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THE EXECUTIVE DEPARTMENT OF GOVERNMENT AND THE RULE OF LAW*

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FOR a long time, people have been talking about the executive department of government and the Rule of Law. Indeed, the suggestion of Aristotle that government should be by law, and not by men, represented a protest directed to the earlier Grecian systems of despotically controlled administrative law.[1] It is my privilege this afternoon to carry forward the discussion of a problem that has been talked about for some two thousand years: how to apply the Rule of Law to the executive agencies of the government. They are commonly called "independent agencies" within the executive branch. I suggest that the name is well chosen, for they have assumed a degree of independence that puts them beyond the effective control of the legislatures and the courts. This, I make bold to suggest, should not be so, if we are to preserve the Rule of Law to which as lawyers we have all dedicated our lives; for the very concept of the Rule of Law "means in the last resort the right of the judges to control the executive government. . . ." These are the words of the venerable A. V. Dicey, barrister-at-law of the Inner Temple and Vinerian Professor at Oxford. He wrote them seventy-four years ago.[2]

Now, it has become commonplace to treat Mr. Dicey with a sort of polite condescension. But as I re-read his famous book a few weeks ago, I was impressed with the thought that his ideas are not so different from those expressed only a few months ago by a hard-headed and practical American lawyer, Mr. Louis J. Hector, in his famous *Memorandum to the President,* written upon the occasion of his resigning from the Civil Aeronautics Board.

This recent reiteration of Mr. Dicey's ideas suggests that it is relevant to re-examine what Mr. Dicey had to say; and then consider whether his suggestions are pertinent to our contemporary post-war thinking about the rule of law. He declared: "In Eng-

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1 The classic phrase found in Part I, § 30, of the Massachusetts Constitution, 1780, was borrowed from Harrington [OCEANA 2-29 (1656)] who acknowledged his indebtedness to Aristotle's POLITICS III, xvi, 4-5.

2 DICEY, THE LAW OF THE CONSTITUTION 401 (2d ed. 1886).

land, and in . . . the United States . . . the system of administrative law and the very principles on which it rests are in truth unknown."[3] This is so, he added, because the system of administrative law[4] "rests upon political principles at variance with the ideas which are embodied in our existing constitution, and contradicts modern English convictions as to the rightful supremacy or rule of the law of the land."[5]

Some years later, reviewing in the *Law Quarterly Review* the now famous decision in *Local Government Board v. Arlidge,* [1915] A.C. 120, which permitted a municipal council to order a rooming house closed after an *ex parte* investigation and without notice or hearing, Mr. Dicey pointed out that this decision allowed executive agencies of government to exercise judicial authority not in accordance with the procedures of the courts of law, but rather in accordance with whatever procedures the agency found to be "convenient in the transaction of the business."[6]

There can be no doubt but that Mr. Dicey was most accurate in his prediction that administrative agencies would, as they developed, operate not in accordance with traditional judicial modes, but rather in accordance with such procedures as they might find convenient. This thought was echoed and strongly emphasized a few years ago by the United States Supreme Court.[7]

But was Mr. Dicey correct in his contention that this course of development would be in derogation of the Rule of Law? Was he a prophet without honor, or an old-fashioned viewer-with-alarm? For a long time I thought his views were outdated. But on recently re-reading them, I was impressed with the close similarity between his views and those expressed last September by Mr. Hector in his *Memorandum* to the President. He said (p. 29) that the failure of the members of regulatory commissions to decide cases on the basis of personal knowledge of the record, and their failure to explain the reasons for their decisions, mean "that the

[3] *Id.* at 182.

[4] *Ibid.* He was speaking particularly of the *droit administratif* of France; but his remarks can fairly be applied in a broader context.

[5] *Id.* at 205.

[6] 31 L.Q. REV. 149, 151 (1915).

[7] In FTC v. Pottsville Broadcasting Co., 309 U.S. 134, 142 (1940), Mr. Justice Frankfurter observed for the Court: "Modern administrative tribunals . . . have been a response to the felt need of governmental supervision over economic enterprise. . . . Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims. . . . These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."

so-called 'quasi-judicial' processes of the agencies bear little relation to what is normally thought of as judicial process."

More specifically, he asserted (p. 19) that the public "have the right to expect, as a part of the basic judicial process:

> "1. That adjudicated cases will be decided on the basis of general principles and standards known to the parties and applicable to all cases, and
>
> "2. That the persons who decide adjudicated cases will do so on the basis of the voluminous testimony and arguments advanced by the parties and this alone, and that they will personally state the reasons for their decision."

But, Mr. Hector added, "Neither of these reasonable expectations is satisfied by present Board procedures and practices."

We find, in short, that the English scholar writing in 1886 and the hard-headed American lawyer writing in 1959 reached the same conclusion, which might fairly be summarized with the blunt assertion that the conduct of administrative agencies is in derogation of the judicial process which we describe as the rule of law.

So blunt is this assertion that I should like to buttress it by a number of examples illustrating the wide disparity between the administrative and the judicial process—disparities which indicate a well-defined tendency on the part of the agencies to depart from the norms that characterize our Anglo-American Rule of Law. Then I should like to suggest what I deem to be the principal reasons for this departure. Finally, I should like to review briefly the principal proposals now being urged in the hope of healing this rapidly developing breach between the executive agencies of the government and the Rule of Law—proposals to integrate the functions of the administrative agencies with the judicial process.

Examples of the Disparity

Illustrations of the fundamental disparities between the administrative and the judicial process fall into two principal categories: (a) differences in the attitude of the decision-maker; (b) differences in the process of reaching the decision.

Judge v. Administrator — Eight Differences in Attitude

1. Perhaps the outstanding illustration of the deep-seated differences in attitude between administrators and judges concerns their interest or disinterest in the result. In the Anglo-American legal system, judges are steeped in long-established traditions of

impartiality. A judge will frequently disqualify himself for the slightest reason that might conceivably affect the impartiality of his judgment. On the other hand, administrators, appointed to administer broad policies of social or economic reform, entertain so strong a predilection for rapid implementation of these policies, that they exhibit an active interest in the outcome of cases pending before them. Such interest, to be sure, is inherent in the purpose for which such agencies are created; and the absence of such interest would interfere with their most effective functioning. But over-concern with the desirability of achieving appointed ends sometimes leads to an excess of zeal—as illustrated by the antipathy toward participation by counsel in agency proceedings, sometimes encountered, or a pronounced antagonism toward judicial review.

2. A second outstanding characteristic of the administrative process is the broad scope of administrative discretion. Although courts characteristically eschew discretionary standards in determining legal rights, discretion is the very life-blood of administrative adjudication. It can be granted that the vesting of discretionary powers in administrative agencies is necessary to the most effective performance of their appointed tasks. But at the same time, it clearly appears that where agencies predicate their decisions on such vague standards as what is deemed "adequate," "desirable," "detrimental" and the like, what might be called the rule of discretion is substituted for the Rule of Law. Discretion can be exercised more freely when cases are decided without a hearing; and the resulting tendency to minimize the importance of hearings has had far-reaching effects on the course of administrative decision. Again, reliance on the role of discretion has disinclined many agencies to make available for the use of interested parties any clear statements either of the exact practice and procedure of the agency, or the criteria relied on by the agency in deciding cases.

3. A third characteristic attitude of administrative agencies is to emphasize (if not magnify) their stature by seeking to extend their jurisdiction to the furthest possible limits. Not infrequently, they press further than the legislature intended. The courts have had occasion to strike down unwarranted assumptions of jurisdiction by such agencies as the Federal Trade Commission,[8] the

[8] FTC v. Bunte Bros., Inc., 312 U.S. 349 (1941).

Interstate Commerce Commission,[9] the Securities and Exchange Commission,[10] the Federal Power Commission,[11] and others. Sometimes it has been Congress rather than the courts which called a halt, as when the Wage and Hour Division of the Department of Labor determined that its jurisdiction over employees engaged in occupations necessary to the production of goods for commerce extended to the gardener who mowed the grass and trimmed the geraniums in a garden outside the executive offices of a company in whose plant goods were produced.[12]

4. A fourth illustration of the expansive genius of administration may be seen in the cases where the courts have struck down administrative decisions on the ground that the administrators have adopted policies going beyond or even at variance with the standards of the statutes which the agencies administer. Thus, the Court has criticized the Federal Communications Commission for seeking to accomplish through agency regulations an amendment in the governing statute which it had unsuccessfully requested of Congress.[13] The National Labor Relations Board has been reminded by the Supreme Court that a company "cannot be held guilty of an unfair labor practice by administrative amendment of the statute."[14] Similarly, the Interstate Commerce Commission has been reversed because it added a requirement not included in or authorized by the statute, as a condition of acquiring a carrier license.[15] The Civil Aeronautics Board was criticized by the Court on the ground that it "forsook the standard" imposed by Congress "and adopted a different one."[16] The Federal Trade Commission was found to have adopted policies at variance with those of the statute, when it asserted power to compel a seller of patent medicines to include in his advertisements statements that would be derogatory of the value of his product.[17] The Supreme Court has more than once had occasion to condemn administrative determinations of the Internal Revenue Service as being invalid

9 United States v. Pacific Coast Wholesalers' Ass'n, 338 U.S. 689 (1950).
10 Jones v. SEC, 298 U.S. 1 (1936).
11 FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949).
12 Fair Labor Standards Act Amendments of 1949, 63 Stat. 911, 29 U.S.C. § 203 (1958).
13 FCC v. American Broadcasting Co., 347 U.S. 284 (1954).
14 Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 364 (1949).
15 Barrett Line v. United States, 326 U.S. 179 (1945).
16 Civil Aeronautics Board v. Summerfield, 347 U.S. 67, 72 (1954).
17 Alberty v. FTC, 182 F.2d 36 (D.C. Cir. 1950).

attempts to "add a supplementary legislative provision" to a statute.[18]

5. A fifth characteristic attitude of agencies has to do with their evaluation of the evidence presented in contested cases. Their constant striving to reach desired results tends to make most administrators "convicting judges." The performance of most agencies in the appraisal of evidence leaves much to be desired, from the viewpoint of achieving a scrupulously impartial determination of facts. The reports contain a distressingly large number of cases wherein courts have felt compelled—despite the crutch afforded by the substantial evidence rule—to set aside agency findings of facts as being based on mere conjecture and speculation.[19]

6. The principle of *stare decisis* is little heeded in administrative adjudication. Indeed, to the extent that the doctrine is founded on the notion that the law does not change—or that it changes slowly—the classical doctrine of *stare decisis* does not square with the theory and practice of the agencies. It is commonplace that today's ruling may be based on a different policy, or on a different principle or philosophy, than yesterday's ruling. This attitude of treating each decision as a unique phenomenon, unaffected by precedent, sharply differentiates the administrative process from the judicial.

7. The principle of *res judicata* is likewise inapplicable to administrative adjudication—and properly so, for agencies are not courts, and their determinations are not judgments. But it should be noted in passing that the freedom of agencies to disregard the philosophy on which the *res judicata* principle is based, leads to attitudes which are at odds with the traditional approach of the Rule of Law.

8. The last of the eight attitudes I should like to mention is that which makes many agencies impatient to hear out the respondent. It is only natural that an agency which acts as both prosecutor and judge, and which does not institute proceedings until its own informal investigation has convinced it preliminarily of respondent's guilt, should display a certain readiness to treat respondent's offers of proof in somewhat cavalier fashion. Seldom does this treatment go so far as the instance reported in *Brinkley*

[18] *E.g.*, Helvering v. Credit Alliance Corp., 316 U.S. 107, 113 (1942); Helvering v. American Dental Co., 318 U.S. 322 (1943).

[19] For cases, see Cooper, *The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (1958).

v. Hassig.[20] There, in proceedings to revoke a physician's license, one of the members of the licensing board, after listening to respondent's testimony for three days, said he was ready to vote—against respondent—and asked permission to cast his vote and be excused for more pressing business. Most administrators are more sophisticated, but the attitude so forthrightly indicated by the very frank physician in the Kansas case twenty-five years ago has persisted, and had been criticized by such diverse authorities as President Roosevelt and the Hoover Commission. It is an attitude which, along with the others, reveals a tendency at odds with the fundamental concepts of the Rule of Law.

Courts v. Agencies — Differences in Procedure

Differences in the process of decision—no less than differences in mental attitude—account for the tendency of administrators to depart from the norms that characterize the Rule of Law. We all know, as the Court recently reminded us in *Speiser v. Randall*,[21] that "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied."

We all know, too, the typical process of agency adjudication. The materia of decision [pleadings, a transcript of testimony, exhibits (frequently, thousands of pages of exhibits), a hearing examiner's report, proposed findings by each party (duly excepted to by the other party) and voluminous briefs] are all dumped into the files of the agency, like ingredients dumped into a metaphysical crucible or melting pot; and there a secret group of anonymous staff assistants blend them into a witches brew from which finally emerges a secret staff memo (in formulistic adherence to the requirements of the *Morgan* case) that becomes transmuted into an agency decision.

Long ago, the Supreme Court declared in *Morgan v. United States*[22] that the agency members who decide the case must master the record. But this is an impossible command. There is recorded the instance of the member of the Interstate Commerce Commission who found that over a period of two years he cast a case-deciding vote every twelve and one-half minutes of his working time.[23]

[20] 83 F.2d 351 (10th Cir. 1936).
[21] 357 U.S. 513, 520 (1958).
[22] 298 U.S. 468 (1936).
[23] DAVIS, CASES ON ADMINISTRATIVE LAW 423 (1951).

Commissioner Hector pointed out (p. 34) that members of the C.A.B. find "there is no real chance for a review of the record" and that "the thousands of man-hours which go into the making of a record are thus virtually ignored at the crucial moment of final decision."

It is not the members of the agency who make the decision. The actual decision is hammered out by the unseen, unknown, unapproachable (we hope!) staff assistants—a group of lawyers, engineers, statisticians, technicians, and political hacks. They produce a staff "memo" which too frequently affords substantially the only source of information available to the agency members, when they decide the case. Deciding the case is sometimes made easier, to be sure, because the staff memo is frequently accompanied by a proposal for decision—a proposal which, judged by the supporting memorandum—appears eminently reasonable.

How well these staff memoranda are prepared no one can judge —for they are secret documents not made available to the parties to the case. The actual decision-making process within the agencies is one, as Donald C. Beelar so well put it, "about which we know almost as little as we know about the dark side of the moon."[24] We do know that a great deal of internal maneuvering goes on. We do know that the maneuvering includes external influence and pressures, as individuals possessing an interest in the matter and some degree of influence approach the agency staff, much as lobbyists approach legislators. We do know that as of a few years ago in the National Labor Relations Board, for example,[25] a detailed review of the record in representation cases was made by only one person—one of the junior legal assistants to one of the members of the Board. We do know that the trial examiner's report and recommendation is frequently disregarded. We do know, to borrow again from Mr. Beelar, that all these internal maneuverings may have more to do with the actual decision than anything in the hearing record.

Can you imagine any procedure further removed from norms consonant with the Rule of Law? It is as if a trial judge, at the conclusion of a hearing, bundled up the record and briefs of the parties and turned them over to the law clerks of the judges sitting on the appellate court, and these law clerks prepared short memos

24 Beelar, *The Dark Phase of Agency Litigation*, 12 Ad. L. Bull. 34 (1959).

25 *The Problem of Delay in Administering the Labor-Management Relations Act*, Staff Report to the Subcommittee on Labor and Labor-Management Relations of the Committee on Labor and Public Welfare, U.S. Senate, 82d Cong., 2d Sess. 11-15 (1952).

—perhaps five or ten pages to a case—and the judges of the appellate court were asked to render initial decision on the basis of such memos (which the parties were not even permitted to see) at a rate approximating five decisions per hour!

Even this comparison is not complete, for it leaves out the element which is really critical in the administrative process of adjudication—the tugging and tussling within the agency staff, where in the war of competing philosophies and ideologies and—frankly—political pressures, the testimony of the parties and the points argued in briefs of counsel and the recommendations of the trial examiner may be quite overlooked; where a litigant may be ambushed by secret lurking forces without his knowing what has happened.

When the decision does finally emerge from all this maelstrom, it bears little resemblance to a court opinion. The latter is essentially a carefully reasoned statement of the principles which led to the decision, serving not only to explain the basis of the decision but to afford a guide upon which future conduct may be patterned so as to conform to the Rule of Law, and to afford a precedent upon which future cases may be decided. But the opinion-writing staffs of agencies, as Mr. Hector has told us, explain that they consciously avoid statements of general principle as much as possible in the opinions they write, because they must be able to write an opinion justifying an opposite conclusion the next day, and hence must not be hampered by prior statements of general principles (p. 26).

In short, the typical processes of administrative adjudication are fundamentally at odds with the tenets of the Rule of Law. It was Mr. Hector's conclusion (p. 30) that the administrative system does not produce consistent, informed, responsible, or articulate judgments—and that it is an ideal breeding ground for *ex parte* presentations and improper influence (p. 30).

A Pathological Specimen

I have undertaken to describe the attitudes which differentiate agencies from the courts, and the characteristics of administrative adjudication that create its unique problems. Now I should like to direct your attention to a pathological specimen that shows what can happen—indeed, what did happen—as a result of the attitudes and procedures I have undertaken to describe in general terms.

Anna Myers was a widow, thirty-five years of age, with two children; and she was lonely. By some happy chance, she met

Charles Boyd, a widower, fifty-nine years old, who had six of his nine children living with him. They fell in love and were married. The bride took her two children with her to her husband's abode, but unfortunately the house was too small for the two families. The husband's children resented their father's new bride; and there was some trouble between the two sets of children. In the course of time, relations became so strained that the bride and groom decided the only way to attain peaceful and harmonious relationships was to maintain two houses. His children lived in one; hers in the other. Thus was connubial bliss restored; and during their two years and eight months of marriage, they were blessed with three children—twins born in April 1954, and a third child born posthumously in May 1955. The record established continuous cohabitation as man and wife. Indeed, his death—the event which gave rise to the case—occurred when he suffered a heart attack one night while in his wife's intimate embrace.

The husband had been, in the parlance of the Social Security Administration, a fully-insured individual; and accordingly after his death Anna applied for the various benefits due under the law to a widow who had been living with a fully-insured husband at the time of his death. Her claim was denied on the grounds that she was not living with her husband at the time of his death. This somewhat startling conclusion was predicated on the theory that if husband and wife have separate abodes, they cannot be deemed to be living together. Evidence as to the reason for dividing the family between two houses—and indeed, evidence as to the circumstances of his death—was all irrelevant; such matters could not change established administrative policy. The policy, to be sure, had its genesis elsewhere than in the statute. The statute[26] provided in part that a widow shall be deemed to have been living with her husband if they were both members of the same household [it said nothing about sharing the same abode] or if he had been contributing to her support, or if he had been ordered to do so. To the reviewing courts, it appeared plain that Anna must be deemed to have been living with her husband, under the plain language of the statute as applied to the undisputed facts. But it was apparently the fixed policy of the agency that if husband and wife shared two residences, they could not be deemed to be members of the same household. In short, the statutory test was whether husband and wife were living together; but the administrative test was whether they had only one house. Thus, it may

[26] 64 Stat. c. 809, § 216 (h) (2) (1950).

be seen how the sweet freedom of administrative discretion can lead an agency to establish policies at odds with the legislative intent.

Following the administrative denial of her claim, Anna requested the hearing afforded her by statute. This was duly held, and the referee upheld the administrative denial of Anna's claim. With great tact, he made no reference to the most explicit testimony adduced as to the occasion of the husband's demise, except to observe, "He died while visiting the claimant."

Anna then applied for a review by the Appeals Council, the appellate body of the Bureau. The Council, however, refused to review the case—on the somewhat discomforting ground that "a review of the referee's decision would result in no advantage to the claimant." Here is a pointed illustration of the prejudgment that occurs when an agency sits as judge in its own cause.

It might also be noted that the agency had a more direct interest in the case. It had already made certain payments to a child of decedent's previous marriage; and these payments would have to be characterized as an unauthorized disbursement if the widow's claim were upheld. She was, in effect, asking the agency to say it had decided wrong the first time.

Fortunately, Anna had a lawyer—and a courageous one. Most claimants do not have the advantage of legal representation, for the agency's regulations[27] prohibit an attorney from charging or receiving a fee in excess of ten dollars, except as otherwise specifically authorized. It is easy to understand why most lawyers do not eagerly accept for such a fee a case which involves study of a complex insurance statute of more than 100 pages, implemented by some 277 pages of regulations in fine print, and which may involve (as in Anna's case) filing the initial papers, appearing at a hearing which occupied the better part of a day, and then seeking an administrative appeal, and prosecuting it if it is allowed. Even if counsel is willing to do all this for ten dollars, he may understandably feel discouraged because of the circumstance that there are those who suspect that many policies of the Social Security Administration are set forth in unpublished documents which the hearing examiners follow but which are unavailable to the parties or their counsel.

But Anna's counsel exhausted all administrative remedies and pursued his case by petition for review to the federal district court. That tribunal denied a government motion for summary judgment

[27] 20 C.F.R. § 403.713 (d) (2) (1949).

(filed apparently for the reason that the agency did not want Anna to have a hearing, even in court, on the question whether she was living with her husband when in his intimate embrace on the night of his death) and entered an order reversing the decision of the Social Security Administration.[28]

The Government appealed to the Court of Appeals for the Third Circuit, charging in its brief that the decision of the district court "has over-ruled the long-established administrative understanding." (Brief, p. 14) But the appeal was unsuccessful, the court preferring to decide the case on the basis of the statutory language, rather than the administrative understanding.[29]

While this sorry tale concerns an admittedly extreme case—one which can most kindly be described as pathological—yet it may serve to illustrate the problem that is raised by the conflict between administrative adjudication and the rule of law; and it may serve as a point of departure for discussing a few basic questions seeking to probe the reasons for this unfortunate conflict.

The Reasons for the Trend Toward Administrative Adjudication

Among the reasons advanced retrospectively to explain the phenomenal trend during the last three decades away from the Rule of Law and toward administrative adjudication, one of the most popular rationalizations is that the courts were not equal to the task—that there were too many cases for the courts to decide, and that the cases presented problems too difficult and technical for the judicial mind.

But actually, I submit, this is not true at all. The courts could handle the cases being decided by administrative agencies. We might need more courts, of course, and more judges. But there never seems to be any great difficulty in finding able lawyers willing to accept lifetime appointments as federal judges. Nor have the judges been incompetent to master the difficult problems involved. The Tax Court and the Court of Customs and Patent Appeals pass on questions just as complex and technical as the questions passed on by the I.C.C. and S.E.C. In reality, the trend toward administrative adjudication reflects not a breakdown of the courts, but rather a breakdown of the legislative process.

Most agencies have been created because Congress faced a situation where it was clear that some law was needed to prevent or correct potential social abuses, but where it was not at all clear

[28] Boyd v. Folsom, 149 F. Supp. 925 (W.D. Pa. 1957).
[29] Boyd v. Folsom, 257 F.2d 778 (3d Cir. 1958).

what the law should be. Not having sufficient information about the problem to lay down a well formulated policy, Congress took the easy way out of the dilemma by creating an agency, and delegating to the agency responsibility for settling fundamental matters of policy, and implementing such policy by rules having the force of law. Such was the general situation which led to the creation of such agencies as the Interstate Commerce Commission, Federal Trade Commission, Securities Exchange Commission, Atomic Energy Commission, and many others that might be mentioned.

Congress, of course, gave polite recognition to the legal principle that some standard must be created to limit the agency's policy-making responsibilities, but the standards set up were so vague as to amount to little more than the expression of a pious hope that the agency would act in the public interest.

It may, indeed, be necessary, upon venturing into a new field of governmental regulation, to grant the agency wide powers. Perhaps the agency must, initially, have some authority to experiment. But as experience defines the contours of the problem involved, opportunities are afforded to redefine and tighten the standards which guide administrative action, terminating the agency's authority to perpetuate unsuccessful experiments. Occasionally the Congress has done this, as in the 1947 amendments to the National Labor Relations Act. But too often the Congress has permitted the original enactment to stand for generations without significant amendment. The whole body of radio law, for example (or so I am told), is based upon a statute adopted in 1927, when the knowledge of the problems involved was very slight. Those of us who turned to the Communications Act last winter to see what guide it provided to solve the many problems by which the radio and television industry has recently been so bitterly plagued found that it provided no guide at all to most of the problems—because those problems had not been envisaged in 1927. If Congress had kept the act up to date through the years, the situation would have been much healthier.

But the fact seems to be that Congress has lost much of its ability to legislate. Its capacity to produce legislation is no greater now than it was forty or fifty years ago. When we pause to think of all the streamlining which has been done in the courts during the past fifty years, does it not seem strange that Congress has done so little to modernize its own procedures?

It would seem that Congress is in dire need of a more efficient staff organization—a staff which could hear all affected groups, and

study the problems involved, and then submit to the appropriate congressional committee a carefully planned proposal for legislative solution of the problems that are now turned over—lock, stock, and barrel—to an administrative agency. Surely, if Congress can delegate such broad powers to an independent agency, it can delegate a comparable measure of power to its own staff organizations—and if the delegation were thus kept with Congress' own organization, there would be closer supervision and avoidance of some of the dangers that result from delegating the legislative function to an independent agency.

When responsibility for formulating policy, through the twin measures of rulemaking and *ad hoc* administrative adjudication, is delegated to an organization so large that responsibility is divided among hundreds of persons, many of whom are politically motivated, it is inevitable that there should result a tendency toward government by men, and not by law.

This was well pointed out by that patron saint of all Republican critics of administrative agencies, the late Franklin Delano Roosevelt, who said in 1937:

> "There is a conflict of principle involved in their make-up and functions. . . . They are vested with duties of administration . . . and at the same time they are given important judicial work. . . . The evils resulting from this confusion of principles are insidious and far-reaching. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself."[30]

The Remedy

I observed that people have been talking about administrative law since at least the time of Aristotle. It might be added that from time to time, through the years, they have done things about it.

[30] Quoted, S. Doc. No. 8, 77th Cong., 1st Sess. p. 206 (1941).

The Magna Carta was the result of the very effective protests by the barons gathered at Runnymede, who objected to the administrative law of King John. The American Declaration of Independence charged many abuses against the administrative agencies comprising the British Government's colonial establishment. Incidentally, many of the phrases employed in that document by Thomas Jefferson have a surprisingly modern ring. It protested the "multitude of new offices" that had been created. It objected to the "swarms of officers" sent to "harass" the people. It bemoaned the fact that administrative officers were displacing the legislatures, and depriving the citizens of the benefits of fair trials in the courts.

Perhaps our brief review this afternoon of the attitudes and procedures of administrative agencies suggests that the time has come once again for the people of this country to do something about applying the Rule of Law to the executive agencies of the Government.

We must of course move with caution and circumspection. As Mr. Justice Stone warned in *United States v. Morgan*,[31] we must not "repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice."

What was the mistake to which Mr. Justice Stone referred? Was it not the mistake of attempting to continue an artificial separation of law and equity—a separation which is continuing to cause trouble even to this very day? If we are to avoid this mistake, must we not move along the path of integrating the functions of the agencies with those of Congress and of the courts?

This, in brief, is the fundamental tenet of the recommendations of the second Hoover Commission, many of whose proposals (somewhat modified in form as a result of the work of the drafting committees of the American Bar Association) are now pending in Congress. They adopt four basic approaches to the problem.

First: Reduce the area of untrammeled administrative discretion by enacting legislative standards that will afford real guidance to the agencies in effectuating congressionally-approved policies.

Second: Remove the aura of secrecy, which serves as a fertile breeding ground for improper influences. It can be removed by requiring the agencies to make public their criteria of decision, and by providing for public participation in rulemaking proce-

[31] 307 U.S. 183, 191 (1939).

dures, and by providing means whereby such participation would be effective.

Third: Guarantee fairness of procedure by providing for due separation of functions within the agencies, and by adopting measures designed to assure that decision shall be based on matters of record and not on *ex parte* conferences, and to assure that all the matters considered in reaching the decision shall be known to all parties.

Fourth: Achieve a justicialization of the decision-making process. This approach has several facets. It contemplates that the hearing officers would be made, in effect, trial judges. They would decide the case at the conclusion of the hearing, and on the basis of the matters adduced at the hearing. Their decision would stand as the decision of the agency, subject to appeal on certain basic issues (such as questions of law) directly to the heads of the agency, who would be able to consider the appealed cases in the same manner as appellate judges consider appealed cases, and to write carefully reasoned opinions disposing of the key issues thus presented. For many agencies, this simple remedy would cure most of the evils of institutional decision. But in others—the Federal Trade Commission and the National Labor Relations Board come to mind as two illustrative instances—it would seem helpful to follow the example afforded by the Tax Court, and to separate the prosecuting and policy-making functions from the judicial function, vesting the latter in a separate court.

Conclusion

I have made bold to suggest that administrative agencies have strayed from the political theories and judicial norms that constitute our American Rule of Law—one of the most precious of our American heritages. But I do not view the departure as in any way a planned subversive attempt to overthrow our philosophical ideals of government. Rather, I think, the departure has been almost accidental—a result of a lack of careful planning and supervision. When the procedural difficulties I have described have been corrected, a healthy change of attitude will follow. The present condition of the patient may be grave, but the prognosis is favorable.