find itself seriously embarrassed by the threat of a

49. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 321-322 (1943).

50. *Falbo v. United States*, 320 U.S. 549, 560-561 (1944).

51. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 429 (1942).



statute or regulation which it believes to be unconstitutional or illegal, but may be kept in that condition indefinitely until in order to relieve itself from suspense and uncertainty it comes to some arrangement dictated by an administrative agency. It is not considered a matter of public interest that parties know what their rights are. It is assumed that businesses and enterprises are inherently wrongdoers and their rights are inimical to policies which the administrative agencies claim the power to identify with the public interest. The attitude of these agencies was well put by the then chairman of the National Labor Relations Board: ". . . the requirements of fair hearing do not permit inquiry into the internal operation of the administrative agency. . . ." <sup>52</sup>

In the same spirit some administrative agencies argued that there could be no stay of enforcement of their orders pending review unless Congress expressly provided for it, and others provided by rules a procedure for obtaining a stay which in practice made it impossible of procurement. An appeal without stay, where the order is destructive of a business, is no remedy at all. A majority of the Supreme Court of the United States was not willing to go so far. They held it proper to grant a stay, where review was allowable, but left it to the administrative agency whether to grant one in the particular case. <sup>53</sup> Both defense and appeal seem to be resented by many of these agencies.

Perhaps the worst feature of administrative procedure, as it has developed since 1900, results from combining or not differentiating the receiving of complaints, investigation of them, bringing and conducting a prosecution upon them, advocacy before the agency itself by its own subordinates in the course of the prosecution, and adjudication. Thus the adjudication becomes one by or with the advice and assistance of those who investigated, prosecuted, and were advocates for the prosecution. Such things are in clear derogation of the fundamental maxim of justice that no one is to be judge in his own case; no one is to be both accuser and judge. <sup>54</sup>

52. 51 Rep. Va. State Bar Assn. 427 (1939).

53. *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 17 (1942).

54. *Wilcox v. Royal Arcanum*, 210 N.Y. 370 (1914); *People v. Trustees*, 4 App. Div. (N.Y.) 399, 401-403 (1896); *People v. Kreinheder*, 197 App. Div. (N.Y.) 887, 889 (1921); *State v. Board of Education*, 19 Wash. 8, 17-18 (1898); *Dimes v. Grand Junction Canal*, 3 H. of L. Cas. 759 (1852).

From the beginning of our constitutional policy they have been denounced. The English courts in the seventeenth century refused to allow even Parliament to provide for one to judge his own case.<sup>55</sup> Courts today refuse to allow it where policies of insurances or contracts or by-laws of corporations provide for it.<sup>56</sup> Over and again the courts a generation ago held that if one of the members of an administrative body made or promoted a charge his mere sitting at the hearing, although he did not participate in decision, would vitiate an order.<sup>57</sup> Yet the regime in which complaint is made to an administrative agency, which takes it up, investigates it, orders a hearing before itself on the complaint it has made its own, advocates it at the hearing by its own counsel before one of its own staff as trial examiner or hearing commissioner, and renders an order depriving an individual of some valuable right, involves an emotional interest in the result which precludes objective and impartial action as surely as the pecuniary interest which has always been held to disqualify. The discussion of the procedure of the OPA in the San Francisco report<sup>58</sup> is only one more illustration of the vice of combining the functions of investigating, prosecuting and judging in one administrative organization. The bad features of this procedure are brought out in the monographs prepared for the Attorney General's Committee and are recognized in the report of that Committee.<sup>59</sup> In some administrative proceedings this combination of roles has led to procedures little short of scandalous.<sup>60</sup> But the Federal Communications Commission being "convinced that there was no merit in segregation of functions in its work, and a good deal to be gained by scrapping the distinction between prosecuting and judging a case" made a practice of deciding a

55. *Bonham's Case*, 8 Co. 114, 118 (1605); *Day v. Savadge*, Hobart, 212, 217-218 (1615); *City of London v. Wood*, 12 Mod. 669, 687-688 (1701).

56. *Employees Benefit Assn. v. Johns*, 30 Ariz. 609, 619 (1926); *Supreme Council v. Grove*, 176 Ind. 356, 363 (1911).

57. *State v. Crane*, 36 N.J.L. 394, 404 (1873); *Queen v. Justices of Great Yarmouth*, 8 Q.B.D. 525, 528 (1882); *Reid v. Medical Society*, 156 N.Y. Supp. 780, 790-791 (1915); *Rex v. Hendon Rural District Council* [1933] 2 K.B. 696; *Kuberski v. Haussermann*, 113 N.J.L. 162, 170 (1934); *Narragansett Racing Assn. v. Kierman*, 59 R.I. 90, 105, 112-115 (1937).

58. pp. 8-12.

59. E.g. Monographs, pt. 1, p. 16; pt. 3, p. 138.

60. House Rep. no. 3109, 76th Congress, 3d Session, pt. 1, p. 138.

case as a whole, with no discrimination of fact, policy, and law.<sup>61</sup> Thus, if it chose, it could reach its decision in advance and promulgate it in an order after the form of a hearing. The Report of the Attorney General's Committee considered that, as a general policy, there ought to be at least a separation of functions within each agency.<sup>62</sup> But the recommendations of the majority of the Committee go no further than proposing a segregation within the agencies themselves, and, in view of the close organization of those agencies and the *esprit de corps* they develop, what was proposed does not reach and could not affect the actual situation. Nothing has been done toward remedying this condition. Even the small measure of relief proposed by the majority of the Attorney General's Committee has not been pushed. The American Bar Association measure proposes to deal with this subject effectively.

A specially bad feature of the procedure of these agencies is the great power which is given to small subordinates.<sup>63</sup> The then chairman of the NLRB said to a Bar Association Institute in April, 1939: "The Board members cannot expect to read the records. In making its decision the Board, therefore, avails itself of assistants. . . . The review attorneys analyze the evidence, inform the Board of the contentions of all the parties and the testimony relating thereto, and, after decision by the Board, make initial drafts of the Board's findings and order."<sup>64</sup> The contrast to judicial methods is significant. The report of a master may be excepted to and argued to the court. What these review attorneys informed the Board could only be conjectured and there was no opportunity to except to it or to argue as to it. If an appellate court decides on an abstract, it is one agreed on by the parties or settled after hearing both as to what it should contain, settled before argument of the case, and available to both parties at the argument, so that those who argue and those who decide have the same material before them. Decision on the basis of abstracts of the record not accessible to the parties would not be tolerated in a court. It is obvious why the agency in question objected to judicial inquiry into

61. Monographs, pt. 3, p. 29.

62. Report of the Attorney General's Committee, 207-210.

63. See Hearing before Senate Subcommittee on Bills Proposed by Majority and Minority of Attorney General's Committee (1941).

64. 51 Rep. Va. State Bar Assn., 414, 415 (1939).

its "internal operations."<sup>65</sup> The general attitude of too many of these agencies today is illustrated by the objection of the NLRB to a provision recommended by the minority of the Attorney General's Committee intended to emphasize the responsibility of the individual official. Many cannot afford the expense of formal hearings and judicial review. Their only reliance is on the fairness of a multitude of subordinates. There is need of emphasizing that these subordinates have a responsibility beyond that of carrying out in every way the general aims of the organization. They ought to feel that they are under a responsibility of dealing fairly with all parties whose interests are involved. That an authoritative statement of this responsibility, such as we have in the canons of judicial ethics, should be objected to as "dangerous" can only mean that it is thought dangerous to a policy of unfairness toward those whom the administrative agency is pursuing.

It is not, as some would have us think, merely a question of protecting wealthy wrongdoers and great corporations from reasonable regulation. They alone have a certain degree of protection by suits for injunctions and by contesting in the courts enforcement of administrative regulations. But suits for injunction are expensive, other judicial remedies have become much limited, and in the multiplicity and diversity of statutes and regulations it is often difficult to know what they are and how to pursue them. Hence it has become a question of protecting the average business and the small business and the individual man. These cannot afford to bring expensive injunction suits and carry them through to the Supreme Court at Washington, with a certainty that the administrative agency will resist to the last, will have an ample staff of bureau lawyers, bureau experts, and the law officers of the government behind it. The ordinary business and the ordinary man are coerced into settlements and consent decrees to their injury and in defiance of their rights. Nothing has been done to impose effective checks upon administrative adjudication and administrative rule-making by legislation and by providing simple, expeditious, not too expensive procedure for judicial review. The American Bar Association measure seeks to achieve this.

When one points out the characteristics of the exercise

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65. *Ibid.* 427.

of administrative powers of adjudication as they have developed in recent years, he is not attacking the responsible members of the federal administrative agencies nor impugning their intentions or motives. Administrative agencies in the states, in England, and in Australia show like tendencies. It is the system rather than the man which is chiefly at fault. What is behind those characteristics is largely zeal in carrying out laws which are felt by those chosen to administer them to be of such paramount importance as to justify the means by the end. It has been argued by an able exponent of the administrative standpoint that we should look at the exercise of administrative authority "against a background of what we now expect government to do." If we keep our eye too exclusively on that background we may overlook the importance of how we expect government to do it. The effect of well intentioned zeal upon administrative action has often been remarked. The British Commission speaks of "bias from strong and sincere conviction as to public policy,"<sup>66</sup> and we have had many examples of how such convictions could lead administrative agencies to substitute policies of their own creation for those Congress had set up in the statute creating the agency.<sup>67</sup> Speaking of the tendency of administrative agencies to look at all questions exclusively in the light of their immediate narrow task, Mr. Justice Byrnes said: "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertakes this accommodation without any excessive emphasis on its immediate task."<sup>68</sup> As a witness at the hearing on the proposals of the Attorney General's Committee before the Senate Subcommittee put it: "Administrators have a tendency to become so wrapped up in their objectives that they are often unnecessarily

66. Report of the British Commission on Ministers' Powers, 78.

67. See the remarks of Hughes, C.J. in *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U.S. 240, 255, 260-261 (1939).

68. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

unmindful of private rights.”<sup>69</sup> The present Attorney General, when Solicitor General, testifying before the Senate Subcommittee in 1941, put this tendency as an excuse for not effectively segregating the judging from the prosecuting function, saying that administrative boards were set up to carry out policies and make that the paramount consideration.<sup>70</sup> This attitude on the part of high officials of government may well aggravate the features of exercise of administrative authority which have been growing up. Under such conditions an idea of using their powers not merely to advance the policy of the statute but of using them to change the whole social and economic order and reach visionary ultimate social objectives beyond or against the policy of the statute easily takes possession of subordinates entrusted with large authority. As Mr. Justice Brandeis admonished us, nowhere is cautious scrutiny of governmental action so much needed as when the government is acting from the best of motives.

By no means all administrative agencies or officials are unfair. But experience has shown that many are and that many more are mistakenly over-zealous at the expense of the citizen and seek to be efficient by overriding individual rights. Told by teachers of administrative law that “partisanship is to be expected” and taking literally the general statement of the attitude of the zealous administrator, the administrative agencies habitually do the things illustrated by the cases discussed above.

Great stress has been laid on the simple, nontechnical methods of administrative agencies. But in the hands of agencies not disposed to be scrupulously fair, these simple, nontechnical methods easily serve as traps for the citizen who is seeking to obey the law. Let two examples suffice. In one case a state agency was empowered to classify telephone companies as urban or rural and their liabilities depended upon the classification. A small company applied to the commission to be classified as a rural company and received a letter on the letterhead of the commission, signed in the name of the commission by its secretary that the company’s exchange could be classified as rural and that the exchange

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69. Hearings on Administrative Procedure, U.S. Senate Subcommittee of the Committee on the Judiciary (1941) p. 1295.

70. *Ibid.* 1433.

might "be governed by the rules regulating such a classification." After acting on this for five years, the company was held liable, as having operated an urban exchange, because there was no record of an order of the bureau but merely a statement by its secretary which did not purport to be authorized by the bureau (though signed in its name by its secretary) and did not state who authorized the secretary to make the statement.<sup>71</sup>

In another recent case a company was charged with violating a ration order of the OPA. The Hearing Commissioner held there had been no wilful violation but that there was carelessness and suspended the company from selling, transferring, or dealing for two weeks, involving a loss of \$10,000. On appeal this order was sustained by the Hearing Administrator. It appeared that an employee of the company telephoned to the OPA office for advice and did what a subordinate in the office said to do.<sup>72</sup> As it is put as one of the advantages of the administrative regime that advice is given in advance, whereas courts can only act after things have been done or controversies have arisen, it would seem that administrative agencies are chargeable with negligence in such cases rather than the parties who apply to them, and that they ought to supervise their employees more thoroughly, in deference to fairness to the citizen, rather than look solely to a policy of maximum enforcement of their regulations.

We cannot, as some suggest, attribute the administrative absolutism which has grown up in recent years to the emergency of war. The condition which confronts our American constitutional policy had grown strong before the war. An article by Dean Wigmore, published in January, 1939, pointed out the enormous multiplication of federal agencies, their vast powers, and the great difficulty of ascertaining their practice and policies.<sup>73</sup> In April, 1939, federal administrative law was the subject of an Institute held under the auspices of the Virginia State Bar Association, in which administrative absolutism was discussed. On August 3, 1939, the President of the Virginia State Bar Association delivered an address entitled "Administrative Law and Liberty" in

71. *Wiseth v. Traill County Telephone Co.*, 70 N.D. 44 (1940).

72. *Wilemon v. Brown*, 51 Fed. Supp. 978, 980 (1943).

73. Wigmore, *Federal Administrative Agencies*, 25 A.E.A. Journ. 25 (1939).

74. 51 Rep. Va. State Bar Assn., 367-456 (1939).

which he declared the need of a measure, such as the American Bar Association had been at work upon for two years, in view of what he called the "demand for wholesale power . . . over the lives and liberties of our people" made by administrative agencies.<sup>75</sup> All this was before the war broke out in Europe and long before we entered the war. Moreover, in 1933 the American Bar Association appointed a special committee on administrative law, which has been maintained ever since. In 1937, Attorney General Cummings appointed a committee to study and report on administrative procedure. In 1940, the Walter-Logan bill, based on a draft adopted by the House of Delegates of the American Bar Association, passed both houses of Congress, but was vetoed, chiefly on the ground that the matter should await the report of the Attorney General's Committee. The most that can be said is that the tendencies which had developed increasingly during and after the prohibition regime have been given added momentum by the exigencies of the war.

Such things as we see in the conduct of administrative adjudication today belong to lands which believe in government by an omniscient superman, with supermen under him, to whom the life, liberty and property of the citizen are to be subordinated; who are so all-wise as to know offhand what the public interest demands in each case and need no hearings or evidence or arguments to advise them, but are to adjust all relations and order all conduct by the light of their *ex officio* wisdom in a political organization of society which does not recognize private rights. If, as recent realists tell us, a government is in fact simply the office holders of the moment, and so the rule of men rather than of law is the rule of human beings, who may act from the greatest variety of motives, political expediency, prejudice, spite, mistaken zeal, and may be at times fair and at others ruthless and unreasonable, it is obvious what a theory of law as whatever is done officially may lead to.

There has come to be a cult of force throughout the world. In place of the political and legal theory on which our government was founded and under which America has grown to be a land to which people have been eager to come from every part of the world in order to live the lives of free men and enjoy life, liberty, and property in security,

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75. *Ibid.* 246, 252.



new theories are being advanced. Instead of our fundamental doctrine that government is to be carried on according to law, we are told that what the government does is law. Instead of a law which thinks of citizens and officials as equally subject to law, we are told of a public law which subordinates the citizen to the official and enables the latter to put the claims of one citizen over those of another, not according to some general rule of law but according to his personal idea for the time being. A give-it-up philosophy of law and government is being widely taught. We are told that law is to disappear in the society of the future. We are told of a society in which an omniscient and benevolent government will provide for the satisfaction of the material wants of every one and there will be no need of adjusting relations or ordering conduct by law since every one will be satisfied. Thus there will be no rights. There will only be a general duty of passive obedience. We need to bestir ourselves that while we are combatting regimes of this sort, as they have developed in dictatorships and totalitarian governments, we do not allow a regime of autocratic bureaus to become so entrenched at home as to lead us in the same direction.

