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Ferdinand F. Stone

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AN INTRODUCTION TO THE ADMINISTRATIVE PROCESS*

FERDINAND F. STONE**

I

No one knows precisely what was in the minds of our forefathers when they framed the Constitution for these United States. The document must speak for itself and when it stutters it must speak through the lips of the Supreme Court. However, we can assume that our forefathers were concerned lest the new government as set up become merely a substitute tyranny for that which they saw in the rule of Great Britain; that they considered that the powers wrested from Great Britain belonged to the states and the people, who, in turn, delegated certain of these powers to the central government. We know also that they viewed the functioning of government, as Caesar had earlier viewed Gaul, as divided into three parts: the legislative, the executive and the judicial powers. In this division they had the support of theory and practice among civilized states. Lest these powers be exercised arbitrarily, our forefathers devised an elaborate system of checks and balances as insurance against tyranny. It is because of this system of checks and balances, rather than because of its tri-partite form, that the new constitution became a model for other nations and a landmark in constitutional development.

This division of government into a legislature, an executive and a judiciary adequately described the business at hand in the world of the late eighteenth century and indeed for many years thereafter. Government was a relatively simple business in a society which was by our standards singularly uncomplicated. Laws passed by the early legislatures usually dealt with particular problems and prescribed for them fairly precise cures. It is sometimes erroneously believed that administrative law and the administrative process are relatively recent problems. This is true in the sense that in our time they have become celebrated and controverted issues. It is not true in the sense of describing a new function of government, since from the beginning our government has been concerned with the administration of

*For some time, I have sought an article which would serve to introduce the student quickly to some of the major ideas involved in the federal administrative process. The literature on the whole field is immense, but much of it is too detailed to serve for introduction. Since I have found no such article, I determined to write one myself.

**Professor of Law and Director of The Institute of Comparative Law, Tulane University.

law.¹ However, in 1789, the administration of law was conceived as a subordinate task performed by one or more of the existing branches of government. Much of that which is now done by administrative agencies was then performed either on the state or municipal level or left to be resolved by individual action.² In our time, as we know, administration has become a major function of government, touching at vital points the life of each citizen, trespassing in a sense upon the precincts of the old established areas of governmental power, and blurring to some extent the clear-cut separation of powers. The phenomenon is not, however, one of novelty, but rather of complexity.³

It is not alone in the field of government that administration has become a worrisome child. It is a mark of our age that administration has grown to be one of the most important expressions of our activity.⁴ This might be called the age of the fact finders and the administrators. The gathering of facts has for some become confused with the acquisition of wisdom. The arranging of facts has for some come to pass for the development of policy. To call a man a "good administrator" is in many minds to accord him that high praise formerly associated with calling a man a "great statesman." In the field of business enterprise, we hear the remark that owners are easy to find but management is "hard to come by."⁵ In various fields of endeavor, we have come to place a high value upon administrative ability and success in our appraisal of men, so that it is not unusual to hear it said of a man that he has the brains and the wisdom but what is really needed in the job is a good administrator. This is the climate of opinion in which in government we have come to find that the administrators

1. "In the Federal realm, as is well known, the administrative process may be traced in an unbroken line from 1789, the first year of government under the Constitution of the United States." GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 4 (1941).

2. As A.A. Beale, Jr. wrote in 1917, "There is a desire, even a clamor, for public regulation, state or national, in matters which before the Civil War the nation conceived concerned only the persons directly interested." Beale, *The Expansion of American Administrative Law*, 30 *HARV. L. REV.* 430 (1917). Both sides of the Atlantic saw this change. See Dicey, *The Development of Administrative Law in England*, 31 *L.Q. REV.* 148, 149 (1915).

3. "If the American lawyer takes an increasing interest in Administrative Law it is because he associates it with the fact that he has more and more occasion to attend to the interests of his clients in government departments and before commissions which claim to administer law without pretending to be courts of justice." FREUND, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 16 (1923). See Frankfurter's statement, "Administrative Law has not come like a thief in the night. It is not an innovation; its general recognition is." Frankfurter, *Foreword*, 47 *YALE L.J.* 515, 517 (1938).

4. Goodnow opens his treatise by saying, "The most striking if not the most important questions of public law and the first to demand solution are those to which the name 'constitutional' is applied. To their solution the wisdom and political activity of the past have been devoted. The present age, however, is devoting itself primarily to questions which are generally referred to as 'administrative'." GOODNOW, *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 1 (1905).

See such studies as BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Dodd, *The Modern Corporation, Private Property and Recent Federal Legislation*, 54 *HARV. L. REV.* 917 (1941); Washington, *The Corporation Executive's Living Wage*, 54 *HARV. L. REV.* 733 (1941).

are no longer thought of as an army of clerks and minor officials; administration has become the daily business of powerful and important figures. In times of emergency we find government and business vying for the services of key administrators.

The story of how all this came about in the United States is the story of the growth of our country, of the industrial revolution and the factory system, of the vanishing frontier and the crowding of cities, of the concentration of wealth and the rise of monopoly, of the maturing into practice of certain ideals of our democracy and of the facts of a general economic depression and mobilization for two world wars. Some writers have tried to set out in orderly fashion the cause of these changes but the problem, like the chicken-egg priority, defies much orderly analysis. Some like to attempt to tie it up with dates, such as the Supreme Court's decision in *Munn v. Illinois*⁶ or the establishment of the Interstate Commerce Commission in 1887,⁷ but these are but peaks in a slowly rising plateau. Still others say that all went well until the establishment of the alphabetical agencies of the "New Deal,"⁸ but that was only the proverbial straw which broke the camel's back. A few valiant souls admit that like Topsy the administrative phenomenon "just grewed."⁹

The results of its development are easier to state, at least as they concern government. State and federal governments are today engaged in the control and regulation of many fields of economic activity which were formerly largely self-regulating.¹⁰ In the main, these are businesses classified as affected with a public interest such as railroads, air lines, communications and public utilities. Further, short of the step of declaring the business affected with a public interest, state and federal governments have become interested in the control and regulation of specific functions performed by business, such as the setting of wages, collective bargaining, social security, prices, securities and form of enterprise, to name but a few examples. Again, government itself has entered into certain areas of activities hitherto occupied almost exclusively by private enterprise, such as insurance, housing, money lending, defense and war production and the generation of electric power. Then too, the ordinary business of government, witness the collection of taxes, has grown more complex as the society itself became more developed. Finally, we may note the increased tendency on the part of legislatures to concern themselves with the formulation of policy in general

6. 94 U.S. 113 (1876).

7. 24 STAT. 379 (1887), 49 U.S.C. c. 1 (1946).

8. Jacob M. Lashly wrote in 1939, "there are now some 130 of these instrumentalities of government, employing in one capacity or another about 850,000 people. It is reported that one of the executive agencies alone decided over 600,000 separate controversies, while during a corresponding period the aggregate of cases decided by all of the federal courts of the country was less than 150,000." Lashly, *Administrative Law and the Bar*, 25 VA. L. REV. 641, 647 (1939).

9. A thesis vigorously scouted in BECK, OUR WONDERLAND OF BUREAUCRACY 91 (1932).

10. See generally FREUND, *op. cit. supra* note 3.

outlines, leaving to subordinate agencies the actual implementation of the ideas into concrete rules. These are by no means all of the results, but they will serve to indicate the problem and suggest other examples.

Standing off and viewing the picture from another side, we can see the wearing away of certain ideas long held about law in general. In some instances this represents the correction of an idea which was unsound; in others it represents a more fundamental shift in opinion. For example, despite experience, the attitude had been widely indulged by laymen that laws, once written down and enacted by legislatures, were practically self-executing. The assumption that all laws are clear and capable of only one meaning is as groundless as the assumption that all words have an agreed meaning content and hence that ambiguity or misunderstanding cannot arise. Under such a concept of law, administration of law was considered to be an essentially mechanical process and administrative officials as mere clerks. If indeed this were ever so, certainly it is not true today. Despite advances in technical skill in the drafting of legislation, despite the fact that many acts include sections defining the terms used therein, there is a wide area left in which the modern administrator must act even though legislative meaning may be debated and courts have not yet authoritatively determined meanings.

Under our system, it is usually contemplated that the administrator will make the initial interpretation and act under it even though his interpretation may later be invalidated by court action.¹¹ He cannot seek an advisory opinion from a court;¹² neither has the declaratory judgment procedure aided him materially.¹³ This has meant that the administrator through his necessity of interpreting acts which he administers has come to exercise an important policy function.¹⁴ We need only refer to the interpretations and rulings of the Collector of Internal Revenue or the Federal Security Administrator as examples of the importance of this function.

Another idea which is succumbing to experience is the belief that legislatures, meeting at stated periodic times, can provide adequately for future problems. In the debates on the Federal Constitution, the delegates expressed concern lest the federal legislature meet too often,¹⁵ but today

11. "Interpretation by way of adjudication, manifestly, is interpretation after the event; but the adequate functioning of the administrative process requires that much interpretation precede the event." LANDIS, *THE ADMINISTRATIVE PROCESS* 80 (1938).

12. For a recent statement of the Court's position see *Coffman v. Breeze Corps.*, 323 U.S. 316 (1945).

13. This does not mean that the procedure itself is defective, but only that it has been sparingly used. On the whole subject see BORCHARD, *DECLARATORY JUDGMENTS* 875 *et seq.* (2d ed. 1941); Borchard, *Declaratory Judgments in Administrative Law*, 11 N.Y.U.L.Q. REV. 139 (1933); Comment, *Declaratory Judgments and Administrative Agencies*, 15 TEMP. L.Q. 139 (1940).

14. See generally LANDIS, *op. cit. supra* note 11, at 55 *et seq.*

15. "Mr. King could not think there would be a necessity for a meeting every year. A great vice in our system was that of legislating too much." 3 MADISON'S PAPERS 1246 (1842).

we find a growing doubt as to whether the legislature should adjourn at all, so great and demanding has its business become. Problems do not remain static between legislative sessions: neither do they declare a moratorium merely because the legislature is concerned with other matters of consequence. Legislatures have used two principal methods for dealing with future problems. One has been to attempt to anticipate by detailed legislation all the problems which are likely to arise in the foreseeable future. Such a method becomes not only cumbersome in detail but requires better than usual crystal balls for prediction.¹⁶ A second method involves the legislature contenting itself with laying down general standards, policies and limitations and entrusting to administrative agencies the task of applying the policies to day-by-day problems as they develop. This latter method has been used increasingly. It has greatly enhanced the importance of the administrator as the day-by-day "quasi-legislator."

Still a further idea which has been undergoing change is the notion that legislation is primarily directed to problems which have already arisen and become bothersome enough to require direct action. This is the old thesis that legislatures act to cure evils but are only mildly interested in preventing them. Much modern legislation is planning type legislation. The approach is to a whole area of activity rather than to specific facets and the emphasis is upon the future. Sometimes the planning is detailed; sometimes it merely sketches generally the plan, leaving the administrator to put in the details. Planning for the future usually presupposes a policy and policy usually grounds itself upon a theory, and hence the administrator is sometimes left with considerable latitude as to both theory and policy. Legislative direction to an administrator to preserve "fair methods of competition" or to take steps against "unreasonable restraints upon commerce" or "unfair labor practices" are illustrations in point.

From whatever causes it arose, the fact remains that the rise of the administrator in government to a position of power and influence was such that he could no longer be regarded as a subordinate cog in a tri-partite wheel. His rise to that position has not gone unchallenged and it is with the challenges that we must now concern ourselves.

II

The administrative process has been attacked by many challenges. Not all of them have been successful but each for a certain time has held the

16. As an example of the difficulty, we may look to the history of the Federal Trade Commission. On January 20, 1914, President Wilson addressed both houses of Congress saying, "Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limit of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item, forbidden by statute." But as the historian of the Federal Trade Commission points out, the statutes which resulted "were rather a victory for those who doubted the efficacy of legislative codification, and placed their reliance instead upon the development of rules and precedents by the gradual process of interpretation and decision of controversies by administrative and judicial tribunals." HENDERSON, *THE FEDERAL TRADE COMMISSION* 23, 48 (1924).

limelight of public attention. For example, it has been said that the administrative process is in fact a "headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers" which does "violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three." Despite the strength of the language here used, this was no demagogic outcry but was said by a distinguished committee in its report to the President.¹⁷ It is of course true that the Constitution did not provide for a fourth branch of the government to be called the administrative power, but, as Mr. Landis has written, "in terms of political theory, the administrative process springs from the inadequacy of a simple tri-partite form of government to deal with modern problems."¹⁸ Like the child born out of wedlock, it is a real entity: to call it illegitimate does not affect its existence in fact, it merely gives it a label. For the purpose of this essay, it is sufficient to say that the process has withstood this attack and continues to function. Debate as to whether it is a "fourth branch" or a "mongrel" will continue to interest the theorists.

The constitutionality of the administrative process has also been questioned as a violation of the doctrine of separation of powers. For example, it has been charged that some agencies perform quasi-legislative, quasi-judicial and quasi-executive powers, so that functions of two or more of the traditional branches of government are united in the same agency. The separation of powers doctrine is an old one.¹⁹ Montesquieu had warned that "when the legislative and the executive powers are united in the same person or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."²⁰ By way of example, Massachusetts can be cited in that her constitution provides that "the legislative department shall never exercise the executive or judicial powers, or either of them."²¹ The Federal Constitution placed the legislative power in the Congress, the executive power in the President and the judicial power in the federal judiciary, but it did not in so many words provide against their blending. It was specifically raised in objection to the new Constitution that "the several departments of power are distributed and blended in such a manner as at once to destroy all symmetry

17. THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 36 (1937).

18. LANDIS, *op. cit. supra* note 11, at 1.

19. Berle remarks that "however the theory of division of powers may stand as a philosophical proposition, it is firmly engrafted into American law, primarily by constitutional provisions, and secondarily and more effectively by five generations' habit of legal reasoning." BERLE, *supra* note 2, at 433. See also Parker, *Separation of Powers Revisited: Its Meaning to Administrative Process*, 49 MICH. L. REV. 1009 (1951) where the author concludes that "it is perhaps inaccurate to speak of separation of powers as a basic constitutional principle. All that is left of it seems to be an expedient of governmental procedure."

20. MONTESQUIEU, *THE SPIRIT OF LAWS* Bk. XI, c. 6 (Nugent's transl. 1900).

21. MASS. CONST. Art. XXX, § 31.

and beauty of form." Madison defended against this attack by resorting to the words of Montesquieu himself and to his admiration of the British Constitution, where indeed it could not be said that the departments were kept totally separate and distinct from one another.²²

In defense of our system it is argued that the liberty of which Montesquieu spoke and which it was in the minds of our forefathers to guard was in our Constitution protected not by a sealing off of each department from the others but by providing for the harmonization of these powers, usefully exerted together, and kept from arbitrariness by the system of checks and balances provided for each upon the others. The constitutional argument of doctrinal separation of powers is more often appealed to than described. The great decisions of the Supreme Court, in cases where the argument has been raised, seem to exhibit less concern for the mechanical departmentalizing of powers than for giving effect to those checks and balances which can preserve us against tyranny.²³ As Mr. Justice Cardozo has reminded us, "the separation of powers between Executive and Congress is not a doctrinaire concept to be made use of with pedantic vigor."²⁴

Ground for attack has also been found in the deeply embedded, even if erroneously introduced, maxim *delegata potestas non potest delegari*.²⁵ Professor Woodbine of Yale has discovered and Mr. Patrick Duff of Cambridge has agreed that this maxim "owes its origin to medieval commentators on the Digest and Decretals, and its vogue in the common law to the carelessness of a sixteenth century printer."²⁶ Its doubtful parentage has, however, not affected its virility. The argument runs, as it concerns our topic, that powers delegated in the Constitution to one of the three branches of the government cannot in turn be delegated to another branch

22. THE FEDERALIST, No. 47 (1788).

23. Referring to the doctrine of the separation of powers, Frankfurter and Landis wrote in 1924, "That doctrine embodies cautions against tyranny in government through undue concentration of power. The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind 'the separation of powers' is fear of the absorption of one of the three branches of government by another. As a principle of statesmanship the practical demands of government preclude its doctrinaire application." Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012-13 (1924). A.A. Berle, Jr. had said in 1917, ". . . it is necessary to develop statutory construction in connection with the constitution to the end that the commission may be checked at the point where its tyranny may begin." Berle, *supra* note 2, at 448. "The framers feared tyranny, and the theories of Montesquieu were accepted by them and by courts as the final word of political wisdom." Cheadle, *The Delegation of Legislative Functions*, 27 YALE L.J. 892, 893 (1918).

24. Dissenting in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935).

25. For an able discussion see Foster, *The Delegation of Legislative Power to Administrative Officers*, 7 ILL. L. REV. 397 (1913). See also Jaffe, *An Essay on Delegation of Legislative Powers*, 47 COL. L. REV. 359, 561 (1947).

26. See Duff, *Delegata Potestas non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 172-3 (1929).

or to an administrative agency.²⁷ Sugden,²⁸ Kent²⁹ and Story³⁰ all seem to base the maxim on the reasoning that the original delegation of power usually rests upon a personal trust and confidence reposed in the agent to whom the powers are given, which confidence and trust may be defeated by sub-delegation to another not chosen by the principal. Story, however, admitted exceptions where "from the express language used, or from the fair presumptions, growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent," *i.e.*, the power to sub-delegate. Again, it should be pointed out that we are here dealing in this challenge with a maxim of common law and not with an express prohibition of the Constitution itself.

From the point of view of the practical operation of government, it has been vigorously argued that it is inefficient, if not impossible, for the legislature to deal in minute detail with all the complicated problems presented to it; that it must resort to subordinate and specialized agencies to implement the policies which it lays down.³¹ It is also argued that the Constitution does not prohibit cooperation or coordination among the various branches of the government; that such is indeed necessary if the government is to discharge the responsibility placed upon it. It has been maintained that the evil from which the maxim is to protect us is not the intelligent use by the legislature of aids to its task wherever it can find them, but the abdication or delegation by the legislature of the legislative power itself.

There would be little merit and less truth in asserting that expressed judicial opinion on this point has been at all times clear and uniform. One senses the courts' cautious case by case approach, seeking some firm ground for distinction. The early landmark cases in the Supreme Court seem to announce firmly that there can be no delegation of legislative

27. As John Locke expressed it, "these are the bounds which the trust that it put in them by society and the law of God and Nature have set to the legislative power of every commonwealth in all forms of government. * * * the legislature neither must nor can transfer the power of making law to anybody else or place it anywhere but where the people have." LOCKE, *CIVIL GOVERNMENT* 142 (1821).

28. SUGDEN, *TREATISE ON POWERS* 144 (1st ed. 1808).

29. KENT, *COMMENTARIES* 633 (1st ed. 1827).

30. STORY, *COMMENTARIES ON THE LAW OF AGENCY* § 13 (1839).

31. Chief Justice Taft in responding to resolutions offered on the death of Chief Justice White said, "The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier days of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government, and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive and judicial machinery of the Federal Government and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare. The pioneer work of Chief Justice White in this field entitles him to the gratitude of his countrymen." 257 U.S. xxv-xxvi (1922).

power by Congress to the Executive,³² but that legislative acts which provide for suspension of the law when the Executive finds an event to have occurred or a condition of affairs to exist are not delegations to him of legislative power and hence do not offend the maxim.³³ Some twenty years of experience later, the Supreme Court was asked to pass upon the constitutionality of legislation authorizing the Secretary of Agriculture to make rules and regulations for the protection of public forests and forest reservations from destruction by fire and depredation and providing that violations of such rules or regulations would be crimes.³⁴ The court considered that this was not a delegation of legislative power since the subjects as to which the Secretary could regulate were defined.³⁵ Another fifteen years passed and we find the Supreme Court, with reference to legislation providing for the cooperation of the Congress and Executive in the so-called flexible tariff provisions, stating that "in determining what it (the legislature) may do in seeking assistance from another branch, the extent and character of the assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."³⁶ In each of these cases, the Court upheld the acts and distinguished that which was done from delegation of powers. It was in the *Hampton* case that the Court seems to have indicated a new line of reasoning when it wrote that "if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix rates is directed to conform, such legislative action is not a *forbidden delegation* of legislative power."³⁷

In the *Panama* case, we find the majority opinion stating that "the Congress manifestly is not permitted to abdicate, or to transfer to others, the *essential* legislative functions with which it is vested,"³⁸ and again the Court wrote that if the challenged action were held valid then "it would be idle to pretend that anything would be left of *limitations* upon the power of Congress to delegate its law-making function."³⁹ The use of the terms "essential" and "limitations" seems to indicate that the Court may be willing to sanction some delegations but not others. Mr. Justice Cardozo, dissenting in the *Panama* case, was of the opinion that in applying the maxim "there must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government which

32. See for example the majority opinion of Mr. Justice Harlan and the dissenting opinion of Mr. Justice Lamar in *Field v. Clark*, 146 U.S. 649 (1892). For discussion of the early cases see Whiteside, *Delegata Potestas non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 176 *et seq.* (1929).

33. *Field v. Clark*, 143 U.S. 649 (1892); *The Cargo of the Brig Aurora*, *Burnside Claimant v. United States*, 7 Cranch 382 (U.S. 1813).

34. *United States v. Grimaud*, 220 U.S. 506 (1911).

35. Although the district judge had written, "if this does not necessarily involve a delegation of legislative power, it is difficult to conceive of a statute challengeable on that ground." *United States v. Grimaud*, 170 Fed. 205, 209 (S.D. Cal. 1909).

36. *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394, 406 (1928).

37. *Id.* at 409 (italics ours).

38. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (italics ours).

39. *Id.* at 430 (italics ours).

cannot foresee today the developments of tomorrow in their infinite variety."⁴⁰

The question now became: what protection or safeguards shall be required in such permissible "delegations" to insure against tyranny or arbitrariness of action? Mr. Justice Cardozo spoke of the fact that where discretion was entrusted by the legislature to an agency, it must not be "unconfined and vagrant."⁴¹ It must be "canalized within banks that keep it from overflowing."⁴² He was of the opinion that the act challenged in the *Panama* case was so canalized, but that the NIRA, challenged in the *Schechter* case, constituted "delegation run riot."⁴³ The question was still: what banks does a canal require? Chief Justice Stone, in the *Yakus* case, considered that the "essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct."⁴⁴ This the legislature must do. If this be done, then it is no objection that such legislative command becomes effective only when a designated administrative agency determines from relevant data that certain conditions or facts exist. Nor is it a valid objection that the determining of such facts or conditions involves the exercise of administrative judgment.⁴⁵ The role of the court is seen to be that of deciding whether the challenged legislation laid down sufficient standards for the guidance of the administrator so that his acts can be tested in such a way as to insure that the will of Congress has been obeyed. Thus one of the banks of the canal became "standards."

The other bank of the canal may be said to be "safeguards." The notion appears to be that if the legislature has exercised its essential function by laying down policy and standards for the guidance of the administrator, and if in addition there exist adequate safeguards as checks upon arbitrary or misused power, then tyranny is in check and the individual protected. The spelling out of these requirements of safeguards and standards may in a sense be called the development of "checks and balances" within the constitutional framework to apply to the constitutionally-unpro-

40. *Id.* at 440. Actually here Mr. Justice Cardozo was treating the related problem of separation of powers. As Chief Justice White had written earlier, ". . . to deny the power of Congress to delegate such a duty would, in effect, amount to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." *Butterfield v. Stranahan*, 192 U.S. 470 (1904). See also Mr. Justice Harlan's statement, ". . . indeed, it is not too much to say that a denial to Congress of the right, under the constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be to 'stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business." *Union Bridge Company v. United States* 204 U.S. 364 (1906).

41. *Panama Refining Co. v. Ryan*, *supra* note 38.

42. *Ibid.*

43. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

44. *Yakus v. United States*, 321 U. S. 414, 424 (1944).

45. *Opp Cotton Mills v. Wage and Hour Adm'r*, 312 U.S. 126, 144 (1941).

vided-for "fourth branch of government."⁴⁶ The nature of the safeguards required may vary with the particular problems presented to the court, but in the main they consist of such devices as judicial review, requirement of findings, and notice and hearing to the parties concerned.

This brings us to the important question of "due process." Even where the administrative process has survived the attacks made upon it that it is an unconstitutional fourth arm of government and that it violates the constitutional concepts of separation and non-delegation of powers, it has still to meet the vigorous challenge that it is in violation of the due process of law clauses of the Constitution as found in the Fifth and Fourteenth Amendments. This attack has taken at least two forms: first, that the statute under which the administrative process operates is unconstitutional in that it fails to provide for due process of law;⁴⁷ secondly, that the administrative process in operation does not accord due process of law.⁴⁸ The former is essentially the argument of a lack of sufficient safeguards: the latter goes to the heart of the question of arbitrary, capricious "Star Chamber"⁴⁹ exercises of power.

The idea is deeply engrained in our thought that no person shall be deprived of his life, liberty or property without due process of law. The ratification of the Constitution guaranteed by the Fifth Amendment protection to this right against acts of the federal government. The war which tested the Union brought in its wake the guarantee by the Fourteenth Amendment of this right against acts of the state governments. There has been widespread acknowledgment of the existence of this right: the extent of the guarantees has been less generally agreed upon. As Mr. Justice Frankfurter has written recently, "The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of

46. "The power of the courts to declare laws and delegated legislative action void for unconstitutionality is a unique feature of American constitutional law. The exercise of this authority stabilizes our institutions and checks the transitory ebullitions of temporary majorities. The courts thus safeguard the rights of life, liberty and property which are included in that pursuit of happiness for which governments are instituted among men. So long as the power remains, it is to be exercised and not abdicated; exercised not arbitrarily, but as a check and balance on arbitrary power and with the breadth and comprehension of statesmen dealing with the supreme law, not with the meticulousness of an inferior judge construing a city ordinance." Address of Cuthbert W. Pound, *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 131 (1923). See also ROSCOE POUND, *ADMINISTRATIVE LAW* 26 (1942), ". . . to admit that development of the administrative process is necessary does not involve admitting that it should be free of checks such as a due balance between the general security and the individual life has led us to impose on both the legislative and judicial process."

47. For example, see *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

48. See discussion in *Opp Cotton Mills Inc. v. Wage and Hour Adm'r*, *supra* note 45.

49. This slogan, dating back to Tudor days, was used by the court in the case of *Saginaw Broadcasting Co. v. Federal Communications Comm'n*, 96 F.2d 554 (D.C. Cir. 1938).

conflicting claims * * * on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in any progressive society."⁵⁰ At this point it should be stated that in this essay we are concerned with the requirements of due process in the administrative process, although we must be aware that our answer to this question depends to a large extent upon the wider reaches of the development of the doctrine surrounding due process.⁵¹

It is usual to give "due process" an ancestry at least as far back as Magna Carta, although it cannot be denied that the forms in which due process has been carried out have varied from age to age.⁵² No one has been antiquarian enough to claim that due process in this twentieth century should slavishly follow the forms in vogue and use in the twelfth century. The Supreme Court has reminded us that "to believe that the judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges."⁵³ Again, Mr. Justice Frankfurter writes, ". . . due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Justice Cardozo twice wrote for this court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' * * * or are 'implicit in the concept of ordered liberty.'"⁵⁴ Or again, it is referred to as protection of "those canons of decency and fairness which express the notions of justice of English-speaking peoples."⁵⁵ The problem is of course the rendering of these "fine phrases into concrete action. What are the canons of fair play and decency? What is the summarized constitutional guarantee?

The application of the test of due process to the administrative process was attended by some of the difficulties inherent in the provisions of the new Japanese Constitution⁵⁶ guaranteeing due process. What is due process as applied to a new institution? Over a long period of time and not without

50. *Rochin v. California*, 72 Sup. Ct. 205, 209 (1952).

51. "But constitutional limitations on the power of government are self-imposed restrictions upon the will of the people and qualify the despotism of the majority. Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict arbitrary legislative power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the legislature enacts on grounds of public policy should be sustained, but the courts may not uphold the exercise of arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts." Cuthbert W. Pound, *supra* note 46, at 116. See also ROSCOE POUND, *op. cit. supra* note 46, at 100-101.

52. See McIlwain, *Due Process of Law in Magna Carta*, 14 COL. L. REV. 27 (1914).

53. *Rochin v. California*, *supra* note 50, at 209.

54. *Id.* at 208.

55. *Ibid.*

56. "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." JAPANESE CONST. Art. 31, promulgated November 3, 1946.

controversy, the courts have worked out a concept of judicial due process. There has also been developed in less elaborate form a concept of legislative and executive due process as approved by the courts. These three branches of government had, however, been established in the Constitution as part and parcel of the organic law which contained the due process requirement. The administrative process was neither completely contemplated by the Constitution nor expressly provided for by it or its amendments. The single guiding star was the proposition that reason and experience dictated that the government ought not to be permitted to accomplish by the indirect means of the administrative process that which it was expressly prohibited from doing directly, namely, depriving citizens of life, liberty or property without due process of law.

Several avenues of approach were open to the courts in this matter. One was to say that wherever the court was called upon to pass upon acts done by the administrative process, it would apply in testing the validity of such acts the specific requirements of judicial due process. It was pointed out by the opponents of this view that to a considerable extent the administrative process had grown up as a reaction to cumbersome and technical court rules which had rendered the judiciary unable to meet modern problems;⁵⁷ that if judicial methods were to be required in the administrative process, this would "hamstring" its operation.⁵⁸ It was further pointed out that if the legislature had wished to create new courts, it could have done so, but that instead it had created administrative agencies which were not courts.⁵⁹ The proponents of this first approach pointed out that only through the time-honored judicial due process could the rights of individuals be protected adequately and the danger of arbitrary action be avoided.

A second approach favored by many was that since within the administrative process were contained some functions which were "quasi-judicial," some which were "quasi-legislative" and some "quasi-executive," courts in testing the validity of administrative action would first determine the precise function involved, *i.e.*, legislative or judicial, and then apply to it the proper due process concept.⁶⁰ Against this view it was argued that it ignored the essential unity and unique mission of the administrative process and would necessitate a compartmentalization of action which did not exist and would be inefficient in operation.⁶¹ In support of this approach, it

57. "Characteristics arising from the so-called rigidity and formality of the judicial process are commonly stated to be factors leading to the rejection of the judicial for the administrative process." GELLHORN, *op. cit. supra* note 1, at 14. See also LANDIS, *op. cit. supra* note 11, at 30.

58. For example, see Holmes' method in *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915).

59. See particularly Landis' appraisal as summarized. LANDIS, *op. cit. supra* note 11, at 46.

60. Such seems to have been the approach in *The Assigned Car Cases*, 274 U.S. 564, 583 (1926).

61. "The dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government." LANDIS, *op. cit. supra* note 11, at 12.

was urged that such a requirement would aid in eliminating from the administrative process some of that blending of functions, *e.g.*, prosecuting and judging, which had done much to create resentment against the process.⁶²

It was also open to the court to take a third approach, namely, to treat the administrative process as *sui generis* despite its rather irregular birth and to apply to it tests which might be called "administrative due process."⁶³ One version of this approach might be to accept as determinative of administrative due process the rules and procedures set down by each agency. An obvious difficulty in this version was that only a few of the agencies had published rules, while the great bulk of them either had no specific rules at all or operated under rules which were not available to the general public.⁶⁴ This defect has now in large part been remedied.⁶⁵ A further version was for the court to elaborate the requirements of administrative due process in specific cases. Still a further possibility was to provide by legislation a basic due process requirement to be followed by all agencies.

This struggle over the issue of due process was no academic debate but one of the most heated political controversies in our history. Today it has largely cooled, but from the early thirties until the middle forties the contest effectively divided political and legal opinion. The rapid increase in administrative power under President Roosevelt and the "New Deal," the open antagonism between the President and the Supreme Court, the reaching of the government's hand into hitherto sacrosanct areas of private business, the sometimes over-zealous activities of the administrators; all these and more raised the cry of "bureaucratic tyranny." The Walter-Logan Bill,⁶⁶ backed by the American Bar Association, which measure sought to "judicialize" the administrative process, passed the Congress but was vetoed by the President.⁶⁷ Public sentiment was also roused by the debated ques-

62. These arguments are considered by Gellhorn. See GELLHORN, *op. cit. supra* note 1, at 25-29. See REP. PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT 40 (1937), ". . . the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself."

63. As the Chairman of the Senate Judiciary Committee said in discussing the bill which later became the Administrative Procedure Act of 1946, ". . . we have set up a fourth order in the tri-partite plan of Government which was initiated by the founding fathers of our democracy. They set up the executive, the legislative, and the judicial branches; but since that time we have set up a fourth dimension, if I may so term it, which is now popularly known as administrative in nature. So we have the legislative, the executive, the judicial and the administrative." 92 CONG. REC. 2148 (March 12, 1946).

64. See Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934).

65. See *The Federal Register Act*, 4 GEO. WASH. L. REV. 268 (1936); ADMINISTRATIVE PROCEDURE ACT, § 3, 60 STAT. 237, 5 U.S.C. § 1003 (1946).

66. SEN. DOC. NO. 915, favorably reported to the Senate in 1939 and H.R. 6324, 76th Cong., 1st Sess. (1939).

67. In vetoing the Walter-Logan bill, President Roosevelt called attention to the fact that he had earlier appointed a committee "to review the entire administrative process" which was "to recommend improvements, including the suggestion of any

tion of the President's power to remove the Chairman of the Federal Trade Commission on the ground that they did not see eye to eye on economic matters.⁶⁸ In England, the Lord Chief Justice had written a book in which he characterized the administrative process as "The New Despotism."⁶⁹ The Supreme Court, with changing personnel as the result of the President's retirement plan for the justices, was shifting ground. President Roosevelt in 1939 had acted to appoint, at the suggestion of the Attorney General, a committee to undertake a study of the whole area of administrative agencies.⁷⁰ The committee was headed by the Attorney General and its work extended over a period of several years.⁷¹

The result of all this activity was the Federal Administrative Procedure Act, enacted into law on June 11, 1946.⁷² It was almost inevitable that the final version of this Act would be a compromise measure. It did not satisfy those who saw in the administrative process a new despotic challenge to free government and private initiative.⁷³ Nor did it satisfy those who wished to keep the process relatively free from court interference.⁷⁴ Professor Frankfurter, as he then was, had counselled some years earlier that "in a field as vast and unruly as contemporary Administrative Law we must be wary against premature generalization and merely formal system."⁷⁵ The passage of years and the rapid growth of the process had caused others to see in it a Paul Bunyan-like child quite ready for discipline.⁷⁶

The theoretical problem was the determination of the controls necessary to safeguard the rights of individuals and businesses in their contact with the administrative process, while at the same time recognizing and

needed legislation." He said that he "should desire to await their report and recommendations before approving any measure in this complicated field." H.R. Doc. No. 986, 76th Cong., 3d Sess. 3, 4 (1940).

68. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

69. LORD HEWART OF BURY, *THE NEW DESPOTISM* (1929).

70. The creation of such a committee had been suggested to the President by the Attorney General in December, 1938. The President agreed to its appointment by letter of February 16, 1939.

71. The Final Report was made in 1941. SEN. DOC. NO. 8.

72. 60 STAT. 237, 5 U.S.C. § 1001 *et seq.* (1946). The intervening years between 1941 and 1946 found Congress concerned with other pressing matters in Europe and the Pacific.

73. Mr. Gwynne of Iowa said, "Some of you who have been very much interested in this subject over the years may read this bill with a certain amount of disappointment. You will regret that the bill does not go further. I am frank to say that I have these same feelings myself. Nevertheless * * * it will become the much needed start along the road I am so anxious to have us travel." House of Representatives Proceedings of May 24, 1946. See also Walkup, *The Administrative Procedure Act*, 34 GEO. L.J. 457, 476 (1946).

74. See Blachly and Oatman, *The Federal Administrative Procedure Act*, 34 GEO. L.J. 407 (1946).

75. FRANKFURTER, *Preface, CASES ON ADMINISTRATIVE LAW* (1932).

76. "We have in general the materials and the facts at hand. I think the time is ripe for some measure of control and prescription by legislation. I cannot agree that there is anything inherent in the subject of administrative procedure, however complex it may be, which defies workable codification." Excerpt from Letter of Attorney General to the Chairmen of the Judiciary Committees of both Houses of the Congress. SEN. REP. NO. 752, 79th Cong., 1st Sess., 37-8 (1945).

preserving the special functions in our society usefully performed by these administrative agencies. The practical problem lay in discovering some basic propositions upon which Congress and the President could agree and which it was hoped would prove acceptable to the judiciary. There is no wish here to go into the details of the Administrative Procedure Act. It must suffice by way of introduction to point out some of its salient features, although the Act itself is best regarded as an outline of minimum essential rights and procedures.

The Act requires agencies to state and publish formally the procedures and methods used by the agency as well as any substantive rules adopted as authorized by law and any statements of general policy or interpretations formulated and adopted for the guidance of the public.⁷⁷ Certain exceptions are made where secrecy is properly involved⁷⁸ or public interest not concerned.⁷⁹ Once published these become the measure of required procedure.⁸⁰ Since much of the objection to the administrative process had been levelled at its so-called "Star Chamber" methods in that the procedure by which it acted was not known except by the agency itself and was sometimes changed even during the course of a proceeding, it was hoped that this new requirement would go far to dispel some of the fear of these "unpredictable" agencies.⁸¹ The Act then proceeded to draw careful distinctions between the so-called "legislative" functions performed by administrative agencies, which the Act terms "rule-making,"⁸² and the "judicial" functions, which the Act refers to as "adjudication."⁸³ Having drawn these distinctions, the Act requires different procedures for each function with regard to the important questions of notice and hearing.⁸⁴ Next, the Act lays down in detail the essential requirements for administrative hearings and decisions and provides that these are to apply in all cases where hearings are provided for by statute.⁸⁵ Finally, the Act addresses itself to the problem of judicial review in regard to such matters as the right to review, acts which can be

77. ADMINISTRATIVE PROCEDURE ACT, *supra* note 72, § 3.

78. This exception "is not to be construed to defeat the purpose of the remaining provisions. It would include confidential operations in any agency, such as some of the aspects of investigating or prosecuting functions of the Secret Service or Federal Bureau of Investigation, but no other functions in those or other agencies." Senate Committee Report at p. 12 (1945).

79. This exception likewise "may not be construed to defeat other provisions of the bill or to permit withholding of information as to operations which remaining provisions of the section or of the whole bill require to be public or publicly available." *Ibid.*

80. "No person shall in any manner be required to resort to organization or procedure not so published." ADMINISTRATIVE PROCEDURE ACT, *supra* note 72, § 3.

81. "Laymen and lawyers alike are baffled by a lack of published information to which they can turn when confronted with an administrative problem." FINAL REP. ATT'Y GEN. COMM. AD. PROC. 25 (1941).

82. ADMINISTRATIVE PROCEDURE ACT, *supra* note 72, § 4.

83. *Id.* § 5.

84. Particularly, *id.* §§ 4-6. In fact, however, these requirements are integrated into the whole thesis of the Act. See Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389, 612 (1948).

85. ADMINISTRATIVE PROCEDURE ACT, *supra* note 72, §§ 7, 8.

reviewed, interim relief and the scope of review.⁸⁶ In summary, it is perhaps fair to say that "administrative due process," as conceived by the Administrative Procedure Act, went quite far in committing the administrative process to "judicialization,"⁸⁷ but this came at a time when the Supreme Court had come to look upon the administrative process with a more understanding eye.⁸⁸

III

The administrative process has now apparently entered a new phase of its growth, a sort of levelling off or stabilizing period. We still do not know whether it is a headless fourth branch of government or a *mélange* of three, but somehow the fire has gone out of the question. Even candidates for political office seem to have decided that it is of doubtful political wisdom to belabor the Securities and Exchange Commission or the National Labor Relations Board as "bureaucracies" engaged in tyrannical exploits. They seem to have joined the respectable company of the Interstate Commerce Commission. There is the suspicion that the Administrative Procedure Act was merely the dotting of i's and the crossing of t's on an already completed sentence. Even the names of the chief administrators of the agencies are no longer so much on the lips of the public. Attacks upon government spending may curtail the extent of their activities, but the function is recognized and, apart from a radical change in our government, it is likely to be so.

The problem which now requires attention is on the personnel level. The administrative function has been accepted as legitimate: minimum due process has been prescribed; rules and regulations have been made public; public fear and indignation has to a degree abated. But the success of administration, be it of a trust, a corporation or of government, depends not only upon the rules and the published methods, but upon the calibre and the conscience of the administrator. The most perfect techniques and methods may be set at naught by the human element of the administrator. Recent disclosures of lapsed moral and ethical standards in certain government officials have brought the searchlight of attention upon the problem of personnel.

The Administrative Procedure Act in at least two instances laid stress upon the personnel element; once when it provided for separation of the investigative and prosecuting functions from those of adjudication,⁸⁹ and

86. *Id.* § 10.

87. "The tendency in America has been towards the judicialisation of these forces of social control—toward fitting them into the existing constitutional framework, and, above all, toward their subordination to law." Schwartz, *The American Administrative Procedure Act*, 63 L.Q. Rev. 43 (1947).

88. The administrative process itself had by this time abandoned some of the practices which had originally served as a basis for legitimate criticism. See Nathanson, *Some Comments on Administrative Procedure Act*, 41 ILL. L. REV. 368, 420 (1946).

89. ADMINISTRATIVE PROCEDURE ACT, *supra* note 72, § 5c.

once when it provided for examiners under civil service.⁹⁰ This was clear recognition of the fact that attention must be given to the human-frailty element in administration. Far too little attention has been given to the qualifications necessary for sound administration.⁹¹ We have been too busy with other aspects of the process. It is of course true that the increased number of administrative agencies has vastly swelled the number of appointments at the dispensing hand of the President. Surprisingly little has been said about this fact by practical politicians or theorists.

It may well be that the Congress, which presently seems concerned with legislative prescription of public and official ethics, might with profit explore, with political scientists and personnel experts, ways and means for securing in administration the most capable and competent personnel. The old rule that in government as in business, sound, responsible management is the key to the success or failure of the venture still applies with full vigor.

90. *Id.* § 11.

91. See GELLHORN, *op. cit. supra* note 1 at 65, 73. See also, Ballantine, *Administrative Agencies and the Law*, 24 A.B.A.J. 109, 112 (1938), "if the Government service comes to be made up in large part of highly competent, disinterested and permanent personnel, not only will there be better and fairer decisions in particular cases, but we may achieve the shaping of Government policies on firm ground rather than on grounds of prejudice and political expediency."