

Summer 1962

Procedural Safeguards in Administrative Rule Making in Indiana

P. Allan Dionisopoulos
University of Wisconsin

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Administrative Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Dionisopoulos, P. Allan (1962) "Procedural Safeguards in Administrative Rule Making in Indiana," *Indiana Law Journal*: Vol. 37 : Iss. 4 , Article 1.

Available at: <http://www.repository.law.indiana.edu/ilj/vol37/iss4/1>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

INDIANA LAW JOURNAL

Volume 37

SUMMER 1962

Number 4

PROCEDURAL SAFEGUARDS IN ADMINISTRATIVE RULE MAKING IN INDIANA

P. ALLAN DIONISOPOULOS†

The purpose of this study is to examine administrative rule making in Indiana in light of criticisms of the reformers and against the background of Anglo-American ideas about certainty in the law and procedural due process. At the outset it should be noted that this study will treat only a part of the whole body of administrative rule making. The primary concern is with that sub-legislation which has a relatively obvious effect on the rights and interests of private parties. However, for purposes of examining Indiana's rule making history, it will be necessary to consider and discuss certain administrative rules which are limited in their application to a relatively few persons, *e.g.*, students in public schools or state universities; and to disregard that portion of administrative rule making which is informal in character and is seldom brought to the attention of the courts. While rules for the governance of school systems might be discussed because of their pertinency to this study, rules pertaining to the internal organization and procedure of administrative agencies will be disregarded.

Some words of caution should be offered before any effort is made to analyze the evolutionary development of administrative rule making in Indiana. Rate making and licensing (including grants of franchises or certificates of convenience and necessity) are functions which could be, and were historically, exercised by legislatures within the Anglo-American world. They might, therefore, be properly embraced within the meaning of such terms as "rule making," "sub-legislative," or "quasi-legislative." On occasion, as will be seen in certain of the cases discussed herein, the Indiana courts regarded these as "ministerial" or "legislative" in character. But only incidentally, and for purposes of illustrating certain points, will there be discussions of these two functions. On other occasions such words as "orders" and "decisions" will be used as though they are synonymous with "rules" and "regulations." This is not, of

† Assistant Professor, Department of Political Science, University of Wisconsin.

course, a proper use of such words; however, this course seems necessary to the writer because of the occasional failures of the general assembly or the courts to distinguish sharply between quasi-legislation and quasi-adjudication.

Finally, the writer must explain his failure to distinguish between substantive and procedural law. The first reason is that students of administrative law may honestly differ over the question of whether procedure is limited to such things as notice, hearing, and publication requirements. For example, the writer believes that statutory standards are guide lines for administrative agents and should be considered as part of the adjectival rather than substantive side of the law. Secondly, while the emphasis is on procedural safeguards, the writer hopes to demonstrate in his conclusions that those affected by administrative rules are primarily concerned about the substance of the sub-legislation, not the procedures whereby the rules are adopted and issued. If these conclusions are at all meritorious, they might suggest that the reform movements of the past several decades have been misdirected.

1. THE SHORTCOMINGS OF UNSAFEGUARDED ADMINISTRATIVE LEGISLATION

At both the national and state levels the legislative function of administrative agencies evolved in similar fashion, and the movement to reform procedures and provide legislative supervision and guidance has been of recent date. Two reasons may be suggested for this delay: first, the time and energies of both the opponents and the proponents of regulatory administration were exhausted in debate over questions about delegation of authority and diffusion of power; second, the legislators were primarily concerned with the establishment of effective methods for coping with the increasingly complex problems of an industrialized society, evidently believing that new administrative techniques could be sufficiently safeguarded by old judicial remedies.

New methods of problem solving were demanded as society moved from a frontier to a more complex social setting, yet the introduction and expansion of these new methods were vigorously protested. For the most part the critics tried to prevent administrative legislation and adjudication by appealing to Anglo-American ideas about the supremacy of law, and by raising constitutional questions about delegated authority and separation of powers. The futility of such arguments in the face of increasingly complex demands upon government was brought into focus by the predictions of Walter Gellhorn in 1940. He claimed for administrative law a three phase development with the last stage occurring

when concern was "addressed chiefly not to constitutional divisions of power, not to appropriate boundaries of judicial review, but to the procedure of administration itself."¹ Obviously his review of the totality of this development revealed that the third stage evolved only when erstwhile critics of the administrative process accepted the inevitable entrenchment of substantial administrative government.

If the critics are to be blamed for the delay in imposing procedural requirements upon the new administrative techniques, then no less guilty of shortsightedness were the innovators. They emphasized effectiveness in securing quick treatment and solution of complex problems. However, their failure to establish within the organic and regulatory acts reasonable standards to guide those charged with administrative responsibilities caused delays instead of speed. The added burdens thereby imposed upon the courts, and the unnecessary delays which attended judicial action might have been prevented if administrative procedure had been a legislative concern at an earlier date.

Not all men were blind to the situation which had evolved. The need for accepting administrative regulation as inevitable and for improving administrative procedure had been recognized by Elihu Root in 1916. In his presidential address to the American Bar Association he spoke of one field of development in law which demanded earnest attention:

We are entering upon the creation of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As a community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. . . . Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be

1. *Symposium on Procedural Administrative Law: Introduction*, 25 IOWA L. REV. 421, 422 (1940).

developed, and that with us is still in its infancy, crude and imperfect.²

As seen by Root the problem was one of accepting a de facto situation which, on the one hand, forced into retirement time-worn arguments about organic features of government, and, on the other hand, demanded a renewed interest in preventing arbitrary exercises of power.³

A reference to accomplished fact rather than mere inevitability would not have been amiss. It might even have enabled Root to bring the central problem into sharper focus. His examples of federal and state agencies in existence in 1916 suggest that these were already concrete fixtures of government, therefore something beyond rather than at the threshold of change. Highly suggestive that the regulatory agencies were firmly rooted by that time were their longevity (the Interstate Commerce Commission was approaching its thirtieth birthday) and court approval of the quasi-legislative⁴ and quasi-judicial⁵ powers which they exercised.

Two decades passed before serious consideration was given to the problem which had been outlined by Root. Then, within the relatively brief span of ten years, a spate of studies, recommendations, model acts, and statutes⁶ appeared. In 1937 a Committee on Administrative Agencies and Tribunals was created within the Section of Judicial Administration of the American Bar Association. In 1938 this committee submitted a report on Judicial Review of State Administrative Action in State Courts.⁷ The freshest of reform proposals became a stream as the Association's work on improving both federal⁸ and state administrative procedure was supplemented by the model act of the National Conference

2. ABA REPORT AND DRAFT OF BILL BY THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW 4 (1939).

3. *Ibid.*

4. *Locke's Appeal*, 72 Pa. 491 (1872); *Field v. Clark*, 143 U.S. 649 (1892). Indiana's examples include *Fertich v. Michener*, 111 Ind. 472, 11 N.E. 605 (1887), and *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900). In the latter case the court rejected the claim that a delegation of rule making powers contravened the constitution, stating that the constitutional prohibition would "not properly be extended so as to prevent the grant of legislative authority, to some administrative board or other tribunal, to adopt rules, by-laws, or ordinances" for the carrying out of a particular purpose. *Id.* at 132.

5. Indiana's jurists resisted all efforts to have certain administrative functions labeled quasi-judicial, acknowledging only that administrative officials exercised a discretion analogous to judicial discretion. *Elmore v. Overton*, 104 Ind. 548, 4 N.E. 197 (1885); *Burroughs v. Webster*, 150 Ind. 607, 50 N.E. 750 (1898), and *Southern Ind. Ry. v. Railroad Comm'n*, 172 Ind. 113, 87 N.E. 966 (1909).

6. *E.g.*, Administrative Procedure Act, 5 U.S.C. §§ 1001-1011 (1958) and the several state procedure acts. For a discussion of the latter see HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES (1952).

7. MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1957).

8. ABA REPORT, *supra* note 2.

of Commissioners on Uniform State Laws,⁹ the Logan-Walter Bill,¹⁰ the report of the United States Attorney General's Committee on Administrative Procedure (Acheson Committee),¹¹ and the "Benjamin Report."¹²

Underlying these studies and proposals was a general dissatisfaction with administrative procedure at both the state and national levels.¹³ That there was a basis for such dissatisfaction is apparent in the Acheson Committee's general statement about deficiencies in the administrative process, and the specific findings of Professor Horack¹⁴ and Mr. Robert Hollowell¹⁵ with regard to administrative legislation in Indiana.

The Acheson Committee summarized the criticisms of the reformers in stating:

Where necessary information must be secured through oral discussion or inquiry, it is natural that parties should complain of a "government of men." Where public regulation is not adequately expressed in rules, complaints regarding "unrestrained delegation of legislative authority" are aggravated. Where the process of decision is not clearly outlined, charges of 'star chamber proceedings' may be anticipated. Where the basic outlines of a fair hearing are not affirmatively set forth in procedural rules, parties are less likely to feel assured that opportunity for such hearing is afforded.¹⁶

These were indeed serious charges. They suggest why debates over regulatory administration were frequently punctuated with the allegation that a government of men rather than of law existed. If it were necessary for those who were affected by administrative rules to take the initiative

9. MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1957).

10. *Hearings Before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives on Bills to Provide for the More Expeditious Settlement of Disputes with the United States*. 76th Cong., 1st Sess. 114-155 (1939) [hereinafter cited as Report of Subcommittee No. 4].

11. *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

12. ROBERT M. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK: REPORT TO HONORABLE HERBERT H. LEHMAN* (1942).

13. This is evident in statements by President Roosevelt and Governor Lehman, when they proposed the need for studies of procedural reform. See the president's letter of February 16, 1939 in *Administrative Procedure in Government Agencies*, *op. cit.* *supra* note 11 at i; and Governor Lehman's comments in his message to the legislature, cited in BENJAMIN, *op. cit. supra* note 12 at i.

14. Professor Horack was a member of the faculty, School of Law, Indiana University, until his death in November 1957.

15. Mr. Hollowell served as chief counsel in the office of the attorney general in the 1940's and was instrumental in obtaining legislation in administrative procedure in 1945 and 1947.

16. *Administrative Procedure in Government Agencies*, *op. cit. supra* note 11 at 25.

to learn about the rules and regulations in force, then there was a denial of the Anglo-American idea about certainty in the law. There is in this allegation also a criticism of the legislators for not defining clearly the areas of authority and responsibility of administrative agencies.

Administrative rule making in Indiana was subject to criticisms similar to those voiced by the Acheson Committee. Professor Horack's monumental compilation of administrative rules and regulations¹⁷ was the product of many hours of searching the files and safes of state house offices. He later informed Dean Leon Wallace that too often rules and regulations in force were gathering dust in a corner, while the people and interests affected by them were unaware and uninformed of their existence.¹⁸ Mr. Hollowell, who served as chief counsel in the attorney general's office, reported that the attorney general's staff had considerable difficulty in determining what rules and regulations were in force, and when they were called upon to introduce one in court, "it was difficult to obtain information as to when it had been adopted or whether it had been properly and legally adopted."¹⁹ These were unfavorable commentaries on administrative rule making in Indiana and largely explain the reform legislation of 1943²⁰ and 1945.²¹

2. ADMINISTRATIVE RULE MAKING LEGISLATION

By 1943 some Hoosier legislators were sufficiently concerned about the reported shortcomings of administrative rule making to introduce reform measures: the Slenker Bill in the lower chamber²² and Senate Bill 227 initiated by Senators Johnson and Eichhorn. The latter was passed. It called for executive approval of agencies' rules and the filing of sub-legislation with the secretary of state. Although the measure was brief and barely touched upon the problems of reform, its adoption represented a significant initial step.²³ It also illustrated the piecemeal fashion whereby this type of reform reaches the statute books. After the 1943 legislative session, leadership in reform of administrative procedure came from the executive branch, as Governor Gates and Attorney General Emmert authorized the creation of a study committee within the office of

17. HORACK, *INDIANA ADMINISTRATIVE CODE* (1941).

18. This information was provided to the writer by Dean Leon H. Wallace, School of Law, Indiana University.

19. Letter to the writer, October 24, 1958.

20. 1943 Ind. Laws ch. 213.

21. IND. ANN. STAT. §§ 60-1501-11 (Burns 1961).

22. This bill proposed the creation of a state administrative board to pass upon all sub-legislation issued by state agencies. H.B. 162. The original is filed in the Archives Division of the Indiana State Library, Indianapolis.

23. The 1943 act was specifically repealed by the 1945 rule making act, its several provisions having been incorporated in the latter.

the attorney general.²⁴ Because of the limited time available to the committee, it soon became apparent that a comprehensive procedure bill could not be drafted before the opening of the 1945 legislative session. Consequently the committee decided to concentrate upon matters relating to administrative rule making and leave to the 1947 session the task of drafting a bill that would treat the other matters of administrative regulation.²⁵

As previously noted, sub-legislation was subject to the same harsh criticisms in Indiana as were voiced elsewhere. Generally the critics had denounced the sub-legislative process as undemocratic, and because of the non-representative composition of administrative boards and commissions, they rejected any contention that this process was essentially the same as traditional lawmaking.²⁶ The reformers further demanded that legislators prescribe a uniform rule making procedure, and that all agencies be brought within the provisions of the laws.²⁷ They also proposed that those persons required to comply with administrative rules be given an opportunity to express their views thereon, and that the public have access to, or be promptly informed about, rules in force.²⁸

The removal of the shortcomings at which these proposals were directed was the expressed objective of the General Assembly in 1945,²⁹ yet a matter of little apparent concern in 1943. In 1943 the attention of the legislators was focused on the form of administrative rules rather than the sub-legislative process. Nonetheless, the 1943 act must be included as an important part of procedural reform in Indiana because of certain features. The law required that all rules thereafter adopted be submitted to the attorney general and governor for approval, and that copies be filed with the secretary of state and legislative bureau. It also made certified rules and regulations admissible as evidence in any court proceeding.

24. Two members of the attorney general's staff, Cleon Foust and Robert Hollowell, became interested in the problems pertaining to administrative procedure. With the support of the governor and attorney general, they undertook the drafting of an administrative procedure bill.

25. Mr. Hollowell provided this background information to the writer.

26. See especially *Administrative Procedure in Government Agencies*, *op. cit. supra* note 11 at 101, and PENNOCK, *ADMINISTRATION AND THE RULE OF LAW* 47 (1941).

27. Such uniformity was the objective of a Special Committee on Administrative Law of the ABA. Nevertheless, there were those groups, such as national agencies, the National Lawyer's Guild, and the New York City Bar Commission, which offered vigorous dissents. See generally *Report of Subcommittee No. 4*, note 10 *supra*.

28. Dean E. Blythe Stason believed that these goals were reached by the Model Act. Stason, *The Model State Administrative Procedure Act*, 33 *IOWA L. REV.* 196, 200 (1948); and see Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 *IOWA L. REV.* 252, 256 (1948).

29. *IND. ANN. STAT.* § 60-1501 (Burns 1961).

The requirement that rules and regulations be approved by the attorney general and governor, an innovation in reform,³⁰ was sound for several reasons. First, the attorney general was implicitly empowered to confine administrative agencies within constitutional and statutory bounds. Second, it strengthened the hand of the governor as the state's political leader and chief administrative officer. Finally, it enabled these two state officers to determine whether newly issued rules were in conflict with existing ones of other agencies.³¹

Only the provision for filing rules had its counterpart in the Model State Administrative Procedure Act,³² although for a different reason. Under the Model Act the secretary of state was instructed to keep open to public inspection a register of rules, whereas the Indiana Act required the secretary of state to certify those rules which were offered as evidence in the courts. The requirements of executive approval of agency rules and the filing of rules were modest corrective innovations, and major achievements in procedural reform became the responsibility of the 1945 legislative session.

For the most part the 1945 act followed those sections in the Model Act which pertained to rules and rule making. This is apparent in a comparison of the corresponding provisions in the two acts. Thus we find similarities in definitions,³³ procedures for adopting rules, and requirements regarding the filing, promulgation, compiling, and publication of rules. Certain differences are to be noted as well, such as the Indiana Act's greater detail, its requirements that rules be approved by the attorney general and governor, and its provision for judicial notice of rules.³⁴ And there are provisions in the Model Act which have no counterparts in the Indiana statute: (1) a right of petition;³⁵ (2) provision for declaratory judgments on the validity of rules; and (3) provision for declaratory rulings by agencies.³⁶

30. North Dakota introduced this control through approval by the attorney general in 1941; however, Indiana added approval by the governor.

31. These several points were made by Mr. Hollowell in explaining the uniform procedure statutes to Indiana bar associations.

32. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (1957); 1943 Ind. Laws, ch. 213, § 1.

33. There is anything but common agreement with regard to a workable definition of rule making. Cf., Administrative Procedure Act, 5 U.S.C. § 1001-11 (1958); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1 (1957); IND. ANN. STAT. § 60-1503 (Burns 1961); CAL. GOV'T. CODE § 11371.

34. The latter two items were carried over from the 1943 Act, which was expressly repealed in § 13 of the 1945 Act.

35. Under the Model Act interested parties may petition agencies to promulgate, amend or repeal any rule. This right has been frequently proposed. See, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

36. Dean Stason regarded declaratory judgments and declaratory rulings as important accomplishments of the Model Act. Stason, *supra* note 28.

The main deficiencies in previous rule making methods are evident in the Indiana Act's statement of intent and requirements of procedures to be followed. As stated in section 1 this intent is threefold: (1) it prescribes uniformity in rule making; (2) it secures for the public an opportunity to participate in the sub-legislative process; and (3) it requires that rules be readily accessible to the general public.³⁷

Procedures for adopting rules are essentially the same in both acts. Notice and hearing are required by each act, but the Model Act's use of the qualifying phrase, "the adopting agency shall so far as practicable,"³⁸ makes this something less than the mandatory provision of the Indiana Act. The latter specifies that notices are to be published in a Marion County newspaper of general circulation ten days prior to the date for a hearing on proposed rules. The law also states that the notice must contain: (1) a statement of the time and place of the hearing; (2) a reference to the subject-matter of the rule under consideration; and (3) the information that copies of the proposed rule may be examined at the office of the issuing agency.³⁹ The provision for hearing in the Indiana statute is more elaborate, although in each case all interested parties are given the opportunity to submit oral or written arguments.⁴⁰

Neither of these acts explains who are to be considered "interested parties" or "interested persons," the terms used. If the public service commission proposes to issue a rule regarding the size and candlepower of locomotive headlights, must it regard as "interested parties" the officials from cities, towns, and townships served by the railroads? The Indiana Act, as indeed all others, leaves this matter in question. Possibly it is within the discretion of the administrative officials, although, by way of example, section 4 merely states that "any interested party in person or by attorney shall be afforded an adequate opportunity to participate in the formulation of the proposed rule or rules" by presenting facts and arguments. The administrative body must give full consideration to all relevant matters; but may it prevent certain parties, whose "interest" might be questioned, from taking part in a hearing? A later paragraph in this section is at least more specific in authorizing agencies to invite facts, arguments and suggestions from interested persons, thereby implying that it is within the board's discretion to determine whom it will invite.

37. IND. ANN. STAT. § 60-1501 (Burns 1961).

38. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2(3) (1957).

39. IND. ANN. STAT. § 60-1504 (Burns 1961).

40. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2(3) (1957); IND. ANN. STAT. § 60-1504 (Burns 1961).

Each act imposes upon the agencies the duty of filing regulations with the secretary of state,⁴¹ who, in turn, is required to compile, index, and publish the rules.⁴² Under the Indiana Act the secretary of state is instructed to assemble the rules, arrange them by the titles of the issuing agencies, and publish them annually in cumulative form.⁴³ The law guarantees easy access to the rules by requiring that the annual volumes be distributed to designated county, state and federal officials and be sold to the general public.⁴⁴ With the present requirement for official publication of the rules, it is no longer necessary for them to be certified before a court may take cognizance of them.⁴⁵

Neither the Indiana nor the Model Act has a provision similar to the exceptional one in the Federal Administrative Procedure Act which places the burden of proof on the proponent of a rule or order.⁴⁶ Nor does the Indiana Act have a section expressly authorizing judicial review, such as is found in the Model Act⁴⁷ and this state's administrative adjudication act of 1947.⁴⁸ While the provisions of the Indiana Act do not limit the scope of judicial review, they at least suggest the legislature's intent to reduce or limit judicial action with respect to rule making procedure, an inference being possible from certain statements in the statute: (1) a proviso in the notice section "that no rule shall be invalid because the reference to the subject-matter thereof in said notice may be inadequate or insufficient;"⁴⁹ or (2) from section 11, wherein it is said:

Any such rule or regulation adopted, approved, recorded and published as herein provided shall be judicially noticed by all courts and agencies of this state and the official publication thereof as herein provided shall be *prima facie* evidence that

41. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (1957); IND. ANN. STAT. § 60-1505 (Burns 1961). The latter also includes the requirement that rules be approved by the governor and attorney general, and it demands compliance with the provisions of the act before rules may be considered in force.

42. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4 (1957); IND. ANN. STAT. § 60-1507 (Burns 1961).

43. IND. ANN. STAT. § 60-1509 (Burns 1961). The several agencies are authorized to print pamphlets containing rules and information statements about the agency's internal and field organization. These pamphlets may be sold to the general public at cost. IND. ANN. STAT. § 60-1508 (Burns 1961).

44. IND. ANN. STAT. § 60-1507 (Burns 1961).

45. IND. ANN. STAT. § 60-1511 (Burns 1961).

46. Professor Sherwood found the Administrative Procedure Act's provision harsh and burdensome when applied to agencies, because (1) it implied that rules had to be supported by evidence, and (2) the "statute does not even specify what is to be proved." Sherwood, *Administrative Procedure and Civil Liberties*, 33 CORNELL L.Q. 235 (1947).

47. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 6(2) (1957).

48. IND. ANN. STAT. § 63-3014 (Burns 1961).

49. IND. ANN. STAT. § 60-1504 (Burns 1961).

said rule or regulation was adopted, approved and filed as herein provided.

*State ex rel. Sights v. Edwards*⁵⁰ demonstrates that a *prima facie* presumption does not prevent a judicial inquiry into procedures, whether because of a challenge or on the initiative of the court. In *Sights* the rule in question had been published along with many others of the state board of education, but this rule had not been approved by the governor and the attorney general, a matter which was determined by the court upon examination of the cumulative rules publication of the office of secretary of state.

Certain matters pertinent to a discussion of judicial review of administrative rules should be discussed. First, with regard to the substance of rules, a backward glance over the decisions of the Indiana courts would lead to a conclusion similar to one expressed by Professor Fuchs: the cases "are emphatic in espousing the basic proposition that the special competence of administrative agencies should have scope to operate and that the courts in reviewing agency actions should not attempt to supervise the agencies' work or do it over again."⁵¹ In view of the holdings of the judges, and the narrow role that they carved for themselves in reviewing agency actions, it was not necessary to specify in the statutes a right of judicial review.⁵² The judicially determined procedure for review has long operated on the premise that judicial review of agency rules did not depend upon legislative authorization.⁵³ The court had limited itself in the exercise of its power of judicial review of rules to considering questions about (1) their reasonableness; (2) excess of power; (3) conflict with the Constitution or statutes; and (4) violation of principles of justice.⁵⁴

One additional feature of the Model Act, which was not incorporated into the Indiana Act, demands some consideration. In his commentary on the Model Act Dean E. Blythe Stason had said:

50. 228 Ind. 13, 88 N.E.2d 763 (1950).

51. Fuchs, *Judicial Control of Administrative Agencies in Indiana: I*, 28 IND. L.J. 1, 2 (1952).

52. *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900); *In re Northwestern Ind. Tel. Co.*, 201 Ind. 667, 171 N.E. 65 (1930); *Wallace v. Feehan*, 206 Ind. 522, 190 N.E. 438 (1934); *Albert v. Milk Control Board*, 210 Ind. 283, 200 N.E. 688 (1936); *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939); *Warren v. Indiana Tel. Co.*, 217 Ind. 93, 26 N.E.2d 399 (1946).

53. *E.g.*, in *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 122, 23 N.E.2d 472 (1939) the court said, "In the case at bar the act does not provide for an appeal from the order made by the Department of Financial Institutions, nevertheless, the appellant is now present in the court questioning the acts of the department and the authority granted by the Legislature."

54. *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900); *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 122, 23 N.E.2d 472 (1939); *In re Northwestern Ind. Tel. Co.*, 201 Ind. 667, 171 N.E. 65 (1930).

Recognizing the wisdom and effectiveness of declaratory judgment procedures in courts of law, advantage is taken of the principle by prescribing a similar procedure for testing the validity of administrative rules. The validity of any rule may be tested in a court of appropriate jurisdiction on petition of any person whose legal rights or privileges are impaired or threatened. The declaratory rulings on specific fact situations by the administrative agencies themselves on application of interested persons who may be unjustifiably uncertain with respect to the possible application to them of any rule or statute enforceable by the agency.⁵⁵

Indiana's refusal to make provision for declaratory rulings and declaratory judgments was dictated largely by situations peculiar to the state rather than to questions about their value. Mr. Hollowell informed this writer of several reasons underlying the committee's decision. He stated, first, that the act provides for holding conferences "and inviting and permitting the submission of suggestions, facts, argument and views of interested persons" in advance of drafting rules.⁵⁶ Secondly, Mr. Hollowell noted that section 8 provides for the publication of rules by the agencies, including statements about the internal and field organization, descriptions of methods for handling matters affecting private parties, "and such other information as would be helpful to the parties affected by the laws, rules and administration" of the agencies. His third stated reason was that such a provision was opposed by state officials.⁵⁷ Items one and two were regarded by the committee as adequate substitutes for declaratory rulings by agencies.

Yet another reason peculiar to Indiana prevented the inclusion of a provision for declaratory judgments. A decision of the Indiana Supreme Court,⁵⁸ while not rendering invalid this state's declaratory judgment act of 1927, went a long way toward stating a doctrine which, in Professor Borchar'd's words, "if applied, will deprive the people of Indiana of many of the benefits derived from this procedure by other states of the Union."⁵⁹ In view of the court's attitude, the Hollowell Committee decided not to jeopardize the rule making act.⁶⁰

55. Stason, *The Model State Administrative Procedure Act*, *supra* note 28.

56. IND. ANN. STAT. § 60-1504 (Burns 1961).

57. These points were made by Mr. Hollowell to the writer.

58. *Brindley v. Mears*, 207 Ind. 657, 194 N.E. 351 (1935).

59. Borchar'd, *An Indiana Declaratory Judgment*, 11 IND. L.J. 376, 377 (1936); also see Borchar'd, *Declaratory Judgments in Indiana*, 19 IND. L.J. 175 (1944); Note, 6 NOTRE DAME LAW. 122 (1930).

60. But it should be noted that *Brindley v. Mears*, 207 Ind. 657, 194 N.E. 351 (1935), was not the only case involving the declaratory judgment act. See *Zoercher v. Agler*,

With the adoption of this statute Indiana became one of the first states to institute reforms along suggested lines. Like the Model Act, Indiana's held promise of minimizing arbitrary exercises of quasi-legislative power. The provisions for notice and hearing offered guarantees for advance warning of rules to be adopted and active participation by those who would be affected; and other statutory requirements that rules be published and easily accessible to the general public preserved to the individual that element of certainty which is embraced within the meaning of the rule of law. Such safeguards and guarantees were not often found in earlier laws conferring legislative powers on agencies.

3. HISTORICAL BASIS—STATUTORY PROVISIONS AND JUDICIAL DEMANDS FOR PROCEDURAL SAFEGUARDS

There is little about early rule making in Indiana to merit acclaim, and much to support the reformers' charges that the quasi-legislative process did not measure up to minimum principles. The earlier statutes prescribed a few procedures, especially requirements for publicizing rules and regulations in force, but more frequently the statutes were devoid of such provisions, the legislators either being unconcerned or believing that such were not necessary. Nor did the decisions in early cases involving administrative rules reveal any special concern by the courts over the procedural question.

In *Fertich v. Michener*⁶¹ the court had accepted the doctrine espoused in other jurisdictions⁶² that the power to take charge of a school system carried with it the authority to make all rules necessary to govern the schools. But this, the court said:

does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such school shall be authorized or confirmed by a formal vote. No system of rules, however carefully prepared, can provide for every emergency, or meet every requirement. In consequence, much must necessarily be left to the individual members of the school boards,

202 Ind. 214, 172 N.E. 186 (1930); *Rauh v. Fletcher Savings Co.*, 207 Ind. 638, 194 N.E. 334 (1935).

61. 111 Ind. 472, 11 N.E. 605 (1887).

62. *Thompson v. Beaver*, 63 Ill. 353 (1872); *Roberts v. Boston*, 59 Mass. 198 (1849); *People v. Medical Society*, 24 Barb. 570 (N.Y. Sup. Ct. 1857); *Ferriter v. Tyler*, 48 Vt. 444 (1876).

and to the superintendents of, and the teachers in, the several schools.⁶³

Apparently the Indiana court had not foreseen that rules had to be made a matter of record if certainty in the law were to be realized; and by suggesting that formal procedures were not required and that the issuance of rules might be dictated by emergency situations, the court seemed to be vesting in the officials a discretion limited solely by the judicial demand that rules be reasonable. In other words, the judges were willing to test the substance of the rules; they were not willing to impose procedural requirements. The court's position on the procedural question was in accord with earlier decisions of other jurisdictions,⁶⁴ and with such later U.S. cases as *Butterfield v. Stranahan*,⁶⁵ and *Bi-Metallic Investment Co. v. State Board of Equalization*.⁶⁶

A significant problem of interpretation arises at this point. In the earlier cases Indiana's judges failed to distinguish between the legislative and adjudicatory powers of administrative agencies. At most they were willing to acknowledge that administrative officials exercised a discretion analogous to judicial discretion, and they subsumed all administrative powers under the words "ministerial" or "legislative."⁶⁷ Confusion arises from such haphazard use of these words, since there is no suggestion as to which, if any, administrative powers should be exercised in accordance with prescribed procedures. To illustrate this problem consideration may be given to two decisions⁶⁸ of the Indiana court in the last years of the nineteenth century.

Both cases dealt with licensing, a power which may properly be described as legislative in nature, since it could be exercised directly by the General Assembly. The court characterized licensing as ministerial, and it insisted that no procedural safeguards were required, since this power was not judicial in nature. In a sense the court was caught in a paradox of its own making. On the one hand, it upheld delegations of licensing powers to administrative agents, and it even admitted that the exercise of this authority was "so far analogous to a judicial discretion" that officials were "protected from any claim for damages on account of any mere mistake" in deciding to grant or withhold a license.⁶⁹ But, on the

63. *Fertich v. Michener*, 111 Ind. 472, 482, 11 N.E. 605 (1887).

64. *Den v. Hoboken Land and Improvement Co.*, 18 How. 59 U.S. 272 (1856); *Weimer v. Bunbury*, 30 Mich. 201 (1874).

65. 192 U.S. 470 (1903).

66. 239 U.S. 441 (1915).

67. See especially *Elmore v. Overton*, 104 Ind. 548 (1885); *Burroughs v. Webster*, 150 Ind. 607 (1898); and *Southern Ind. Ry. v. Railroad Comm'n*, 172 Ind. 113 (1909).

68. *Wilkins v. State*, 113 Ind. 514 (1887); *Burroughs v. Webster*, *supra* note 67.

69. *Elmore v. Overton*, 104 Ind. 548 (1885).

other hand, the court did not want to carry this analogy so far that it would be claiming for administrative officials powers which were largely judicial in character. Indeed, in each of the first several cases the court had held that the General Assembly could not confer judicial powers on other than judicial officers.⁷⁰

The court did not escape from this paradox, but at least its definition of licensing permitted it to circumvent demands for surrounding ministerial powers with procedural safeguards. This was apparent in *Wilkins v. State*.⁷¹ In holding that dental examining boards were not tribunals, the court said that it was a mistake to assume that the laws (under which the boards operated) had to "conform to all requirements as to notice and like incidents that would be necessary if the act were judicial," (*i.e.*, conferred a judicial power).⁷² As far as the court was concerned an applicant for a license needed no notice other than the public law.⁷³ This was still true a decade later when the judges said that they could not understand what failure as to notice was shown in the statute, for the law was notice of legislative intent to recall old licenses and allow reasonable time in which to obtain new ones.⁷⁴ Actually notice and hearing provisions had been included in the law in question, the 1897 act which had established the Board of Medical Registration and Examination.⁷⁵ In fact, its requirements were such that they elicited from the court the comment that this law was a much more guarded and limited exercise of police power than similar statutes of other states which had been held constitutional.⁷⁶ But this parenthetical comment did not affect the court's ruling, for it was obvious that its attitude toward procedural requirements had not changed since *Fertich v. Michener* and *Wilkins v. State*. There were parallels to be noted between these decisions and those of other jurisdictions.

The Indiana cases are significant because of analogies drawn between ministerial functions and the legislative process, and because of the court's refusal to claim any similarity between administrative and judicial functions, a position that was not unlike that stated by the U.S. Supreme Court in 1856⁷⁷ and with similar results. At that time the U.S. Supreme Court had said that a summary action without the safeguards of the judicial system was not unknown to the common law, even though certain

70. *Ibid.*; and see *State ex rel. French v. Johnson*, 105 Ind. 463 (1885).

71. 113 Ind. 514 (1887).

72. *Id.* at 516.

73. *Ibid.*

74. *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 615 (1898).

75. 1897 Ind. Laws ch. 169.

76. *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 615 (1898).

77. *Den v. Hoboken Land and Improvement Co.*, 18 How. 59 U.S. 272 (1856).

acts of administrative officials are judicial in nature.⁷⁸ Similarly, a Michigan court held in *Weimer v. Bunbury* that an individual may be temporarily deprived of liberty or property as a consequence of an administrative action yet have no redress under the common law.⁷⁹ Administrative proceedings, the court said, are almost universally conducted "without judicial forms, and without the intervention of judicial authority; the few cases in which statutes have required the action of courts being exceptional."⁸⁰ The evidence has been such that Professor Foster Sherwood could point to four fields of governmental activity "where notice and hearing were not required at the common law as a prerequisite" to action.⁸¹

Some of these actions, such as those which came before the United States, Michigan, and Indiana courts, may have enough of the characteristics of a judicial action to warrant the claim that they are quasi-judicial functions; therefore, courtlike proceedings should be employed. In the several cases previously discussed there was some agreement with the claim of similarity; however, the courts' use of such terms as "purely administrative" or "ministerial" to describe all kinds of administrative action enabled them to circumvent demands for formal proceedings. The latter point is explained by Professor Fuchs in his statement that there was relatively little in the decisions of the Indiana courts regarding "procedural requirements surrounding the formulation and issuance of general regulations," largely because of the traditional absence of such requirements "and the freedom of the legislature itself to frame its enactments without extending opportunities for appearance or other procedural courtesies to affected parties."⁸²

The court's attitude with regard to procedural requirements may or may not have been of concern to the legislature when conferring rule making powers on administrative agencies; but any presumption that the legislators were concerned about such things as procedural safeguards or the court's attitude thereto cannot be supported after a survey of such legislation, beginning with the 1881 health board act. The fact that statutory requirements range from no prescribed methods for issuing

272 (1856).

78. *Id.* at 280.

79. 30 Mich. 201, 210 (1874).

80. *Ibid.*

81. He includes (1) military law, *Ex Parte Quirin*, 317 U.S. 1 (1942); (2) taxation, *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915), and the two cases just discussed; (3) eminent domain, *Bragg v. Weaver*, 251 U.S. 57 (1919); and (4) public health and safety regulations, *People ex rel. Lodes v. Dep't of Health*, 189 N.Y. 187 (1907). Sherwood, *supra* note 46 at 242.

82. Fuchs, *Judicial Control of Administrative Agencies in Indiana: II*, 28 IND. L.J. 293, 308 (1953).

rules to somewhat elaborate statements on this matter suggests that initiators of legislative proposals did not look far—if at all—to determine what previous legislators had done.

Provisions for notice and hearing are not to be found in early laws empowering various agencies to issue rules; yet certain other procedural requirements, and especially demands for publicizing rules in force, were usual rather than exceptional. These laws are quite different with regard to procedures. For example, the 1881 health board act merely required that rules be promulgated,⁸³ a not too significant guide for board members, yet more than what was required in the public health acts of 1891⁸⁴ and 1899.⁸⁵ Somewhat more elaborate procedural requirements were found in statutes establishing the livestock commission and the office of state veterinarian in 1889,⁸⁶ the labor commission in 1897,⁸⁷ and the medical and dental licensing agencies.⁸⁸ Detailed statements about printing and making available for public examination the rules in force promised certainty in the law. Among the more noteworthy features were stipulations that the livestock commission's rules and quarantines could take effect only when officially proclaimed by the governor,⁸⁹ and that the labor commission's rules governing arbitration proceedings be adopted "with the advice and assistance of the Attorney-General of the State."⁹⁰

While these were not significant as safeguards, they might at least have provided subsequent legislatures with models. That the legislators did not search for models becomes more evident in the period 1900-1920, a time in which the railway and public service commissions were created. While extensive procedural requirements were prescribed in the statutes establishing these two agencies, the laws endowing other agencies with rule making powers were, for the most part, significant only because of their informational requirements.

In 1901 the state veterinarian was instructed to publish rules "from time to time,"⁹¹ a provision that was anything but a guarantee that the people affected by the rules would be adequately informed about them. Far more definitive was the statement on publication requirements in a 1915 statute, for there the veterinarian was instructed to publish his rules

83. 1881 Ind. Laws ch. 19, § 9.

84. 1891 Ind. Laws ch. 15.

85. 1899 Ind. Laws ch. 121.

86. 1889 Ind. Laws ch. 212.

87. 1897 Ind. Laws ch. 88, as amended 1899 Ind. Laws ch. 128.

88. Medical licensing law, IND. ANN. STAT. §§ 63-1301-15 (Burns 1961); dental licensing law, 1899 Ind. Laws ch. 211.

89. 1889 Ind. Laws ch. 212, § 9.

90. 1897 Ind. Laws ch. 88, § 11 and 1899 Ind. Laws ch. 128, § 11.

91. 1901 Ind. Laws, ch. 64, § 2.

in one or more papers of general circulation and to post quarantine notices and rules as set forth in the act.⁹² He was also required to file copies of sub-legislation with county auditors, who, in turn, were to publish the rules locally.

Certainty about rules in effect could be expected also under the health board act of 1909.⁹³ Its provisions are unique, matched by few laws of that period. Under this law the board was instructed to publish its rules in pamphlet form and distribute them to designated officials and the public on request. As a further guarantee that publicity would be given, county health officers were required to announce publicly the existence and receipt of the rules.⁹⁴ Equally important was an act of 1911 designed to protect the health of school children by providing for medical examination and the appointment of school physicians. In that law the state boards of health and education were authorized to issue jointly:

rules for the detail enforcement of the purposes of this act, which rules shall bear the printed seals of the said boards, the said rules to be printed and promulgated by the state printing board, promulgation to consist in supplying a reasonable number of copies to each county superintendent from whom all who are interested may procure a copy.⁹⁵

Seldom did the statutes contain such detailed statements on informational requirements; more often the acts merely authorized the issuance of such rules as the agency considered necessary to achieve the stated purposes. Examples of the latter point are found in health board acts in 1903,⁹⁶ 1911,⁹⁷ and 1919,⁹⁸ and the pure food and drug law of 1907.⁹⁹ Some of the other acts of that period, such as two in 1907 empowering the state chemist¹⁰⁰ and board of pharmacy¹⁰¹ to issue rules and regulations, and those of 1909 and 1913 pertaining to the regulatory powers of the boards of state charities¹⁰² and pharmacy¹⁰³ were devoid of informational and other procedural requirements. On the other hand, the veterinary licens-

92. 1915 Ind. Laws ch. 138, § 2.

93. 1909 Ind. Laws ch. 144.

94. 1909 Ind. Laws ch. 144, § 3.

95. IND. ANN. STAT. § 28-3605 (Burns 1933).

96. 1903 Ind. Laws ch. 83.

97. 1911 Ind. Laws ch. 71.

98. 1919 Ind. Laws ch. 56.

99. 1907 Ind. Laws ch. 104.

100. IND. ANN. STAT. §§ 16-1001-11 (Burns 1950).

101. IND. ANN. STAT. §§ 63-1101-03; 1113-14 (Burns 1961).

102. IND. ANN. STAT. §§ 22-2401-15 (Burns 1950).

103. IND. ANN. STAT. §§ 63-1102, 1103, 1113 (Burns 1961).

ing law ordered that sub-legislation be published and available for public examination.¹⁰⁴

The marked contrast between these several acts and that which established the railroad commission in 1905¹⁰⁵ is obvious on examination. Rather than a mere statement that rules shall be issued when considered necessary, the 1905 act specifies seven subjects to be covered by sub-legislation.¹⁰⁶ Moreover, provision was made for revision of rules, rates, and classifications in accordance with defined procedures, including notice, hearing, and the compulsory attendance of witnesses.¹⁰⁷ Additional consideration was given to procedure in the amending laws of 1907 and 1911.¹⁰⁸

The informational requirements of the 1905 act seem adequate, for the commission was instructed to furnish each railway company with copies of rules and regulations twenty days before they entered into force.¹⁰⁹ The law also stated that published rules were to "be admissible in evidence in any suit and sufficient to establish the fact" that the rules, orders, and classifications were official acts of the commission.¹¹⁰

Like the federal Administrative Procedure Act the railroad commission act determined where the burden of proof would lie. However, unlike the federal law this one placed the burden on the plaintiff, who, by definition, could never be the commission, since this section was operative only when an appeal was taken to the court from a determination of the agency. Placing the burden on the complainant was in accord with the court's ruling in *Horne v. Beil*,¹¹¹ a ruling that was followed in such later cases as *Pittsburgh R.R. v. Railroad Comm'n*,¹¹² and *Vonnegut v. Baun*.¹¹³ Only recently has the court departed from this ruling in rate making cases.¹¹⁴

The provisions of the several railroad commission laws guaranteeing such rights as notice, hearing and participation in the rule making process, and even authorizing private parties to request either new rules or modifications of existing ones, were in the nature of the reforms proposed

104. This was essentially the same as those found in the medical and dental licensing laws of 1897 and 1899.

105. 1905 Ind. Laws ch. 53.

106. 1905 Ind. Laws ch. 53, § 3.

107. 1905 Ind. Laws ch. 53, § 4.

108. IND. ANN. STAT. §§ 55-101; 110-113, 115, 117-122, 125-130 (Burns 1951).

109. IND. ANN. STAT. § 55-114 (Burns 1951). In 1907 this was reduced to ten days.

110. IND. ANN. STAT. § 55-111 (Burns 1951).

111. 157 Ind. 25, 60 N.E. 672 (1901).

112. 171 Ind. 189, 86 N.E. 328 (1908).

113. 206 Ind. 172, 188 N.E. 786 (1934).

114. *Public Serv. Comm'n v. Indianapolis Rys.*, 225 Ind. 30, 72 N.E.2d 434 (1947); *Public Serv. Comm'n v. Indiana Bell Tel. Co.*, 235 Ind. 1, 130 N.E.2d 467 (1955).

some years later. However, with the exception of the public service commission law of 1913, these did not set a new trend in statutes conferring sub-legislative powers.

In 1913 railroads and other utilities were brought under the control of the public service commission.¹¹⁵ The procedural safeguards still applied in the regulation of railroads, but new procedures, largely in determining and confirming rate schedules and charges,¹¹⁶ were provided for the other utilities. Elsewhere in the law the commission was empowered:

to adopt reasonable and proper rules and regulations relative to all inspections, tests, audits and investigations, and to adopt and publish reasonable and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations of public utilities and other parties before it. All hearings shall be open to the public.¹¹⁷

The railroad and public service commission acts were exemplary in that or any other period, for their procedural requirements, if faithfully followed, could not be realistically challenged either by the reformers or those individuals affected by the laws.

An assertion that a commission rate order was contrary to the due process clause of the fourteenth amendment was set aside by the Indiana court in the following year with the statement:

Appellants but feebly contend that the element of due process of law is absent from the statute, and the order made in pursuance thereof. It is shown that the ten days' notice required by the statute of the filing of the cement company's petition was served upon the appellants; that both companies appeared and resisted a modification or reduction of rates. Each was entitled to, and had, a hearing.¹¹⁸

Presumably one could not successfully challenge a rule or regulation under the due process clause if adequate procedures were required by law. But this was not to say that notice and hearing had always to be provided, for later the court noted that it was the law that regulatory powers were exercised exclusively by the legislature or its duly authorized

115. IND. ANN. STAT. §§ 54-105-07; 201-22; 301-22; 401-29; 439-42; 501-11; 601-14; 701-20 (Burns 1951).

116. IND. ANN. STAT. §§ 54-107, 204, 217, 222, 304-06, 309, 313-18, 401, 408-15, 419, 423-24, 426-28, 429, 440, 712 (Burns 1951).

117. IND. ANN. STAT. § 54-401 (Burns 1951).

118. *Southern Ind. Ry. v. Railroad Comm'n*, 172 Ind. 113, 126, 87 N.E. 966 (1909).

agent. "Whether the mode adopted by that body is wise or unwise is not a matter of judicial cognizance," for the courts could interfere "only when the legislative method violates some provision of the Constitution."¹¹⁹ In this and other decisions the court did not indicate what procedures would be necessary to keep both statutes and regulations within constitutional bounds.

Questions about agency procedures were answered by the court in *Vandalia R.R. v. Railroad Comm'n.*¹²⁰ The company had challenged the validity of the 1909 act,¹²¹ because it authorized the commission to make and enforce orders without providing for notice and hearing; and it objected to the commission's order to install new locomotive headlights, claiming that this was a costly undertaking and deprivation of property without due process of law.¹²² In answer to the first objection the court stated that the law in question was supplemental to the 1905 act which had prescribed procedures.¹²³ Moreover, the court determined that there had been a number of hearings, consequently, the company could not claim that due process had not been served.¹²⁴ The court's answer to the second assertion was based on its claim that the state's responsibility for protecting public health and safety made all property "subservient to the State."¹²⁵

In affirming the *Vandalia* decision, the Supreme Court characterized the Commission's order as "state action, legislative in its nature,"¹²⁶ a point that was at most only implied by the Indiana Supreme Court.¹²⁷ Only an appellate court case in Indiana is comparable in that there was a specific statement that an action such as this might be taken in the absence of statutory procedural requirements. In *Southern Ry. v. Railroad Comm'n* the appellate court said that it would be difficult to contend:

that the power of the legislature to enact such legislation would be paralyzed because it could not determine the reasonableness of the proposed legislative rate, it being a subject of judicial investigation and determination.¹²⁸

119. *Id.* at 130.

120. *Vandalia R.R. v. Railroad Comm'n*, 182 Ind. 382, 101 N.E. 85 (1914).

121. IND. ANN. STAT. § 55-107 (Burns 1951).

122. *Vandalia R.R. v. Railroad Comm'n*, 182 Ind. 382, 385, 101 N.E. 85 (1914).

123. *Id.* at 392.

124. *Ibid.*

125. *Id.* at 393.

126. *Vandalia R.R. v. Public Serv. Comm'n*, 242 U.S. 255, 260 (1916).

127. See *Pittsburgh R.R. v. Railroad Comm'n*, 171 Ind. 189, 86 N.E. 328 (1908).

128. 42 Ind. App. 90, 101, 83 N.E. 721 (1908).

Since the question could not be raised directly against the legislative power, it could not be raised against the commission which "stands for the legislature."¹²⁹

Support for this opinion was to be found in Justice Holmes' decision in *Bi-Metallic Investment Co. v. State Board of Equalization*.¹³⁰ Holmes had said that notice and hearing were not prerequisites to legislative action, a doctrine appealed to by counsel for the public service commission when the *Vandalia* case was before the U.S. Supreme Court:

The legislature, by the aid of committees appointed to investigate the subject, could have prescribed the kind of headlight without depriving the plaintiff in error of its property without due process of law, and, if the legislature could have done this without notice to the plaintiff in error, or without giving it a chance to be heard, then it could delegate the power to make such regulation in the same manner to the Railroad Commission.¹³¹

The commission wanted it understood that there was no right to a hearing on the question whether the commission should determine the condition and efficiency of headlights, "or on the question of whether the order should be passed."¹³²

The silence of the Indiana court during this period, and its decision in a 1918 case¹³³ might suggest that the supreme court did not regard as good law the appellate court's ruling in *Southern Ry.*, or that this was not an established principle. The 1918 case arose from the public service commission's dismissal of a petition for a rate increase. When the court found that no adequate remedy was provided in the statute to compel the agency to hold a hearing on a petition, it announced that a common law writ of mandamus could be issued, requiring the commission to take jurisdiction.¹³⁴ It should be noted that the court merely stated that the petition presented a state of facts over which the commission had jurisdiction; but there was no hint by the court that it would invalidate this or any other statute on the grounds that it was silent with regard to procedural matters.

No pattern emerged in the statutes adopted before 1920 to suggest a growing awareness on the part of the legislators of the need for procedural safeguards. Some improvements may be noted between 1920

129. *Ibid.*

130. 239 U.S. 441 (1915).

131. *Vandalia R.R. v. Public Serv. Comm'n*, 242 U.S. 255, 61 L.Ed. 276, 282 (1916).

132. *Ibid.*

133. *Indianapolis Traction Co. v. Lewis*, 187 Ind. 564, 120 N.E. 129 (1918).

134. *Id.* at 574.

and 1945, and especially within the last decade before the passage of the administrative rule making act. Even so, there was no consistency on the part of the legislators.

A failure to prescribe methods for publicizing rules in force is disturbing because of the Anglo-American demand for certainty in the law and because of the ruling in *Cotton v. Commonwealth Loan Co.*¹³⁵ There the court said that licensees are presumed to know the law; and since the law calls for the issuance of rules and regulations, the licensees are presumed to know them as well. The validity of this presumption may be challenged. All statutes are published and easily accessible to the public, but administrative legislation might or might not be published, this depending largely on the statutory requirements. The presumption fails in yet another way. The General Assembly meets at stipulated periods, and its activities command the attention of the press, while the work of the several agencies proceeds in relative quiet, the newspapers seldom giving any attention to the fact that a commission is in session. If we operate under the notion stated in *Fertich v. Michener* that sub-legislation need not be a matter of record,¹³⁶ or under the presumption stated in *Cotton*, then we need not be disturbed by the several laws adopted between 1920 and 1945, which merely authorized the issuance of rules, or which called for the promulgation of rules but left to the issuing agency the procedure to be followed.¹³⁷ These, the critics must note, were few in number and by no means representative of legislative action during this period, for an examination of the session laws will reveal a far greater number of acts that conferred legislative powers and required that the rules in force be publicized in accordance with procedures set down in the statutes.¹³⁸

Two of these laws (highway commission act, 1941, and milk control board act of 1935) contained a provision not found in the others: when properly posted the rules of these agencies were to be judicially noticed and have the force and effect of law, a provision that was not necessary

135. 206 Ind. 626, 190 N.E. 853 (1934).

136. 111 Ind. 472, 11 N.E. 605 (1887).

137. See *e.g.*, acts establishing seed commissioner, 1921 Ind. Laws ch. 28; state veterinarian, 1925 Ind. Laws ch. 7; commissioner on weights and measures, IND. ANN. STAT. §§ 67-601-27 (Burns 1961); and department of commerce and industries, 1935 Ind. Laws ch. 265.

138. Expediency and space permit only brief references to the more favorable accomplishments of this period. Four acts pertaining to public health: 1935 Ind. Laws, ch. 214; 1939 Ind. Laws ch. 38; 1941 Ind. Laws ch. 225; 1943 Ind. Laws ch. 264; livestock sanitary board, 1943 Ind. Laws ch. 85; milk control board, 1935 Ind. Laws ch. 281; egg board, 1939 Ind. Laws ch. 117; but *cf.* IND. ANN. STAT. §§ 35-2251-66 (Burns 1949); barber examiners, IND. ANN. STAT. §§ 63-301-25 (Burns 1961); committee on safety, IND. ANN. STAT. §§ 47-1701-10 (Burns 1952).

in view of the court's frequent rulings on this matter,¹³⁹ yet it did appear as a significant additional requirement in the 1927 state fire marshal act,¹⁴⁰ and one which the Indiana Supreme Court considered in rendering its decision in *Town of Kirklin v. Everman*.¹⁴¹

In 1927 the state fire marshal was authorized to issue rules for the purpose of preventing fires and promoting public safety. Such rules were to be enforced "by order thereon as is provided for the enforcement of orders of the state fire marshal."¹⁴² This meant, according to the pertinent section in the statute, that the rules would enter into force only if the parties affected were given notice, and an opportunity for a court hearing and review had been provided. But confusion arises from the provisions of this law. An order might be issued in a specific situation in which a fire hazard exists, whereas rules apply generally to matters of preventing fires and protecting life and property. This point may be noted in the context of the court case. In question was a regulation which required that gasoline storage tanks be located below the surface of the ground in specified manner.¹⁴³ If the law were strictly followed, each assistant fire marshal would have to examine storage tanks within his jurisdiction, and if he found tanks not constructed in accordance with the regulation, a proceeding as outlined in the statute would have to be initiated.

Apparently the lower court overlooked this provision, or possibly it failed to determine whether the regulation had been properly issued, for the trial court judge stated in his charge to the jury that this regulation was "the law of this state," an instruction which the Supreme Court regarded as "clearly erroneous."¹⁴⁴ The upper court distinguished this law from others which delegated quasi-legislative powers on the grounds of the specific requirement pertaining to enforcement. Thus, in holding that there had to be notice and an opportunity for a judicial hearing on and review of the regulation, the judges were in effect saying that the fire marshal's rules could take on the characteristics of rules of other agencies only after the statutory requirements had been fulfilled. It did not mean that the court was demanding the inclusion of procedural

139. *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900) ; *Wallace v. Dohner*, 89 Ind. App. 416, 165 N.E. 552 (1929) ; *Coleman v. City of Gary*, 220 Ind. 446, 44 N.E.2d 101 (1942) ; and see 1953 OPS. IND. ATT'Y GEN. 213. State Senator Bontrager stated to the writer, "Frankly, however, I have always rebelled against giving those agencies the power to make rules and regulations which shall have the force and effect of law." Letter dated July 27, 1959.

140. IND. ANN. STAT. § 20-807 (Burns 1950).

141. 217 Ind. 683, 29 N.E.2d 206 (1940).

142. IND. ANN. STAT. § 20-807 (Burns 1950).

143. *Town of Kirklin v. Everman*, 217 Ind. 683, 29 N.E.2d 206 (1940).

144. *Ibid.*

requirements; it did mean that the court would compel agencies to abide by those requirements set forth in the statutes.

The railway commission, public service commission, and fire marshal acts were forerunners of other legislation having stringent procedural requirements. Some other agencies were brought under similar requirements, notably the public health board, an agency long governed by laws with little in the way of procedural safeguards and one which seemed to operate with unlimited power even with respect to the substance of its rules, and this despite the court's claim that judicial tests of the agency's rules could be expected.¹⁴⁵

Substantial progress was made in health board laws toward goals similar to those of the reformers. As though in response to the outcry for reform in the 1930's the General Assembly prescribed the procedures for issuing rules in the 1939 pure food law, including public participation in the rule making process.¹⁴⁶ Appropriate notice had to be given at least thirty days prior to the hearing date, and those affected were to be advised about the proposed rules and the time and place of the hearings. There was also provision for amending or repealing rules, the board being required to follow the same procedure as for adoption :

except that in the case of a regulation amending or repealing any such regulation of the board, to such an extent as it deems necessary in order to prevent undue hardship, may disregard the the foregoing provisions regarding notice, hearing, or effective date.¹⁴⁷

Possibly the next General Assembly regarded this provisio as vesting too great a discretion in the board, for the 1941 milk inspection act did not include exceptional situations. And the 1943 act empowering the health board to regulate food locker plants largely followed the two just discussed, except that no reference was made to amending or repealing procedures.¹⁴⁸

Equally significant with regard to procedures were the laws of the 1930's establishing the division of labor and the unemployment compensation division.¹⁴⁹ Under the division of labor act of 1937 important safeguards were established, though there might be objection to the language

145. See especially *Lake Erie Ry. v. James*, 10 Ind. App. 550, 35 N.E. 395 (1894) ; *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900) ; *Horne v. Beil*, 157 Ind. 25, 60 N.E. 672 (1901) ; *Isenhour v. State*, 157 Ind. 517, 62 N.E. 40 (1901) ; *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677 (1934).

146. 1939 Ind. Laws ch. 38.

147. 1939 Ind. Laws ch. 38, § 26.

148. 1941 Ind. Laws ch. 225, § 4.

149. 1936 Ind. Laws. ch. 4.

used. Some words suggested that these measures depended largely upon the commissioner for fulfillment. For example, he was authorized to collect and publish the rules if he believed that the statute's purposes would be advanced thereby.¹⁵⁰ More definitive was the statutory right to petition the commissioner for a modification of a rule which caused practical difficulty or undue hardship. The commissioner was required to hold a public hearing to determine whether modification seemed to be demanded.¹⁵¹ Interested parties were also given the right to request from the agency "a review of the validity or reasonableness of any rule," with the procedures for such action stipulated in the act. Provisions of this law seemed to contradict each other in that, on the one hand, much discretion was vested in the commissioner, whose answer to the petition was to be final and conclusive; but, on the other hand, there was a statutory provision for judicial review.¹⁵²

Certain other statutes of this period are in sharp contrast and must be stamped as inferior when measured by the reformers' standards, for rule making powers were not surrounded by procedural safeguards. While other sub-legislative powers were to be exercised according to statutory procedures, there is nothing in these several statutes that suggests, nor does the court give us reason to believe, that these limitations extended to the issuance of rules.

In 1933 the department of financial institutions was authorized to issue, alter, amend, and repeal rules.¹⁵³ Although the stated purposes for which rules were to be issued may have provided adequate guidance, this act, and the amendments of 1935 and 1945¹⁵⁴ did not prescribe methods for adopting rules. Under the small loan act of 1933 the department was empowered to issue rules "for the proper conduct of such business and the enforcement of this act."¹⁵⁵ The failure to prescribe procedures in the exercise of the rule making power becomes more apparent in the examination of other "ministerial" functions,¹⁵⁶ which, as the court pointed to on several occasions, could only be exercised in accordance with statutory requirements; but nowhere did it suggest that the rule making power was to be conducted in accordance with similar procedures. Nor did the judges claim that prescribed procedures were

150. 1937 Ind. Laws ch. 34, § 9(6).

151. *Ibid.*

152. *Ibid.*

153. IND. ANN. STAT. § 18-207 (Burns 1950).

154. IND. ANN. STAT. §§ 18-103-2171 (Burns 1950).

155. IND. ANN. STAT. § 18-103 (Burns 1950).

156. By "ministerial" functions the court meant licensing and rate making. See *Financial Aid Corp v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939).

essential to due process. Indeed, they rejected an argument of this nature in stating :

The standard is as definite and certain as the Legislature could fix by a general statute. An administrative officer charged with the administration of the laws enacted by the General Assembly necessarily exercises a discretion partaking of the characteristics of the judicial department of the government but does not have the force and effect of a judgment. Unless an administrative officer or department is permitted to make reasonable rules and regulations, it would be impossible in many instances to apply and enforce the legislative enactments, and the good to be accomplished would be entirely lost.¹⁵⁷

There are more questions suggested than answers given in this statement. Twice within the same paragraph the court referred to definite standards. But immediately after the first such reference the court pointed to the statutory requirements for "a full and careful investigation" before fixing interest rates, and "a full and complete hearing" prefatory to acting on license requests. If these were the definite standards found by the court what about the rule making powers? Second, the court treated licensing, rate setting, and rule making as part of the same thing, the administrative duties of the agency. But the court did not state whether agency discretion in exercising the rule making power is also in the nature of one "partaking of the characteristics of the judicial department of government," thus whether procedural due process was denied in the absence of fixed statutory methods.

Statutory methods for exercising some sub-legislative functions, but not rule making, were characteristic of the laws of the department of financial institutions and the insurance and securities commissions.¹⁵⁸ There were these situations; and there was also a general improvement through the years, although not one that would suggest a more reasoned and systematic treatment of procedural matters during successive sessions of the General Assembly. In view of the irregularity in the development it is unlikely that the General Assembly would have reached the same goals by piecemeal legislation that presumably were reached under the 1945 act.

157. *Id.* at 121.

158. IND. ANN. STAT. §§ 18-3101-25, 3201-38 (Burns 1950); 1933 Ind. Laws ch. 148-49; IND. ANN. STAT. §§ 39-3201-03, 3301-31 (Burns 1952); 1937 Ind. Laws ch. 120.

4. DEVELOPMENT SINCE 1945

A more strict judicial examination of the substance of rules was evident in 1944 and 1945 when the supreme court declared void a town ordinance¹⁵⁹ and an agency action¹⁶⁰ on the grounds that the issuing agencies went beyond powers conferred in the statutes. These two decisions might be distinguished as harbingers of the somewhat more strict judicial attitude. A question about an agency operating beyond the authority of the law was presented in *Illinois Central R.R. v. Public Service Comm'n*,¹⁶¹ wherein the appellant challenged the agency's order that it restore train services. At issue was a rule adopted in 1937 requiring that each railroad company follow a certain procedure before discontinuing intrastate trains. The court upheld the rule, concluding that the act gave the commission the necessary authority to promulgate rules of orderly procedure.¹⁶²

The act in question had used such terms as "to adopt all necessary rules and regulations to govern . . . train service and accommodations," and "adopt and enforce such rules, regulations and modes of procedure as it may deem proper to hear and determine complaints" in conferring powers on the commission. Presumably this act provided a suitable standard, although there is a suggestion in the court's language that it had to consider the commission's responsibilities as well as the words of the statute.¹⁶³ Why this situation should differ from that involving an ordinance prescribing maximum speeds within a town's limits¹⁶⁴ seems a reasonable question to ask, and especially when a somewhat similar question is posed in *Standard Oil Co. v. Review Board*.¹⁶⁵

The latter question arose from the "good cause" proviso of this state's unemployment compensation act. Standard Oil objected to the payment of unemployment benefits to sixteen women who left work voluntarily to marry. There seemed to be good reason for this objection, section 1507 of the act having explicitly forbidden payment of benefits in such instances; but a proviso to that section authorized annulments of this policy in individual cases upon showing a "good cause" by the claimant.

159. *Southern Ry. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944).

160. *McCreery v. Ijams*, 115 Ind. App. 631, 59 N.E.2d 133 (1945).

161. 225 Ind. 643, 75 N.E.2d 900 (1947).

162. *Id.* at 647.

163. The court's decision in *Illinois Central* was in accord with earlier decisions wherein statutory standards were liberally construed when the public interest was involved. See *Albert v. Milk Control Board*, 210 Ind. 283, 200 N.E. 688 (1936).

164. *Southern Ry. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944).

165. 230 Ind. 1, 101 N.E.2d 60 (1951).

In answering the question whether this was an unwarranted delegation of legislative power, the court stated that the legislature had to lay down a standard "as definitely described as is reasonably practicable." The court could not find such a standard in the present law, nor did it find a definition of the proviso.¹⁶⁶ In the court's estimation the choice was left to the unbounded discretion of the agency. "The Board may find the facts, but, having found them is without any legal yardstick by which to measure the rights of parties."¹⁶⁷ The provision in question was held unconstitutional, with the court suggesting the need for drafting a statute "which would not leave to the Review Board the legislative power of choice."¹⁶⁸

The rule that reasonable standards had to be included in the statutes was reaffirmed by decisions in 1952¹⁶⁹ and 1958.¹⁷⁰ But in the latter case the court qualified this by saying:

However, the policy of the Legislature and the standards to guide the administrative agency may be laid down in very broad and general terms. Such terms get precision from the knowledge and experience of men whose duty it is to administer the statutes, and then such statutes become reasonably certain guides in carrying out the will and intent of the Legislature.¹⁷¹

Why this was not true in the *Standard Oil* case is not apparent in the court's discussions. There is a contradiction that is not explained by the court's claim that this and other jurisdictions "are less strict in requiring specific standards" in statutes designed to protect the public health, safety, morals, or general welfare.¹⁷² The general welfare was the stated policy of the compensation act, and public safety, through regulating the sale of firearms, was the aim of the statute in question in the *Matthews* case. Yet they were not accorded the same status by the court. Apparently the court meant that it would be less likely to demand elaborate standards for protecting public health or safety than for protecting the general welfare.

During the same term in which *Matthews* was decided the court heard objections to a 1915 act which empowered the public service com-

166. Note, *Good Cause Proviso in Unemployment Compensation Statute Held Unconstitutional Delegation*, 101 U. PA. L. REV. 284 (1952), claims that such provisos appear in one form or another in all but one state unemployment compensation statute.

167. *Standard Oil Co. v. Review Board*, 230 Ind. 1, 9, 101 N.E.2d 60 (1951).

168. *Ibid.*; see *Bezossi v. Indiana Employment Security Board*, 237 Ind. 341, 346, 146 N.E.2d 100 (1957).

169. *Ennis v. State Highway Comm'n*, 231 Ind. 311, 108 N.E.2d 687 (1952).

170. *Matthews v. Indiana*, 237 Ind. 677, 148 N.E.2d 334 (1958).

171. *Id.* at 681-82.

172. *Ibid.*

mission to require either a watchman or automatic signal at any obstructed crossing. To the contention that this act did not contain a "proper standard" the court stated:

if the legislature can delegate to a board or commission the fixing of a reasonable rate or charge, it is certainly difficult to see why it may not delegate to the Public Service Commission the function of determining what is or is not an obstructed crossing under the particular facts.¹⁷³

In the latter decision judicial notice was taken of the number of children, adults, motor vehicles and bicycles crossing the tracks where the obstruction existed, thus giving weight to the idea that the public interest demanded support and validation of the agency's order. But a mere policy statement that the public interest was affected was not enough, as is apparent in the *Standard Oil Co.* case, for the court had to have convincing evidence that a matter was in the public interest.

The latter point is apparent in cases involving the department of financial institutions and the insurance commissioner.¹⁷⁴ These cases arose from efforts of the agencies to prevent automobile dealers from selling automobile insurance. The first objection to such an attempt was voiced by the Johnson Chevrolet Company, when it requested that the department be permanently enjoined from enforcing section III of its General Order No. 1.¹⁷⁵ In fixing the maximum participation of retail sellers thereunder the department obviously believed that this was its responsibility under the retail installment sales act.¹⁷⁶ But the court disagreed with this interpretation, for it could not find that the act contemplated licensing insurance agents, nor the amount of compensation that they could receive; nor could the court find legislative intent to keep "people or corporations from engaging in both the insurance business"

173. *N.Y. Cent. R.R. v. Public Serv. Comm'n*, 237 Ind. 544, 551, 147 N.E.2d 547 (1958).

174. *Department of Financial Institutions v. Johnson Chevrolet Co.*, 228 Ind. 397, 92 N.E.2d 714 (1950); *Department of Ins. v. Motors Ins. Corp.*, 236 Ind. 1, 138 N.E.2d 157 (1956); *Department of Financial Institutions v. Holt*, 231 Ind. 293, 108 N.E.2d 629 (1952); *Department of Financial Institutions v. C. I. T. Credit Corp.*, 237 Ind. 404, 146 N.E.2d 93 (1957).

175. INDIANA RULES AND REGULATIONS 157 (1948 Additions & Revisions).

176.

No licensee shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer, as a finance charge or as the cost of the insurance to the retail buyer, in excess of an amount fixed and determined by the Department. . . .

IND. ANN. STAT. § 58-910 (Burns 1948). This portion of the act was invalidated in the *Holt* case, 231 Ind. 293, 108 N.E.2d 629 (1952).

and automobile sales. The court concluded that the department's action was "an arbitrary invasion of private property and personal rights under the guise of police power."¹⁷⁷

Possibly the commissioner of insurance had this statement of the court in mind when he set down twelve reasons why he was refusing to license automobile dealers as agents and solicitors of insurance.¹⁷⁸ This he claimed to do in the exercise of his discretionary powers and in the public interest. But neither claim influenced the court, for it stated, as it did in the previous case, that it was not the intention of the legislature to keep people from engaging in both businesses.¹⁷⁹

A limit on the police power was set by the court; the legislature could not "authorize a public official to give or withhold arbitrarily or capriciously, permission to pursue a lawful occupation or business,"¹⁸⁰ and any sub-legislation issued was "bounded by the constitutional limitations of the police power."¹⁸¹ That the court was not impressed with the commissioner's twelve reasons was apparent in its statement that the general public was not concerned with the matter of an automobile dealer also being an insurance salesman, a claim first made in *Department of Financial Institutions v. Johnson Chevrolet*.¹⁸² In each case the court ruled that the regulations were without statutory authority, and it rejected the claims that they were issued in the public interest. Later the court admitted that rights may be limited by the police power,¹⁸³ nevertheless, it struck down both section 10 of the retail installment sales act and the department's rule. The court said that they could not be supported as valid exercises of the police power, since the interests of the buying public were adequately protected against unfair and exorbitant finance charges by other provisions of the act.¹⁸⁴

Agencies suffered other setbacks in the courts, but not by reason of the 1945 act. In 1951 the appellate court and employment security division came to entirely different conclusions on the meaning of an

177. *Department of Financial Institutions v. Johnson Chevrolet Co.*, 228 Ind. 397, 406, 91 N.E.2d 643 (1950).

178. 236 Indiana Supreme Court Briefs 1, 13 (1956); *Department of Ins. v. Motors Ins. Corp.*, 236 Ind. 1, 7, 138 N.E.2d 157 (1956).

179. *Department of Ins. v. Motors Ins. Corp.*, *supra* note 178.

180. *Id.* at 16, citing as authority *Stern v. Metropolitan Life Ins.*, 154 N. Y. Supp. 283 (1915).

181. *Department of Ins. v. Motors Ins. Corp.*, *supra* note 178 at 7.

182. 228 Ind. 397, 92 N.E.2d 714 (1950).

183. 231 Ind. 293, 108 N.E.2d 629 (1952).

184. For a further discussion of these several cases see Note, *Is Control of Dealer Participation a Necessary Adjunct to Regulation of Installment Sales Financing*, 28 IND. L.J. 641 (1953); also Hardy, *Another View on the Origin of Dealer Participation in Automobile Finance Charges*, 30 IND. L.J. 311 (1955); Pecar, *Dealer Participation in Automobile Finance Charges: A Reply*, *id.* at 319 (1955).

act. This was not an instance, the court said, in which the legislature had stated a broad general policy then delegated to an administrative agency the power to implement policy with rules and regulations. Rather the legislature had provided a specific statutory yardstick which could neither be broken nor shortened by administrative legislation.¹⁸⁵

In 1952 the supreme court heard two cases involving questions about an agency operating beyond the law. Under the gross income tax law of 1933 the director was granted rule making powers.¹⁸⁶ From May 1933 to April 1946 the gross income tax division followed a department rule which stated:

Taxpayers selling real property upon which there is a mortgage lien will be deemed to be selling only an equity therein where the mortgage lien is assumed by the purchaser, and only the amount received in cash, notes or other property will be reported for gross income tax.¹⁸⁷

On April 27, 1946 Rule No. 3405 entered into force, providing:

If any mortgage existing on real property at the time of sale was executed by the seller of such real estate as security for borrowed money received by, or credited to, such seller, then no deduction whatsoever may be taken by the seller, regardless of whether the mortgage is assumed by the purchaser or a third party; or satisfied by the seller with funds provided by the purchaser or other parties.¹⁸⁸

In these cases the court ruled that the department had gone beyond the authorization of the law. Only the General Assembly could say what income was subject to taxation, and it had "not said that a mortgage interest in property is an asset to the mortgagor that is subject to assessment for gross income tax."¹⁸⁹

The emphasis in these decisions was on the substance of administrative rules, and the court's strict supervision of agency rule making after 1945 had nothing to do with the 1945 rule making act. Indeed, that statute was overlooked in one case in which it might have been applied;

185. *Employment Security Division v. Ponder*, 121 Ind. App. 51, 92 N.E.2d 224 (1951).

186. IND. ANN. STAT. § 64-2629 (Burns 1961).

187. The rule was cited in *Gross Income Tax Division v. Crown Development Co.*, 231 Ind. 449, 461, 109 N.E.2d 426 (1952).

188. *Ibid.*

189. *Ibid.*; see *Gross Income Tax Division v. Colpaert Realty*, 231 Ind. 463, 109 N.E.2d 415 (1952).

it was of minor significance in another case, and ultimately was the basis for only one decision.

The court might have invalidated an agency regulation in *Department of Insurance v. Motors Insurance Corp.*¹⁹⁰ on the grounds that the commissioner had not complied with the provisions of the 1945 act. However, for an obvious reason the court elected a different course of action in striking down the rule in question. In a letter to the insurance company the commissioner had set forth his twelve reasons for not licensing automobile dealers as insurance agents. The court announced that this letter was treated as a regulation by the insurance commissioner, the company, and the trial court, and that it would be so regarded by the supreme court.¹⁹¹ Yet there is nothing about this letter to suggest that it was a regulation within the meaning of the 1945 act, and certainly it was not adopted in conformity with the procedure stated in that law. Obviously the court was preoccupied with the substance and aim of this rule, and, by going to the heart of the matter, it could emphasize its determination to block the efforts of the two state agencies to prevent automobile dealers from selling insurance.¹⁹²

In *State ex rel. Sights v. Edwards*¹⁹³ the 1945 act played only a minor role. Possibly its only significance to this study was the court's going behind the published rule to discover that Rule No. 58 of the state board of education had not been approved by the governor and attorney general; consequently, it was inoperative.

The last decision for consideration is *Blair v. Gettinger*,¹⁹⁴ the one instance in which the 1945 rule making act gained serious attention. This case arose from an apparent contradiction between a properly adopted and published rule and a practice of the commission on teacher licensing. Certain rules governing teacher certification had been issued by the commission, including one which provided for a general elementary certificate. Prior to the time of the issuance of this rule certificates were issued for specific grade levels from kindergarten through the eighth grade. The question for the court was whether the appellant was licensed to teach in the primary grades, her certificate being for those at the intermediate level. From the description of Blair's license it was obvious that she was not certified to teach the primary grades, nor could she

190. 236 Ind. 1, 138 N.E.2d 157 (1957).

191. *Id.* at 9.

192. *Department of Financial Institutions v. Johnson Chevrolet Co.*, 228 Ind. 397, 92 N.E.2d 714 (1950); *Department of Financial Institutions v. Holt*, 231 Ind. 293, 108 N.E.2d 629 (1952).

193. 228 Ind. 13, 88 N.E.2d 763 (1949).

194. 230 Ind. 588, 105 N.E.2d 161 (1952).

qualify for a general certificate under Rule No. 14.¹⁹⁵ Blair insisted that hers was a valid general certificate, for at the commission's meeting in April 1950:

[the] question was raised as to whether the Division might continue the practice of accepting any elementary license as valid for teaching in grades one through eight. Dr. Maxam moved that such an interpretation be accepted indefinitely as a policy of the Commission. Mr. Morehead seconded the motion and it was carried.¹⁹⁶

It thus appeared that the commission had been accepting as a matter of practice any elementary license as valid for teaching grades one through eight. While the court admitted that when there was a doubt as to the meaning of a rule, the agency's interpretation of it would "have much weight unless it is plainly erroneous or inconsistent with the rule itself,"¹⁹⁷ it could not see such doubt in the present rule, and did not need to look to the agency's construction of it.¹⁹⁸

Of significance was the court's further statement that rights or benefits arising under rules could "not be extended by interpretation beyond the plain terms of the rule itself," for to do so:

would be to create rules by interpretation thus defeating the legislative requirement that rules may be adopted only by compliance with required formalities such as publication of notice and a hearing and the approval of the attorney general and governor as required by Ch. 120 of the Acts of 1945.¹⁹⁹

Rule making laws adopted since 1945 fall into three categories, according to rule making provisions. The first category includes laws which authorize the issuance of rules and regulations and demand that the procedure be "in the manner as provided by law," or, in a more specific reference to the uniform rule making act, be in accordance with the "statutes [sic] of this state concerning the establishment of rules."²⁰⁰

195. INDIANA RULES AND REGULATIONS 262 (1949 Additions & Revisions). This rule pertained only to those who entered teacher training after September 1946, and she had been teaching for twenty years.

196. Appellant's exhibit No. 4, a minute of the meeting. *Blair v. Gettinger*, 230 Ind. 588, 601, 105 N.E.2d 161 (1952).

197. *Id.* at 602; and citing *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 440 (1955).

198. The court found support in *Brown Lumber Co. v. Louisville & Nashville R.R.*, 299 U.S. 383 (1936).

199. *Blair v. Gettinger*, 230 Ind. 588, 602, 105 N.E.2d 161 (1952).

200. These include: (1) regulation of nursing, IND. ANN. STAT. §§ 63-901-29 (Burns 1961); (2) public health code, IND. ANN. STAT. § 35-101 (Burns 1949); (3) dental examiners board, IND. ANN. STAT. § 63-502 (Burns 1961 Supp.); (4) state

Laws in the second category are those which appear to alter or modify in some way the procedural and informational requirements of the administrative rule making act as they apply to specific agencies, yet leave open the question whether this was the actual intent of the legislature. In 1947 an amended livestock sanitary board act provided for approval of rules by a majority of the board and state attorney general, yet made no reference to the governor.²⁰¹ The publication requirement was identical to that in the 1943 act, suggesting that the initiators did not refer to the 1945 act. But this section was specifically repealed in 1951, with the board instructed to adopt, revise, or repeal rules in accordance with the administrative rule making act.²⁰²

The notice and hearing requirements of the 1945 act were disregarded by the authors of a 1953 law regulating the sale and distribution of fertilizers²⁰³ and one in 1957 regulating the sale of vegetable seeds.²⁰⁴ And the laws of 1959 creating airport authority districts²⁰⁵ and levee authority districts²⁰⁶ prescribed methods for the adoption of sub-legislation different from those prescribed in the uniform rule making act.

These laws which prescribe procedures other than those of the 1945 act are not as numerous as those in the third category. Embraced within this latter group are acts which confer rule making powers in language essentially the same as that of the earlier laws; they neither refer to the uniform rule making act, nor do they impose limitations on the exercise of sub-legislative powers which represent significant departures from, or innovations in, such statutory grants.²⁰⁷

board of health, IND. ANN. STAT. §§ 35-3603-10 (Burns 1949); (5) livestock sanitary board, 1951 Ind. Laws ch. 80; (6) regulation of mobile homes, IND. ANN. STAT. §§ 35-2841-81 (Burns 1961 Supp.); (7) regulation, sale and distribution of commercial feeds, IND. ANN. STAT. §§ 16-1012-26 (Burns 1961 Supp.); (8) regulation and inspection of nursing homes, IND. ANN. STAT. §§ 42-1448-64 (Burns 1961 Supp.); (9) control of radiation, IND. ANN. STAT. §§ 35-4501-21 (Burns 1961 Supp.); (10) livestock licensing, IND. ANN. STAT. §§ 42-925-37 (Burns 1961 Supp.); (11) taxing motor vehicles, 1959 Ind. Acts, ch. 384; and (12) veterinary medicine licensing, IND. ANN. STAT. §§ 16-1431-56 (Burns 1961 Supp.).

201. IND. ANN. STAT. §§ 54-511-12 (Burns 1951).

202. IND. ANN. STAT. § 16-1201 (Burns 1961 Supp.).

203. IND. ANN. STAT. §§ 15-1007-22 (Burns 1961 Supp.).

204. IND. ANN. STAT. §§ 15-825-38 (Burns 1961 Supp.).

205. IND. ANN. STAT. §§ 14-1201-35 (Burns 1961 Supp.).

206. IND. ANN. STAT. §§ 27-1001-33 (Burns 1960).

207. Included are laws pertaining to: (1) fire marshal, IND. ANN. STAT. § 20-807 (Burns 1950); (2) licensing of nursing homes, IND. ANN. STAT. §§ 42-1418-47 (Burns 1952); (3) unemployment compensation, IND. ANN. STAT. § 52-1525-63 (Burns 1950); (4) oil and gas inspection, IND. ANN. STAT. §§ 46-1701-27 (Burns 1952); (5) embalmer's board, IND. ANN. STAT. §§ 63-719-30 (Burns 1961); (6) financial institutions, IND. ANN. STAT. §§ 18-705, 1103, 2105, 2109, 2123-25, 3001, 3404, 3407-11, 3416 (Burns 1961 Supp.); (7) division of safety, IND. ANN. STAT. §§ 47-1046-48, 1052, 1074, 1081-83, 1087 (Burns 1952); (8) small loans licensing, IND. ANN. STAT. §§ 18-3001-04 (Burns 1961 Supp.); (9) regulation of mining, IND. ANN. STAT. §§ 46-1502-11 (Burns 1952); (10)

More than thirty laws fall within the third category. They do not, of course, pose any special problem, since it may be assumed that the 1945 act is applicable. If any problem is presented it is with regard to those regulatory laws which prescribe procedures other than those of the rule making act. It is as though the legislators were neither cognizant of the long struggle for procedural reform nor aware of the 1945 act. If the legislators and other public officials disregard the 1945 act and its stated goals, what hope may be held out for the new reform measure?

5. SOME COMMENTARIES ON RULE MAKING IN INDIANA AND THE REFORM PROPOSAL

Events of the last few years in Indiana and elsewhere demonstrate a continuing dissatisfaction with practices related to administrative rule making. Yet it would not be correct to say that all who look favorably upon recent reform proposals fall within the same camp, for, as determined by Ferrel Heady, they "may be divided into three groups on the basis of their attitudes toward the earlier settlement represented by the 1946 APA and its state counterparts."²⁰⁸ The first group is comprised of liberals and ex-New Dealers who have been disillusioned with government in the past decade and especially concerned with encroachments upon the rights of the individual.²⁰⁹ Professor Schwartz probably speaks for the second group of the new reformers. Their philosophy is described by Heady as "building block" or "gradualist."²¹⁰ They claim that it is time to carry reform forward with the establishment of legislative control of administrative rules and regulations. "We wuz robbed" seems to describe best the attitude of the third group, men who believe that the accomplishments of the uniform procedure acts have been "whittled away and eroded" in frequent skirmishes.²¹¹

financial institutions, IND. ANN. STAT. §§ 19-2201-06 (Burns 1961 Supp.); (11) aeronautics commission, IND. ANN. STAT. §§ 14-327-41, 1101-09 (Burns 1961 Supp.); (12) board of health, IND. ANN. STAT. § 28-3609, §§ 35-4214-28, 2801-21 (Burns 1961 Supp.); (13) sale of checks and money orders, IND. ANN. STAT. §§ 18-3401-17 (Burns 1961 Supp.); (14) department of insurance, IND. ANN. STAT. §§ 39-3501, 3007-09, 3015, 3018-19, 3024, 3026 (Burns 1961 Supp.); (15) board of pharmacy, IND. ANN. STAT. §§ 63-1213-26 (Burns 1961); (16) regulation of chartered vehicles, IND. ANN. STAT. § 47-1229 (Burns 1961 Supp.); (17) department of conservation, IND. ANN. STAT. § 11-1524, §§ 68-1101-10 (Burns 1961); (18) regulation of ferry boats, IND. ANN. STAT. §§ 36-2506-12 (Burns 1961 Supp.); (19) board of tax commissioners, IND. ANN. STAT. §§ 64-535-39 (Burns 1961); (20) boiler inspection, IND. ANN. STAT. §§ 20-634-58 (Burns 1961 Supp.).

208. Heady, *The New Reform Movement in Regulatory Administration*, 19 PUB. ADMIN. REV. 89, 92 (1959).

209. Fuchs, *The Proposed New Code of Administrative Procedure*, 19 OHIO ST. L.J. 423 (1958).

210. Heady, *supra* note 208.

211. *Symposium: Proposed Changes in Federal Administrative Practice and Procedure*, 19 OHIO ST. L.J. 377 (1958), Foreword by Charles S. Rhyne.

Indiana's current reformers are within the Schwartz camp. They provided the leadership in 1959 and 1961 for the creation of a legislative oversight committee to review all administrative rules. Schwartz believes that truly effective controls are possible only if the work of the courts is supplemented by legislative oversight:

The Congress is the one great organ of government that is both responsible to the electorate and independent of the executive. As the source of delegations of administrative power, it must also exercise direct responsibility over the manner in which such power is employed.²¹²

In support of this proposal Professor Schwartz points to the experiences in the United Kingdom and several American states where such controls are in effect.²¹³

In 1959 the Indiana Senate moved in the direction of this new reform with the adoption of Concurrent Resolution No. 9. This provided for an interim committee to consider "the feasibility of amending chapter 120 of the Acts of the Indiana General Assembly of 1945 to require the approval of all rules and regulations by the [legislative advisory] commission as a necessary part of the process of promulgation."²¹⁴ Statements by Senators Bainbridge and Bontrager leave no question as to why the legislature wants its own members to approve administrative rules and regulations before they may take effect. Senator Bainbridge believes that the legislators have abdicated from their responsibilities in delegating so much of their authority to state agencies;²¹⁵ and Senator Bontrager states:

My reason for joining with Senator Spurgeon in the authorship of Senate Concurrent Resolution No. 9 was that I frequently, as a lawyer, come in contact with regulations promulgated by administrative agencies which seem to me to encroach rather heavily upon the rights of individual citizens. I have realized,

212. Schwartz, *Legislative Oversight: Control of Administrative Agencies*, 43 A.B.A.J. 19, 20 (1957).

213. Carr & Schwartz, *Legislative Control of Administrative Rules and Regulations*, 30 N.Y.U.L. REV. 1031 (1955). Statutory provisions for such control may be seen: NEB. REV. STAT. § 84-904 (1958); KAN. GEN. STAT. ANN. § 77-410 (1949); VA. CODE ANN. § 9-6.9 (1956); WIS. STAT. ANN. § 227.041 (1957). Wisconsin's experience with legislative oversight is described: Boles, *The Post-Hearing Stage of the Administrative Rule Making Process in Wisconsin: The Conservation Commission*, 40 MARQ. L. REV. 251 (1956).

214. 1959 Ind. Acts ch. 403, § 2. On August 4, 1959 a bipartisan committee was appointed by Lt. Governor Parker and Speaker Bayh. Senator Martin served as chairman and Representative Kent as vice-chairman.

215. Interview in Indianapolis, July 16, 1959.

of course, that it probably is necessary for the Legislature to give administrative agencies and bureaus some powers with regard to the promulgation of rules and regulations. Frankly, however, I have always rebelled against giving those agencies the power to make rules and regulations which shall have the force and effect of law.²¹⁶

The statements of these two legislators imply that we have moved some distance from the ideas of responsibility and responsiveness to the people. Their statements also explain Senate Concurrent Resolution No. 9 and why Senate Enrolled Act No. 58, an act providing for legislative oversight, was drafted and passed in 1961. This was pocket vetoed by Governor Welsh, thereby delaying until the 1963 session a final answer to the question about further reform. Meanwhile certain questions about practices since 1945 and the proposed legislative oversight demand answers.

First we should consider whether the legislature should not concentrate its efforts in improving the situation under the 1945 act. There is no check to determine whether agencies actually comply with the provisions of the 1945 rule making law, and there is some evidence that the law is frequently evaded. Professor Kirk, who was recently engaged in codifying Indiana's school laws, found that agencies publish amendments to existing rules, but the citations are to agency pamphlets rather than the cumulative publication of the secretary of state, thus making it difficult to find the rules.²¹⁷ Mrs. Kay Cleveland, the former chief clerk in the office of secretary of state, had also stated that agencies do not follow faithfully and carefully the law's stipulations.²¹⁸

Substance for these claims is found in a number of examples. Previously we noted the court's statement in *Department of Insurance v. Motors Insurance Corp.* that the commissioner's letter would be treated as an administrative regulation, despite the fact that this was not such under the 1945 act. If the commissioner treated this as a regulation, has he issued others which do not meet the requirements of the 1945 act, but which have not been brought to the attention of the court? An examination of the cumulative volumes of rules since 1947 and a spot check of agencies would reveal how many rules have been issued contrary to the 1945 law.

Questions may also be raised about the accuracy of handling rules and regulations. An example in point is Rule No. 58 of the state board

216. Letter to writer, July 27, 1959.

217. The writer discussed matters pertinent to this study with Professor Kirk.

218. Response to questionnaire, October 1958.

of education, one which was published by the secretary of state, even though it had not been approved by the governor and attorney general. Obviously this caused some confusion to the appellant in *Sights v. Edwards*, she believing that was a valid rule.²¹⁹ Another case in point is a 1955 rule adopted by the department of insurance. Both the proposed rule and the rule as adopted carry the notation, "Effective June 30, 1955." But in several places in the rule as proposed and as adopted there is notice that a hearing was to be held, and was held, on July 25, 1955. There is also the notation that the rule was filed with the secretary of state on September 1, 1955.²²⁰ According to the rule making act rules are "effective as of the date and time filed with the secretary of state."²²¹ We thus find a unique situation in which the rule took effect almost a month before the hearing and two months before it was filed.

Most agencies seem to be careful in numbering rules so that interested parties may readily locate them. This has largely been true of the veterans affairs commission, although some confusion arises from the fact that it has two different sets of rules numbered from one through seven, and they are in no way related to each other.²²²

While there are these agency failures to be noted, we cannot assume that they are typical, or that these critical comments tell the whole story. There are those who look favorably upon developments since 1945, and there is evidence to support the claims that they make. Mr. Robert Hollowell, who, as one of the chief architects of the rule making act, has both a personal and professional interest in the results, believes that agencies in general have followed faithfully the provisions of the law. He suggests that any exceptions that are found arise from changes in administration and a lack of familiarity with the law, "rather than from any desire upon the part of any administrative agency to deliberately ignore or circumvent them."²²³ To anyone familiar with Indiana politics this is a reasonable explanation. The election of a new officeholder usually results in a complete change of personnel, continuity not being one of the characteristics of Indiana's bureaucracy.

But, while this point is well taken, and while it is sound to be realistic, the question must be asked whether it would not be equally realistic to ensure conformity with a law that is regarded as a significant

219. 228 Ind. 13, 88 N.E.2d 763 (1950).

220. INDIANA RULES AND REGULATIONS 124 (1956 Additions & Revisions).

221. IND. ANN. STAT. § 60-1505 (Burns 1961).

222. The first seven rules were adopted in August 1945, providing for the employment of veterans as district, county and/or city service officers, 2 INDIANA RULES AND REGULATIONS 1935 (1947); the second set deals with the veteran's bonus, INDIANA RULES AND REGULATIONS 159 (1950 Additions & Revisions).

223. Letter to writer, October 24, 1958.

safeguard for the people. The earlier reformers demanded that we not lose sight of historic American notions; and their claims that such principles as the rule of law and certainty in the law were being overshadowed by the emphasis on effectiveness of government were not without justification. It is thus empirically sound to provide certain safeguards in the laws, and it is not unwise to take advantage of a single rule making act, such as that of 1945, thereby accomplishing with one stroke what would otherwise obtain only under a host of acts.

Whether Indiana should embark upon a further reform program depends on certain matters, not the least of which is gubernatorial opposition to a reform such as that envisaged in Senate Enrolled Act No. 58. Reform-minded legislators should consider the objections which were voiced by Governor Matthew E. Welsh:

This bill was pocket vetoed because it seems to me that for the legislature to be reviewing proposed rules would unduly complicate the administration of government. Under present law public hearings must be held before any rules are adopted, after which they must be approved by the attorney general as to form and legality before they become effective.

The bill in question proposed a 60 day waiting period before such regulations would become effective, which could mean at least that much delay in a matter where time is usually important.

Governor Welsh also questioned legislative review of the regulations of the executive branch, believing that this violates, the principle of separation of powers; and he questioned "the wisdom of giving a veto power to a small committee acting by itself while the legislature is not in session."²²⁴

Possibly individual legislators will find answers to these objections in advance of the 1963 session of the General Assembly. But members of the legislature should also consider certain other points if they intend to pursue this line of reform.

The legislators should know what Indiana's experiences tell us with regard to further reform. Procedural due process has not been an important issue in rule making cases since 1945, for the persons affected are more concerned with the substance of the rules. It should also be noted that very few administrative rules are challenged in the courts; a matter which becomes significant when we consider the number of rule making agencies and the number of rules issued annually. There is thus no significant loss of motion in nor obstruction of the administrative

224. Letter to writer, August 4, 1961.

process either with or without such procedural safeguards as those found in the 1945 act.

The first finding stated above might lend support to a reform measure such as legislative oversight. If substantive rather than procedural considerations are more important to private parties affected by sub-legislation, legislative oversight would place the emphasis where it properly belongs. This presumes, of course, as have some Hoosier legislators, that administrative rules generally do not conform to policies laid down in the statutes. Such a presumption underlies both the 1959 Senate resolution and the legislative oversight bill adopted in 1961. However, a presumptive of this nature fails to take into account the roles of the governor and attorney general, and the highly political character of some of this state's more important administrative agencies. There is also the question whether legislative oversight is realistic in view of the institutional arrangements and the relative roles of the governor and legislature in Indiana. A reform proposal such as this demands examination in light of such matters.

The governor is the state's chief administrative officer both in name and fact. He exercises appointing and removal powers which, according to *Tucker v. State*,²²⁵ inhere in his office and may not be removed by legislative fiat. In rendering this decision the Indiana court followed *Meyers v. United States*²²⁶ rather than *Humphrey's Executor v. United States*,²²⁷ despite the closer parallel of United States independent regulatory commissions to state administrative agencies than a postmaster. In effect, then, the Indiana Supreme Court looked to unity within the executive-administrative branch, with the governor at the apex, a position not permitted to the President of the United States so long as there is a "headless forth branch."

The governor's obvious implication in the policy-making by the several agencies may be demonstrated by such recent examples as the public service commission's role in the struggle between the Indiana Public Service Company and Rural Electrification Membership Corporation during the crucial 1958 senatorial campaign, or Governor Handley's firing of three members of the department of financial institutions in December 1959, when they refused to go along with his policy of raising interest rates on bank deposits. The political overtones of such incidents emphasize the role of the governor in administrative action, a role that is not contingent upon the statutory requirements that he approve all rules

225. 218 Ind. 614, 35 N.E.2d 270 (1941).

226. 272 U.S. 52 (1926).

227. 295 U.S. 603 (1935).

and regulations before they may enter into force. Could legislative oversight provide a more effective check upon administrative agencies to determine whether their rules conform to public policies as stated in the statutes? Possibly at most this new role for the legislature would mean an added dimension when, as occasionally happens in Indiana, the executive and legislative branches are not under the control of the same political party.

Legislative oversight might do little more than raise false hopes; it might do no more than add to the number of public hearings without resulting in any significant action on the part of those legislators charged with the duty of supervising agency rule making. It seems reasonable to state again that hearings are presently required by law, and to suggest another hearing (which might have been held by a committee of the General Assembly in the absence of a proper administrative agency) means little more than transferring to a different forum and one that is not devoid of political implications nor divorced from politically inspired decisions. Perhaps it is here that we should recall the points made by Senators Bontrager and Bainbridge regarding the legislature's abdication from its responsibility in delegating so much of its authority to administrative agencies. In view of the emphasis that we place on responsibility in a society claiming a representative system of government, this is indeed a serious matter and one demanding attention.

There is an obvious need to keep in focus demands for responsible government and effective government. Both matters merit consideration in view of the enlargement of the functions and services of government in the past 100 years and the constant emphasis on specialization. No student of government and politics could entertain seriously the notion that these developments may be reversed, or even that the trend may be stopped. Certainly such suggestions are not made by the reformers, for they obviously accept the permanence of the present arrangement whereby the General Assembly frames public policy and leaves to administrative agencies the responsibility for filling in the detail with appropriate rules and regulations. However, mere acceptance of what is a reality does not make more realistic their proposal nor more sound the purposes of their proposal. Administrative responsibility is no more assured under a system of legislative oversight than at present under executive oversight. Indeed, in view of the governor's roles as chief executive, chief administrative officer, and political leader of this state (roles which, incidentally, are not diminished even near the end of his constitutionally-limited one term, a fact demonstrated in Governor Handley's successful bargaining with his veto power when the 1959 General Assembly threatened to

play havoc with the appropriation bill), one may question whether there is not a greater assurance of administrative responsibility under executive oversight than might be obtained under legislative oversight.

Even in the absence of a strong chief executive office there would be no reason to believe that the Indiana General Assembly could operate in such a way that administrative responsibility would be guaranteed. Legislative bodies are representative in terms of population and territorial units, not functionally. There is thus no reason to believe that lawmakers could do more than operate on the advice and recommendations of specialists in each field—as they do now and have for so long a time. In some instances, such as the point system used in suspending drivers' licenses, the legislature could act directly, this not being a complex matter demanding a degree of specialization. But what knowledge and experience may the typical legislator bring to bear on rules adopted by highly technical or specialized agencies? How, for example, would legislators cope with the problems of public health that are presently handled by experts on such matters? A likely answer is that a legislative oversight committee would hear explanations and conflicting testimony in a vocabulary largely unfamiliar to them and approve the rules adopted by the agency. Perhaps some would herald this as an important development because a group of men directly responsible to the people had a part in the issuance of the rules. Whether this is more than presently accomplished under the 1945 rule making act, with two elected officials exercising the approval function, is subject to question.

There are still other matters pertinent to the latest reform proposal. First, the General Assembly is in session for just sixty-one days in each biennium and must of necessity delegate to a committee of its own choosing the responsibility for reviewing administrative rules. But what size group would adequately represent a General Assembly of 150 members? Should the group consist largely or entirely of lawyers, or should there be some effort to get a maximum degree of functional representation? What geographic considerations must be taken into account, or is it enough to have an equal division between legislators from rural and urban areas? How much time would be necessary for this committee to operate effectively and to achieve the stated purposes for which legislative oversight is established? To answer the last question some consideration must be given to the matter of reviewing the hundreds of administrative rules adopted, revised, amended and repealed in each year, and to the amount of time necessary for hearings and searching *Burns*, session laws, and supreme and appellate court reports. Finally, in view of the present salaries of state legislators and the small per diem allowances to members

of legislative advisory sub-committees, we may ask how much time the legislators are willing to spend away from their law practices or businesses in order to perform public services?

It is not enough for legislators to answer such questions by saying that they are aware of rules of this or that agency which are unreasonable, capricious, arbitrary, or contrary to legislative intent. A larger role for the legislature in resolving whatever problems attend administrative rule making in this state is certainly essential to promoting the principles of the rule of law and administrative responsibility. However, a proposal of this nature is unrealistic under the present arrangement. Lawmaking is at most a part time activity, whereas administering laws is a full time responsibility. The evidence suggests that further procedural changes, whether legislative oversight or something else, are not necessary. Responsibility is not sacrificed to efficiency in a system where two elected officials must give approval to administrative rules before they take effect. Instead of trying to determine what new procedures may be devised, the General Assembly should dedicate itself to the task of compelling agencies to abide by those presently required, and it should make such changes as are needed in each agency's organic acts to bring each one under the provision of the uniform rule making law.