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John D. O'Reilly, Jr.

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Cover Page Footnote

Professor of Law, Boston College Law School. This article was prepared for publication in the Spring of 1937, but for editorial reasons it was necessary to postpone actual printing until the present time. Since the article was written, the Committee on Administrative Law of the American Bar Association has withdrawn its proposal for the establishment of a federal administrative court [(1937) Advance Program, Am. Bar Assn. 168, 183-186] but the public law principles advanced by the Committee are little changed from those which led to its advocacy of the administrative court, so that a discussion of the basic arguments in favor of an administrative court are pertinent to the new phases of the issue raised by the Committee's current report.

THE FEDERAL ADMINISTRATIVE COURT PROPOSAL: AN EXAMINATION OF GENERAL PRINCIPALS

JOHN D. O'REILLY, JR.†

IN MAY, 1933, the Executive Committee of the American Bar Association authorized appointment of a special committee "to investigate and report upon the subject of the Practice of Administrative Law."¹ In August of the same year, at the annual meeting of the Association, this Committee, now endowed with the name, Special Committee on Administrative Law, tendered its report.² In view of the short time which had elapsed since its appointment, the Committee made no specific recommendation other than that it be continued. The report itself, including elaborations by the chairman in presenting it on the floor,³ consisted of a dissertation upon the constitutional doctrine of separation of powers, a tentative classification of administrative powers with commentary upon their relation to the separation-of-powers doctrine, an enumeration and a superficial analysis of recent legislation related to the two preceding topics, and a tentative enumeration of seven points for future activity of the Committee.

The Committee, having been continued by the Association, published its second report in the summer of 1934. There, some tentative conclusions are revealed. Although these conclusions are to some extent interdependent, the chief of them is, in the words of the Committee:⁴

"In principle and with certain exceptions, the judicial functions of federal administrative tribunals should be divorced from their legislative and executive functions, and should be placed

"(a) preferably in a federal administrative court with appropriate branches and divisions including an appellate division or, failing that,

"(b) in an appropriate number of independent tribunals (or a combination of such tribunals and an administrative court) analogous to the Court of Claims, the Court of Customs and Patent Appeals and the Board of Tax Appeals. . . ."

† Professor of Law, Boston College Law School.

This article was prepared for publication in the Spring of 1937, but for editorial reasons it was necessary to postpone actual printing until the present time. Since the article was written, the Committee on Administrative Law of the American Bar Association has withdrawn its proposal for the establishment of a federal administrative court [(1937) *ADVANCE PROGRAM, AM. BAR ASSN.* 168, 183-186] but the public law principles advanced by the Committee are little changed from those which led to its advocacy of the administrative court, so that a discussion of the basic arguments in favor of an administrative court are pertinent to the new phases of the issue raised by the Committee's current report.

1. (1933) 58 A. B. A. REP. 318.
2. *Id.* at 197, 407.
3. *Id.* at 197.
4. (1934) 59 A. B. A. REP. 539.

In 1935, the Committee failed to present a formal report, giving as its reason the facts that Congress was still in session at the date of the Association meeting, and that the Supreme Court had, on May 27, 1935, rendered decisions on matters within the Committee's field. The chairman of the Committee delivered an informal report from the floor.⁵

In 1936, the Committee, with some modification in detail, definitely sponsored the establishment of the federal administrative court which it had tentatively suggested two years before.⁶ As the Committee stated, "Its [the court's] essential purpose should be to provide a means for the gradual segregation of judicial functions now exercised by administrative agencies . . . and to establish an independent forum for the exercise of those judicial functions on issues both of law and of fact, either originally or on review of the decisions of such agencies." The proposed segregation, continued the Committee, is necessitated chiefly by the presence in the federal administrative service of three fundamental evils:⁷

"(a) The combination of judicial with executive or legislative functions [afterwards discussed by the Committee under the heading, 'The Combination of Prosecutor and Judge'];

"(b) The fact that the tenure of office of administrative judges is insecure; and

"(c) The lack of effective independent or judicial control of administrative decisions."

The Assembly of the American Bar Association passed a somewhat ambiguous resolution in response to the Committee's recommendation⁸ and, in effect, returned the proposal to the Committee with instructions to make further investigation and report to the Association's meeting in the summer of 1937. As is manifest from its history to date, the proposal is certain to be brought again before the Bar Association, and possibly before more potent tribunals.⁹ Accordingly, the time is not inappropriate for a discussion of the issues involved, to the end that those interested may develop points of view, and possibly that those upon whom decision rests may find matter for reflection and, perhaps, guidance.

While the discussion which follows will be found to be adversely critical of the Committee's reports, there is not necessarily intended a

5. (1935) 60 A. B. A. REP. 136-143.

6. (1936) ADVANCED PROGRAM, AM. BAR ASSN. 209-283.

7. *Id.* at 213; see also, (1935) 59 A. B. A. REP. 544.

8. (1936) 22 A. B. A. J. 748.

9. Several bills, embodying the substance of the proposal under discussion, have been introduced in Congress at the instigation of the Committee. See citations in the successive reports of the Committee.

wholesale condemnation of the Committee's conclusions and proposals. It is unquestionable that there are defects, and important ones, in the federal administrative service. And it is unquestionable that, where an evil exists, it should be remedied. But it is also true that, before the remedy is devised, the mischief sought to be prevented should be accurately analyzed, so that, when the remedy is prepared it will, so far as possible, cover the mischief completely and exactly, leaving no part of the evil unremedied nor yet covering too broad a field and thus possibly creating a new mischief. This last proposition has the earmarks of a mathematical formula, and it is of course idle to suggest that anything so rigid and unbending has a practical place in such dynamic sciences as law and government. Nevertheless, such a formula may well serve as the statement of an ideal towards which action can tend, and the closest practical approximation of which can be selected as the most desirable law. The criticism here to be made of the Committee is that it has failed to demonstrate that the proposed administrative court is the closest practical approximation of a "perfect" remedy for existing evils. This, primarily because the nature and extent of the evils has not been adequately analyzed, so that, in the present state of knowledge of the subject as gathered from the Committee's reports, not enough information is at hand to pass intelligent judgment upon the efficacy and propriety of the measure which has been suggested to remedy the evil.

This is the principal thesis of this paper. It is proposed to establish it first, by examining certain underlying assumptions made by the Committee and showing that at least they are not accorded universal recognition. Then will be examined the three items which the Committee designates the fundamental evils of the existing system. An effort will be made to determine whether the evils have been established as such and what the relation is between the alleged evils and the proposed remedy. Finally, a brief evaluation will be attempted of the objective merits of an administrative court.

At the outset, it must be remembered that the burden of proof is upon those who advocate the establishment of an administrative court, since they propose a departure from what, however may be its faults, is unquestionably the *status quo*. So far as the Constitution of the United States is concerned, the existing administrative system not only has being, but it also has all the elements of legality. An unbroken line of Supreme Court decisions, too familiar to require lengthy citation,¹⁰ have established that within rather broad limits it is permissible

10. *United States v. Jones*, 119 U. S. 477 (1886) (Court of Claims may adjudicate controversies between individuals and the United States); *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894) (I. C. C. may exercise delegated power to conduct investi-

for authorized subordinate governmental agencies to perform acts which will have the same force and effect as if they were performed directly by the President, or by the Congress, or by the ordinary courts. On the general issue of competency, it has never been suggested by the Supreme Court that it makes the slightest difference, under the Constitution, which of numerous subordinate agencies is selected to perform a particular act. Thus, the issue drawn is purely one of policy. It being conceded that the Constitution is indifferent to whether a given class of governmental functions is performed separately by a number of authorized agencies or collectively by a single agency,¹¹ and there being, consequently, no overpowering constitutional necessity to supplant the existing system, the question for decision is whether what is proposed is, in general, more desirable than what exists or than any practicable substitute.¹² This issue the Committee has not met satisfactorily.

I. Separation of Powers

In the first place, not all men will be able or willing to follow the Committee in its classification of governmental functions to be exercised by the proposed administrative court. "Judicial" functions, say the Committee, must be segregated. But what functions are judicial? The Committee themselves confess doubt. There is, they admit, no conclusive objective test by which a given act or function may be identified as judicial. But, they say in effect, let not the fact that, for want of a suitable definition of judicial function, we are unable to determine whether some acts are judicial, obscure the further fact that a good many administrative acts must be judicial, for the reason that they are neither legislative nor executive.¹³ For the Committee avowedly

gations); *United States v. Grimaud*, 220 U. S. 506 (1911) (Secretary of Agriculture may define a criminal offense); *Hampton Co. v. United States*, 276 U. S. 394 (1928) (President may raise and lower tariffs); *Old Colony Trust Co. v. Comm'r. Int. Rev.*, 279 U. S. 716 (1929) (Board of Tax Appeals may adjudicate disputes of taxpayers); *Baltimore and Ohio R. Co. v. Brady*, 288 U. S. 448 (1933) (reparation award of Interstate Commerce Commission may be not only valid, but also conclusive).

11. In fact, it has been suggested in the present connection, that there is serious constitutional objection to the jurisdiction of the proposed court. Cooper, *The Proposed Administrative Court* (1936) 35 *MICH. L. REV.* 193.

12. The last phrase is properly made a part of the issue. The proposed change of the existing administrative structure is so broad and far-reaching that every precaution must be taken to ensure that a change, if made, will be permanently desirable. It can safely be assumed that once such a sweeping change of governmental structure is enacted into law it will not readily be modified thereafter. Past experience is eloquent to the effect that it is a thousand times more difficult to reform a reform than it is to have it enacted in the first place. A not inappropriate parallel is found in the federal circuit courts of recent memory. Created by the first Judiciary Act, they were continued in existence for well over a century, despite continued protests of bench and bar.

13. (1933) 58 A. B. A. *REP.* 411; (1934) 59 *id.* at 541.

take as their starting point the premise that all governmental powers are classified in one or another of the three categories provided by the doctrine of separation of powers.

Mention of this starting point gives rise to a need of definition of terms. For, despite the impressions created by the copy books, the expression "separation of powers" has more than one connotation. The phrase had one meaning for Baron Montesquieu, writing in the eighteenth century, but has a quite different one for the Supreme Court of the United States expounding the Constitution of the United States in the twentieth. To the great Frenchman, the phrase was the key to the ideal of decentralization of governmental authority. His thesis has been given classical embodiment by James Madison as follows:

"In saying 'There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye [the British Constitution] can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."¹⁴

To the Supreme Court, on the other hand, the phrase has an additional meaning. Although the court recognizes, and has, on occasion applied¹⁵ the maxim in the sense in which Montesquieu is said to have formulated it, its chief function in our constitutional law has been as a means of implementing an ideal of *classification* of governmental powers. Thus, the Court will not review the finding of fact of a public utilities commission, not because such review would tend to arrogate to the court the power of other branches of the government, but simply because the acts of the commission are not "judicial" in the sense in which that term is used in Article III of the Constitution.¹⁶ Or, an executive order of the President by the way of delegated legislation is invalid, not because it would tend to bring all legislative power to the White House, but simply because it was not preceded by a technically complete exercise by Congress of its function as stated in Article I.¹⁷

14. The Federalist (1788) No. XLVII (Hallowell ed. 1852) 224. Italics in original.

15. Evans v. Core, 253 U. S. 245 (1920); O'Donoghue v. United States, 289 U. S. 516 (1933).

16. Keller v. Potomac Elec. Co., 261 U. S. 428 (1923).

17. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); A. L. A. Schechter Corp. v. United States, 295 U. S. 495 (1935). Cf. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 305 (1933).

It would not be inaccurate to say that the doctrine as enunciated by Montesquieu and Madison is a *political* doctrine of separation of powers, and lays down a fundamental rule of universal application for the maintenance of a democratic form of government. The doctrine as formulated by the Supreme Court of the United States is a *legal* or *constitutional* doctrine of separation of powers. This legal doctrine is not, like the political doctrine, a corollary of a basic and immutable truth, but is simply an authoritative pronouncement of the principle that a written document, itself having no pretensions to being an embodiment of universal truth, impliedly provides for the making of three categories into one of which each governmental function must be placed. That the doctrines of Montesquieu and of the Supreme Court each call for a tripartite division of the functions of government is mere accident. The number of divisions is not of the essence of either doctrine. To Montesquieu, the important thing was that there be at least two classes of governmental power and that the individuals who exercised the one did not dominate and control those who exercised the other. Indeed, John Locke, who preceded Montesquieu by over a half century, argued, in effect, for a bipartite division of powers.¹⁸ Nor is trinity of the essence of the legal doctrine of separation. The categories of governmental powers are three in number because the framers of the Constitution have provided for three main branches of government. For the legal doctrine is an expression of the proposition that the tree of positive law is subject to the constitutional limitation of consistency with the root of constitutional authorization. The political doctrine is the heart of democratic government. The legal doctrine is an aspect of the constitutional law of the United States. The two are to each other as the private law correlatives, substance and form.

If the Committee's starting point is the doctrine of separation of powers in the political sense, it is difficult to see how the existing administrative organization violates that doctrine. The very number and diversity of departments, bureaus, boards, commissions and courts, their varying degrees of responsibility to the Executive or the Congress, and in not a few cases, non-responsibility to any other branch of the government, all make for a dispersion of powers such as to drive from any informed mind the thought that it is conceivable that all governmental powers can become concentrated in the hands of a single individual or of a single group. In fact, as will be observed in greater detail later, the question would seem to be whether the political doctrine of separation of powers has not been practiced to excess.

18. LOCKE, *ESSAY ON GOVERNMENT* (1690). Locke postulated an executive, a legislative, and a federative branch of government, but the executive and the federative powers he vested in the same individual, the executive.

If, on the other hand, the Committee took as their starting point the doctrine of separation of powers in the *legal* sense, one questions the pertinence of that doctrine in a discussion of administrative reorganization. The legal separation doctrine is simply a doctrine of constitutional limitations, and, as has been seen, the issue is, not whether the existing administrative organization oversteps the bounds of constitutionality, but whether, in the interests of efficiency and other consideration of policy, the proposed reform is desirable. Montesquieu has never said, nor has the Supreme Court ever decided, that every governmental act, in the essence and nature of things, is subject to classification into one or another of three categories as executive, legislative, or judicial. It is true that, in order to determine whether, under the Constitution, or even under a statute, it has jurisdiction to review a given administrative act, the Supreme Court is bound to classify the act in one of the constitutional categories. That much is understandable in the light of the Supreme Court's treatment of the Judiciary Article of the Constitution. But it does not follow that the label of the Court's classification must remain affixed to the act in a field where constitutional (or statutory) limitations are not of immediate concern, and where, consequently, there is opportunity for greater variety of category. To insist that such classification of powers is a universal principle, pervading the whole field of government, rather than, at most, a positive rule of the Federal Constitution, is purely gratuitous and involves undesirable ambiguity in argument.

An illustration taken at random from the myriad list of administrative functions is that of rate-making for public utilities. It has been held for the purpose of determining federal jurisdiction to grant injunction against the rates, that the Supreme Court of Appeals of Virginia "legislates" when it reviews the findings of fact of the State Corporation Commission looking to the making of a rate order.¹⁹ But in any other connotation, a Virginia lawyer would scarcely agree that this or any other function of the court is legislation. The Virginia court itself has expressly said that the commission's action (and presumably its own) in passing upon the reasonableness of rates is "judicial."²⁰

To be sure, one part of the process of rate-making is similar to the judicial process. When the commission, as it must under statutory and constitutional requirement, investigates, for example, the reasonableness of rates and comes to a conclusion, its action is, in form and substance, similar to that made traditional in the ordinary courts. When,

19. *Prentis v. Atlantic Coast Line*, 211 U. S. 210 (1908).

20. *Commonwealth ex rel. Att'y Gen. v. Atlantic Coast Line R. Co.*, 106 Va. 61, 55 S. E. 572 (1906); and see *People ex rel. Central Park, N. & E. R. R. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909).

after such investigation and decision, the commission makes its order, there is an act similar to that performed by the legislature in making a statute. And when the commission operates its machinery of surveillance to ascertain whether the order is being observed, its function bears a resemblance to the undefined task which the Constitution delegates to the Executive. Logically, these three concrete functions of the commission are distinguishable, just as are the different operations of a machine. But logical distinctions do not necessarily make for practical separability. When the three functions are so interdependent and mutually complementary as to constitute in reality a single function of "rate-making" ("effective rate-making," if you will) one would naturally, in the absence of preconceived ideals or of constitutional necessity, describe that function as, not legislative, not executive, not judicial, but (if there is any necessity for classification at all) administrative—performed in the exercise of a subordinate governmental power. The Supreme Court recognized that the function had to be taken as a whole, and, being under a constitutional necessity of classifying, it placed rate-making in the legislative category, on the assumption that it more nearly fitted that one than either of the two others available. But that the decision eternally and indelibly marked rate-making, or any part thereof, a "legislative function" is palpably not the fact.²¹ It has never been authoritatively laid down that the old categories, made for the purpose of establishing the government as a whole, must necessarily pervade, in correspondingly smaller gradations, each of the inner parts of the structure.

From the foregoing, it should appear that the doctrine of separation of powers, whether considered as a political or as a legal doctrine, does not give support to the Committee's major assumption that judicial functions of federal administrative tribunals should be divorced from their legislative and executive functions, for the doctrine does not even establish that the functions are distinguishable, not to say separable. But there is still another basic assumption of the Committee which is not entirely satisfactory, but which nevertheless affects the validity of all the conclusions reached. Implicit in the Committee's argument is the assumption that "judicial power" has a single connotation, regardless of the circumstances of its exercise. That exercise of this function by one department of government requires, under the immutable law of nature, the same safeguards against abuses as does its exercise by any other department. Thus, the acts of the Board of Tax Appeals in its ordinary jurisdiction, and those of the Secretary of Labor in determining whether a steamship owner is to be fined for violation of the immigration

21. *People ex rel. Central Park, N. & E. R. R. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909).

laws, being both "judicial" acts, both should, argues the Committee, come within the jurisdiction of the proposed court.²²

Functional analysis of these instances of administrative adjudication will reveal many reasons why jurisdiction in each case should remain where it is. It will also, doubtless, reveal many reasons for change. The sound solution, manifestly, is to weigh the reasons *pro* and *con* in each instance of administrative exercise of "judicial" power and to decide whether the greater advantage lies in the maintenance of the *status quo* or in some alternative—and not necessarily in a single alternative.

To argue that, because a governmental act performed by an administrative agency bears analogy to governmental acts which have traditionally been performed by courts, that act should, as a matter of general policy and without constitutional necessity therefor, be transferred to the jurisdiction of a court, is to lose sight of the fact that government, being a living, organic thing, like the common law itself transcends the artificial rules and categories by which it is sought to be encompassed. It is to lose sight of the fact that the proper task of reformers (the term is used in the literal, rather than in the popular sense) is to find a means of preserving a healthy balance between government and governed and to promote the efficiency of each, rather than to bring about conformity of state organization to a prearranged pattern.

That the way of reform is piecemeal change rather than wholesale transformation was indicated by the reception given to the Committee's report at the Boston meeting of the American Bar Association.²³ The representative of the Association's Committee on Federal Taxation announced that he and his associates were opposed to the application of the proposed change to the Board of Tax Appeals. A similar objection was voiced on behalf of the Section of Patent Law to any change of the Court of Customs and Patent Appeals. Objections of this sort may be discounted to some extent on the ground of professional conservatism and aversion to change. But even after a liberal discount, this thought remains. In the eyes of qualified observers, these two tribunals, the one an "administrative board," the other a "legislative court," are performing their respective functions in an eminently satisfactory manner. In fact, it is none too certain that their efficiency would not be materially impaired by the sort of consolidation proposed. Yet, to continue their present status would be in violation of the ideal set up by the Committee.

This thought suggests another. If there are two legitimate exceptions to the rule arrived at by the Committee, should not further inquiry be made among experts in the other fields which would be affected by the proposal in order to determine whether there are other legitimate ex-

22. (1936) ADVANCE PROGRAM, AM. BAR ASSN. 235-237.

23. *Id.* at 213; see also (1934) A. B. A. REP. 544.

ceptions? When this is done it may be possible (and until it is done it will be impossible) to determine whether the Committee have arrived at a sound principle of government or its rule has so many exceptions that it is something of an exception itself. The non-existence, in our public law system, of a single specific for the multitude of ills of a conglomerate administrative organization has been marked by Professor Frankfurter, addressing himself to a germane topic:²⁴

"The problems subsumed by 'judicial review' or 'administrative discretion' must be dealt with organically; they must be related to the implications of the particular interests that invoke a 'judicial review,' or as to which 'administrative discretion' is exercised. In short, for the scientific development of Administrative Law a subject like 'judicial review' must be studied not only horizontally but vertically; we must explore not 'judicial review' generally or miscellaneously, but 'judicial review' of utility regulation, 'judicial review' of Federal Trade Commission orders, 'judicial review' of postal fraud orders, 'judicial review' of deportation orders. 'Judicial review' in Federal Trade Commission cases, for instance, is affected by totally different assumptions, conscious and unconscious, from those which govern courts when reviewing orders of the Interstate Commerce Commission. Likewise 'judicial review' in postal cases is under the sway of the whole structure of which it forms a part, just as 'judicial review' in land office cases or in immigration cases derives significance from the agency which is reviewed no less than from the nature of the subject matter under review."

To recapitulate: So far as the Committee's argument is based upon the doctrine of separation of powers, it fails to convince on either of two vital points. (1) It has not been satisfactorily shown that there can be extracted from existing administrative process an element of "judicial function" which can be synthesized with the remaining elements of the process so as to produce a better result than the existing process turns out. (2) Even if this were the case, it is gratuitous to assume that all of the synthesis can be accomplished in a single crucible.

II. Administrative Independence

To pass from the Committee's criticism of the existing administrative structure because of its relation to separation-of-powers, and take up the more specific objections, we find the strongest exception taken to the existence of the prosecutor-judge combination is that it is in disregard of a maxim fundamental to the administration of justice. The gist of this objection apparently is that identity of prosecutor and judge tends to destroy rights and liberties of the individual and is inconsistent with the spirit of the Bill of Rights. The maxim relied upon is over three centuries old in the Anglo-American law, and its application to ad-

24. FRANKFURTER AND DAVISON, *CASES ON ADMINISTRATIVE LAW*, (2d ed. 1935) viii.

ministrative tribunals has been suggested for about three years. The Committee cites Lord Coke's pronouncement in *Dr. Bonham's Case*, "*Iniquum est aliquem suae rei esse judicem*," and draw from it the generalization that an administrative officer or official must not be allowed to make charges and then decide upon the merits of these charges. Were James Barr Ames alive, he might be prompted to repeat his observation on the "power of a great name for the perpetuation of error."²⁵

Not to discourse at undue length upon *Bonham's Case*, it should be pointed out that Coke's statement as to the iniquity of judging one's own case was probably *obiter dictum*, or, at best, an alternative ground of decision in the case. Again, it was ambiguous. It is none too clear, from his accompanying examples of statutes "impertinent to be observed," whether he had in mind judicial veto of legislation which provided for an interested *judex*, or simply judicial disregard of statutes whose terms were inconsistent with themselves. The latter has been the judicial interpretation of the dictum in England. A century after *Bonham's Case* we find the court holding²⁶ that an action brought by the Mayor and Commonalty of London could not properly be tried before the Mayor and Aldermen of London because of an objectionable identity of plaintiff and judge. But, per Ward, C.B.:

"This objection does not arise from point of interest, but from point of inconsistency, for an objection from the point of interest would be of no force; for the mayor has no greater share of the penalty to be recovered than even the party defendant has."

True, there is some validity in Lord Coke's dictum. This much was recognized in *London v. Wood*, and a century and a half later the House of Lords went so far as publicly to rebuke and reverse the Vice Chancellor of England for sitting in judgment in a case which involved the interest of a corporation some of whose stock he held.²⁷ And within the past decade the Supreme Court of the United States found wanting in due process of law a statute under which a judge in a criminal court had an interest in the fines which he imposed to the extent of an average of \$100 per month in addition to his salary.²⁸ In the opinion in the latter case, Mr. Chief Justice Taft used language which, if taken literally, lays down a rule even more strict than a literal interpretation of Lord Coke's dictum. He said:

25. Ames, *Disseisin of Chattels* (1890) 3 HARV. L. REV. 337, 339; 3 SELECT ESSAYS ON ANGLo-AMERICAN LEGAL HISTORY (1907) 541, 582.

26. *City of London v. Wood*, 12 Mod. 669, 88 Eng. Reprints 1592 (1702).

27. *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759, 10 Eng. Reprints 301 (1852).

28. *Tumey v. Ohio*, 273 U. S. 510, (1927). But see *Dugan v. Ohio*, 277 U. S. 61 (1928).

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

But this language goes beyond the necessities of the particular case, and is probably an effort to state the ideal of judicial disinterestedness, rather than a general test of judicial qualification. And it is submitted that the decisions in the cases cited and in other similar cases are authority for no more than the proposition that an interest which will *a priori* disqualify a judge is a *pecuniary* interest.²⁹ Other interests may disqualify him in particular cases if it can be shown that they actually prejudice him or warp his judgment, but if there is pecuniary interest, he is disqualified, even though he can completely disregard the influence of such interest.

Such a simple test as this served admirably in a day when judicial business consisted for the most part of adjudicating actions of assumpsit and ejectment, and when, apart from such occasions, the individual had little direct contact with his government. But, with the tremendous growth, particularly in recent years, of administrative establishments, and the consequent increasingly intimate relation between individual and state, the thought has begun to find expression that other than pecuniary pressures may make their influence felt in determinations which affect the interests of individuals in particular cases.

Thus, it is possible that a broad political policy of a given governmental officer or department will color a decision made by that officer or department in the case of a particular individual, which should, of course, be decided according to the letter of the law. To become concrete the Interstate Commerce Commission in its administration of the Transportation Act³⁰ and of the Federal Motor Carrier Act,³¹ may be compelled to adopt some policy with respect to the conflicting interests of common carriers by rail and by motor. Let us suppose that it determines upon the policy of encouraging the development of rail, rather than motor transportation in a given growing locality. Suppose further that *X*, a trucker doing business in the locality, is cited to show cause why his certificate of public convenience and necessity should not be revoked. It is important that *X* be not deprived of his certificate merely to bring about a transfer of his business to the railroads. It is equally important that the certificate be revoked if *X* has committed a sufficient breach of the law. Does the Commission's (supposed) pro-

29. *Cf.* *United States v. Wood*, 299 U. S. 123 (1936); and see *Reynolds v. United States ex rel. Dean*, 68 F. (2d) 346 (C. C. A. 7th. 1934).

30. 41 STAT. 456 (1920), 49 U. S. C. A. §§ 71-74, 76-78, 141 (1927).

31. 49 STAT. 543, 49 U. S. C. A. § 301 (1935).

railroad policy disqualify it to pass upon *X*'s case? This, it will be observed, is quite different from the problem of disqualification of the judge who has a financial stake in the litigation before him. Here the matter of *personal* interest does not enter. But there is a serious problem as to the significance of the *official* interest which is undoubtedly present. Is it to be presumed that the desire to effectuate its broad policy will so blind the Commission to the merits of the case that it is not fit to pass upon the issues? Or is the *likelihood* or *possibility* that departmental *esprit de corps* will enter into the balancing of the evidence sufficient to ordain that, as a matter of caution, the adjudication should be removed from the Commission's hands?

This matter was considered, although somewhat obscurely, in 1932, by the (Sankey) Committee on Ministers' Powers.³² The obscurity is occasioned chiefly by the Committee's tenacious adherence to the "Rule of Law" as enunciated by Professor Dicey, and its consequent adoption of a novel (and, it is submitted, faulty) classification of "judicial" and "quasi-judicial" powers.³³ In brief, the argument is that a "judicial" decision is a resolution of a dispute according to the law of the land, whereas a "quasi-judicial" decision is a resolution of a dispute by whatever solution recommends itself to the discretion of an administrative officer. It will be observed that there is implicit in this sort of thought the premise that "judicial act" is an undifferentiated thing, whether performed by an ordinary court or by an administrative officer or tribunal.

But, taking the Sankey Committee's categories for what they are worth, there is a thought developed in relation to them which is pertinent to the present discussion. The Committee say, in their report:³⁴

"We are of opinion that in considering the assignment of judicial functions to Ministers, Parliament should keep clearly in view the maxim that no man is to be judge in a cause in which he has an interest. We think that in any case in which the Minister's Department would naturally approach the issue to be determined with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the cause. Parliament would do well in such a case to provide that the Minister himself should not be the judge, but that the case should be decided by an independent tribunal."

The Committee here were apparently wrestling with the thought that it is necessary in some instances to make a line of demarcation between the policy-making and the decision-making branches of a governmental department or bureau. Much the same thought was more recently ex-

32. H. M. STATIONERY OFFICE (1932) Cmd. 4060.

33. *Id.* at 73.

34. *Id.* at 78.

pressed by the President's Committee on Administrative Management,³⁵ who made the further point that failure to establish such a line of demarcation is undesirable because it tends to weaken public confidence in the decision-making tribunal.

¶The important fact, for purposes of the present discussion, is that, although three qualified bodies of investigators have discerned what is essentially the same objectionable point in existing administrative organization, they have arrived at three different conclusions as to what is the proper solution, and, as far as can be determined from their reports, none of them gave consideration to the conclusions reached by the others! The American Bar Association Committee, as has been seen, advocates the segregation and cloistering of the so-called judicial functions by the creation of a special administrative court. The Sankey Committee would have the business transferred to the ordinary law courts.³⁶ The President's Committee would assimilate all independent agencies into twelve executive departments and set up in each department a judicial section which "would be 'in' the department only for purposes of 'administrative housekeeping,' such as the budget, general personnel administration, and *matériel*. It would be wholly independent of the department and the President with respect to its work and its decisions."³⁷

A general criticism of all of these solutions is that each committee seems intent upon a single simple formula in answer to an essentially complex problem, and that, without adequate analysis of the problem. It is one thing to state the abstract truth that there is a policy-making function distinct from the adjudicating function, but it is quite another to say that a device for preventing the policy-maker from influencing the adjudicator is necessarily applicable in every phase of governmental activity. In such a process there is failure to recognize the living, dynamic character of government, the fact that each department and subdivision is a separate organism, so affected by nature and circumstance as to require treatment of its individual problems in an individual way.

Concretely, it will scarcely be suggested that the considerations which may impel a separation of functions in the process of deporting aliens are the same as would impel a classification of personnel in reparation proceedings before the Interstate Commerce Commission. The outrageous alliance between the Departments of Labor and of Justice which brought about the Red-baiting hysteria of 1919 is sufficient indication that the field of deportation is one where the policy-makers are pecu-

35. Sen. Doc. No. 8, 75th Cong. 1st Sess. (1937) 67, 68.

36. *Op. cit. supra* note 32, at 115.

37. *Op. cit. supra* note 35, at 69.

liarily able and on occasion likely to exert improper influence over adjudicators and adjudications. There is, on the other hand, nothing in the history of the Interstate Commerce Commission to indicate that its reparation decisions are unduly affected by any of the policies it has adopted. In each instance, there is the policy-maker and the adjudicator. In each instance, it is theoretically possible for abuse to creep in. But the fact is that the likelihood of abuse is varying in degree and its actuality varying in incidence. It would seem, then, that the problem presented by the presence, side by side, of the policy-maker and the adjudicator, is not a single one, appearing with equal intensity in all fields of government. And if this is so, it would seem that the remedy for the problem is not to be found in a single panacea.

It might be added parenthetically that there seems to be behind the reasoning of the three committees mentioned a basic assumption to which some exception might well be taken. There lurks, as an "inarticulate major premise," the proposition that fact-finding and exposition of law are processes to be carried on *in vacuo*, with *actor* and *reus* presenting their evidence, and the *judex* blindly weighing the respective contentions and dispassionately measuring them against an objective norm. The facts, of course, are otherwise. While it is idle to attempt to find the explanation of a judicial decision in the judge's breakfast menu, it is nevertheless clear that, at least in the field loosely described as public law, the judge's reaction to a set of facts and his interpretation and application of statutes are colored by birth, environment, education and experience. In brief, he is *influenced* by his own concepts of policy. The fact of some influence, drawing away from the pure objectivity of law, is inescapable. It would seem immaterial whether the influencing policy is that of a federal district judge, or of an administrative court judge, or of an independent departmental examiner, or of a cabinet secretary. The important question is as to the degree of influence exerted. Is it, or is it likely to be, much or little? Is it consistent with attainment of the ends of law and government? And the answer to these questions is to be found, not in recasting all the adjudicatory functions of government into one or two molds, but rather, in examining each existing adjudicating body and finding to what extent it stands in need of and is susceptible of recasting.

III. Tenure of Office

The second argument which the American Bar Association Committee make in support of their proposal is by far their weakest. It is based, as has been seen, upon the insecurity of tenure of administrative officers charged with adjudication. The Committee introduce their argument with a quotation of Hamilton's aphorism, "A power over

a man's subsistence amounts to a power over his will." This theme is developed by quotations from *Evans v. Gore*³⁸ and *O'Donoghue v. United States*,³⁹ and the conclusion reached that security of tenure is as desirable for administrative officials who perform "judicial" functions as for the judges in the courts created under Article III of the Constitution. Basically, this argument is a corollary of the preceding one. Just as there is danger in the adjudicator being influenced by himself or by his immediate superior acting in an executive capacity, so too there is danger if influence comes from without in the form of intimidation. The impartiality of the adjudicating administrator is potentially lessened to the extent that Congress can reduce or cut off his salary or the President can summarily remove him from office. Here, again, is an instance of the Committee's *a priori* reasoning which, if sufficient investigation were made, might turn out to be specious. At least it is true that there is authoritative opinion diametrically opposed to the Committee's idea,⁴⁰ and, so far as appears from the Committee's reports, no consideration has been given to any of the existing alternatives. That this matter is truly controversial, and that the last word has yet to be spoken about it, is the evident view of the American Bar Association itself. That body has invited entrants in its current annual prize essay contest to submit papers on the topic, "The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers."

Apart from the validity of the ideal set up by the Committee, it is doubtful as a practical matter if the ideal could be implemented by the adoption of the plan of an administrative court. Such a court would be a "legislative" and not a "constitutional" court,⁴¹ and its judges, consequently, would have no constitutional security of tenure under Article III.⁴² Even if Congress should provide such security at the beginning, there would be nothing to prevent succeeding Congresses from taking it away. The President would have the power of removal of judges at least for cause,⁴³ and quite possibly even without cause.⁴⁴ There would be no known means, short of a constitutional amendment (and that the Committee do not suggest) of abrogating the congressional (or in proper cases the executive) power to reduce salaries. In brief, no more

38. 253 U. S. 245 (1920).

39. 289 U. S. 516 (1933).

40. See authorities cited in Cooper, *The Proposed Administrative Court*, (1937) 35 MICH. L. REV. 565, 578 *et seq.*

41. See Cooper, *The Proposed Administrative Court*, (1936) 36 MICH. L. REV. 193, *passim*.

42. *Williams v. United States*, 289 U. S. 553 (1933).

43. *Rathbun v. United States*, 295 U. S. 602 (1935).

44. *Myers v. United States*, 272 U. S. 52 (1926).

adequate provision can be made for security of tenure of judges of the proposed court than can be made for that of administrative officers under the existing system.

A more fruitful direction for the Committee's energies, if they would seek a remedy against insecurity of tenure in such cases, would be a study of available devices for curbing abuses of the executive and legislative power to affect the salary and tenure of administrative officers. They might, for example, examine the feasibility of concerted bar association activity in the scrutiny of proposed legislation to assure that it contains provision for whatever measure of administrative independence is felt to be necessary. They might examine such extra-constitutional machinery as means of bringing pressure to bear upon an executive who threatens to misuse his power of removal. They might adopt a long-range plan of attack upon the problem, seeking a solution which would be permanent rather than a temporary stop-gap, and consider what bearing an extension of the Civil Service principle would have upon administrative independence, and how such extension, if it is found desirable, could be brought about.

IV. Need of Judicial Review

It is the third point of the Committee, the alleged need of broader judicial review of administrative action than is afforded at present, that will carry the greatest appeal to the professional legal mind. There seems to be ingrained in the professional soul a profound reverence for the institutions and procedures of the common law, and a frank distrust of anything in derogation of those institutions and procedures. This reverence finds its most coherent expression in the doctrine that every individual involved in a dispute has an inherent, if not a constitutional, right to a hearing before a court of common law jurisdiction. This doctrine was first enunciated as a rule of American public law by Mr. Justice Story, in his dissenting opinion in *Cary v. Curtis*,⁴⁵ and Story's view, although never accepted by the Supreme Court, has exerted untold influence upon the outlook of lawyers for nearly a hundred years.

The basic assumption of those who hold this sort of view seems to be that responsibility for the maintenance of individual rights is solely judicial, *i.e.*, that these rights can be guaranteed only through the instrumentality of constitutional courts. Implicit in this assumption is the conviction, inarticulate perhaps, but real nevertheless, that there is inherently an antagonism, a working at cross-purposes, between the constitutional courts on the one hand, and all the other agencies of government on the other. That the main function of courts is to keep careful watch for the abuses and excesses of power of which the other branches

45. 44 U. S. 235 (1845).

of government are always to be suspected. That this conviction has for years pervaded American constitutional thought is true. That it has been acquiesced in by the various branches of government themselves is true.⁴⁶ But that it is a necessary or logical corollary of the American doctrine of judicial supremacy is none too clear.

Behind this conviction stands the belief that the essence of constitution-making lies in its setting up a system of checks and balances, the judiciary being the ultimate and unchecked check. But the weakness of a constitutional system which places the main emphasis upon checks and balances was recently indicated by eminent authority:⁴⁷

"Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government or that it alone can save them from destruction is far more likely in the long run, 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says."

If this view is sound, it would seem that interest in a strong constitution demands a re-examination of the propriety of emphasis upon checks and balances rather than upon some of the more obvious purposes of constitutions. This is not to suggest that checks and balances do not belong in a constitutional system. They have a place in fact in the constitution, and the sole question raised is as to a proper evaluation of that place. It is submitted that they are negative and secondary; that sight should not be lost of the fact that a constitution performs primarily the positive function of erecting a government; that secondary things may properly be conceived of as a means of attaining the primary end, but they should not be given such emphasis as to become ends in themselves to the obscuration of the original primary end.

Apart from the sentiment expressed in the Story *dictum*, and its corollary that judicial review is a *desideratum* for its own sake, the standard of reviewability of administrative action should be similar to the standard of reviewability of ordinary judicial action. That is to say, review should be provided in instances where, in the judgment of the legislature it is likely to be necessary or helpful towards the accom-

46. Congressional debates are replete with instances of legislators disclaiming power to pass upon the constitutionality of proposed legislation. Very recently much political capital was made of a Presidential message urging enactment of a bill "despite doubt, however reasonable, of its constitutionality."

47. Stone, J., dissenting, in *United States v. Butler*, 297 U. S. 1, 87 (1936).

plishment of the purposes for which particular laws are made. In all other instances administrative adjudications should have all the finality accorded unappealable decisions of the ordinary courts. This thought, whether consciously or not, has been translated into legislative technique in grants of jurisdiction to administrative bodies. In no statute does Congress appear to have taken the position that administrative decisions should be appealable simply because they are administrative. Rather, there is a distinctly discernible tendency, particularly in more recent legislation, to make more and more administrative adjudication conclusive and unreviewable. And, on the whole, the courts have shown themselves to be in sympathy with this plan. Reserving to themselves a right of review, whether or not it is provided in the statute, when administrative deprivation of constitutional rights is alleged,⁴⁸ they have in other cases acquiesced in literal interpretation of the statutes.

This is not to say that a poorly drafted statute, once enacted by Congress, may enable an administrator to run riot, to the detriment of individual rights, so long as the rights he destroys or ignores do not come under the head of "constitutional" rights. Nor is the Supreme Court's self-imposed limitation of judicial review of administrative findings of fact productive of such a result. In a static and sterile system of public law, possibility of abuses under such conditions would be very real, and would justify such distrust of any administrative finality as the Committee expressed when they said:⁴⁹

"The administrative agency needs only slightly more than a scintilla to support a finding of fact and, with only a vague statutory standard to guide its determination, can frame its findings to fit in safely with the law and with a preconceived result."

The argument, however, is predicated upon an entirely too naive hypothesis of the true function of the federal judiciary in the exposition of the Constitution. It postulates a judiciary of gullible personnel whose procedure is the largely mechanical one of lifting aside a curtain and revealing the pre-existing but hitherto concealed essence known as the law of the particular case. A similar argument was made to the Supreme Court nearly thirty years ago, and it should have been completely shattered by the classic reply of Mr. Justice Harlan:⁵⁰

"Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of Executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment

48. *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452 (1910); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936).

49. *Op. cit. supra* note 6, at 229.

50. *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195 (1910).

or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

Nor is this mere rhetorical bombast. The history of the Court has indicated that Mr. Justice Harlan was guilty of, if anything, understatement. Although the Court professes to lack jurisdiction to review administrative findings of fact,⁵¹ it found no difficulty in distinguishing and deciding that there is no lack of jurisdiction where the facts are those upon which administrative jurisdiction depends.⁵² The Court is definitely committed to the rule that administrative regulations long in force under a statute are presumably adopted by Congress as a part of the statute at the time of re-enactment.⁵³ But where this rule would reach a result manifestly not intended by the legislature, the Court has no difficulty distinguishing it within weeks after having reaffirmed it.⁵⁴ The bearing of facts upon the issue of "confiscation" has given the court a ready means of control of rate-making bodies.⁵⁵ In a word, so flexible are the results that may be had from use of the extraordinary writs that as long as these are at hand there need never be wanting a way to overcome the technicalities upon which some administrative body may rely to defeat the true ends of the laws.

To recapitulate briefly. The major arguments of those who advocate the establishment of a federal administrative court are all based upon faulty premises. On the score that the existing administrative organization contains a wrongful mixture of functions, we have seen that there has been failure to differentiate pecuniary from official interest. On the score that administrative officers have at present too little assurance of tenure, we have seen that the personnel of the proposed court would have no better protection. Finally, on the score that there is at present insufficient review of administrative action, we have seen that the argument postulates review as a thing to be desired for its own sake, rather than as a means to an end.

V. Personnel and Efficiency

In addition to the weakness of the arguments advanced in support

51. *Keller v. Potomac Elec. Co.*, 261 U. S. 428 (1923).

52. *Crowell v. Benson*, 285 U. S. 22 (1932).

53. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931); *McFeely v. Commissioner*, 296 U. S. 102 (1935); *Morrissey v. Commissioner*, 296 U. S. 344 (1935).

54. *Koshland v. Helvering*, 298 U. S. 441 (1936).

55. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920).

of the proposal, there are affirmative objections to the establishment of an administrative court. The administrative process is essentially that of experts, and calls for specialized technical skill in a high degree. The adjudicator must have a familiar knowledge not only of the evidence in the case before him, but also of the *minutiae* and imponderables which as a background, have a valid bearing upon the issues, but whose natures do not lend themselves to specific phrasing by witnesses. The Committee's statement that the administrative decision "is ordinarily no more difficult than the functions performed daily by every court in the country,"⁵⁶ is purely gratuitous and the Committee practically admit it to be so. They rejoin, however, that the objection can well be met by transferring to the new court the existing administrative personnel.⁵⁷ To this answer, two objections can be put. In the first place, such a solution of the problem of manning the administrative bench with experts would be temporary only. After the "first generation" of judges have left the bench, there is no assurance that a new generation, equally expert, will grow up. The experience which makes the expert is gained by performing a number of functions which, by hypothesis, will have been divorced upon the formation of the court, so that men trained in what may be called the administrative work of what remains of the board or commission will have no foundation in adjudicative work, so that, even if they will be available for the court, they will not be as expert as the present personnel. In the second place, the admission that the present personnel and functions of existing boards, bureaus and commissions would be absorbed as sections of the new court lays bare the essential structural weakness of the proposed tribunal. It would be a hybrid reincarnation of large parts of the existing administrative organization, whose very size would give little guaranty of efficiency, and would at the same time constitute a threat to the integrity of the functions retained by the remainder of the separate branches of the administrative body.

One more word in conclusion. The basic objective of the Committee is not so much that of the political scientist as it is that of the advocate. A truer analysis of their own thoughts is that they were objecting, not so much to a supposed violation of the doctrine of separation of powers as to a perversion of the rules of the principle division of labor. In all of their reports,⁵⁸ the fact most distressing to them was that there are scores of disparate tribunals having jurisdiction to render decisions in litigations affecting the interests of individuals. The result of this

56. *Op. cit. supra* note 6, at 233.

57. *Op. cit. supra* note 6, at 234.

58. (1933) 58 A. B. A. REP. 412 *et seq.*; (1934) 59 *id.* at 551-555, 556-562; (1936) ADVANCE PROGRAM, AM. BAR ASSN. 212.

condition is overlapping of jurisdiction, *lacunae* of jurisdiction, and general confusion. The point has been reached where division of labor has come to yield diminishing returns. The remedy for such a state of affairs is, naturally, consolidation. The Committee realized this, as witness the extreme simplicity of the plan they offered. Their root difficulty was that their objective was not clearly recognized, and they attacked the problem as though it were one of restoring constitutional government, instead of a problem of promoting efficiency within constitutional limits which have not been violated.

It can be suggested, as a parting thought, that the problem will not be satisfactorily solved until it has first been viewed from many angles. The Committee have viewed the problem from the standpoint of the advocate, but seem to have ignored the standpoints of the Executive and Legislative branches of the government. Since the publication of the Committee's latest report, there have appeared two noteworthy studies of the same problem,⁵⁹ but they, too, had one-sided aspects. They viewed reorganization from the standpoint of executive efficiency, but they either ignored, or showed lack of understanding of the adjudicating function of the administrative agency. If some individual or group could make a study of the problem, combining these two points of view, and adding to them an examination of the problem as it affects or is affected by Congress, then would the groundwork be laid for true and beneficial administrative reform.

59. Sen. Doc. No. 8, 75th Cong. 1st Sess. (1937) 67, 68; (1936) HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST.