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## ADMINISTRATIVE LAW REFORM: A FOCUS ON THE ADMINISTRATIVE LAW JUDGE

RODOLPHE J.A. DE SEIFE\*

### INTRODUCTION

Administrative law reform has been the main topic of conversation among administrative lawyers since the adoption of the Administrative Procedure Act in 1946. However, little has been done in a constructive way to achieve logical and cogent reform. Much of the change has been the result of patchwork reaction to complaints, resulting in "reform" that falls far short of creating a workable system.

Many authors, reflecting the malaise in legal circles, have recently complained about the status of administrative law.<sup>1</sup> Numerous suggestions have been made, designed to cure the deficiencies of the present morass in which the administrative process finds itself.<sup>2</sup> To put it plainly, the activities of the administrative

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1. Carrow, *Administrative Adjudication: Should Its Role Be Changed?* 27 GEO. WASH. L. REV. 279 (1959); Cole, *Administrative Agencies and Judicial Powers*, 44 A.B.A.J. 953, 954 (1958); Cooper, *Administrative Law: The Process of Decision*, 44 A.B.A.J. 233 (1958); Fascell, *Complexities and Delays in Administrative Procedures Must Be Eliminated*, 46 A.B.A.J. 49 (1960); Hanslowe, *The Malaise of the Administrative Process*, 1962 DUKE L.J. 477; Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273 (1955); Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1 (1960); McFarland, *Landis Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373 (1961); Miller, *A Continuing Forum for the Reform of the Administrative Process*, 27 AD. L. REV. 205 (1975); Ross, *ABA Legislative Proposals to Improve Administrative Procedures in Federal Departments and Agencies*, 27 AD. L. REV. 395 (1975); Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See*, 50 WASH. L. REV. 341 (1975).

2. Cary, *Why I Oppose the Divorce of the Judicial Function from Federal Regulatory Agencies*, 51 A.B.A.J. 33 (1965); Fascell, *supra* note 1; Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429 (1960); Jones, *The Role of Administrative Agencies as Instruments of Social Reform*, 19 AD. L. REV. 279 (1967); Kramer, *supra* note 1, at 45, 51; Levinson, *Enforcement of Administrative Decisions in*

agencies have become cumbersome,<sup>3</sup> expensive,<sup>4</sup> often repetitive<sup>5</sup> and represent an enormous waste of time and effort with few resulting benefits.<sup>6</sup>

The initial problem, which has not been recently discussed, is to determine the original concept underlying American administrative law. Then, in light of contemporaneous developments, one may consider whether the *review* of administrative action is not the core of the problem with which we have wrestled unsuccessfully for the past fifty years.

One hardly needs to be reminded of the purpose of administrative agencies and the congressional intent behind their creation. Congress, obviously, could not do all of the legislating in every area of socio-economic activity. The answer was to create agencies to which Congress could delegate, within bounds, its legislative functions.<sup>7</sup> Concomitant with these quasi-legislative functions are quasi-executive functions for implementing administrative rules and regulations,<sup>8</sup> and quasi-judicial functions to adjudicate the rights and interests of parties involved in the administrative process.<sup>9</sup> The fusion of these three governmental functions within one agency, a

*the United States and in France* (pts. 1-2), 23 EMORY L.J. 11, 321 (1974); Nathanson, *Proposals for an Administrative Appellate Court*, 25 AD. L. REV. 85 (1973).

3. K. DAVIS, *DISCRETIONARY JUSTICE* (1969); Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A.J. 1045 (1970); Fascell, *supra* note 1, at 50.

4. K. DAVIS, *supra* note 3, at 155; Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down*, 49 A.B.A.J. 833 (1963).

5. Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968); Leiter, *The Equal Employment Opportunities Commission and "Duplicitous Suits": Examination of EEOC v. Missouri Pacific RR Co.*, 49 N.Y.U.L. REV. 1130 (1974).

6. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965).

7. *Arizona v. California*, 373 U.S. 546 (1963). *Cf.* *National Cable Television Association v. United States*, 415 U.S. 336, 342 (1974): "Congress, of course, does delegate powers to agencies, setting standards to guide their determinations." *See also* *Lichter v. United States*, 334 U.S. 742 (1948); *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Grimaud*, 220 U.S. 506 (1911); *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

8. E. GELLHORN, *ADMINISTRATIVE LAW AND PROCESS* 7 (1972). *Organic Statutes: E.g.*, 15 U.S.C. § 45 (1976) (FTC); 15 U.S.C. § 78 (1976) (SEC); 16 U.S.C. § 797 (1976) (FPC); 29 U.S.C. § 160 (1976) (NLRB); 47 U.S.C. § 151 (1976) (FCC); 49 U.S.C. § 1 (1976) (ICC); 49 U.S.C. § 1323 (1976) (CAB). *Rulemaking: SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935); *The Assigned Car Cases*, 274 U.S. 564 (1927).

9. *See, e.g.*, *FTC v. Flotill Products*, 389 U.S. 179 (1967); *United States v. Western Pacific RR Co.*, 352 U.S. 59 (1956); *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

phenomenon which many believe to run contrary to our constitutional concepts, has brought many complaints by the bar.<sup>10</sup> In trying to resolve, in an *ad hoc* manner, the problems of poor administrative performance,<sup>11</sup> we have achieved a state of affairs in the area of administrative law which some consider almost unbearable.<sup>12</sup>

The original premise of administrative law, which is still valid today, is that an agency issues regulations in its quasi-legislative function pursuant to a mission established by Congress and within the constraints of the organic act of the agency.<sup>13</sup> Regulations promulgated by an agency are, in fact, often issued by its staff under an appropriate delegation of power.<sup>14</sup> Similarly, the executive function of an agency is discharged in enforcement proceedings by an enforcement staff.<sup>15</sup> Frequently subpoenas and other official agency documents are signed by a director of an agency division or the head of its enforcement division on behalf of the agency.<sup>16</sup> Adjudicatory matters are handled by staff members, who were formerly known as hearing examiners, acting on behalf of the agency.<sup>17</sup> These

10. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 13.02 (1958); Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966 (1936); Levinson, *supra* note 2, at 55; Ross, *ABA Legislative Proposals to Improve Administrative Procedures in Federal Departments and Agencies*, 159 A.B.A. REP. 148 (1934).

11. Botein, *Primary Jurisdiction: The Need for Better Court/Agency Interaction*, 29 RUTGERS L. REV. 867, 897 (1976); Hanslowe, *supra* note 1, at 486; Robinson, *The Administrative Conference and Administrative Law Scholarship*, 26 AD. L. REV. 269 (1974).

12. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting); Botein, *supra* note 11.

13. *E.g.*, 15 U.S.C. § 45 (1976) (FTC); 15 U.S.C. § 78 (1976) (SEC); 16 U.S.C. § 797 (1976) (FPC); 29 U.S.C. § 160 (1976) (NLRB); 47 U.S.C. § 151 (1976) (FCC); 49 U.S.C. § 1 (1976) (ICC); 49 U.S.C. § 1323 (1976) (CAB).

14. *Wilson & Co. v. United States*, 335 F.2d 788 (7th Cir. 1964). *See also* *Morgan v. United States*, 298 U.S. 468 (1936); *American Telephone and Telegraph Co. v. FCC*, 449 F.2d 439 (2d Cir. 1971); *U.S. Trust Co. v. Blake*, 234 N.Y. 273, 137 N.E. 327 (1922); B. SCHWARTZ, *ADMINISTRATIVE LAW* 6 (1976); Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 YALE L.J. 647 (1938); Note, *Subdelegation by Federal Administrative Agencies*, 12 STAN. L. REV. 808 (1960).

15. *See, e.g.*, 15 U.S.C. § 1464(d)(1) (1976).

16. 5 U.S.C. § 555(d) (1976). *Cf.* *Fleming v. Mollowk Wreckers and Lumber Co.*, 331 U.S. 111 (1947) (District Directors of Price Control Administration delegated authority to issue subpoenas). *Contra*, *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942); 15 U.S.C. § 53 (1976) (Power of FTC to enjoin false advertising); 15 U.S.C. § 77(t) (1976) (SEC subpoena power and enforcement); 16 U.S.C. § 825(m) (1976) (FPC subpoena power and enforcement).

17. Note 14, *supra*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Allentown Broadcasting Corp. v. FCC*, 222 F.2d 781 (D.C. Cir. 1954); *NLRB v. James*, 208 F.2d 743 (2d Cir. 1954); *Administrative Procedure Act*, § 8(a), 5 U.S.C. § 557 (1976).

hearing officers are now our administrative law judges.<sup>18</sup>

Responsible and effective reform must arise from a consideration of the proper place and function of the hearing examiners, or administrative law judges. This article puts forward a proposal for revamping our troubled administrative law system based on the concept that a scheme cannot function properly if we have conflicting statutory mandates made less intelligible by conflicting court decisions. Thus, a separate system of administrative law courts is needed to review agency decisions, thereby restoring the hearing examiners to their proper role. This proposal is logically based on sound historical concepts that are needed to effectively respond to the various reasons for reform.

### THE ROLE OF ADMINISTRATIVE AGENCIES

#### *The Need For Administrative Agencies*

Some authors have written extensively on the administrative agencies.<sup>19</sup> They have been called the fourth branch of the government,<sup>20</sup> and many less flattering things.<sup>21</sup> It is appropriate at this juncture to review some fundamentals.

Congress has the authority to delegate certain of its powers.<sup>22</sup>

18. 37 Fed. Reg. 16787 (1972); Cramton, *A Title Change for Hearing Examiner? "A Rose by Any Other Name . . ."* 40 GEO. WASH. L. REV. 918 (1972); Zwerdling, *Reflections of the Role of an Administrative Law Judge*, 25 AD. L. REV. 9 (1973).

19. H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962); B. SCHWARTZ, *ADMINISTRATIVE LAW* 6 (1976); Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 WIS. L. REV. 95; Dixon, *The Independent Commissions and Political Responsibility*, 27 AD. L. REV. 1 (1975); Levy, *Positive View of Commission Regulation: Revisited*, 41 ICC PRAC. J. 430 (1974); Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305 (1972); Rotunda, *The Combination of Functions in Administrative Actions: An Examination of European Alternatives*, 40 FORDHAM L. REV. 101 (1972); Williams, *Fifty Years of the Law of the Federal Administrative Agencies—and Beyond*, 29 FED. B.J. 267 (1970); Comment, *Administrative Agencies, the Public Interest and National Policy: Is a Marriage Possible?* 59 GEO. L.J. 420 (1970); 28 BAYLOR L. REV. 1157 (1976).

20. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 AD. L. REV. 108 (1963); Dixon, *supra* note 19, at 1; Elman, *supra* note 3, at 1048; McFarland, *supra* note 1, at 391; Rotunda, *supra* note 19, at 101.

21. FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting); Beelar, *Impact of the Administrative Process on the Judicial Branch of the Government*, 16 FED. B.J. 501, 503 (1956) ("Frankenstein-like implications"); Dixon, *supra* note 19, at 5; Williams, *supra* note 19, at 267.

22. National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336 (1974);

It does so by creating agencies in order to implement a broadly worded statute, leaving many details which it cannot police itself to these creatures of congressional power.<sup>23</sup> Every organic act of Congress provides that the agency created thereunder shall be accountable to Congress either directly<sup>24</sup> or indirectly through the President.<sup>25</sup> This is usually done by way of annual reports and budget submissions.<sup>26</sup>

Congress has given agencies the task of making rules to implement the legislative intent evinced in the agencies' organic acts.<sup>27</sup> In this capacity the agency acts as a legislator.<sup>28</sup> Furthermore, the agencies are usually charged with the enforcement of the very rules and regulations they promulgate,<sup>29</sup> as well as laws passed by Congress.<sup>30</sup> Many agencies, particularly the licensing agencies,<sup>31</sup> adjudicate adverse interests either between different parties<sup>32</sup> or between the agency and an outside party.<sup>33</sup> Thus the agencies combine

United States v. Robel, 389 U.S. 258, 274 (1967) (Brennan, J., concurring); Arizona v. California, 373 U.S. 546 (1963); Lichter v. United States, 334 U.S. 742 (1948); Yakus v. United States, 321 U.S. 414 (1944); Sunshine Anthrocoite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); United States v. Grimaud, 220 U.S. 506 (1911); Honolulu Rapid Transit & Land Co. v. Territory of Hawaii, 211 U.S. 282 (1908); Buttfeld v. Stranahan, 192 U.S. 470 (1904).

23. FCC v. Schreiber, 381 U.S. 279 (1965); 29 U.S.C. §§ 141, 151 (1976) (Labor Management Relations Act); 42 U.S.C. §§ 4321, 4331-32 (1976) (Environmental Protection Agency); 47 U.S.C. § 154 (1976) (FCC); 49 U.S.C. § 12 (1976) (ICC); 49 U.S.C. § 1324 (1976) (CAB).

24. 42 U.S.C. § 4341 (1976) (EPA Reports to Congress); 47 U.S.C. § 155 (1976) (FCC Reports to Congress); 49 U.S.C. § 21 (1976) (ICC Annual Report to Congress); 49 U.S.C. § 1325 (1976) (CAB Annual Report to Congress).

25. Address by E. McIntyre (Commissioner of FTC), Fed. Bar Ass'n, Wash., D.C. (Jan. 1, 1969), *Regulatory Independence: Factual or Fanciful*, printed in 115 CONG. REC. 1835 (1969). Meyers v. United States, 272 U.S. 52 (1926); Springer v. Philippine Islands, 277 U.S. 189 (1922). See, e.g., 10 U.S.C. § 121 (1976); 31 U.S.C. §§ 11, 16 (1976) (Budget and Accounting Act); 42 U.S.C. §§ 4341, 4344 (1976).

26. See, e.g., note 24, *supra*. See also Dixon, *supra* note 19, at 6-12.

27. E.g., 5 U.S.C. § 553 (1976); 47 U.S.C. § 315(c) (1976). See G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 29 (1974).

28. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 797 (1976).

29. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). E.g., 15 U.S.C. §§ 45, 46 (1976).

30. E.g., 15 U.S.C. §§ 46, 53 (1976).

31. 20 U.S.C. § 1371 (1976); 47 U.S.C. § 301 (1976). See Dean, *The Opportunity to Be Heard in the Professional Licensing Process in Pennsylvania*, 67 DICK. L. REV. 31 (1962).

32. 29 U.S.C. § 160 (1976); 47 U.S.C. § 208 (1976).

33. 47 U.S.C. § 303(m) (1976); 49 U.S.C. § 16 (1976).

under one roof the three powers which the Constitution ordinarily separates.<sup>34</sup>

In theory, the check and balance system works quite well. The executive executes the laws of Congress, while the judiciary decides issues arising under that execution.<sup>35</sup> In practice, of course, it does not work quite that simply.<sup>36</sup> The President, on occasion, makes laws by issuing executive orders.<sup>37</sup> He may also make proclamations under authority vested in him by Congress in certain emergency situations<sup>38</sup> and assume a substantial portion of the legislative task.<sup>39</sup> Obviously, the executive also enforces the laws of Congress and the "laws" created by executive order.<sup>40</sup>

Moreover, the courts have not been content to sit back and merely adjudicate. They have gone so far as to legislate,<sup>41</sup> and the trend is towards increased judicial legislation.<sup>42</sup> There is frequent criticism of the fact that nonelected judges are legislating the conduct of citizens.<sup>43</sup> All this, of course, comes from the simple rule that "nature abhors a vacuum."<sup>44</sup> Thus, when one branch of government

34. Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B.J. 351, 354 (1967); PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES 39-40 (1937).

35. G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 26 (1974).

36. G. ROBINSON & E. GELLHORN, *supra* note 35, at 27; Miller, *Separation of Powers: An Ancient Doctrine Under Modern Challenge*, 28 AD. L. REV. 299 (1976); Moore, *Contemporary Issues in an Ongoing Debate: The Roles of Congress and the President in Foreign Affairs*, 7 INT'L. LAW 733 (1973).

37. *E.g.*, Exec. Order No. 10854, 24 Fed. Reg. 9565 (1959), as amended by, Exec. Order No. 11382, 32 Fed. Reg. 16247 (1967); Proclamation No. 2914, 15 Fed. Reg. 9029 (1950).

38. *See* note 37 *supra*; *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

39. *E.g.*, 49 U.S.C. § 1510 (1976). It should be noted that the various executive departments have spawned numerous "agencies" which, unlike the "congressional" or "independent" agencies, are under the direct authority of the President. This is a subtle but important distinction which has been forgotten by recent White House occupants, an apparently deliberate "oversight" to which Congress has not reacted with the vigor that one might have expected.

40. *E.g.*, 29 U.S.C. § 178 (1976).

41. *Springer v. Philippine Islands*, 277 U.S. 189 (1928); *Meyers v. United States*, 272 U.S. 52 (1926); *Auerbach*, *supra* note 19, at 114.

42. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Education*, 349 U.S. 294 (1955).

43. Bricker, *Judicial Legislation: A Threat to Constitutional Government*, 21 OKLA. B.A.J. 639 (1950); Vom Baur, *The Impact of the Administrative Process on the Executive Branch of the Government*, 16 FED. B.J. 453, 463-64 (1956).

44. B. SPINOZA, *ETHICS*, Pt. I, Proposition 15 (Everyman ed., A. Boyle trans. 1955).

does not function as it should, of necessity, one of the other branches will step in to alleviate social discontent which, in other countries, may blossom into revolution.<sup>45</sup> The commingling of functions within an agency, therefore, is not necessarily as unusual or evil as some have said.<sup>46</sup>

### *The Congressional Power of Delegation*

It is evident that Congress delegates certain of its powers to an agency which is run by people, either board members,<sup>47</sup> or commissioners<sup>48</sup> or a director.<sup>49</sup> The law stops there.<sup>50</sup> The agencies in turn, as a matter of managerial convenience, set up subordinate positions and delegate powers to their employees.<sup>51</sup> Like Congress, the appointed agency members cannot accomplish all the assigned tasks on a first-hand basis.<sup>52</sup> This leads to the creation and appointment of hearing examiners,<sup>53</sup> who hear cases, ascertain facts and come up with a recommended decision for the agency.<sup>54</sup> No organic statute states that Congress delegates its power to the agency *and* to the hearing examiners,<sup>55</sup> or, as they are now known by Civil Service Commission fiat, the administrative law judges.<sup>56</sup> The central issue, which has been consistently overlooked, thus becomes the proper function of the hearing examiner in the overall role of an administrative agency.

45. Ratner, *Executive Privilege, Self-Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. REV. 92 (1974).

46. Cragun & de Siefe, *A Skeptic Views Twenty-Five Years of Administrative Process*, 16 FED. B.J. 556 (1956); Gatchell, *The Impact of the Administrative Process on the Judicial Branch of the Government: A Defense of the Status Quo*, 16 FED. B.J. 482 (1956).

47. *E.g.*, 29 U.S.C. § 153 (1976) (NLRB); 42 U.S.C. § 4342 (1976) (EPA); 49 U.S.C. § 154 (1976) (ICC); 49 U.S.C. §§ 1321, 1324 (1976) (CAB).

48. *E.g.*, 15 U.S.C. § 41 (1976) (FTC); 15 U.S.C. § 78(d) (1976) (SEC); 16 U.S.C. § 792 (1976) (FPC); 47 U.S.C. § 154 (1976) (FCC); 49 U.S.C. § 11 (1976) (ICC).

49. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, *reh. denied*, 402 U.S. 925 (1971). *E.g.*, 29 U.S.C. § 172 (1976); 40 U.S.C. § 751 (1976); 42 U.S.C. § 4276(c) (1976); 49 U.S.C. § 1341 (1976).

50. 5 U.S.C. §§ 556-57, 704 (1976).

51. *FTC v. Flotill Products, Inc.*, 389 U.S. 179 (1967); *Morgan v. United States*, 298 U.S. 468 (1936); *American Telephone and Telegraph Co. v. FCC*, 449 F.2d 439 (2d Cir. 1971); *U.S. Trust Co. v. Blake*, 234 N.Y. 273, 137 N.E. 327 (1922). *E.g.*, 5 U.S.C. § 301 (1976); 29 U.S.C. § 153(b) (1976).

52. *Morgan v. United States*, 449 F.2d 439 (2d Cir. 1971); *U.S. Trust Co. v. Blake*, 234 N.Y. 273, 137 N.E. 327 (1922); 5 U.S.C. § 302(b) (1976).

53. 5 U.S.C. § 3105 (1976).

54. Cramton, *supra* note 18.

55. 5 U.S.C. §§ 551, 557 (1976).

56. Civil Service Commission Order, August 19, 1972, 37 Fed. Reg. 16787 (1972) (codified in 5 C.F.R. § 930.203a (1973)).



*The Role of the Administrative Law Judge*

Much discussion has centered on the separation of functions within agencies.<sup>57</sup> To some extent, this has been achieved by *ad hoc* reforms.<sup>58</sup> The status of hearing examiners has been "upgraded" by awarding them the coveted title of "administrative law judges,"<sup>59</sup> whether or not they are, in fact, "judges."<sup>60</sup> The truth remains that the ALJs are employees of a particular agency, and there has been a groundswell of opinion among many administrative law judges that somehow this role is too confining.<sup>61</sup> Moreover, agencies are subject to the accusation that the administrative law judges are too close to the staff and the appointed agency heads for which they work.<sup>62</sup> It is therefore suggested that a separate corps of administrative law judges be created.<sup>63</sup> Unfortunately, this is no panacea, and demonstrably so.

The concept of an independent corps of administrative law judges has a good deal of merit, but for reasons other than those given by its proponents, since they do not share this author's view of the ALJ's role in the administrative scheme.<sup>64</sup> To perform properly, the administrative agencies should be allowed to function in all three of the fields enumerated above: quasi-legislative, quasi-executive (enforcement) and quasi-judicial (adjudication). Each one of these agency activities may be in need of reform, but this must be done at the proper level. Thus, any proposed standards in rule-making functions should be assessed from the legislative perspective, any changes in the agencies' executive functions ought to be proposed on the basis of enforcement standards, and the adequacy of their adjudicatory role should be assessed from the judicial perspective.

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57. Friendly, *supra* note 2; Hector, *Problems of the C.A.B. and Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedural Reform*, 118 U. PA. L. REV. 485 (1970).

58. Friendly, *supra* note 2, at 441.

59. 5 C.F.R. § 930.203e (1977); Segal, *The Administrative Law Judge*, 62 A.B.A.J. 1424, 1425 (1976).

60. Segal, *supra* note 59.

61. Minow, *Suggestions for Improvement of the Administrative Process*, 15 AD. L. REV. 146 (1963); Pfeiffer, *Hearing Cases Before Several Agencies—Odyssey of an Administrative Law Judge*, 27 AD. L. REV. 217 (1975); Rotunda, *supra* note 19, at 121; Segal, *supra* note 59.

62. Cragun & de Siefe, *supra* note 46.

63. Pfeiffer, *supra* note 61; Segal, *supra* note 59, at 1425.

64. Pfeiffer, *supra* note 61.

In this article the focus is on the need for reform in the area of adjudication, without forgetting that the other two areas in which agencies operate are also in need of comprehensive reform. In the area of agency adjudication, the most controversial agency activity, the focus is on "judicial" review to insure fair and impartial agency action.<sup>65</sup> Of course, where appropriate, the legislative or rule-making activity of an agency may also be subject to judicial review.

#### THE NEED FOR CHANGE: A PROPOSAL

There is little doubt that change is needed in the field of administrative law. That need becomes even more apparent with the proliferation of administrative agencies.<sup>66</sup> Twenty-two years ago, the issue of the *Federal Bar Journal* celebrating the twenty-fifth anniversary of the administrative law system was replete with suggestions for change.<sup>67</sup>

The administrative process is no longer a cheap and efficient way of getting the work of government done.<sup>68</sup> If anything, the untiring efforts of the legal profession<sup>69</sup> and the consequent over-judicialization of the administrative process<sup>70</sup> have made administrative law cases more expensive, cumbersome and lengthy than regular trials,<sup>71</sup> thus defeating the very purpose underlying the creation of administrative agencies. The courts now second-guess agency decisions by looking at the *recommended decisions* of administrative law judges.<sup>72</sup> This is comparable to second-guessing a judge by looking at his clerk's draft of the court's decision.

Administrative law is needlessly confusing because the special functions and purpose of administrative agencies have not been ac-

65. See Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

66. Kendall, *Some Observations About the Administrative Process*, 11 AD. L. BULL. 62, 68-69 (1958).

67. Beelar, *supra* note 21; Cragun & de Siefe, *supra* note 46; Gatchell, *supra* note 46; Kintner, *The Administrative Process Comes of Age*, 16 FED. B.J. 539 (1956); Pound, *Foreword* to 16 FED. B.J., at 445 (1956); Schwartz, *The Administrative Process and Congressional Control*, 16 FED. B.J. 519 (1956); Vom Baur, *supra* note 43.

68. Goldman, *supra* note 5.

69. Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329, 330 (1961); Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A.J. 937 (1972).

70. Auerbach, *supra* note 19, at 109; Goldman, *supra* note 5, at 1424. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.04-14 (1976) (quoting Ash Council findings); Robinson, *supra* note 57.

71. W. GARDNER, *THE ADMINISTRATIVE PROCESS: LEGAL INSTITUTIONS TODAY AND TOMORROW* (M. Paulsen ed. 1959).

72. Zwerdling, *supra* note 18.

cepted by the bar. Rather, the bar has insisted on casting the administrative process in a familiar but inappropriate mold.<sup>73</sup> It is doubtful that the adversary method of proving a case, which to most lawyers is the cornerstone of the American legal system, is desirable in an administrative forum.<sup>74</sup> Administrative law judges, when they proceed by way of adversary testimony, very often create situations in which very little "fairness" is apparent simply because the process is too time-consuming and expensive.<sup>75</sup> Numerous changes are required to make administrative law a viable process. Scholars have written on the subject at length and have testified about it before Congress.<sup>76</sup>

The time has come to take a fresh look at the many proposals of administrative law reform by addressing some fundamental concepts which are too often ignored. In so doing, a workable proposal may be reached for reform of the administrative process which could accommodate the many disparate needs which now exist.

### *The Need for a Complete Overhaul of Administrative Procedure*

Changes in the field of administrative law are the result of a patchwork approach.<sup>77</sup> To some extent the Administrative Procedure Act<sup>78</sup> itself is the result of this method of operating, as are its amendments,<sup>79</sup> which sometimes set out provisions that are contradictory<sup>80</sup> or at least not easily reconcilable with each other. The

73. *Pending Proposals to Amend the Federal Administrative Procedure Act: An Analysis of S. 518*, 20 AD. L. REV. 185, 215 (1967) (roundtable discussion, Aug. 8, 1967; remarks of C. Byse).

74. Schwartz, *Administrative Law Cases During 1974*, 27 AD. L. REV. 113, 122-23 (1975).

75. *Id.*

76. Elman, *supra* note 3.

77. Elman, *supra* note 3; Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48 A.B.A.J. 243 (1962); Hanslowe, *supra* note 1; Hector, *supra* note 57; Minow, *Suggestions for Improvement of the Administrative Process*, 15 AD. L. REV. 146 (1963); Nathanson, *supra* note 2; Landis, Report on Regulatory Agencies to the President-Elect (Submitted by the Chairman of the Sub-Committee on Administrative Practice and Procedure to the Senate Committee on the Judiciary) 86th Cong., 2d Sess. (1960).

78. 5 U.S.C. § 550 *et seq.* (1976).

79. 5 U.S.C. § 557 (1976), as amended by Pub. L. 94-409, § 4(a), 90 Stat. 1246. *E.g.*, 5 U.S.C. § 552, as amended by Pub. L. 89-554, 80 Stat. 383, as amended by Pub. L. 90-23, § 1, 81 Stat. 54, as amended by Pub. L. 93-502 §§ 1-3, 88 Stat. 1561-64, as amended by Pub. L. 94-409, § 5(b), 90 Stat. 1247.

80. Compare 5 U.S.C. § 557(e) (1976) with 5 U.S.C. § 557(b) (1976). Compare 5 U.S.C. § 557 (1976) with 37 Fed. Reg. 16787 (1972), which changed the appellation of "hearing examiner" to that of "administrative law judge" without changing the individual's status within the agency. 5 U.S.C. § 552(a) (1976) also is a source of conflict.

result is court decisions which are difficult to analyze and understand.<sup>81</sup> This is not primarily the fault of the courts, but rather the fault of the legislative drafters and those who lobby their amendments through congressional committees.

The Administrative Law Conference of the United States, to which Congress delegated some of its work in the field of monitoring administrative law,<sup>82</sup> has not produced anything very meaningful. Most of its changes are the product of its close relationship with the Administrative Law Section of the American Bar Association.<sup>83</sup> It is unrealistic to expect lawyers in a specialized field to ask for anything other than what will benefit either their practice or their clients.<sup>84</sup> This is in no way derogatory of the scholarly and often monumental work performed by the Administrative Law Section of the ABA. Nevertheless, the intimate relationship between the Administrative Law Section of the ABA and the Administrative Law Conference of the United States is one cause of the patchwork manner in which real or imagined needs for change have been met.

This lack of creativity, ability or willingness to deal in broad concepts on the part of the organized bar is the main reason for the present state of near disaster in the administrative process.<sup>85</sup> The same unimaginative approach is apparent in the various proposed

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81. *E.g.*, *NLRB v. Sears Roebuck and Co.*, 421 U.S. 132 (1975); *United States ex rel. Brzovich v. Holton*, 222 F.2d 840 (7th Cir. 1955); *General Motors Corp. v. United States*, 359 F. Supp. 1168 (E.D. Mich. 1973); *National Freight, Inc. v. United States*, 359 F. Supp. 1153 (D.N.J. 1973); *Central and Southern Motor Tariff Ass'n v. United States*, 273 F. Supp. 823 (D. Del. 1967); *Younger Bros. Inc. v. United States*, 238 F. Supp. 859 (S.D. Tex. 1965); *Deioma Trucking Inc. v. United States*, 233 F. Supp. 782 (N.D. Cal. 1964); *Youngblood Truck Lines v. United States*, 221 F. Supp. 809 (W.D.N.C. 1963); *North American Van Lines v. United States*, 217 F. Supp. 837 (N.D. Ind. 1963); *T.S.C. Motor Freight Lines v. United States*, 186 F. Supp. 777 (S.D. Tex. 1960); *Watson Bros. Transportation v. United States*, 180 F. Supp. 732 (D. Neb. 1960); *Green v. Kern*, 178 F. Supp. 201 (D.N.J. 1959); *Canadian Pacific Ry. v. United States*, 158 F. Supp. 248 (D. Minn. 1958); *Kenny v. United States*, 103 F. Supp. 971 (D.N.J. 1952); *Aero Mayflower Transit Co. v. United States*, 95 F. Supp. 258 (D. Neb. 1951). Similar problems arise when one examines the cases which attempt to assign the weight that an agency should give to its Hearing Examiner's findings. See *Universal Camera v. NLRB*, 340 U.S. 474 (1951).

82. 5 U.S.C. §§ 571-76 (1976).

83. Harrison, *Co-operation for Improvement in Administrative Law*, 60 A.B.A.J. 1538 (1974).

84. See generally Cooper, *Needed: A Second Attorney General's Committee*, 15 AD. L. REV. 3, 4 (1963); Friedman, *Special Interest and the Law*, 51 CHI. BAR REC. 434 (1970).

85. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1043 (1975).

court reforms. The appointment of more court personnel will not improve the present catastrophic state of affairs in the judicial arena<sup>86</sup> any more than the creation of more administrative law judges<sup>87</sup> will remedy the administrative law problem. Instead of responding to the individual needs of special interest groups before certain agencies,<sup>88</sup> the bar must take a broader view of what is necessary for society if reform is to be meaningful.

A fundamental change in attitude is needed. To some extent the key to a plausible solution to the dilemma is found by looking to the fundamental objectives of administrative law.<sup>89</sup> The purpose of administrative law<sup>90</sup> in relation to societal needs, present and future, rather than the narrow needs of our clients and our practice, must be stressed.

### *The Proper Place of the Administrative Law Judge*

Much has been said of the need for judicial reform,<sup>91</sup> the necessity of increasing the number of federal judges,<sup>92</sup> and the adoption of an independent corps of administrative law judges.<sup>93</sup> Little consideration has been given to the crucial determination of exactly what function the administrative law judge should fulfill.

To advocate the creation of an independent corps of administrative law judges working at the agency level, thus making the ALJs responsible for the *initial* decision, makes the agency an appellate review board,<sup>94</sup> and robs the agency of its *total* administrative power. This dichotomy encourages the emergence of a situation in which the federal courts will, of necessity, look more

86. Cramton, *supra* note 69, at 937, 939, 941; McRae, *Administration of Justice in the Federal District Court*, 23 U. FLA. L. REV. 237, 239 (1971).

87. Auerbach, *supra* note 19, at 109; Cramton, *supra* note 69, at 937, 940.

88. Cragun & de Siefe, *supra* note 46; Friedman, *supra* note 84.

89. Freedman, *supra* note 85, at 1045, 1052. See Jones, *supra* note 2.

90. J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); E. ROOT, *ADDRESSES ON CITIZENSHIP AND GOVERNMENT* (1916); Williams, *supra* note 19.

91. Ashman & Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1 (1974); Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); D'Alemberte, *Let The Sunshine In: The Case for an Open Judiciary System*, 58 JUDICATURE 61 (1974); Nathanson, *supra* note 2; *Symposium—Judicial Reform*, 23 U. FLA. L. REV. 217 (1971).

92. Nathanson, *supra* note 2, at 91.

93. Pfeiffer, *supra* note 61.

94. *Pending Proposals to Amend the Federal Administrative Procedure Act: An Analysis of S. 518*, 20 AD. L. REV. 187 (1967) (roundtable discussion, Aug. 8, 1967).

and more to the administrative law judge as the originator of the administrative process, rather than focus properly on the agency.<sup>95</sup> This suggestion, without more, is not acceptable in theory, nor is it sound in practice since it will result in needless confusion as to where the initial decision-making power lies in the administrative scheme, compounding present problems.<sup>96</sup>

Under the Administrative Procedure Act "all decisions, including initial, *recommended*, or tentative decisions, shall become a part of the record . . . ."<sup>97</sup> The problem with the word "recommended" in this context is that it is subject to varying interpretations. A recommended decision could be a decision that the agency labels as "recommended" because it is a tentative or initial decision. However, "recommended" is also a word of art familiar to the administrative law practitioners who advocated the adoption of the Administrative Procedure Act. It is quite possible that Congress might not have focused on the potential significance of that word as including the recommendation or decision made by the hearing examiner, now the administrative law judge. Thus the foundation was laid for the erroneous interpretation of the role of the ALJ in the administrative process.

It is not purely academic exercise to stress that today's administrative law judge is out of place in the administrative scheme. Proposals to move him around in the administrative organization on the agency level, even to the extent of making him fully independent, will not work.<sup>98</sup> Lines of authority must reflect the statutory theory of delegation of power, and it is not too much to say that our present-day administrative "camel," a product of the so-called pragmatic approach, does not and probably cannot do the job it is assigned to do.

There have been too many changes and amendments made in committee which distort the basic functions and purpose of administrative agencies. It is time to streamline the system so that it can work more efficiently and still not do violence to the constitutional underpinnings of the administrative process. It is apparent that if the system is to work and maintain fairness along with efficiency, the agencies must go back to the tasks assigned by Congress

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95. Note 94, *supra* (remarks of R. Ginnane).

96. *Universal Camera v. NLRB*, 340 U.S. 474 (1951); 5 U.S.C. § 557 (1976); 37 Fed. Reg. 16787 (1972). See also note 81, *supra*.

97. 5 U.S.C. § 557(c) (1976) (emphasis supplied).

98. Zwerdling, *supra* note 18, at 12-13.

and pay more attention to the *reviewing* process. This, along with a suitably amended APA, should insure the requisite fairness. The administrative law judge seems to be the natural candidate as a *reviewer* of agency action.

### *A New Focus on an Old Concept*

It is not the purpose of this article to advocate radical reform for its own sake, but to recommend a restructuring of the present administrative system, reconciling it, in some ways, with the classic thinking in administrative law.<sup>99</sup> However, one must also use a more contemporary approach by reorienting traditional precedent-conscious thinking into relatively new channels best designed to alleviate present administrative law problems, thereby helping the judicial system as a whole.

Under this proposal an administrative agency would handle all matters within its jurisdiction as intended by Congress.<sup>100</sup> Unfettered by undue judicialization<sup>101</sup> or artificial separation of functions concepts,<sup>102</sup> it would nevertheless adhere to the substantive requirements of administrative due process and fair hearing<sup>103</sup> as prescribed by the present APA and the courts. This would mean that the agencies would revert to doing their work, albeit by their employees to whom they delegate certain powers as a matter of internal management. This, of course, includes hearing officers in both rule-making and adjudicatory proceedings.<sup>104</sup>

On the other hand, this proposal would also entail the removal of the most able of the present administrative law judges, among those who are really "judges,"<sup>105</sup> not to an independent ALJ

99. J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); E. ROOT, *ADDRESSES ON CITIZENSHIP AND GOVERNMENT* (1916); Jones, *supra* note 2.

100. *E.g.*, 15 U.S.C. § 45 (1976) (FTC); 15 U.S.C. § 78d (1976) (SEC). See Smith, *Improving the Administration of Justice in Administrative Processes*, 30 A.B.A.J. 127, 128-29 (1944).

101. Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 HARV. L. REV. 1325, 1326 (1968).

102. Bernstein, *supra* note 69, at 331.

103. Smith, *supra* note 100, at 131.

104. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); 5 U.S.C. § 557(b) (1976). The concept of Hearing Examiners will have gone back to its original meaning.

105. See, *e.g.*, BLACK'S LAW DICTIONARY 976 (4th ed. 1951):

Judge: An officer so named in his commission, who presides in some court; a public officer, appointed to preside and to administer the law in a court of justice; the chief member of a court, and charged with the control

corps,<sup>106</sup> but to a new level of administrative review outside the agencies—the Administrative Court. In that system, the administrative law judges would properly function in their judicial capacity in that they would review agency action to decide whether or not it conformed to the applicable law.<sup>107</sup>

Above this first layer of administrative law judges (or the new Administrative Law Court) would sit a Supreme Administrative Law Court to review appeals from the Administrative Law Courts, probably on a *certiorari* basis.<sup>108</sup> This Supreme Administrative Law Court would determine, with finality, all issues arising from adjudicatory as well as rule-making matters. The only appeal to the Supreme Court of the United States would lie in cases involving substantial constitutional issues.<sup>109</sup> It is possible, for the sake of expediency and fairness, as well as economics, that genuine constitutional issues could be settled upon *initial* motion to an administrative law judge, and certified by the Supreme Administrative Law Court to the Supreme Court of the United States. This would mean the adoption of a new type of expediting act wherein fundamental constitutional issues involving the validity of an organic statute could be resolved without waiting for a determination of all the other issues in a case which might be rendered moot.

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of proceedings and the decision of questions of law or discretion. *Todd v.*

U.S., [sic] 158 U.S. 278, 15 S. Ct. 889, 39 L.Ed. 982 . . . .

This definition is used herein to distinguish a "judge" from an "examiner" within the meaning of 5 U.S.C. § 557 (1976), who acts only as the initial eyes and ears of an administrative agency (i.e., the statutorily appointed member or members), and whose decision may be accepted or rejected by the agency as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). There is no more compelling rationale for an agency to follow the recommended decisions of a "hearing examiner" than there is for a judge to feel bound by his clerk's recommended draft of a decision in a case heard by the judge. Conceptually, the agency is the "judge" and the hearing examiner (or ALJ, as he is now misnamed) is the "clerk" in the administrative process.

It is after the final agency decision has been rendered that a party has "exhausted his administrative remedies" and may seek redress in a federal district court, which may review the administrative action to determine whether or not the agency's decision is based upon "substantial evidence" or whether its action was "arbitrary or capricious." 5 U.S.C. § 706(2) (1976). See also *McKart v. United States*, 395 U.S. 185 (1969); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *SEC v. Chenery*, 332 U.S. 194 (1947).

106. See Pfeiffer, *supra* note 61.

107. 5 U.S.C. § 706 (1976), in accordance with the requirements of 5 U.S.C. §§ 701, 704 (1976).

108. *Certiorari* is generally a discretionary writ. See *Whaley v. Whaley*, 213 Ark. 232, 209 S.W.2d 871 (1948); *Lennon v. School District No. 11, Greer County*, 189 Okla. 37, 113 P.2d 382 (1941). See also *Wade v. Mayo*, 334 U.S. 672 (1948).

109. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 180 (1803).



This concept of administrative courts is at variance with proposals such as the one made by Professor Rotunda,<sup>110</sup> whose objectives are worthy but whose theory relies on a questionable comparative analysis of the basic concepts underlying administrative law in Europe. His conclusion that political pressure in the United States makes it impossible to change our system may be valid, but is based upon an inadequate analysis of the differences between the basic judicial systems in the United States and Europe.

The legal system of the United States does not adhere to a private-versus-public concept of the law as does the civil system. Thus, anything involving the government of France, such as the driver of a mail truck colliding with a privately owned vehicle, or the President of the Republic issuing an illegal decree,<sup>111</sup> comes under the jurisdiction of administrative law.<sup>112</sup> The recourse to legal solutions of problems in foreign countries in order to promote solutions to our own legal problems is most commendable, but cannot be done without a thorough understanding of the differences between the legal systems; differences based on history, national traditions or social philosophies.

Conversely, a thorough and correct analysis of our own concepts of administrative law may show the way to meaningful reform. The fact that the reform proposed herein, to some extent, may look like the French system does not make it so, nor is the importation of the French system proposed. On the contrary, the adoption of a new "management" approach to handle administrative law is advocated. This approach would be based on an American viewpoint of the law, and geared to needs under an American constitutional philosophy of government.<sup>113</sup>

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110. Rotunda, *supra* note 19.

111. *E.g.*, The Canal case, Recueil des Decisions du Conseil d'Etat, October 19, 1962; [1973] J.C.P. II 13068. In this case the French Council of State annulled the ordinance of June 1, 1962, issued by President de Gaulle, which established a military court of justice under the provisions of the Law of April 8, 1962.

112. Riesenfeld, *French System of Administrative Justice: A Model for American Law?* (pt. 1), 18 B.U.L. REV. 48, 82 (1938).

113. The contemporary involvement of law reformers in foreign concepts such as ombudsmen (a system which works in Scandinavia but will not work in the U.S.) is commendable. Literature dealing with such proposals fills shelves of our law libraries, but proposals to adopt foreign concepts are generally worthless in view of our own tradition and "legal mythology." For instance, at what point would the American political establishment be willing to give all-encompassing powers to an "ombudsman" such as his Swedish counterpart possesses? It is not, therefore, very productive to advocate the importation of foreign concepts without reconciling them with our own traditions, views and prejudices, regardless of their merit or efficacy in their country of origin.

*Impact of the Proposed Administrative Law Reform on the Federal Judicial System*

The dockets in many of the federal courts are so crowded that the delivery of justice is severely restricted.<sup>114</sup> While overload of the court dockets is due to many factors,<sup>115</sup> one factor which plays an increasing role is the growing load of administrative law appeals to the district courts,<sup>116</sup> circuit courts of appeals<sup>117</sup> and even to the Supreme Court.<sup>118</sup> According to statistics prepared for this article, it is apparent that the overall administrative law caseload, while remaining relatively constant in most district courts in recent years, has dramatically increased in the last year, 1976, accounting for 32.2% of the total caseload.<sup>119</sup> This increase is not apparent at the court of appeals level, but nevertheless represents a substantial proportion of the cases handled. No less than ten percent to as much as slightly over fourteen percent of the cases in any one year for the period 1971-1976 dealt with administrative law problems.<sup>120</sup>

The remedy does not lie in simply appointing more judges,<sup>121</sup> even assuming that with other measures we will improve the quality of the bar<sup>122</sup> and, hopefully, the judiciary (a notion which some of the judges who are the most vocal in criticizing the bar seem to forget).<sup>123</sup> Merely adding numbers to the courts' personnel will not alleviate the problems involved in the determination of administrative law cases, if for no other reason than most judges do not particularly relish administrative law cases and are not equipped to deal with them.

This is not to say that we should be afraid of creating new courts,<sup>124</sup> but we should create the right "type" of courts and not be

114. Goldman, *supra* note 5.

115. Burger, *Bringing the Judicial Machinery Up to the Demands Made Upon It*, 42 PA. B.A.Q. 262 (1970); Cramton, *supra* note 69.

116. Table III, *infra*, page 254.

117. Table II, *infra*, page 253.

118. Table I, *infra*, page 252.

119. The administrative caseload has changed from 21.4% of the total caseload in 1975 to 32.2% in 1976. See Table III, *infra*, page 254.

120. See Table II, *infra*, page 253.

121. McRae, *supra* note 86.

122. Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971); Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 934 (1970).

123. Speaking from experience gathered over the last twenty-odd years, the author feels free to state that in the District of Columbia, where the number of judges in the local courts has increased dramatically, the situation is, if anything, more dismal today than it was ten or fifteen years ago.

124. Pound, *supra* note 67, at 449.

motivated solely by a commendable desire to ease the workload of the present judges.<sup>125</sup> A system of administrative law courts is precisely the type of new court that should be created. This would not only do much to improve the administrative process, but would also redistribute the judicial workload by substantially lightening that of the federal courts, including the Supreme Court of the United States.<sup>126</sup>

### *The Importance of Expertise*

Part of our legal mythology is the fallacious belief that merely clothing a person with a black robe endows him or her with omniscience. This peculiar myth is one of many that may impair our continued existence as a dynamic and democratic society and result in nefarious consequences in the form of delayed, expensive and increasingly formalistic justice.

Expertise (true expertise, not that which the Supreme Court often assigns to agencies)<sup>127</sup> is important in the field of administrative law because to some extent the statutory issues and the methods of arriving at conclusions and decisions are different from run-of-the-mill civil or criminal controversies.<sup>128</sup> If one prefers to call this specialization a "concentration in certain fields of law," so be it.<sup>129</sup> The fact remains that "experienced" people (if not "experts") will get to the issues faster and often more accurately resolve the problems involved therein.

We can no longer subscribe to the theory that administrative hearings must be conducted in an adversary setting, assumed by many to be part of the foundation of the American legal system.<sup>130</sup> It has not worked that way in the past; it will not work in the future. Administrative agencies get their evidence by adopting a mixture of

125. *Supra* note 100, at 1327. See also Kaufman, *The Judicial Crisis, Court Delay, and the Para-Judge*, 54 JUDICATURE 145 (1970).

126. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 337-39 (1975).

127. *RCA v. United States*, 341 U.S. 412, 420 (1951); *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947); *Ford Motor Co. v. Commissioner of Patents*, 387 F. Supp. 675 (D.D.C. 1973).

128. White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 DUKE L.J. 195, 213; Comment, *Abuse of Discretion: Administrative Expertise v. Judicial Surveillance*, 115 U. PA. L. REV. 40, 41-42 (1966).

129. See generally Currie & Goldman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 68-70 (1975); Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996, 999-1001 (1971).

130. Bernstein, *supra* note 69, at 330; Gellhorn, *supra* note 77, at 244.

truth-seeking devices, be they adversary or inquisitorial. Under certain circumstances all the needed evidence can be obtained by a mere exchange of letters or by a questionnaire, and the need for an adversary debate to get to the truth is not always obvious or compelling.<sup>131</sup>

It is important that judges handling administrative law cases be knowledgeable in the intricacies of certain areas of substantive administrative law.<sup>132</sup> This does not mean that the basic principles of administrative procedural law do not apply to all the activities of administrative agencies. Judge Pfeiffer's theory that we ought to have a separate corps of administrative law judges is most enticing. The question is whether the ALJs would not be better judges if they were *in fact* judges, specializing in administrative law<sup>133</sup> and functioning in their proper slot in the administrative law system.

The administrative law should be speedy;<sup>134</sup> it is not at present. By adopting the system advocated herein, we would speed up the administrative process, as intended by the legislature, and as is indeed necessary in a complex technological society,<sup>135</sup> without sacrificing fairness at the same time.

The suggestions made in this article focus on the basic concepts underlying the system rather than on side issues which are merely symptomatic of the need for reform and which have led to the many reform proposals in the past. It is submitted that any change, to be a change for the better, must be compatible with the role of the administrative process in our society. Unfortunately, most of the changes to date have been merely formal changes or have only added to the present confusion. Changes in form are most often superficial and result in patchwork repair, the net result of which is to confuse the real issues and make other equally unattractive changes necessary.<sup>136</sup> Eventually the original objective is lost.

131. Bernstein, *supra* note 69, at 330; Gellhorn, *supra* note 77, at 244.

132. Miller, *The Education and Development of Administrative Law Judges*, 25 AD. L. REV. 1 (1973).

133. Pfeiffer, *supra* note 61, at 217, 218, 222, 231.

134. Schwartz, *The Administrative Agency in Historical Perspective*, 36 IND. L.J. 261, 268 (1961). Rothman, *Four Ways to Reduce Administrative Delay*, 28 TENN. L. REV. 332 (1961); "[T]he progress we ultimately make in combatting congestion and delay depends in a great measure upon the administrative and the enforcement agencies of government." See E. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 7 (4th ed. 1960). Prettyman, *The Nature of Administrative Law*, 44 VA. L. REV. 685, 687 (1958).

135. White, *supra* note 128, at 213-15.

136. Monroe, *The Urgent Case for American Law Reform: A Judge's Response to a Lawyer's Plea*, 19 DEPAUL L. REV. 466, 482, 486-89 (1970).

The adoption of a separate administrative court system should not entail the hiring of any more judicial personnel than is currently contemplated under various proposals.<sup>137</sup> In fact, it is possible that this reform might result in a lesser number of personnel being required.<sup>138</sup> A concrete projection of the required needs to implement the proposed reform can be postponed until the acceptance of the principle of reform outlined herein. It is suggested, however, that the administrative law judges, in addition to having adequate secretarial and clerical help, have available an administrative court staff of economists and other experts in related social fields.

Another advantage of this proposal would be to bring the administrative process closer to the people through decentralization. The agencies would have to fight their cases in the "local" administrative court which, presumably, would sit in the present federal circuits. Nothing should prevent maximum utilization of the ALJs by having them sit in a busy circuit when their own workload permits it. The procedural rules of these administrative courts should, of necessity, be less formal than those governing the conduct of the civilian courts, thus opening up the mysterious and awesome governmental process to the public and permitting a better understanding of government action to those affected by it.

This proposal for a distinct administrative law court system preserves the integrity of the administrative process as it was originally intended to function. It would reestablish the agency as the responsible source of decision-making in consonance with the Congressional mandate.

#### A COMPARISON OF VARIOUS ADMINISTRATIVE LAW REFORM PROPOSALS WITH THE ONE SUGGESTED IN THIS ARTICLE

Some authors have suggested that we adopt the French administrative law system<sup>139</sup> without fully realizing that administrative law in France has very little to do with administrative law in the United States.<sup>140</sup> It is useful to look to other systems for possible solutions to some of our problems, but in doing so, we must understand the tradition and the system from which we wish to borrow a new concept. New concepts, taken out of their natural context, will

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137. Burger, *supra* note 122, at 932-33.

138. Monroe, *supra* note 136, at 469, 480.

139. Rotunda, *supra* note 19.

140. *Id.* See generally Riesenfeld, *supra* note 112, pt. 1 at 48 *et seq.*, pt. 2 at 400-32, pt. 3 at 715-48 (1938).

not grow within our own system unless they are made compatible with it. The ombudsman idea is a good example.<sup>141</sup> It is obvious that the Swedish concept of an ombudsman cannot be transferred, as is, to our American tradition and survive.<sup>142</sup> We may adopt an approximation of an ombudsman, as where he or she would be a negotiator or an arbitrator with relatively limited power. However, it is unrealistic, in the light of the American political tradition, to expect that any one individual<sup>143</sup> be given the type of powers which the Swedish ombudsman has.

Other examples of "patchwork" reform proposals abound. Some have merit, such as that of Philip Elman, former member of the Federal Trade Commission. He suggests, in an interesting and persuasively written article, the creation of Trade Courts to which the F.T.C. and private parties could complain of transgressions of the F.T.C. Act.<sup>144</sup>

Mr. Elman's proposal, while basically sound, addresses itself to his narrow area of interest and does not fit in the broader administrative law scheme. Furthermore, it does not meet the contention that the total administrative process should be left in the hands of the agencies, with the opportunity by an administrative court to review their action. To do otherwise is to forget the basic purpose behind the creation of administrative agencies. We have strayed far from the original concepts of Dean Landis<sup>145</sup> and others,<sup>146</sup> but the time has come to reexamine the basic purpose of an administrative agency.

In a complex industrialized society, the fact that an administrative agency issues regulations, supervises the implementation of these regulations and even prosecutes transgressions of its own regulations is not at all shocking.<sup>147</sup> On the contrary, it fits the concept of more expeditious and possibly cheaper action in the hands of "experts"<sup>148</sup> as contemplated by the original proponents of

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141. Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057 (1961); Gellhorn, *supra* note 130, at 248; Wyner, *Complaint Resolution in Nebraska: Citizens, Bureaucrats and the Ombudsman*, 54 NEB. L. REV. 1 (1975).

142. Gellhorn, *supra* note 77, at 248-50.

143. Williams, *supra* note 19, at 281.

144. Elman, *supra* note 3, at 1048.

145. J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

146. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1965); H. FRIENDLY, *FEDERAL ADMINISTRATIVE AGENCIES* (1962).

147. Jones, *supra* note 89.

148. Freedman, *supra* note 85, at 1052, 1056.

the administrative process.<sup>149</sup> This objective has been perverted, to some extent, by the over-judicialization of these agencies. Therein lies one of the main weaknesses of the present system.

Establishing identical review boards at different agency levels and complex standards for review within each agency would be both cumbersome and expensive, and would not necessarily fit the agency's mission.<sup>150</sup> To burden an agency with several layers of in-house appellate reviews is costly to the taxpayer and unproductive for the agency, delays decision making, and occasionally may result in an "exercise in futility."<sup>151</sup>

Within the agency, it is sufficient to have a hearing before an examiner<sup>152</sup> (an agency employee working under powers delegated to him by the agency for managerial reasons) whose recommended decisions are either adopted or rejected by the agency. An aggrieved party should be able to appeal to an administrative court, as is proposed in this article.

Many worthwhile suggestions for reform, while individually representative of the patchwork approach referred to herein, can be integrated into this proposal. Thus, Professor Cramton's suggestions on solving delays in administrative proceedings,<sup>153</sup> Mr. Hector's proposal,<sup>154</sup> as well as Mr. Minow's recommendations,<sup>155</sup> contain much of value if integrated with a complete overhaul of the present administrative system. While one may not totally agree with the Ash Council,<sup>156</sup> many of its conclusions present worthwhile facets which

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149. E. ROOT, *supra* note 90.

150. *Hearings on S. 518 before the Subcommittee on Administrative Practice and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 223 (1967) (Comments of Chairman Frank W. McCullough).

151. Without unduly traumatizing the present ALJs, it would seem best to revert to the title of "hearing examiner" when referring to the hearing officer within the agency in order to distinguish him from the proposed ALJ, *ie.*, a member of the Administrative Law Court.

152. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); 5 U.S.C. § 557(b) (1976).

153. Cramton, *supra* note 69.

154. Hector, *supra* note 57.

155. Minow, *supra* note 77.

156. THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATIONS: A NEW REGULATORY FRAMEWORK, REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971) [hereinafter REPORT ON REGULATORY AGENCIES]. The main objective of the Ash Council seems to be to remove the regulatory agencies from a case by case decision-making process which is inextricably interwoven with rulemaking and the administrative process in general. Nathanson, *supra* note 2, at 86.

must be considered if one wishes to adopt a meaningful reform of our administrative process.<sup>157</sup>

The proposal in this article, to create an administrative court system outside and above the administrative agencies, meets the many objections to various proposals for reform discussed herein. We do need reform urgently, but we must use a radical approach to solve the many problems in our legal system in a manner consistent with our own heritage and tradition.

The federal courts of appeals are experiencing increasing case loads.<sup>158</sup> The author has conducted some statistical surveys which basically confirm what others have found.<sup>159</sup> Thus, it is apparent that the dramatic increase in the last year surveyed is due to the recent meteoric increase of Freedom of Information Act cases.<sup>160</sup>

There is a small proportionate increase of the case load in the appellate court system as opposed to the district courts.<sup>161</sup> Professor Nathanson states that "administrative appeals constitute only about 10% of the case load of the court of appeals. Furthermore, this number does not seem to be increasing. In 1971 there were 1,383 [administrative] appeals, while in 1967 there were 1,385 appeals."<sup>162</sup>

This, in general, agrees with the statistics secured for this article. Slight variations are due to the fact that the statistical survey brings this data up to 1976, as opposed to Professor Nathanson's article which was written in 1973.<sup>163</sup> For ready reference the summaries of the statistical surveys, as gleaned from various court reports, are best presented in tabular form:

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157. REPORT ON REGULATORY AGENCIES, *supra* note 156, at 21-22, 47, 49, 50, 51.

158. Nathanson, *supra* note 2, at 86.

159. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS (1976).

160. In 1971 administrative law cases represented about 19% of the caseload in the District Courts; in 1975 it had risen to 21.4% and in 1976 administrative law cases rose to 32.2% of the total caseload. See Table III, *infra*, page 254.

161. Nathanson, *supra* note 2, at 86. See Carrington, *supra* note 91, at 543. In the Court of Appeals, administrative law cases have risen steadily from 11% in 1971 to 14% in 1976. See Table II, *infra*, page 253.

162. Nathanson, *supra* note 2, at 87.

163. *Id.*



I. U.S. Supreme Court Caseload\*

	1971			1972			1973			1974			1975			1976		
	Total Cases	Ad.Law Cases	%	Total Cases	Ad.Law Cases	%	Total Cases	Ad.Law Cases	%	Total Cases	Ad.Law Cases	%	Total Cases	Ad.Law Cases	%	Total Cases	Ad.Law Cases	%
Total Circuits	1,727	119	7	2,322	115	5	2,524	101	4	2,520	153	6	2,412	93	4	2,619	159	5
District of Columbia																		
Circuit	88	18	21	95	29	30	101	20	20	117	37	32	98	19	19	126	45	36
Second Circuit	303	15	5	369	31	8	340	6	2	346	11	3	253	8	3	292	10	3
Seventh Circuit	208	10	5	171	10	6	189	8	4	215	19	9	229	9	4	195	7	4
Ninth Circuit	131	5	4	321	13	4	414	17	4	373	21	6	392	20	5	367	21	6

\*The number of administrative law cases is based upon a consecutive percentage rate of identifiable cases, since the breakdown, at this level, does not show the precise number of administrative law cases except by generic reference to an agency or broad category.

## II. U.S. Court of Appeals Caseload\*

	1971		1972		1973		1974		1975		1976	
	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases
Total	12,788	1,383	14,535	1,509	15,629	1,616	16,436	2,205	16,658	2,290	18,408	2,515
Circuits			11	11	10	10	10	13	13	14	14	14
District of Columbia												
Circuit	1,055	182	1,168	229	1,360	352	1,243	423	1,113	498	1,260	563
Second Circuit	1,423	182	1,317	169	1,709	221	1,802	234	1,739	258	1,898	313
Seventh Circuit	902	99	999	108	1,117	102	1,086	103	1,170	141	1,247	131
Ninth Circuit	1,936	307	2,258	250	2,316	316	2,697	586	2,731	437	2,907	440
			16	16	11	14	14	22	22	16	16	15

\*The number of administrative law cases is based upon a consecutive percentage rate of identifiable cases, since the breakdown, at this level, does not show the precise number of administrative law cases except by generic reference to an agency or broad category.

III. U.S. District Courts Caseload\*

	1971		1972		1973		1974		1975		1976						
	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases	Total Cases	Ad.Law Cases					
Total U.S. District Courts	93,396	18,314	19	96,173	20,697	21.5	98,560	20,310	20.6	103,530	20,763	20.117,320	25,079	21.4	130,597	42,083	32.2

\*The number of administrative law cases is based upon a conservative percentage rate of identifiable cases, since the breakdown, at this level, does not show the precise number of administrative law cases except by generic reference to an agency or broad category.

Professor Carrington proposed two to five subject matter divisions within the present appellate court system in order to achieve "some degree of specialization."<sup>164</sup> The author's agreement with the terms of this concept leads to a quarrel with Professor Nathanson's statement that the subject of federal administrative law is not an appropriate "subject matter for judicial specialization,"<sup>165</sup> on the ground that any such flat assertion is not borne out by experience.<sup>166</sup> Nevertheless, Professor Nathanson's proposals, many of which merit serious consideration, should be addressed. They are representative of the patchwork approach to reform complained of in this article, yet are not inconsistent with the objectives herein when effected in their proper areas. Let us analyze briefly seven of the recommendations in that article in sequence and in the author's own words:

(1) "[A]n increasing case load can be accommodated in some of the circuits by increasing the number of judges."<sup>167</sup> One may respond by pointing out that merely increasing the number of judges in the existing judiciary is not going to resolve the problem, because a better degree of understanding of administrative law by the judges is also necessary in order to cure the present confusion.

(2) "The most obvious immediate remedy is the re-drawing of the boundaries of the Circuits . . . ."<sup>168</sup>

This suggestion begs the question, for it is not a revamping of the boundaries of the Federal Circuit Courts of Appeals which is going to resolve the problems created by increased administrative litigation. Moreover, this is a change which might be as difficult to obtain politically as the creation of a separate administrative law court system.

(3) "[T]he number of circuits should be moderately increased so as to keep the number of judges from becoming as unwieldy as in the Fifth Circuit."<sup>169</sup>

While few will quarrel with this suggestion as a useful reform of the federal judiciary, it has no realistic bearing on the problems of the delivery of administrative legal services.

(4) "[A] determined effort should be made to restrict the

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164. Carrington, *supra* note 91; Nathanson, *supra* note 2.

165. Nathanson, *supra* note 2, at 89.

166. Note, 81 HARV. L. REV., *supra* note 101, at 1329-30.

167. Nathanson, *supra* note 2, at 91.

168. *Id.*

169. *Id.* at 91-92.

jurisdiction of the federal courts as a whole . . . .";<sup>170</sup> *i.e.*, do away with diversity jurisdiction, among others.

This, of course, is a drastic revamping of the federal judicial system which does not address the need for reform of the administrative law process. One may point out that the federal courts' work-load would be considerably lightened by adopting a separate administrative court system without curtailing the expectations, if not the rights, of the taxpayers.

(5) "[O]ne of these [suggested jurisdictional changes] has been some system of discretionary appeals rather than appeal as of right . . . ."<sup>171</sup>

It would seem that there is a necessity for a minimum appellate review which should not be discretionary. Psychologically, at least, part of the judicial system has to do with giving people the feeling of being fully heard.<sup>172</sup> To curtail the quality and availability of judicial service is not the answer that today's society expects, and Professor Nathanson seems to agree with this assessment.

(6) "[A] court consisting of temporarily assigned circuit court judges, to which cases might be referred by the United States Supreme Court."<sup>173</sup>

This is another "temporary" modification of the judicial system, a variation of Professor Kurland's proposal for "a single but final court of appeals charged with jurisdiction over non-constitutional questions arising in the federal courts."<sup>174</sup> Its fault lies in failing to squarely face the fact that different problems call for different remedies and, sometimes, for the restructuring of a system unable to cope with the challenge. Professor Nathanson's suggestion has the same weakness as the Chief Justice's proposal in connection with an intermediate adjunct Supreme Court.<sup>175</sup> Politically, such a notion is no more palatable than the "court packing" suggestion.<sup>176</sup>

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170. *Id.* at 92.

171. *Id.*

172. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Green v. McElroy*, 360 U.S. 474, 496-97 (1959); *Opp Cotton Mills v. Administrator of Wage & Hour Div., Dep't of Labor*, 312 U.S. 126, 152-53 (1941); *Nickey v. Mississippi*, 292 U.S. 393 (1934).

173. Nathanson, *supra* note 2, at 95.

174. *Id.* See Kurland, *The Supreme Court Should Decide Less and Explain More*, N.Y. Times, June 9, 1968, §6 (Magazine), at 34.

175. Statement issued by Chief Justice Burger (1974), printed in 61 A.B.A.J. 303 (1975).

176. See generally Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

At least symbolically, every person feels that they are entitled, under our system, to have a hearing at the final or "supreme" court level. If overwork is the problem, then it would be far better to increase the number of Supreme Court Justices regardless of opposition to "court packing," and to distribute the case load on a "collegial" basis.

(7) "[The above proposal] would in effect create either an intermediate or a final appellate court with respect to issues of federal statutory construction and important issues of federal administrative law if there is indeed a difference between the two."<sup>177</sup>

Now, in a roundabout way, Professor Nathanson reaches a conclusion which is, to some extent, consistent with the author's contention. At the core of meaningful reform in the field of administrative justice lies the realization that there are administrative law issues which are, in many ways, different from day-to-day private litigation.

The proposal that an Administrative Law Court be created appears to be validated by any criteria one may choose, along with the concept of placing above the Administrative Law Court level a Final Court of Administrative Appeals which would dispose of all questions raised by the various Administrative Courts. There would be no appeal from that Court's decision to the Supreme Court unless genuine constitutional issues were raised.

#### CONCLUSION

In the final analysis, judicial review is what much of the concern for the need for administrative law reform is all about.<sup>178</sup> This article has addressed the question of the type of review needed.

Whatever the disadvantages of the proposal presented here,<sup>179</sup> it is time that our thinking proceed along a productive and sound analysis of the real issues involved. Until now, the bar has not been willing to discuss reforms in the administrative law area by looking at the whole structure of our judicial system and the quality of the delivery of justice to all of our citizens. Any kind of meaningful reform, aside from being based on a correct analysis of the issues,

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177. Nathanson, *supra* note 2, at 96.

178. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); Cody, *Regulations Having the Effect of Law*, 21 AD. L. REV. 347, 348 (1969); Note, *Extending the Authority of the Judiciary to Review Administrative Agency Decisions*, 1972 WIS. L. REV. 613; Comment, *Judicial Review—Due Process*, 59 KY. L.J. 216 (1970).

179. Nathanson, *supra* note 2, at 88-90.

must have its roots within the traditions of our legal system, updated to serve our contemporary and future needs.

Administrative agencies, within the confines of the Administrative Procedure Act (amended to accommodate the proposed changes), would finally function as Congress intended. Agency action should be subject to review by Administrative Law Courts staffed primarily from the ranks of present administrative law judges. Appeal from the Administrative Courts would be to a Supreme Administrative Law Court, the decisions of which would be final, except for genuine constitutional issues which could be appealed to the Supreme Court of the United States.

This proposal reconciles the many different viewpoints expressed by various scholars and others concerned with our administrative law system. It fits into our contemporary legal system, which remains the one best suited to deal fairly with the individual in his quest for justice within the framework of a modern technological society.





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