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Safeguarding Private Interest in Administrative Procedure

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SAFEGUARDING PRIVATE INTEREST IN ADMINISTRATIVE PROCEDURE

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Administrative procedure suggests procedure before some tribunal, other than a judicial tribunal, created to promote some governmental purpose. But it need not be a tribunal: administrative duties, requiring administrative procedure, may be devolved on individual officers of government. By way of illustration, reference may be made to the authority of the Secretary of War in the matter of bridges over navigable streams,[1] the authority of the Secretary of Agriculture considered in the *Morgan* case,[2] and the recent transfer to the Secretary of the Interior of the functions of the Bituminous Coal Commission.[3] Nevertheless, when administrative procedure is discussed, it is believed to be the general assumption that procedure before an administrative tribunal, or before a government official functioning in much the same manner, is what is usually subsumed.

This assumption will be adopted for the purposes of this discussion, and no attempt will be made to differentiate between executive and administrative functions. But, as regards the difference between the judicial and the administrative tribunal, it seems sufficient at this time to say that the judicial tribunal is primarily concerned with the enforcement of the law for the purpose of doing justice according to law, and the administrative tribunal is primarily concerned with the enforcement of the particular legislative policy which it is created to carry out.[4] This distinction is believed to be important in considering what administrative procedure should be, since it is conceivable that the administrator, through his daily experience with practical problems, may become so imbued with what *he conceives* to be the legislative purpose that he may overlook or disregard the written

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1. Union Bridge Co. v. United States (1907) 204 U. S. 364.

2. (1936) 298 U. S. 468; (1938) 304 U. S. 1.

3. Reorganization Plan No. 2 of May 9, 1939, pursuant to the provisions of the Reorganization Act of 1939 (1939 Supp.) 5 U. S. C. A. sec. 133.

4. Dean Landis suggests the interesting trinity of duties: "to plan, to promote, and to police." *The Administrative Process* (1938) 15.

mandate of the legislature which has undertaken to outline for him what that purpose is and his relation to it.[5] Those who are clothed with power tend inevitably to seek to expand the field in which they may exercise it.

Indeed, there are those who seem to avow the theory that the administrative agency should be imbued with a desire to accomplish what it conceives to be the objectives of the statute which it administers rather than with a desire to do exact justice. Thus Dean Landis says:

> The adequate development of these staffs [administrative agencies' staffs] would provide judges who have, as they should have, an understanding of the general policy of the administrative, indeed a proper bias toward its point of view, and yet, by having been entirely disassociated with the earlier phases of the proceeding, have no personal interest in its outcome.[6]

The accustomed symbol of justice is an imposing figure, blindfolded, holding a pair of scales evenly balanced: the school of thought represented by Dean Landis would seem to desire that, as symbolic of the administrative process, the balance should be tilted, and the eyes uncovered, carefully watching to see that it is kept so. This is said, not so much by way of criticism of this theory, since the effective carrying into execution of policies frequently requires a different mental attitude than the judicial, but because it has a highly important bearing on the proper relationship of the administrative agency to the courts, and the necessity for safeguards against an *undue* bias.

It is important to remember also that there is no recognized minimum test of fitness to serve on administrative tribunals—an important difference as contrasted with the requirements of service on a court. With exceptions so few as to be negligible, a man must be a member of the bar before he may be a judge,

5. In several cases the Supreme Court of the United States has held that the Interstate Commerce Commission has been guided by its conception of legislative policy, rather than by the Congressional description of what was intended. United States v. New York Central R. R. (1924) 263 U. S. 603; United States v. Missouri Pacific R. R. (1929) 278 U. S. 269; Ann Arbor R. R. v. United States (1930) 281 U. S. 658.

6. *The Administrative Process* (1938) 103-104. See also the contributions of Dean Landis and Professor Brown to the Symposium on Administrative Law, Thirty-Sixth Annual Meeting of the Association of American Law Schools held at Chicago, December, 1938. (1939) 9 Am. L. School Rev. 181, 178.

and this almost everywhere involves some measure of training for the duties that he will be called upon to perform as judge. Nothing comparable is found in the case of the administrative officer. No recognized minimum of competence exists. The only protection is found in the method of appointment; and this is, as a rule, not only inadequate, in that it provides no standards of any kind, but also in that these highly important offices, with all the power that belongs to them, are made a part of the political spoils system. Two results frequently appear: first, men are selected who have little capacity for the duties they are expected to perform and who are likely to be superseded as a result of some political change before they can master the duties of the office; and, second, men appointed are often influenced by considerations other than a careful regard for the provisions of the laws that have been enacted for their guidance. This statement is made with respect to the general situation, and with full recognition of the fact that there are honorable exceptions. But it is unfortunately a feature of the administrative process that has a far-reaching bearing on what procedure is essential to protect the just rights of those who are to be affected by decisions of administrative officers or tribunals.[7]

Again, the standards provided for the guidance of the administrative officer or tribunal are frequently exceedingly vague and confer a wide range of discretion upon those who are to apply these standards.[8] Take the general standard for the rates of public utilities—reasonableness. There is some approach to definiteness when the entire rate structure of a water company is to be considered, although even here the problem of valuation and the prognosis as to the effect of any particular rate structure for the *coming* year give abundance of "elbow room" to the administrator who wants it. But pass from this illustration to the question of different classes of rates of a public utility like a railroad: the coal rates, the grain rates, the rates on bananas, on ore, on live stock, the passenger fares, and so on. And pass from these classes of rates to the individual rate, *e. g.*, the rate on limestone from point A to point B. It is obvious that the

7. Some protection against the results that might otherwise be expected from these facts is found in the experience developed in the subordinate officials of the administrative agency, a protection that is enhanced where they have security of tenure.

8. Cf. Landis, *The Administrative Process* (1938) 66-67.

range of discretion in the administrative official is a very wide one, and frequently affords him an opportunity to do pretty much what he chooses. Then remember that the issue may mean an immense sum of money to the railroad that carries the traffic and may amount almost to a question of success or failure to the industry involved.

Frequently the importance extends beyond these two immediate parties to the transaction and affects communities, as is illustrated by the long standing controversy over the rates between the interior and the port cities on the Atlantic seaboard, a controversy that has resulted in many cases before the Interstate Commerce Commission[9] and is apt to result in many more, for it seems impossible of a solution satisfactory to all concerned.

In view of these considerations, *viz.*, the fact that the administrative officer or tribunal is primarly entrusted with power to enforce some governmental policy; that those who are so entrusted are subjected to no régime of training to insure their competence; that they are frequently, if not usually, selected for political considerations and at times to serve political ends; that the standards they are to apply are in many instances extremely vague and permit a wide range of discretion; it seems obvious that private interests need some safeguards.

In saying this there is no thought of intimating that the administrative function is to be disparaged or hindered. It is believed, on the contrary, that it plays a useful and indeed essential part in our present complicated economic life. But it is said in the hope that the faults with which its exercise is at present attended may be realized and in due course corrected; and more immediately because its nature emphasizes the importance of the administrative procedure which should be followed if private interests are to be reasonably protected.

It is not inappropriate to say at this point that the protection

9. New York Produce Exchange v. Baltimore & Ohio R. R. (1898) 7 I. C. C. 612; In the Matter of Differential Freight Rates (1905) 11 I. C. C. 13; Chamber of Commerce of N. Y. v. New York Central & H. R. R. R. (1912) 24 I. C. C. 55; (1912) 24 I. C. C. 674; (1913) 27 I. C. C. 238; In the Matter of Import Rates (1912) 24 I. C. C. 78; (1912) 24 I. C. C. 678; (1913) 27 I. C. C. 245; The New York Harbor Case (1917) 47 I. C. C. 643; Maritime Ass'n of Boston Chamber of Commerce v. Ann Arbor R. R. (1925) 95 I. C. C. 539; Baltimore Chamber of Commerce v. Ann Arbor R. R. (1929) 159 I. C. C. 691; Lighterage Cases (1934) 203 I. C. C. 481; Albany Port District Comm'n v. Ahnapee & W. Ry. (1936) 219 I. C. C. 151; Philadelphia v. Baltimore & O. R. R. (1938) 231 I. C. C. 21.

of such private interests is not without its public aspect, since the services rendered by those who are subject to administrative authority are, for the most part, essential to the public welfare; and, unless those who now furnish them are given reasonable protection, capital will cease to flow into such projects, and the government will perforce find it necessary to assume the responsibility itself. Doubtless to some persons this might be a consummation devoutly to be wished, but it would raise two important questions: first, whether such a change in our methods would prove compatible with the continuance of our democratic system of government, and second, whether those who use these services would be better served and at less charges than they are now. Fortunately, neither of these questions requires discussion here.

Turning, then, to the question of the specific procedure which should attend the exercise of the administrative function if private interests are to be adequately safeguarded, it is elementary that two things are required: (a) a fair and adequate hearing before the administrative agency, and (b) an opportunity for judicial determination whether such hearing has been accorded both in form and in substance, and whether the authority conferred upon the administrative agency has been respected or exceeded.

At this late date it would hardly seem necessary to argue that a fair and adequate hearing should be accorded. The old maxim, "Strike, but hear," is supposed to have its roots in the ancient East. In one of the old romances of chivalry it is said, "It is manifest to all who have any knowledge that man or woman are to be heard, of right, in their own defence, in all cases except in treason and conspiracy; this is the custom in all lands wherein justice is observed."[10]

And Mr. Webster's famous definition in his argument in the *Dartmouth College* case has not yet been repudiated:

> By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.[11]

10. 2 Lobeira, *Amadis of Gaul*, 22. Aristophanes, in his *Wasps* (422 B. C.) says: "He was right who said: 'Decide nothing till you have heard both sides'."

11. Dartmouth College v. Woodward (U. S. 1819) 4 Wheat. 518, at 581.

And yet, as recently as year before last, the United States Supreme Court set aside an administrative decison of the Secretary of Agriculture on the ground that it had been reached without a fair hearing.[12] The Court said:

> * * * The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. * * *
>
> Congress, in requiring a "full hearing," had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. * * *
>
> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

But little need be added on this point. It is difficult to see how any one can question the propriety of a clear statement of what the person subject to the power of the administrative official is to answer: without such statement he has no fair chance to answer. Clearly, also, he should know what is going to be taken into consideration as evidence when the issue comes to be decided, as otherwise he has no fair chance to answer it if he can; and yet, even the Interstate Commerce Commission used to insist that it was entitled to take into consideration not only the evidence in the particular case, but the general information which the Commissioners had accumulated during their years of experience, especially that contained in their files and records,

12. Morgan v. United States (1938) 304 U. S. 1, 18, 19, 22.

a position which, of course, was held untenable by the Supreme Court.[13] But, unless its practice has been recently changed, it still refuses, when its orders are contested in the courts, to certify that a given set of papers constitutes the proceedings "so full and entire as they appear on the record" before it: it insists on confining its certification to a statement that certain papers are correct copies of papers in the case before it—a vestigial reminder of its former theory.

One aspect of the importance of this requirement is in order that it may be possible to determine precisely what the record before the administrative agency is, so that it may be ascertained with accuracy and fairness whether the administrative tribunal has proceeded in accordance with the authority conferred upon it by the statute from which it derives its powers, whether it has issued an order in conformity with the evidence before it, and whether the hearing it has accorded has been the substance rather than the shadow of a fair hearing.

It is settled, of course, that the established rules of evidence that apply in court proceedings are not controlling in administrative hearings.[14] No criticism is here advanced with respect to this principle, but it is suggested that, in the public interest as well as in the interest of those whom it regulates, the administrative agency should exercise what might be described as a liberal discretion with respect to the evidence to be received. It would seem obvious that mere rumor and surmise should be excluded, but except for this it is difficult to offer specific suggestions: perhaps in the present stage of the situation it is enough to say that the agency should not be arbitrary in what it admits or rejects. This vague and general principle would grow in definiteness with the passage of time.

Mr. Walter F. Dodd suggests the following as the essential elements of proper administrative procedure:

13. Interstate Commerce Commission v. Louisville & N. R. R. (1913) 227 U. S. 88, at 91; The Chicago Junction Case (1924) 264 U. S. 258, at 263, 264, 265; United States v. Abilene & Southern Ry. (1924) 265 U. S. 274, at 288. In addition to its other disadvantages, the practice sought to be justified by the Interstate Commerce Commission left uncertain just what the record before it consisted of—on just what evidence it based its decision.

14. See, e. g., Northern Pacific Ry. v. Dept. of Public Works (1925) 268 U. S. 39, at 44; Tagg Bros. & Moorhead v. United States (1930) 280 U. S. 420, at 442.

(1) The administrative body must have acted within its authority, that is, within the powers conferred upon it and in the manner provided by law;
(2) There must be notice and an opportunity to be heard;
(3) There must be a "reasonable opportunity to know the claims of the opposing party and to meet them";
(4) A finding may not be based on undisclosed facts;
(5) The procedure must be consistent with the essentials of a fair trial;
(6) The findings must be based on "substantial evidence" and must not be arbitrary and capricious;
(7) "Mere uncorroborated hearsay or rumor" or a mere scintilla of evidence do not suffice, but there must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[15]

To these might be added the opportunity to examine and cross-examine witnesses;[16] for to the experienced lawyer this seems a prerequisite of a real investigation—the possibility of being subjected to cross-examination is probably a better safeguard against false testimony than the risk of an indictment for perjury. It would be secured by the bill pending in Congress which is being supported by the American Bar Association.

It is difficult to believe that the propriety of these characteristics of a fair hearing can be questioned on any sound grounds; and yet many of them are absent from the procedure that obtains before the United States Railroad Labor Board. And not so many years ago one of the Interstate Commerce Commissioners was suggesting that that tribunal should be empowered to fix rates without a hearing, leaving the railroads to contest their legality after they had been ordered into effect. Something of the sort was actually attempted in the so-called Dennison Act,[17] but the Supreme Court[18] interpreted its provisions as requiring a method of administration which afforded a hearing prior to the forcing of rates into effect.

The right to a hearing is obviously limited to a person having a legal right to assert; and so, in a matter such as the right to issue securities, unless a statute specifically created a right to

15. Administrative Agencies as Legislators and Judges (1939) 25 A. B. A. J. 923, 974.
16. Interstate Commerce Commission v. Louisville & N. R. R. (1913) 227 U. S. 88, at 93.
17. (1924) 43 Stat. 360, c. 243, 49 U. S. C. A. sec. 153.
18. United States v. Illinois Central R. R. (1934) 291 U. S. 457.

be heard, it would seem that no such right would exist on the part of anyone other than the corporation proposing to issue the securities—except, perhaps, in unusual cases where some security holder of the corporation might be able to establish a legal status to object. Therefore, unless such a claim should be interposed and should be found adequately supported, a hearing would not be necessary as a condition precedent to the authorization of the issuance of securities by the Commission, although, if the corporation demanded it, it would seem obvious that a hearing would have to be granted.

An important question also arises with reference to the stage at which a hearing can be demanded. Manifestly, a public utility is entitled to a hearing with respect to the reasonableness of its charges; but this right is not believed to prevent an administrative agency from suspending a proposed change in charges pending a hearing. In other words, the Interstate Commerce Commission can interpose its suspension power prior to the effectiveness of rates that the railroads may publish, without granting them a hearing as to whether such tariff should or should not be suspended, even though this action on its part may involve a substantial loss to the railroads; but it must later accord a hearing as to the propriety of the proposed changes before they are *finally* condemned.

That such administrative action may be taken without a prior hearing is further illustrated by the cases like *Lawton v. Steele,*[19] which have permitted the state, in the exercise of its police power, to take summary action to protect the public health and safety where the surrounding conditions indicate necessity for prompt action and where safeguards are provided to compensate the person whose property is summarily taken or destroyed, if it later proves that such action was not justified.

It seems that a more serious question is whether the Commission can condemn existing rates before a full hearing has been accorded,[20] and sundry difficulties are presented by the so-called temporary rate power which is granted to some of the State Commissions. It is too early to attempt to outline with confidence

19. (1894) 152 U. S. 133. See also North American Cold Storage Co. v. Chicago (1908) 211 U. S. 306; Adams v. Milwaukee (1913) 228 U. S. 572; and cf. Southern Ry. v. Virginia (1933) 290 U. S. 190.

20. See supra, note 16.

to what extent such power may be exercised, but it seems reasonably certain that, at the least, there must be safeguards giving reasonable assurance that the public utility will be allowed to recoup such losses as the temporary rate order may entail upon it if, in its final decision, the Commission finds that the temporary reduction was improvident.[21]

When the administrative tribunal has acted there should be some procedure available whereby a judicial tribunal can consider whether it should stay the operation of the order until it has had an opportunity to consider it in regular course, provided it can be made to appear, prima facie, that the administrative tribunal has disregarded the limitations of its authority or denied a fair and adequate hearing. It is not intended to suggest that the granting of the stay should be treated as a matter of course, but only that there should be procedure available so that the protection may be invoked in proper cases.

In view of what has been said at the outset concerning the personnel of administrative agencies, it is manifest that an important by-product of the fair and adequate hearings which seem obviously appropriate on other grounds is that the administrative officers may be educated in the details of their duties and, with the passage of time, come to possess the expertness in the handling of their responsibilities, the theoretical existence of which is one of the reasons underlying their authority.[22]

Clearly, the Supreme Court is right in its emphasis on the proposition that no particular form of procedure is required. It is the substance that matters. The "basic concepts of fair play" must be observed. It may well be that variety is desirable, both to insure procedure adapted to the particular administrative agency, and to obtain the advantage of experiment with different forms of procedure.

A phase of administrative procedure that deserves consideration is the rule-making authority,[23] the power to formulate and

21. See in this connection, Prendergast v. New York Telephone Co. (1923) 262 U. S. 43; Driscoll v. Edison Light & Power Co. (1939) 307 U. S. 104; Bronx Gas and Electric Co. v. Maltbie (1936) 271 N. Y. 364.

22. The customary description of the Interstate Commerce Commission as "appointed by law and informed by experience," Illinois Central R. R. v. I. C. C. (1907) 206 U. S. 441, at 454, has come to be the theoretical basis for the respect with which it is suggested the decisions of administrative tribunals generally should be regarded.

23. See as to this general subject, Fuchs, Procedure in Administrative Rule-Making (1938) 52 Harv. L. Rev. 259.

prescribe rules and regulations to carry out the purposes of the statute establishing the administrative agency. In its simpler form this is little more than a power to announce in advance of decision in contested cases the conclusions of the agency as to what, in its opinion, certain provisions of the statute require, or the ritual that it will follow in the discharge of its statutory duties; but it may easily develop a tendency in the agency to constitute itself a miniature legislature, as it were, and to supply what it conceives to be the deficiencies of the statute.[24] This last is in conflict with the doctrine of non-delegability of legislative power,[25] and is of doubtful wisdom, to say the least, since practically every governmental body seeks to expand the scope of its power, and hence cannot safely be made the judge of that power's extent. As to the rule-making power in its simpler aspect, the principal procedural questions seem to be whether the agency should accord hearings before formulating its rules and regulations and whether its conclusions should be limited to rules and regulations supported by the record so made. As a practical matter, such a requirement seems of doubtful wisdom, provided in any litigated case the record must be as complete as though such rule or regulation had not been made. There are practical advantages in the promulgation of rules and regulations,[26] but in a general hearing the interests of those who are regulated may be too remote to insure their participation.

Furthermore, the rules and regulations so promulgated may lack the practical character that is more likely to be found in those developed as a product of concrete controversies. At the same time, when later the controversy arises to which a rule or regulation is sought to be applied—i. e., a rule or regulation begotten and born *in vacuo*, as it were—the person affected may well believe that his rights should be determined under the statute and upon the evidence then introduced of record.

Special consideration should be given the important class of proceedings that result from the power entrusted to many administrative agencies to initiate proceedings before themselves,

24. As for example, under the so-called Henry VIII clauses.

25. Unless founded on some report to the legislature setting forth the rules and regulations proposed to be established, where such report is not disapproved by the legislature. Cf. Walter F. Dodd, Administrative Agencies as Legislators and Judges (1939) 25 A. B. A. J. 923, 925-929.

26. Landis, *The Administrative Process* (1938) 68-71.

and consider in such proceedings the remedial action to be adopted within the ambit of the agency's authority. This procedure is frequently criticised as making the agency a judge in its own cause. On the other hand, one of the objectives usually sought when administrative agencies are created is the establishment of machinery that will function of itself, as it were, in the accomplishment of the statutory purposes and without necessitating the interested member or members of the community assuming the burden. This objective may be a natural one, but it is attended by the handicap of impairing the fairness of the proceeding. This is especially so because such proceedings are seldom initiated until after the agency has satisfied itself through an ex parte investigation of its own that some definite remedy should be invoked.[27] The proceeding then begun, while ostensibly an investigation, is in reality in many cases a forum for the purpose of ratifying conclusions reached after the ex parte investigation, and there is little chance of unbiased consideration of the issues presented.

It is not without significance that the *Morgan* case[28] was of the class initiated by the administrative agency itself. As a practical matter this helps to explain the tendency of the Secretary of Agriculture to regard his own methods of procedure as adequate, and the difficulty of the Court's entertaining the same opinion. The naïve suggestion on behalf of the Secretary that the proceeding before him "was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry"[29] only serves to show, as the Supreme Court indicated, the Secretary's lack of clear understanding of the function in which he was engaged, and his failure to afford those whose business he undertook to regulate a more precise statement of that of which he complained.

If these investigations initiated by administrative agencies before themselves are to continue a recognized part of administrative procedure, emphasis is added to the importance of judicial review in order to make certain that the zeal of the administrative officer does not blind him to "the rudimentary requirements of fair play."[30]

27. See Landis, *The Administrative Process* (1938) 94-95.
28. Morgan v. United States (1936) 298 U. S. 468; (1938) 304 U. S. 1.
29. 304 U. S. at 20.
30. 304 U. S. at 15.

On turning to this controversial subject of judicial review, it seems only proper to recall that there is no reason to assume that administrative officials have been trained for the highly important and responsible duties they are to perform, or that they have had experience in the questions that they will be called on to decide, or that they have been disciplined in the analysis and dissection of difficult problems so as to have acquired a proper perspective or a sense of the more important and the less important factors of disputed issues. Nor are they guided by a wealth of prior experience recorded in decisions relating to similar situations: the rule of *stare decisis* plays a very limited part with administrative agencies. The monetary stakes involved in the cases handled by administrative tribunals are frequently enormous; and it is by no means unusual that these controversies, while primarily financial, have other aspects of great importance to the community. The result is that "enterprises of great pith and moment" are, from time to time, subjected to the authority of those whose interests lie in political directions and who are not even amateurs as to the questions they undertake to decide. But, "drest in a little brief authority," they are nevertheless entrusted with the power of decision.

It is believed that this feature of the situation is too often overlooked and that problems of administrative authority and judicial review of administrative action are discussed on the basis of academic assumptions that do not coincide with the facts as to the character of the administrative agencies. While protection is afforded to some extent by experienced staffs, the members of such staffs are by no means universally secure in their tenure of office; and, in addition, are seldom persons of that degree of education and experience which may reasonably be expected of persons given the power to make the important decisions within the jurisdiction of administrative agencies. Furthermore, the laws creating these administrative agencies contemplate the making of the decisions by the administrative officers and not by their subordinates, and it would be an obvious breach of the intention and purpose of such legislation if the administrator's name is merely used as a cover for the decisions of other people.[31] There would be few lawyers willing to agree that the

31. Cf. Morgan v. United States (1936) 298 U. S. 468, at 481.

decisions of the courts should be, in reality, the decisions of the judges' secretaries but given the desired status and respectability by the affixing of the judges' names.

Nor is the risk of an erroneous decision something of consequence only to the public utility or to others who are subjected to the authority of administrative officers. In many instances the reach of administrative decisions goes far beyond that. Take as an illustration the controversy over the so-called port differentials between the eastern seaboard cities, referred to above. Any one of these cities, New York, Boston, Philadelphia or Baltimore will vouch the importance of this issue to their commercial interests wholly apart from the question as to whether the rates are high or low. In similar fashion, whether new railroad construction shall be permitted involves interests extending far beyond those of the railroad proposing the construction.

All this is not said for the purpose of suggesting by implication that administrative officers should be lawyers. It may well be doubted whether lawyers make the best type of administrative officials. But the significant fact is that there is no assurance that the administrative official, prior to his selection, has had any training or experience which fits him to interpret the law under which he acts or to perform the highly important and difficult duties that will fall to his lot. In the case of the Interstate Commerce Act and almost any state commission statute the law that has accumulated is of substantial volume and intricacy, so that it not a simple thing for a successful business man, or a competent engineer or even a newspaper man, to become, in a short space of time, an efficient administrative officer.

In these circumstances it seems manifest that decisions of such agencies should not be conclusive. Presumably the public does not wish the agency to go beyond the mandate it has given it or to apply standards other than those prescribed. Presumably also the public desires that procedure shall be fair and that a real hearing shall be accorded. Some one must decide whether the mandate of the public has been adhered to. Who shall do this?

It is obvious that it cannot be left to the final decision of the administrative agency itself. No public official can safely be trusted to determine the boundaries of his own authority—certainly that has been the accepted theory in American institu-

tions. The tendency to expand the field of one's authority is too well known to require discussion. The situations in which administrative agencies or officials have recommended a diminution of their authority are negligible: on the contrary, there is a perennial recommendation for additional power.[32]

Furthermore, in many instances the question which determines the validity of the action of the administrative agency is whether it is arbitrary or unreasonable. Can there be any doubt as to the propriety of entrusting the determination of this question to some one other than the person or persons whose action is challenged? Is it possible to refer to any occasion on which an administrative or other public officer has formally found his conduct to be arbitrary?

If, then, it is only fair and in the public interest that there should be some opportunity to have a determination as to whether the administrative agency has kept within the boundaries of its authority and has accorded a fair and adequate hearing to those who are to be affected by its decision, it seems to follow that such determination should be made by an independent agency—an agency having no other purpose to subserve than to decide these questions with complete impartiality. Obviously, the only agency answering this description is the judicial arm of the government.

Perhaps the propriety of judicial review is conceded—most decisions of courts of first instance are subject to some form of review—and possibly the bitterness of the present controversy centers in the question as to what should be the scope of that review. Here there is room for real difference of opinion, and it may be that that difference of opinion grows out of an underlying difference of theory as to whether the functioning of administrative agencies should be accepted as a normal and proper feature of present-day governmental operations, or should be opposed. Those who entertain the first point of view seek to

32. If it be suggested that these same considerations apply to judges, it is to be remembered that the court of first instance is, in the great majority of cases, subject to correction by some appellate tribunal, and that the appellate tribunal, by the very nature of its position, has a relatively limited field in which it might seek to expand its authority—with few exceptions, it could do so only in the cases appealed to it. Moreover, each court has, in prior decisions, a much more definite chart for its guidance—vague as that chart may be in many particulars—than has the administrative agency. Furthermore, the court is not confessedly seeking to promote some governmental policy other than the administration of justice.

limit the scope of court review, while those who dislike administrative agencies urge a broad scope of review.

So far as this discussion is concerned, the belief that underlies it is that these agencies constitute an established and indeed necessary part of modern governmental activity and that every reasonable effort should be made to promote their successful functioning. From this it would follow that the courts should not undertake to assume to review the strictly administrative issue decided by the administrative agency, but should limit themselves to a decision as to the two matters several times referred to, *viz.*, (a) whether the administrative agency has kept within the boundaries of the authority conferred upon it, and (b) whether it has accorded those who are to be affected by its decision a fair and adequate hearing. It will be noted that these issues are of a kind which the courts, by virtue of their training and experience, should be especially qualified to decide.

In outlining the classes of questions that the courts may properly consider in passing on the validity of orders of the Interstate Commerce Commission, the Supreme Court of the United States, some years ago, said:[33]

> There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

It is clear that in the second set of cases here described there will be difficulty in deciding precisely where the line lies between what is properly reviewable and what is not. Facts are involved;

33. Interstate Commerce Commission v. Union Pacific R. R. (1912) 222 U. S. 541, at 547.

and, when that is the case, the appraisal of their significance and relative importance opens the door for many differences of opinion. And yet it seems impossible to exclude such cases from judicial examination: otherwise it is quite easy to "keep the promise to the ear and break it to the hope." A commission may order a rate reduced on the ostensible ground that it is too high and therefore unreasonable, when its real reason may be to balance economic or geographical advantage, to oblige a potential member of the party in power, or to strengthen itself in popular estimation. Such motives are not wholly unknown, and the possibility that they may be operating under cover acquires greater danger because of the fact already alluded to, *viz.*, that many administrative standards are vague and indefinite and permit a wide range of discretion in their application.

The provisions of the bill pending in Congress sponsored by the American Bar Association with reference to administrative procedure, are as follows:

> Any decision of any agency or independent agency shall be set aside if it is made to appear to the satisfaction of the court (1) that the findings of fact are clearly erroneous; or (2) that the findings of fact are not supported by substantial evidence; or (3) that the decision is not supported by the findings of fact; or (4) that the decision was issued without due notice and a reasonable opportunity having been afforded the aggrieved party for a full and fair hearing; or (5) that the decision is beyond the jurisdiction of the agency or independent agency, as the case may be; or (6) that the decision infringes the Constitution or statutes of the United States; or (7) that the decision is otherwise contrary to law.

While the phraseology differs from that quoted from the Supreme Court's opinion with reference to Interstate Commerce Commission orders, there is substantial similarity in substance. Debate will arise as to what is meant by "*substantial* evidence," and whether the word "substantial" is superfluous. Its fair significance would seem to be that the conclusion sought to be drawn is reasonably permissible—not an arbitrary one; but possibly the fear is that it may be laid hold of for a more drastic review of the administrative determination than many persons would wish to see.

It is believed that a more serious question is presented by the

proposed implied requirement that the decision be supported by "the findings of fact," since this would apparently require a certain form of procedure; and, while much may be said in favor of this form of procedure, it may be doubted whether it should be embodied in a statutory requirement, especially since there is great variety in the powers granted to the various administrative agencies that may ultimately become subject to this law.

It is submitted that the scope of judicial review may well be prescribed in somewhat general terms, at least for the time being. These administrative agencies are of wide variety not only in their functions but in the character of their personnel. The decisions of the Interstate Commerce Commission are not easily upset in the courts.[34] The fact that this may not be true of some administrative agencies with less experience, with no similar traditions of independence and fairness, with a greater inclination to act summarily and without careful investigation, obviously suggests that one of the most effective methods to promote the finality of administrative action is for the administrative agency itself to be scrupulously fair in its procedure. They are supposed to be "informed by experience." If they are not really so, the foundation for supporting their decisions is shaken.[35] As the Supreme Court said in the second *Morgan* case:[36] "If these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."[37]

34. Judge Hough, formerly of the United States Circuit Court of Appeals for the Second Circuit, is reported to have said: "When I have before me a case for review from the Interstate Commerce Commission, almost instinctively I want to sustain their order. When I have before me a case to review of the Federal Trade Commission, almost instinctively I want to reverse it." Quoted by Professor (now Mr. Justice) Frankfurter (1938) 12 U. of Cinn. L. Rev. 271-272.

35. Cf. Landis, *The Administrative Process* (1938) 143-144, 153.

36. (1938) 304 U. S. at 22.

37. The recent decision of the Supreme Court in Federal Communications Commission v. Pottsville Broadcasting Co. (1939) 60 S. Ct. 437, seems not to be at variance with these general suggestions. Thus Mr. Justice Frankfurter, in his opinion, says:

> To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. * * *
>
> * * * To lay the basis for review here, Congress amended §16 so

As such a policy becomes more prevalent—as is believed certain to come about—the frequency of judicial action adverse to the conclusions of administrative agencies will become steadily less, and the matter of judicial review will gradually solve itself by being reduced to cases in which its propriety will be more and more generally conceded.[38]

While it is believed that judicial review must be allowed, both with respect to the question as to the administrative agency's obedience to the statute under which it operates, and to the adequacy of the hearing accorded to those interested, it is clear that the procedure for such review should be simple and speedy and that the reviewing judicial tribunal should move with special care in those cases where the contention is that the evidence has been disregarded and that the administrative agency has been guilty of sacrificing the substance to the shadow. The court's function in such cases resembles its function in dealing with a verdict of a jury.

These administrative agencies constitute the mechanism which the people are seeking to use in their efforts to grapple with problems created by the increasing complexity of our modern economic life. They are instruments of power, having within themselves the possibility of great public good, but also the possibility of public evil. As time has passed the people have found it necessary, for the maintenance of their liberty, to hedge governmental power with various restrictions. The early amendments to the Federal Constitution disclose an interesting summary, for the most part, of the successive victories won by the

as to terminate the administrative oversight of the Court of Appeals. c. 788, 46 Stat. 844. In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." Federal Radio Comm'n v. Nelson Bros. Co., 289 U. S. 266, 276.

38. In an address before the Association of Practitioners before the Interstate Commerce Commission at Pittsburgh in October, 1938, Mr. Commissioner Aitchison said:

"And the prophecy may be ventured that, *with the aid of existing powers of judicial review, public opinion and the pride of every administrative agency in having its determinations sustained will suffice to bring about any needed correction.*"

people in their struggle against the abuse of governmental power. So also, some restrictions will inevitably attend this developing form of governmental activity.

The administrative agencies are relatively new with us, or perhaps it is more accurate to say that the rapidly increasing growth of their use is a recent matter. In this discussion an effort has been made to indicate the problems to which they give rise, especially because of the methods by which administrative officers are customarily selected, and also because of the vagueness that in so many cases characterizes the standards they are authorized to apply. This vagueness creates an unusual opportunity for the influence of personal inclination, and a range of discretion which, at the best, makes the decision depend on factors as illogical as the relation of the length of the chancellor's foot to his conscience. It is attended with the ancient danger of a government of men in lieu of a government of laws, a danger perhaps more fully apparent today, in view of recent happenings, than a year ago. The United States of America has developed in the belief that a government of men as opposed to a government of laws is not conducive to the maintenance of liberty. So, while the procedure that should be insisted on to safeguard the great interests that are entrusted to administrative agencies should be such as to give them full opportunity to function effectively, it should, at the same time, provide a method of requiring them to keep within the authority that the people have given them and to accord a fair hearing to those who are to be affected by their decisions.

The two objectives of the administrative agency are efficiency in carrying out the governmental purpose and fairness in the attainment of this end. Their ever-present problem is to maintain a proper balance between these two objectives. By doing so they will grow in public usefulness and, at the same time, be properly integrated with our other democratic institutions.