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THE PROPOSED UNITED STATES ADMINISTRATIVE COURT, PART II

Robert M. Cooper
Member of the District of Columbia bar; Special Attorney, United States Department of Justice

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Robert M. Cooper†

PART II

CONSIDERATIONS OF POLICY

THE recent movement for the passage of the Logan bill and the establishment of supervisory tribunals for the control of administrative determinations is the result of several preconceived theories concerning the shortcomings of the present system of administrative justice. These underlying theories, cautiously surrounded by a halo of judicial philosophy, have seldom been analyzed in their relation to the development of a sound policy for the administration of governmental functions. The present installment of this article will be devoted first to an examination of these fundamental theories and a consideration of the question how far the present administrative machinery is inadequate to meet existing needs.[850] Then will follow a further analysis of the jurisdictional provisions of the bill to discover whether they are adapted to accomplish the purposes expressed by the sponsors and drafters of the proposed legislation or materially contribute to the development of a sounder system of governmental administration.

A. *The Segregation of Judicial Functions*

One of the principal assumptions of the sponsors of the Logan bill is that the judicial functions of administrative tribunals should be segregated from the other duties which are performed by these

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† A.B., West Virginia; Ph.M., Wisconsin; J.D., Michigan. Member of the District of Columbia bar; Special Attorney, United States Department of Justice; member of the Committee on Administrative Law of the Federal Bar Association.—*Ed.*

[850] The importance of examining these theories is emphasized by the fact that the sponsors of the bill have indicated that the proposed court should "serve as a nucleus in which jurisdiction over other classes of administrative controversies could . . . be reposed by Congress." "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 (1936). The selection of other jurisdiction to be vested in the administrative court in the future would be largely determined by reference to these underlying theories accepted by the present sponsors.

agencies. Commencing with a questionable[351] application of the separation of powers doctrine, the drafters of the bill observe that "the combination of judicial with executive or legislative functions" represents one of the "more fundamental evils" of the present administrative system.[352] The precise import of this assumption is often obscured by reference to the mingling of "judicial power" with other functions.[353] However, it seems clear that the objections relate to the use of a common agency for the adjudication of controversies between the Government and private litigants and for the exercise of legislative or administrative functions.[354] To eradicate this defect in the present system, the sponsors of the bill suggest the establishment of an administrative court which shall handle such controversies, and which shall not have either executive or legislative duties.

The first problem presented by this proposal concerns the inherent difficulty of segregating the various functions of administrative or executive agencies into well-defined categories. While definitions are reasonably adequate to determine the character of any particular function in a given case,[355] an attempt to establish a system of adminis-

[351] The drafters of the bill concede that the separation doctrine as applied to administrative tribunals offers little encouragement in "*requiring* a segregation of their judicial functions." "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 219 (1936).

[352] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 213 (1936). See also, Caldwell, "A Federal Administrative Court," 84 UNIV. PA. L. REV. 966 (1936); "Report of the Special Committee on Administrative Law," 58 A. B. A. REP. 407 at 415 (1933).

[353] It was previously suggested that the separation doctrine has been frequently applied to the judicial power of the third article of the Constitution and seldom interpreted to limit the vesting of mere judicial functions in administrative agencies. See Part I of this article, 35 MICH. L. REV. 193 at 241, note 287 (December, 1936). In this view of the matter there must be a constant recognition of the difference between the commingling of judicial power and of judicial functions in considering the restrictions of the separation of powers doctrine. The failure to observe this distinction has resulted in the confusion referred to above.

[354] As viewed by the drafters of the Logan bill, this situation represents the most flagrant example of the commingling of judicial and administrative or legislative functions. The combination of prosecutor and judge is another instance of such a commingling and will be discussed at a later point.

[355] A typical example of the attempts of the judiciary to define the powers and functions of administrative government occurs in the opinion of the Supreme Court in Massachusetts v. Mellon, 262 U. S. 447 at 488, 43 S. Ct. 597 (1923), where the Court said: "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts."

However, even these generally accepted definitions have broken down in cer-

trative justice based solely on the nebulous concept of a judicial or quasi-judicial function appears to be exceedingly unsatisfactory. Despite the painstaking efforts of the Special Committee on Administrative Law to classify and segregate the quasi-judicial functions of existing administrative agencies, a substantial number of these functions were placed in a border-line grouping.[356] In a large measure this inability to define and classify the several functions of these tribunals is due to the very nature of the administrative process. The process of administration is one which must be viewed as a whole; it is not susceptible of division in accordance with a few generalized characteristics. The courts themselves have amply demonstrated the futility of attempting to establish categories into which any given function may be placed for the purpose of maintaining the restrictions of the separation doctrine.[357] In the absence of a reasonably definite basis for classifying "quasi-judicial" as distinguished from other administrative functions, a practical application of the drafters' proposal in this regard seems not merely ill-advised but little less than futile.

But apart from the obvious difficulties of making such a division, there are serious questions of administrative policy which militate against the adoption of any proposal for the functional segregation of governmental administration. As a practical matter it has never

tain situations. One writer has observed that, "By way of contrast to the comparatively modern state of affairs that now obtains on the legislative side of administrative law, we are still in the euphemism stage on the judicial side." Caldwell, "A Federal Administrative Court," 84 UNIV. PA. L. REV. 966 at 969-970 (1936). For cases in which the courts have been hard pressed to apply a generalized definition, see: Prentis v. Atlantic Coast Line Co., 211 U. S. 210 at 226, 29 S. Ct. 67 (1908); People ex rel. Central Park, N. & E. R. R. v. Wilcox, 194 N. Y. 383 at 386, 87 N. E. 517 (1909); cf. Prendergast v. New York Telephone Company, 262 U. S. 43 at 48, 43 S. Ct. 466 (1923); Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 at 318, 53 S. Ct. 350 (1933).

[356] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 240 (1936); ibid., 59 A. B. A. REP. 539 at 556 et seq. (1934).

[357] See United States v. Los Angeles & S. L. R. R., 273 U. S. 299 at 309, 47 S. Ct. 413 (1927); Federal Trade Commission v. Eastman Kodak Co., 274 U. S. 619 at 623, 47 S. Ct. 688 (1927); Sears, Roebuck & Co. v. Federal Trade Commission, (C. C. A. 7th, 1919) 258 F. 307 at 311; Arkansas Wholesale Grocers' Association v. Federal Trade Commission, (C. C. A. 8th, 1927) 18 F. (2d) 866 at 870. See also DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 15 et seq. (1927); MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 24 (1933); Needham, "Judicial Determinations by Administrative Commissions," 10 AM. POL. SCI. REV. 235 (1916); Eastman, "The Place of the Independent Commission," 12 CONST. REV. 95 (1928); Rosenberry, "Administrative Law and the Constitution," 23 AM. POL. SCI. REV. 32 (1929).

been thought that a complete segregation of administrative functions was feasible or even desirable.[358] Recent developments in the field of public administration have completely altered long-established principles and methods to such an extent that many so-called constitutional restrictions are no longer strictly applicable to the new concept of administrative law.[359] Under the force of changed conditions and new demands, the administrative tribunal has become the active instrument for the transmission of governmental policy from its source to the point where it is applied in the form of an effective enforceable rule.[360] In the performance of this duty the process of administration assumes the form of either administrative legislation or adjudication, and more often both, in the case of comprehensive procedures.[361] These functions, although frequently possessed of distinguishing features, are in a large measure integral and dependent parts of the same administrative process, mutually interwoven by the practical necessity of preserving administrative autonomy. The entire process might be described as a series of administrative acts ultimately resulting in an enforceable order against parties appearing before the agency in question.

[358] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 213 (1936). See Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers," 37 HARV. L. REV. 1010 (1924); Proceedings on the Death of Chief Justice White, 257 U. S. v at XXV-XXVI (1922); SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 288 (1931).

[359] "There is an undoubted trend to enlarge the power of the executive branch by a gradual delegation to it of mixed powers—partly legislative and partly judicial. . . . We found of late years that the sharp distinction of three departments might be suitable for our country in the early days; but as the conditions and need for their control became more complicated and novel, we realized that no one distinct department could deal with them alone. . . . Instead of adhering to the old distinction, we bowed to necessity; and when the constitutional right to do this was challenged, we had the letter of the constitution yield to the spirit of the demand." Nagel, "Federal Departmental Practice," in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 175 at 177-178 (1923). See also PORT, ADMINISTRATIVE LAW 110 (1929).

[360] Berle, "The Expansion of American Administrative Law," 30 HARV. L. REV. 430 at 441 (1917).

[361] The terms "administrative legislation" and "administrative adjudication" are adopted from a recent treatise describing in exhaustive detail the character of these functions. BLACHLY and OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934). Administrative legislation may be said to include the authority to issue general rules and regulations regarding the subject-matter over which the particular agency has jurisdiction. Administrative adjudication, on the other hand, relates to the settlement of disputes between the agency in question and parties against whom an order has been or will be issued. This function is usually referred to as quasi-

The suggestion that part of these functions should be segregated and vested *en masse* in an independent tribunal having no relation to the previous administrative process appears to be at odds with sound principles of administrative policy.[362] Such a proposal would greatly impair the efficiency and speed of governmental administration and tend to disrupt the entire administrative process during its later stages.

The sponsors of the Logan bill are apparently of the opinion that the surface analogy between administrative adjudication and judicial determination is sufficient to warrant the segregation of administrative adjudication from the entire administrative process. But this opinion seems unsound. Administrative adjudication is particularly misplaced when vested in judicial tribunals steeped in the traditions of common law concepts and motivated by the desire to place new situations in old categories.[363] It has been amply demonstrated that, due to the

judicial and is the part of the administrative process which the Logan bill seeks to segregate from the other functions.

[362] In a speech given before the Judicial Section of the American Bar Association, in Los Angeles, California, on July 16, 1935, Hon. John Dickinson, now Assistant Attorney General of the United States, disapproved a similar proposal for the segregation of the judicial functions of administrative tribunals. In that connection Mr. Dickinson said: "the agency which makes inspections, collects information, supervises accounts, interprets the statute, must be the same agency which makes, at least in the first instance, the quasi-judicial determinations of approval or disapproval of applications for grants and permits, and the quasi-judicial orders to conform to or desist from certain conduct. I do not see how these quasi-judicial functions can be torn from the executive or administrative agency without leaving more than a crippled torso behind." (This quotation appears on page 18 of a mimeographed reproduction of Mr. Dickinson's speech. Copies are available by applying to the Department of Justice as long as the present supply lasts.)

[363] "The vast increase of government business, particularly that of a regulatory or controlling type, compels the administration to make many decisions which are very like judicial decisions in nature. So great is their number, so technical is the knowledge required for making them, so intermingled may they be with the administrative process, so important is it that they be made rapidly, that the regular judicial courts are obviously not the proper authorities to make them. The work of rendering these decisions must be done by some sort of administrative authorities: either the active administration itself, or administrative tribunals." BLACHLY and OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 4 (1934).

"You must have administration, and you must have administration by administrative officers. You cannot afford to have it otherwise. Under the proper maintenance of your system of government and in view of the wide extension of regulating schemes which the future is destined to see, you cannot afford to have that administration by your courts. With the courts giving a series of decisions in these administrative matters hostile to what the public believes, and free from that direct accounting to which administrative officers are subject, you will soon find a propaganda advocating a short-term judiciary, and you will turn upon our courts . . . that hostile and perhaps violent criticism from which they should be shielded and will be shielded if left with the

singular nature of their task, administrative agencies are far more suitable for the handling of administrative controversies than ordinary courts.[364] The technical knowledge of the specialized expert in the formulation of social or economic policies and the legitimate exercise of administrative discretion are as much a part of administrative adjudication as they are of the legislative or executive functions of administration.[365] In the case of the usual dispute arising in the realm of private law, the court merely attempts to adjust the differences between private parties. On the other hand, in the public law field the aim of administrative adjudication centers around the establishment of a sound social or economic policy in a system of government-individual relationships.[366] In this respect the purpose of administration is concerned with the maintenance and protection of some definite governmental policy as much as it is with the protection of individual rights.[367]

jurisdictions which it was intended they should exercise." ADDRESSES OF CHARLES EVANS HUGHES (G. P. Putnam's Sons) 142 (1908).

[364] See Pound, "The Administrative Application of Legal Standards," 44 A. B. A. REP. 445 (1919); Haines, "Effects of the Growth of Administrative Law Upon Traditional Anglo-American Legal Theories and Practices," 26 AM. POL. SCI. REV. 875 (1933). The Report of the Special Committee on Administrative Law suggests that "It has never really been demonstrated that administrative tribunals are capable of greater dispatch in the disposition of cases than are the courts." ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 234, note 64 (1936). If such an obvious proposition needs demonstration it may be found by an impartial examination and comparison of the reports of the various district and circuit courts of appeal and the tremendous number of proceedings handled during the same period of time by such agencies as the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, the Board of Tax Appeals, the Department of Agriculture or the Department of Labor. To deny the speed and efficiency of administrative tribunals is to ignore the fundamental explanation of their existence and phenomenal growth within recent years. See Rosenberry, "Administrative Law and the Constitution," 23 AM. POL. SCI. REV. 32 at 36 (1929).

[365] "Of all the characteristics of administrative law, none is more advantageous, when rightly used for the public good, than the power of the tribunal to decide the cases coming before it with the avowed object of furthering a policy of social improvement in some particular field; and of adapting their attitude towards the controversy so as to fit the needs of that policy." ROBSON, JUSTICE AND ADMINISTRATIVE LAW 275 (1928).

[366] "Authorities that are settling public law disputes should not only have a wide technical training in the field of public law, but should also see clearly the difference in its aims and purposes from those of private law. Instead of merely thinking of law in the terms of individual rights, they should also be able to see in public law a system of state-individual relationships." BLACHLY and OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 211 (1934).

[367] This is not to imply that the protection of individual rights is ignored in the process of administration. The author's position is merely that the emphasis is placed upon the development of a policy during the administrative process, leaving to the

The considerations of administrative policy which have suggested the establishment of administrative tribunals for the exercise of legislative or executive functions pertain to the process of administration as a whole, including those functions which may be termed judicial in character.[368] The manifold advantages attained by maintaining the autonomy and integrity of the administrative process in all of its aspects are considerations which should not be lightly cast aside in a search for a more effective system of administrative justice.[369] Those who are impressed with the seeming advantages which would result from the separation of judicial functions would do well to study the history of the ill-fated Commerce Court. This short-lived court was established solely for the purpose of divorcing the judicial determination of matters arising under the Interstate Commerce Act from the previous administrative process.[370] It may be that there are certain types of judicial functions which are susceptible of separation from the ordinary administrative process, but these instances are exceptional and only serve to emphasize the impropriety of a policy which suggests the wholesale segregation of judicial functions.

As a corollary to the judicial segregation theory, the drafters of the bill disclose another so-called defect in the present administrative system. This objection relates to the "deep-rooted maxim" that "no

courts the task of correcting such errors as may arise. The judicial review of administrative action secured by constitutional guarantees is ample protection for individual litigants.

[368] "The administrative process must necessarily pass beyond the mere enforcement of law, not only in respect to the creation of law, but also in respect to the determination of rights. In many instances, the determination of rights is an integral part of the administrative process; and the findings of facts by administrative bodies, as a part of their work, frequently involves the same kinds of procedures and processes as the finding of facts by a court." BLACHLY and OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 5 (1934).

[369] The advantages to be achieved by tribunals exercising judicial as well as administrative functions have been listed as follows: "The ability to settle cases for the avowed purpose of furthering a particular social or economic policy; to handle cases in a more or less summary way in times of emergency; to develop economic policies, standards, and norms in new and untried social and economic situations; to develop new legal and judicial standards and norms and integrate them into public administration; and to interpret the new principles, standards and norms laid down by the legislature in concrete cases, thus keeping adjudication in harmony with public policy." BLACHLY and OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 220 (1934).

[370] An excellent study of the activities and accomplishments of the Commerce Court appears in FRANKFURTER and LANDIS, THE BUSINESS OF THE SUPREME COURT 153 et seq. (1928).

man should be permitted to be judge in his own cause."[371] Although there may be some doubt as to its universal applicability, this charge seems to be the nub of the entire judicial segregation theory. It is pointed out that in many instances the same administrative agency drafts and issues the general legislative regulations, then investigates alleged infractions of such rules and finally prosecutes private parties for such violations as are discovered during the previous investigation. This procedure, it is argued, strikes at the very foundations of Anglo-Saxon jurisprudence by utilizing the despotic combination of prosecutor and judge for the settlement of administrative controversies.[372] Reduced to its simplest terms, the contention of the drafters seems to be that where the agency in question conducts the original investigation on its own motion and recommends further administrative proceedings, the decision with respect to the existence of violations is likely to be tainted with bias or prejudice if it is entrusted to the same authority. This conclusion is reached by implying that the administrative agency which authorized the investigation, or found the facts to be utilized in the enforcement proceedings, has a personal interest in the ultimate determination of the matter which should automatically disqualify it on the grounds of partiality.

Despite their complete assurance on this point, the drafters are frank to admit that the courts have never expressly prohibited the combination of prosecutor and judge in the same agency,[373] except in situations where other factors might contribute to the bias of the judge.[374] As a matter of fact, there are many decisions giving tacit

[371] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 221 (1936).

[372] Ibid.

[373] Ibid. See also Caldwell, "A Federal Administrative Court," 84 UNIV. PA. L. REV. 966 at 976 (1936).

[374] The members of the Special Committee on Administrative Law seek support for their conclusions by the citation of cases in which the Supreme Court has held that the pecuniary interest of a judge in a controversy disqualifies him on grounds of impartiality. See the cases cited in Tumey v. Ohio, 273 U. S. 510 at 522, 47 S. Ct. 437 (1927). However, the Court has recognized substantial limitations on the pecuniary interest doctrine as stated in the Tumey case. In that connection see the opinion of the Court in Dugan v. Ohio, 277 U.S. 61, 48 S. Ct. 439 (1928). Moreover, the analogy between the pecuniary interest doctrine and the prosecutor-judge combination is obviously not complete. In the case of the combination of prosecutor and judge the personal interest arises solely by implication. But even assuming that the combination results in the development of a personal interest in some form, the Supreme Court has held that this interest is not tantamount to a denial of due process of law. Hibben v. Smith, 191 U. S. 310, 24 S. Ct. 88 (1903). See also De Pauw University v. Brunk, (D. C. Mo. 1931) 53 F. (2d) 647.

approval to such a combination of functions in an administrative agency.[375] In this connection the case of *Brinkley v. Hassig*[376] is directly in point. That case involved the validity of a revocation proceeding before the Kansas State Medical Board. It was contended that, since the board possessed the dual functions of prosecutor and judge, its determinations violated the guaranties of the Federal Constitution. The court refused to invalidate the board's decision and pointed out that although "The spectacle of an administrative tribunal acting as both prosecutor and judge has been subject of much comment . . . it has never been held that such a procedure denies constitutional right."[377] Another federal court reached a similar result with respect to the powers of the Federal Trade Commission under Section 5 of the Act in holding that the criticism of the dual powers of the Commission was "too unsubstantial to justify discussion."[378] The refusal of these courts to condemn the administrative commingling of such functions does not appear to substantiate the fears of those who view the combination with alarm.

Consequently it seems advisable to re-examine the assumptions which form the basis of the drafters' theories pertaining to the segregation of these powers. In the first place, it should be noted that the evils of the combination of prosecutor and judge, if they exist at all, are strictly applicable only to penal proceedings by administrative agencies where such agency is authorized to investigate violations on its own motion. The great mass of administrative adjudications are not penal in nature. For the most part, these adjudications are civil proceedings which merely serve as a warning to the parties engaged in practices contrary to law. The orders issued by the administrative tribunal are not self-executing and may be tested as to their validity by adequate methods of judicial review. Furthermore, the authority to initiate investigations without complaint is not a typical provision

[375] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 221 (1936).

[376] (C. C. A. 10th, 1936) 83 F. (2d) 351.

[377] Ibid at 356.

[378] National Harness Manufacturers' Assn. v. Federal Trade Commission, (C. C. A. 6th, 1920) 268 F. 705 at 707; Farmers' Livestock Commission Co. v. United States, (D. C. Ill. 1931) 54 F. (2d) 375 at 381. Recently the Supreme Court denied a petition for a writ of certiorari in a case which directly raised the question of the constitutional validity of the prosecutor-judge combination in the Federal Trade Commission. A. McLean & Son v. Federal Trade Commission, (U. S. 1936) 57 S. Ct. 117. Brief for the Petitioner in Support of the Petition for a Writ of Certiorari, Doc. Nos. 393-396, October Term, 1936.

of most statute-created administrative agencies, and even when such power is given it has in the past been sparingly exercised.

In the second place, it is most difficult to understand why an administrator should develop a personal interest, amounting to partiality or prejudice in an administrative proceeding, solely because that same person participated in the original investigation. The picture of the over-zealous administrator, although likely to appeal to popular fancy, is hardly realistic. Certainly it should not be taken for granted in the formulation of administrative policies. Partiality or prejudice is a state of mind which may arise from a great variety of causes, but to imply its existence from the bare fact that the same authority has engaged in or has authorized the initial investigation appears to be quite far fetched.[379] The personal interest which the drafters so readily impute to administrative agencies is hardly a universal condition embedded in the minds of governmental officers.[380] It may well be that the advocates of the proposed bill are confusing partiality and bias with the exercise of administrative discretion. But the distinction is self-evident and not worthy of extended discussion. From a functional standpoint, discretion is the life blood on which the entire administrative process feeds—without its vitalizing contribution the machinery of administration would degenerate into an impotent force with neither aim nor direction.[381] Within their respective spheres, the elements of

[379] During the present term the Supreme Court refused to set aside a conviction for larceny on the ground that members of the jury were in the employ of the Government. United States v. Wood, (U. S. 1936) 57 S. Ct. 177. It was contended that the jurors who were in the employment of the Government were biased and partial due to their governmental relationship and should not be permitted to serve in criminal cases to which the United States was a party. The Court refused to reverse the conviction and indicated that the argument of the respondent seemed "far-fetched and chimerical" hardly rising "to the dignity of an argument." 57 S. Ct. 177 at 187. It is submitted that the same observations may be made with regard to the personal interest and partiality which the drafters seek to impute to the authority exercising a combination of functions.

[380] One writer has concluded that the very essence of governmental administration is its neutrality rather than its partiality. "It is the essence of *governmental* bureaucracy to be *neutral* with regard to the interests and opinions which divide the community. That is not to say that every or even any bureaucrat is in fact neutral, but it is their tendency to be that. Naturally, public services are composed of human beings with opinions and prejudices of their own . . . yet the neutrality of the whole remains of central significance. This conclusion is not altered by the observation that the public services participate in the making of legislation by drafting most of the statutes." FRIEDRICH and COLE, RESPONSIBLE BUREAUCRACY: A STUDY OF THE SWISS CIVIL SERVICE 14 (1932).

[381] The drafters of the bill place considerable reliance on the conclusions of the Sankey Committee on Ministers' Powers regarding the impropriety of agencies acting

administrative discretion contribute as much to the administrative process as do the principles of equitable discretion to the judicial process in its equity aspects.[382]

In the third place, it seems quite clear that as a practical matter this attitude of partiality or bias could only be developed in the one-man agency or in the more compact authorities. In the case of the larger and more seasoned administrative tribunals, division of labor and function tends to cut off the spread of personal interest to the ultimate authority rendering the quasi-judicial decision. The typical administrative agency partitions its duties among an investigation unit, an administrative unit and a legal division. Under this procedure the authority making the ultimate determination with respect to violations frequently assumes the independent role of a judge throughout

in the capacity of prosecutor and judge. "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 223 (1936). However, it is noteworthy that the recommendations of the Committee were careful to distinguish between "judicial" and "quasi-judicial" decisions made by executive officers. While the Committee condemned the combination of prosecutor and judge in officers or agencies authorized to render judicial decisions, these conclusions were not extended to authorities rendering merely quasi-judicial decisions. REPORT OF THE COMMITTEE ON MINISTERS' POWERS (His Majesty's Stationery Office, London) 73 and 79 (1932). With reference to the quasi-judicial functions of administrative agencies, which most nearly resemble the process of administrative adjudication under the American system, the Committee recognized that the "application of the [same] principle . . . is not so easy, since a quasi-judicial decision ultimately turns upon administrative policy." Ibid at 79. See also Suzman, "Administrative Law in England: A Study of the Report of the Committee on Ministers' Powers," 18 IOWA L. REV. 160 at 172 (1933). Under its broadest terms the report of the Sankey Committee may be interpreted as recommending the segregation of quasi-judicial functions only in situations where the officer or agency entrusted with these duties is likely to be biased or prejudiced due to firm convictions regarding the extreme development of settled administrative policies. REPORT OF THE COMMITTEE ON MINISTERS' POWER 79 (1932).

[382] "Under the civil law the rise of a system of administrative law, independently of the courts, came as a welcome formulation of principles for the guidance of official action, where no control had existed before. To the common law the use of these administrative agencies came as an encroachment upon the established doctrine of the supremacy of the courts over official action. . . . The ultimate establishment of equity, after a period of resistance, as a coördinate branch of the law, ameliorating the rigors of the common-law system . . . is a comparable transition in the law. The profession of our day, like its predecessors who saw in the pretensions of the chancellor but a new danger to the common law, has given little evidence that it sees in this new method of administrative control any opportunity except for resistance to a strange and therefore unwelcome innovation." Stone, "The Common Law in the United States," 50 HARV. L. REV. 4 at 16, 17 (1936). See McFarland, "Administrative Agencies in Goverment and the Effect Thereon of Constitutional Limitations," 20 A. B. A. J. 612 at 623 (1934).

the entire process. In this manner the various stages of the administrative process are partially segregated through a functional division of duties, thereby eliminating any bias which might have arisen during the earlier proceedings.

Finally, even if it be assumed that the combination of prosecutor and judge gives rise to partiality and prejudice in the mind of the administrator, this defect can be corrected by resort to the courts. Regardless of the personal interest of the members of an administrative agency in a particular proceeding, the record of that proceeding must sustain both the findings and order of the tribunal.[383] If it be contended that the existing modes of review are inadequate to insure impartial treatment of controversies or the elimination of prejudice, the remedy would seem to be in the direction of broadening the scope of review rather than in attempting to obtain an unwise separation of functions. However, when it is claimed that the existing methods of judicial review are inadequate to control this alleged partiality, one is tempted to conclude that the objection really relates not to bias or prejudice but to the legitimate exercise of discretion.[384]

In the last analysis, the objection raised by the drafters of the bill compels a choice of two viewpoints. On the one hand, they stress possibility of prejudice or bias to condemn a combination of functions which has proven its worth and at least has received the tacit approval of the courts. On the other hand, they do not recognize that we are considering the exercise of a combination of "powers and equipment [which] tend to procure the more efficient, just, and impartial discharge of the regulatory powers of the office" in question and which

[383] For decisions describing the scope of judicial review see Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452 at 470, 30 S. Ct. 155 (1910) and Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541 at 547, 32 S. Ct. 108 (1912).

[384] The Supreme Court has consistently refused to either participate in the duties of administration or review the exercise of administrative discretion. Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930); Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 S. Ct. 445 (1923); Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 47 S. Ct. 284 (1927). "If the right of judicial review is not to some degree limited, the courts will have purely administrative duties imposed on them and they will be encroaching on the legislative power when they are forced to deal with regulatory matters. The judiciary does not exercise any supervisory authority over the acts of the legislative or executive branches of government. . . . When the supervisory power of the courts has been extended to matters of executive and legislative decision and discretion, the courts have been given a place of pre-eminence which our scheme of constitutional government never contemplated." Pound, "Constitutional Aspects of Administrative Law," in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 100 at 122-123 (1923).

has never been viewed as a "bar to fair judicial ruling upon those facts" as presented.[385] One's point of view is largely determined by the emphasis which is placed on either of these considerations. Those who view with alarm the possibility of prejudice and partiality arising from a combination of administrative functions are not likely to be impressed with arguments concerning the past efficiency and practical necessity of commingled powers in the same agency.

B. *The Independence of the Administrative Judiciary*

The second principal theory advanced by the advocates of the administrative court concerns the necessity of maintaining personal independence by freeing the judiciary from executive or legislative control. Implicit in this theory is the underlying assumption that the task of adjudication can only be performed with impartiality and disinterest when the judge is neither dependent upon nor under the control of the other branches of the government. In the opinion of the drafters, this independence can be substantially accomplished by protecting the judiciary from diminution of compensation and insecurity of tenure.[386] Without further elucidation, it is then suggested that "just as great, if not greater reason exists for securing a comparable independence for administrative agencies exercising judicial functions. . . ."[387]

In so far as the theory of judicial independence is applied to the judges of courts organized under and exercising the judicial powers of Article III of the Constitution, there seems to be little room for disagreement. The restrictive provisions of the third article have been consistently interpreted to preserve judicial immunity from control in these respects.[388] However, the proposal to extend the application of this theory to tribunals exercising the quasi-judicial functions of the administrative process raises serious questions of policy which should not be overlooked.

It has been suggested that an absolute security of tenure in the case of officers performing the duties of administrative adjudication would be definitely unwise.[389] There is much to be said in support of

[385] Farmers' Livestock Commission Co. v. United States, (D. C. Ill. 1931) 54 F. (2d) 375 at 382.

[386] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 225 et seq. (1936).

[387] Ibid at 226.

[388] O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933). See Part I of this article, 35 MICH. L. REV. 193 at 205 (December, 1936).

[389] "There is, however, another form of securing independence of the bureau-

this position. When administrative adjudication relates directly to the formulation and development of administrative policy or the exercise of functional discretion, the agencies performing this function should be made responsible to some superior authority. In many instances it would seem advisable to place this control in the appropriate executive department or in Congress in order to assure a complete effectuation of the legislative mandate or the administrative policy as the case may be. As a practical matter, this supervisory control over administration is particularly necessary in the performance of certain quasi-judicial functions, since it is at this stage of the process that the will of the state is directly transmitted into an active enforceable order. In this respect the authority to adjudicate should neither be entirely divorced from nor relieved of responsibility to an ultimate control.[390] The impropriety of absolute security of tenure in the case of administrators developing definitely unsympathetic attitudes toward the established policy or aims of the incumbent administration is readily apparent. The presence of hostile administrators entrenched in key positions within the administrative organization has not infrequently contributed to the lack of progressive development in the functional operation of governmental policies.[391]

cracy, namely, permanent tenure of the individual office-holder. . . . But there has been a tendency, for various reasons, to over-emphasize the advantages of such an arrangement which is easily made subservient to the inherent tendency of the incumbents of such offices to 'privatize' their positions, to insist upon having the emoluments of their office treated as private property rights. Any constitutional recognition of a legal 'right' to an office or its emoluments contains the germs of destruction of a fully organized bureaucracy and may lead back to feudal conditions." FRIEDRICH and COLE, RESPONSIBLE BUREAUCRACY: A STUDY OF THE SWISS CIVIL SERVICE 16 (1932). See also Herring, "Politics, Personalities, and the Federal Trade Commission," 29 AM. POL. SCI. REV. 21 at 29 et seq. (1935); Langeluttig, "The Bearing of Myers v. United States Upon the Independence of Federal Administrative Tribunals—A Criticism," 24 AM. POL. SCI. REV. 59 at 64 (1930).

[390] One of the cardinal principles of scientific management is that authority should be made co-extensive with responsibility. Without attempting to develop this principle further, it should be recognized that public administration is merely a specialized aspect of management, which is equally susceptible of scientific treatment. "Public administration is the management of men and materials in the accomplishment of the purposes of the state. . . . The objective of public administration is the most efficient utilization of the resources at the disposal of officials and employees. . . . Public administration is, then, the execution of the public business; the goal of administrative activity the most expeditious, economical, and complete achievement of public programs." WHITE, PUBLIC ADMINISTRATION 2, 4 (1926).

[391] For an illuminating discussion of this aspect of administration, see Wallace, "Nullification: A Process of Government," 45 POL. SCI. Q. 347 (1930). See also the opinion of Chief Justice Taft in Myers v. United States, 272 U. S. 52, 47 S. Ct. 21 (1926), where it was intimated that the President could remove an officer performing

But the substitution of limited tenure provisions primarily as an indirect means of control, in place of the more direct and effective methods of administrative supervision seems to be of doubtful wisdom. The need for supervisory control of administrative activity may be conceded in certain respects, but the fear of removal through insecurity of tenure is hardly the most desirable form of corrective supervision.[392] Such coercive pressure more often operates to develop unwholesome group resentments and frequently prevents the growth of a true *esprit de corps* among the administrative personnel. In the establishment of administrative authorities extreme care should be exercised in the choice of tenure alternatives in order to avoid the Scylla of a constantly changing political bureaucracy and the Charybdis of an administration hamstrung by the "privatization" of administrative offices.

One other point in this connection seems worthy of further analysis. The underlying assumption of the drafters that a limited tenure adversely affects the performance of the duties of administrative adjudication is open to wide speculation. In a large measure the actual effect of insecurity on administrative, or even judicial, determinations is the result of a combination of many psychological factors.[393] Any attempt to measure or describe this relation between tenure and the integrity or independence of adjudication must take cognizance of both the degree of insecurity and the nature of the particular administrative task.[394] Administrative independence and the effectuation of govern-

quasi-judicial functions "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." 272 U. S. 52 at 135. However, the opinion of the Supreme Court in Rathbun v. United States, 295 U. S. 602, 55 S. Ct. 869 (1935), casts some doubt on this earlier dictum. See also Shartel, "Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution," 28 MICH. L. REV. 485, 723 et seq. (1930).

[392] WILLOUGHBY, PRINCIPLES OF PUBLIC ADMINISTRATION 219 et seq. (1927); Hart, "The President and Federal Administration," in HAINES and DIMOCK, ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION 47 at 84 (1935); BLACHLY and OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 282 (1934).

[393] The American Bar Association has announced the subject for the 1937 Ross Bequest Essay Contest to be: "The Administration of Justice as Affected by Insecurity of Tenure of Judicial and Administrative Officers." Perhaps the results of this contest will shed some light on this highly speculative field.

For a consideration of the psychological aspects of insecurity of tenure see DAWSON, THE PRINCIPLE OF OFFICIAL INDEPENDENCE 12 (1922); ROBSON, JUSTICE AND ADMINISTRATIVE LAW 46 (1928); WALLAS, OUR SOCIAL HERITAGE 188 (1921).

[394] There are, in general, four types of tenure which may be utilized in the appointment of administrative officers: a tenure at the will of the appointing authority; a tenure for years; a tenure during good behavior; and a tenure for life. The first two classes need no explanation as to their character or nature. A tenure for life

mental policy must be made to coincide at the point where each is given a maximum degree of emphasis. To accomplish this purpose, the relative security of tenure should vary somewhat with the discretionary or political functions entrusted to the particular officer. Obviously, a due recognition of these considerations would not lead to the establishment of a general or universal type of tenure for all administrative officials.

It is noteworthy that the provisions of the Logan bill do not insure the absolute security of tenure which the drafters consider so essential to the independence of the adjudicating authority. Although the bill provides that the judges "shall hold office during good behavior"[395] the proposed court would be legislative in origin and character[396] and, therefore, under the complete domination of Congress.[397] The judges of the administrative court would be made independent of the executive, but they would at the same time still be subject to congressional interference. This departure from their theory is explained

differs from a tenure during good behavior in that in the case of the former a formal procedure to remove the officer is necessary. A definite act of misconduct must be shown and the procedure is often in the form of an impeachment. Although cause for removal must be shown in the case of an officer holding office during good behavior, the removing authority is given more latitude in the justification for the action. In actual practice the distinction between the last two classes of tenure is often obscured by vague statutory language authorizing the original appointment. See WILLOUGHBY, PRINCIPLES OF PUBLIC ADMINISTRATION 219 et seq. (1927). See also Shartel, "Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution," 28 MICH. L. REV. 870 et seq. (1930).

[395] S. 3787 (H. R. 12297), § 2(b), 74th Cong., 2d sess. (1936).

[396] See Part I of this article, 35 MICH. L. REV. 193 at 212, 213 (December, 1936).

[397] In Williams v. United States, 289 U. S. 553, 53 S. Ct. 751 (1933), and Ex parte Bakelite Corporation, 279 U. S. 438, 49 S. Ct. 411 (1929), the Supreme Court held that the judges of legislative courts were not protected from congressional interference with respect to their tenure or salaries. See also, American Insurance Co. v. Canter, 1 Pet. (26 U. S.) 511, 7 L. Ed. 242 (1828). There is some doubt as to extent of congressional control which may be exercised with respect to the decisions of legislative courts. However, in the past, Congress has exercised some control on the decisions of the Court of Claims. In 1931, it remanded the case of Pocono Pines Assembly Hotels Co. v. United States, 69 Ct. Cl. 91 (1930), to hear further testimony as to the actual facts. 46 Stat. L. 1622 (1931). The Hotels Company petitioned the Supreme Court for a writ of mandamus or prohibition to prevent this interference, but the Court refused to grant relief. Ex parte Pocono Pines Assembley Hotels Co., 285 U. S. 526, 52 S. Ct. 392 (1932). Since these legislative courts do not exercise any of the "judicial power of the United States" the separation doctrine presumably would be no bar to congressional interference. See Part I of this article, 35 MICH. L. REV. 193 at 209 (December, 1936). For a further consideration of this subject, see 46 HARV. L. REV. 677 (1933).

by the fact that the administrative court would exercise a jurisdiction which could not be vested in a constitutional court,[398] and consequently its judges could not be accorded the constitutional protection guaranteed by Article III of the Constitution. In other words, it would appear that the advocates of the Logan bill are more interested in broadening the scope of administrative review than they are in assuring the judges of the proposed court a complete independence from legislative control. While it may be admitted that there are advantages to be gained by granting more secure tenure in some instances, a universal permanency of office would neither recognize the dangers of an entrenched bureauracy nor the evils of administrative stagnation by arbitrary nullification.

C. *A More Comprehensive Review*[399]

The final theory upon which the sponsors of the Logan bill postulate their demand for a new administrative court is the lack of effective independent review of the decisions of administrative agencies under the present judicial system.[400] It is contended that the present scope of review by constitutional courts, which extends to issues of law and only in a few instances to fact determinations,[401] offers "little comfort . . . when the administrative agency needs only slightly more

[398] The proposed court is authorized to review all questions of fact as well as questions of law. S. 3787 (H. R. 12297), § 8, 74th Cong., 2d sess. (1936). Such a jurisdiction has been held to be administrative rather than judicial. See the first installment of this article, 35 MICH. L. REV. 193 at 248 (December, 1936).

[399] In so far as this theory is considered as a part of the first theory relating to the segregation of judicial functions, the following discussion is inapplicable. Where the proposed court is authorized to exercise an original jurisdiction in the performance of quasi-judicial functions, there appears to be no objection—other than that previously pointed out in connection with the discussion of the theory, advocating the segregation of this class of duties—to vesting that tribunal with a power to decide issues of fact as well as of law. It is only in connection with the appellate jurisdiction over administrative decisions that the following analysis is directed.

[400] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 228 (1936).

[401] In addition to a review of questions of law, the constitutional courts also review issues of fact when they relate to the jurisdiction of the administrative agency or its constitutional power to act. Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527 (1920); St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720 (1936). See Dickinson, "Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of 'Constitutional Fact'," 80 UNIV. PA. L. REV. 1055 (1932), and MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND INTERSTATE COMMERCE COMMISSION (1933).

than a scintilla [of evidence] to support a finding of fact."[402] The drafters propose to remedy this alleged defect by vesting the proposed court with a broad jurisdiction to review administrative determinations as to questions of fact as well as of law.[403] In the main, the acceptance or rejection of this theory will be largely determined by reference to basic considerations of policy regarding the adequacy of the present scope of judicial review now exercised by the lower federal courts.[404]

Discussions concerning the proper scope of judicial review of administrative acts comprise the major part of the legal literature in the administrative law field.[405] A detailed analysis of existing rules of review would fall beyond the narrow limits of this article. It will suffice here to observe that, in general, judicial review extends to all questions affecting the constitutional power of the administrative agency, the scope of its delegated authority and the sufficiency of the evidence upon which its order was based.[406] The courts have construed these questions to be essentially of a judicial nature, even though their determination may incidentally involve the reexamination of administrative findings of fact.[407] The propriety of subjecting

[402] "Report of the Special Committee on Administrative Law," ADVANCE PROGRAM OF THE AMERICAN BAR ASSOCIATION 209 at 229 (1936).

[403] Ibid. at 228.

[404] In reality this consideration has a double aspect. On the one hand, the federal courts exercise a limited jurisdiction to review certain fact determinations which cannot be taken away from them without violating fundamental constitutional guarantees. See note 401, supra. On the other hand, there is presumably a somewhat broader jurisdiction to review fact issues which may be conferred upon those courts by express legislative mandate. However, this latter jurisdiction cannot be constitutionally extended to include questions of fact involving the exercise of discretion or the formulation of administrative policy. See note 384, supra. It is apparently this latter authority to review issues of fact relating to administrative discretion or the development of policy which the drafters particularly desire to attempt to place in the proposed court. The following discussion will attempt to avoid reference to the distinction between those two classes of fact review wherever possible, but as will later appear a review of decisions based primarily on discretionary elements or administrative policy is clearly inappropriate.

[405] See the treatises cited in McFarland, "Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations," 20 A. B. A. J. 612 at 613, note 12 (1934). Two more recent articles are Dickinson, "The Conclusiveness of Administrative Fact—Determinations Since the Ben Avon Case," 16 PUB. UTIL. FORT. 385 (1935), and Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 (1935).

[406] Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541 at 547, 32 S. Ct. 108 (1912). See also the material cited in note 401, supra.

[407] For an explanation of the judicial aspects of these questions, see DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 235 (1927) and McFAR-

administrative determinations to judicial control to this limited extent will not be questioned.[408] The succeeding discussion will deal only with the advisability and feasibility of permitting an independent tribunal to completely review the fact determinations of administrative authorities engaged in the performance of quasi-judicial functions.[409]

The instant proposal to subject administrative fact determinations to a comprehensive review[410] is the result of two assumptions which are clearly open to serious question. In the first place, the liberal review theory assumes that there are certain definite findings of fact ascertainable in any proceeding that involves the adjudication of private rights which in reality are correct and that any other findings would be erroneous. For lack of a more concise description, this may be termed the assumption of the existence of facts in the absolute.[411] The fallacy in this position is readily apparent. When a tribunal is created to perform certain governmental functions in accordance with established policies and is authorized to act under stipulated conditions, the absolute existence of facts indicating the presence of such conditions is immaterial so far as the authority of that agency is concerned. The validity of administrative action depends upon the facts as found by the adjudicating agency in a regularly conducted proceeding for that purpose. The absolute existence of these or other facts in reality should have no bearing on the authority of the agency or the validity of its order, provided there were no substantial irregularities in the administrative proceeding.[412] A system of administrative justice which

LAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 25 (1933).

[408] The author is not unmindful of the total inadequacy of the alleged distinctions between issues of law and issues of fact. Isaacs, "Judicial Review of Administrative Findings," 30 YALE L. J. 781 at 782 (1921). However, the vagueness and uncertainties of these distinctions should not be accepted as the basis for employing an unprecedented judicial control over administrative adjudications.

[409] It should be noted at the outset that this proposal for a comprehensive judicial review is completely out of line with the more recent tendencies to broaden the fields of administrative immunity. For a history of this present development, see Dickinson, "The Conclusiveness of Administrative Fact—Determinations Since the Ben Avon Case," 16 PUB. UTIL. FORT. 385 (1935).

[410] The provisions of the Logan bill not only authorize a complete review of law and fact determinations, but they provide for an entire trial *de novo at two separate stages in the proceedings.* See page ???.

[411] Gordon, "The Relation of Facts to Jurisdiction," 45 L. Q. REV. 459 (1929).

[412] Science and logic have totally failed to provide us with tools by which we may ascertain the absolute existence of any state of facts. In the conduct of judicial determination this fallibility is immeasurably increased by the abstract nature of legal proof. See the dissenting opinion of Mr. Justice Brandeis in Crowell v. Benson, 285

failed to recognize this truism would contain the seeds of its own destruction. Unless there is accorded a finality to findings of fact at some stage in a proceeding—regardless of their existence in reality—the process of determination and redetermination would never cease. In this respect fallibility is inherent in the fact-finding machinery of any tribunal—whether administrative or judicial. If it be conceded, as it must, that finality must be accorded at some point, the only remaining question concerns the stage of the process of governmental administration at which this conclusiveness should be given.[413] In terms of the present system of administrative justice, the problem centers around the selection of the most suitable tribunal to entrust with this jurisdiction of finality. A consideration of this question involves an analysis of the second assumption implicit in the liberal review theory.

This other assumption supporting the theory of a more comprehensive review strikes at the very heart of administrative integrity. The drafters are presumably of the opinion that an independent tribunal endowed with many of the traditional attributes of judicial agencies and completely isolated from the previous steps in the administrative process, is the most suitable agency in which to vest the authority to determine finally the existence of all facts pertaining to an administrative controversy. From a functional standpoint, this belief in judicial superiority gives rise to a number of perplexing questions. No adequate reason has ever been advanced to explain why judges are the "only suitable custodians of administrative honor and decorum" or "by what strange process . . . judges become more trustworthy than" administrative officers.[414] It is hardly reasonable to assume that judicial officers completely untrained in the problems of public administration are more capable or more likely to reach proper results than experienced administrators thoroughly familiar with the intricacies of modern

U. S. 22 at 85, 52 S. Ct. 285 (1932). "It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom." Dissenting opinion of Mr. Justice Bradley in Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U. S. 418 at 465, 10 S. Ct. 462, 702 (1889).

[413] See Pound, "Constitutional Aspects of Administrative Law," in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 100 at 127 (1923).

[414] Dimock, "Forms of Control over Administrative Action," in HAINES and DIMOCK, ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION 287 at 297 (1935).

government and the techniques of governmental administration.[415] In recognition of this truth, the tendency of both judicial decision and legislative action has been in the direction of according greater administrative finality to official action. Within the sphere of legitimate governmental functions, positive administrative adjudication constantly tends to replace the negative aspects of judicial control.[416] It is noteworthy that in the past the limitations upon the scope of judicial review were in a large measure self-imposed and based upon a frank recognition of the judicial inability to effectively supervise administrative affairs.[417]

Under the comprehensive review theory proposed by the drafters of the bill, the whole aim and object of administrative law would be frustrated by converting the administrative agency into "a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."[418] From a judicial viewpoint, perhaps the most persuasive argument against the establishment or employment of a more liberal judicial review is the fact that the judiciary are not equipped to reexamine findings of fact in the many technical and specialized fields of governmental administration.[419] With respect to a judicial review of fact determinations involving, as they frequently do, the exercise of a legitimate discretion or the development of an administrative policy, this argument is even more cogent. The considerations of administrative policy which militate against the segregation of quasi-judicial functions are similarly applicable to the review of these purely administrative decisions. It is not without significance that the Sankey Committee on Ministers' Powers indicated that it was "definitely opposed to any right of appeal from an administrative decision whether it contains a judicial element or not"[420] and was like-

[415] The realistic discussions of Jerome Frank have done much to correct the common attitude of judicial superiority. FRANK, LAW AND THE MODERN MIND (1930). See also, CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[416] Dimock, "The Development of American Administrative Law," 15 J. COMP. LEGIS. (3rd ser.) 35 (1933).

[417] Dickinson, "Judicial Control of Official Discretion," 22 AM. POL. SCI. REV. 275 at 279-281 (1928); Isaacs, "Judicial Review of Administrative Findings," 30 YALE L. J. 781 (1921).

[418] United States v. Louisville & Nashville R. R., 235 U. S. 314 at 321, 35 S. Ct. 113 (1914). See ROBSON, JUSTICE AND ADMINISTRATIVE LAW 304 ff. (1928); PORT, ADMINISTRATIVE LAW 294 (1929).

[419] Rosenberry, "Administrative Law and the Constitution," 23 AM. POL. SCI. REV. 32 at 42 (1929).

[420] REPORT OF THE COMMITTEE ON MINISTERS' POWERS 109 (1932).

wise "satisfied that there should as a rule be no appeal to any Court of Law on issues of fact."[421]

The foregoing remarks should not be interpreted as advocating the complete freedom of administrative action from judicial control. On the contrary, it must be recognized that some measure of control over official action is necessary to prevent arbitrary, capricious or unlawful interference with private rights. That a substantial part of this supervision must remain in the hands of the judiciary is also a recognized proposition. However, the urgency of this need should neither obscure the fundamental limitations which adhere in our judicial system nor destroy the advantages to be derived from a reasonably autonomous system of administrative justice. The judiciary should be used as a supervisory control only in connection with the performance of essentially judicial duties. For the most part, the present scope of judicial review is thus limited, largely through the self-restraint of the courts themselves. There is still something to be desired in the way of a satisfactory balance between free administrative action and the employment of traditional legal safeguards. The need for a formula to define the areas of administrative immunity and judicial superiority is one of the most pressing problems with which government is faced today. The provisions of the Logan bill authorizing a complete review of administrative activity, utterly fail to meet this urgent need; they place the whole emphasis on safeguards and ignore the resultant paralysis of administration. The existing haphazard methods of judicial control, despite their admitted defects and shortcomings, are decidedly preferable to the method suggested by the sponsors of the proposed legislation. The future of administration lies in the improvement of the administrative machinery itself. The need today is for the development of internal controls rather than the employment of the negative restraints of an external power. With a constantly improving administrative technique, the development of traditions and standards, a more effective discipline, and a superior personnel organization, the need for external supervision and control should become less and less. Judicial supervision may always have a proper place, but it should not be used to paralyze administrative action.

[421] Ibid at 108.

D. *The Substantive Provisions of the Logan Bill*

(1) *General Observations*

Before considering in detail the jurisdictional aspects of the proposed legislation a few general observations should be made. A comparison of the underlying theories advanced by the drafters of the bill with the ultimate jurisdiction vested in the new court, brings into sharp relief the utter lack of consistency with avowed principles. While it is stated that the proposed court should be created to exercise the quasi-judicial functions of administrative authorities, the legislation actually follows this course in only one instance, to wit, the jurisdiction to revoke and suspend licenses, permits or grants for regulatory purposes.[422] The remaining jurisdiction is transferred from previously established legislative and constitutional courts without apparent reference to any of the adopted theories previously examined. The practical results of this departure from theoretical objectives will be considered later in connection with the jurisdictional aspects of the bill.

Perhaps the outstanding feature of the Logan bill is its attempt to develop a single autonomous system of administrative justice,[423] based entirely on a classification of jurisdiction which relates to controversies arising between the government and private citizens.[424] This is not a new suggestion, but the implications of this proposal are not always fully realized. The establishment of such a system would be a decided step in the direction of adopting an administrative organization quite similar to that of the Continental *Droit Administratif*.[425] It is not within the province of this discussion to evaluate the merits or demerits of this system; but before taking such a step it would seem advisable to inquire whether it would not be preferable to adopt the Continental system as a whole rather than a piecemeal substitute for it.

Even a glance at the set-up of the proposed court makes it clear that efficiency in the dispatch of government business would be serious-

[422] To this might be added the present jurisdiction of the Board of Tax Appeals. However, this agency has a peculiarly independent status and consequently does not really fit into the concepts established by the drafters of the bill.

[423] This system of administrative autonomy is apexed by the United States Supreme Court. However, it has been pointed out that the effect of this supervisory control is practically negligible due to the discretionary nature of the remedy provided.

[424] The preamble of the Logan bill [H. R. 12297, 74th Cong., 2d sess. (1936)] states its purpose to be "To establish a United States Administrative Court to expedite the hearing and determination of controversies with the United States. . . ."

[425] REPORT OF THE COMMITTEE ON MINISTERS' POWERS 110 (1932); Borchard, "French Administrative Law," 18 IOWA L. REV. 133 (1933).

ly impaired by the constant retrial of issues. The legislation authorizes the appropriate section of the trial division to try the facts in accordance with the law in any proceeding coming before it. An appeal is then authorized to a similar section of the appellate division, which has a jurisdiction to review all matters appearing in the record—including both questions of law and issues of fact—and authority in its discretion to permit or direct the taking of additional evidence. In other words, the appellate division is authorized in any case to grant a trial *de novo* identical with that authorized in the trial division.[426] It is difficult either to explain or understand why there should be two stages in the procedure providing for a trial *de novo* within the same tribunal. This double trial of issues is particularly indefensible in cases where the administrative court is exercising its appellate jurisdiction to review the original determinations of an administrative agency. In those situations a private litigant is actually guaranteed the right to a trial *de novo* on three separate and distinct occasions. It seems reasonable to presume that the trial division will be composed of judges with precisely the same capabilities and qualifications as those serving on the appellate division of the proposed court. Consequently, the second trial would appear to serve no useful purpose and would certainly tend to delay and obstruct the functioning of governmental administration.

But even if it be assumed that private litigants require this unusual protection against administrative action, there would appear to be no real need for the establishment of a new court for that purpose. Both the District Court and the Court of Appeals for the District of Columbia are admirably suited to supply this protection. Moreover, since these courts have been accorded a dual status[427] not possessed by the ordinary constitutional courts, they could be vested with a jurisdiction to review administrative fact determinations as well as ques-

[426] It should be noted that this is not the end of many reviewing stages provided by the bill. Two further stages of appeal are permitted. If a party is not satisfied with the decision of the appropriate section of the appellate division, he may appeal to the appellate division sitting en banc. From this determination a final appeal is allowed to the United States Supreme Court upon a petition for a writ of certiorari. These two stages of review are restricted to questions of law appearing on the record.

[427] Without attempting to explain in detail the status of the courts of the District of Columbia it should be observed that these tribunals possess not only the power and authority of the traditional constitutional courts, but also the competency to be vested with a jurisdiction similar to that exercised by the courts of any state. See the first installment of this article, 35 MICH. L. REV. 193 at 204 et seq. (December, 1936).

tions of law. Furthermore, even though these courts are permitted to exercise an administrative jurisdiction their judges are accorded the substantial protection and guarantees of the third article of the Constitution.[428]

In the previous instalment of this article it was pointed out that both the desire of the framers of the bill to eliminate existing remedies in constitutional courts,[429] and their attempt to authorize an appeal to the Supreme Court, were subject to possible constitutional infirmities.[430] But aside from these objections, there are substantial considerations of policy against such a proposal. Private litigants should be afforded the protection of our traditional constitutional tribunals with respect to those questions affecting rights and privileges guaranteed by the Constitution. The present judiciary has efficiently served this purpose and the substitution of a legislative agency to carry out this task would be, to say the least, regrettable. Even with respect to those clear-cut judicial issues which arise so frequently in the operation of governmental functions, it would seem advisable to retain the remedies now available in those courts experienced in the problems of judicial control. The provisions of the bill authorizing an appeal to the Supreme Court upon a petition for a writ of certiorari, due to basic practical limitations, would not, as previously pointed out,[431] supply this urgent need for traditional judicial supervision.[432]

(2) *Jurisdiction Now Vested in Legislative Courts and the Board of Tax Appeals*

The provisions of the bill authorizing the transfer of the jurisdiction now vested in the Court of Claims, the Customs Court and the Court of Customs and Patent Appeals are not seriously objectionable. However, this proposed transfer would offer little, if any, advantage

[428] O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933). As a matter of fact these are the only courts which would be available to the drafters of the bill if they desire to give a full effect to the more comprehensive review theory as well as the judicial independence theory.

[429] See Part I, 35 MICH. L. REV. 193 at 220 et seq. (December, 1936).

[430] See Part I, 35 MICH. L. REV. 193 at 250 et seq. (December, 1936).

[431] See Part I, 35 MICH. L. REV. 193 at 251, notes 346 and 348 (December, 1936).

[432] This conclusion does not conflict in any way with the author's previous position with respect to the more comprehensive review theory. See page 581 ff., supra. Under the present system of administration, the author conceded the need for a judicial control in certain limited respects. When administrative standards and personnel qualifications have been substantially improved this traditional judicial supervision can be gradually reduced as internal controls become more effective.

either to private litigants or to the administration of government service. The bill provides that the judges of these courts shall be transferred to the appropriate sections of the administrative court, presumably for the purpose of performing the same functions. In these respects the Logan bill accomplishes little more than a change in name. The same observations are true with respect to the transfer of the jurisdiction now possessed by the Board of Tax Appeals. However, the changes in procedure which have already been considered would create many new difficulties not at present experienced in these independent tribunals.

(3) *Jurisdiction Over Tax Matters*

The transfer of the jurisdiction now vested in the district courts of the United States over actions for the recovery of taxes or suits to enjoin their collection is open to very serious objection. Apart from the probable unconstitutionality of such a proposal,[433] there would appear to be many basic considerations of policy against the outright transfer of this particular jurisdiction from a court surrounded by the protection of the Constitution to a legislative tribunal under the potential domination of Congress. These controversies are purely judicial in their nature, involving as they usually do questions of statutory interpretation and constitutional power. Consequently it would seem more desirable to allow the existing remedies to remain intact in these courts; they are already familiar with and experienced in the adjudication of these specialized controversies. The issues presented in tax litigation neither involve real administrative problems nor raise questions which could be more suitably determined by judges sitting on a tribunal established for the purpose of reviewing administrative determinations. There are certain undoubted advantages to be attained by the centralization and unification of jurisdiction over tax controversies, but the more effective method of accomplishing this objective would appear to be by utilizing the existing constitutional courts. Moreover, the transfer of tax jurisdiction to a legislative court cannot be justified by reference to any theory or explanation advanced by the drafters of the bill. The real purpose for creating the new tribunal has utterly no relation to the proposal with respect to the transfer of the jurisdiction over tax controversies now possessed by the regularly constituted judicial agencies.

[433] Part I, 35 MICH. L. REV. 193 at 216 (December, 1936).

(4) *Jurisdiction in Proceedings by Extraordinary Process Against Officers and Employees of the United States*

The provisions of the bill authorizing the transfer of the jurisdiction now vested in the courts of the District of Columbia in proceedings by extraordinary process are subject to the same objections which relate to tax jurisdiction. In substance, the proposal amounts to a withdrawal of existing constitutional remedies by vesting such jurisdiction in a legislative agency. The substitution of legislative courts for the regularly constituted judiciary, performing essentially judicial duties, is ordinarily a most unwise policy. The judges of the courts which are now handling these controversies are well informed and expert in matters of a judicial nature pertaining to governmental administration. The members of a new tribunal could hardly be better informed and most certainly would not have the experience now possessed by these judges. Due to the fact that the heads of the executive departments of the government reside in Washington, where they are subject to judicial process only,[434] the judges of the courts in the District have had more contact with and experience in these matters than any other members of the federal judiciary. It is probably in the public interest to have these fundamentally important controversies, testing the statutory and constitutional powers of administrative officers, decided by judges with wide knowledge and experience in both public and private law. The determination of these controversies is not suited to the judges of a specialized legislative tribunal. Such specialization and experience as they would acquire in time, would be too one sided; it would undoubtedly tend to make them oblivious to the considerations which affect important questions in the private law field.

It has been suggested by one writer that the courts of the District are inexperienced in matters relating to federal jurisdiction and that their work for the most part relates to divorce proceedings and other local matters of a non-federal nature.[435] Quite the contrary appears to be true. During the last few years between fifty and sixty per cent of the controversies heard in the Court of Appeals for the District were cases directly raising federal questions. Many of these cases involved questions of great national importance.[436] Due to this fact approxi-

[434] 28 U. S. C., § 112. See Part I, 35 MICH. L. REV. 193 at 224, note 201 (December, 1936).

[435] See McGuire, "The Proposed United States Administrative Court," 22 A. B. A. J. 197 at 198 (1936).

[436] See for example: North American Co. v. Landis, (App. D. C. 1936) 85 F. (2d) 398; Deutsche Bank und Disconto-Gesellschaft v. Cummings, (App. D. C. 1936)

mately seventy per cent of the court's time has been occupied in the trial and consideration of these federal controversies. Although the proportion of federal cases is substantially less for the District Court of the District of Columbia, a large number of its adjudications relate to federal questions, many of which are also of considerable public importance.[487] Under no circumstances could it be said of the courts of the District that they are inexperienced or unfamiliar with the problems arising in governmental administration.

As in the case of the jurisdiction over tax matters, the purpose of transferring this jurisdiction is not revealed by an examination of the drafters' underlying theories. This jurisdiction is purely judicial in character and the impropriety of placing it in a new and uninformed tribunal seems obvious. This suggestion for the establishment of a new administrative court is a typical example of the unfortunate and characteristically American desire to create new instrumentalities of control rather than to utilize the existing governmental machinery and preserve the many advantages and facilities which have been developed through experience.

(5) *Jurisdiction to Revoke or Suspend Licenses, Permits or Other Grants*

The transfer of the authority now vested in the various administrative agencies to revoke licenses, permits or grants for regulatory purposes gives rise to several fundamental questions of sound administrative policy. This is probably the only proposal in the jurisdictional provisions of the bill which has any relation to the underlying theories advanced by the drafters of the legislation. Since the revocation or suspension of these licenses involves the exercise of quasi-judicial functions, this jurisdiction comes within the purview of the judicial segregation theory. Most of the arguments which were advanced against the adoption of this theory are applicable to this suggested transfer of authority. Without attempting to review those criticisms the following pertinent points should be observed. The proposed court would be vested with a vast jurisdiction over miscellaneous and varied mat-

83 F. (2d) 554; Boeing Air Transport, Inc. v. Farley, (App. D. C. 1935) 75 F. (2d) 765; Sykes v. Jenny Wren Co., (App. D. C. 1935) 78 F. (2d) 729; MacCracken v. Jurney, (App. D. C. 1934) 72 F. (2d) 560.

[487] See for example: Alton R. R. v. Railroad Retirement Board, (D. C. D. C. 1936) 16 F. Supp. 955; Carter v. Carter Coal Co., (D. C. D. C. 1936) as yet unreported; Silas H. Strawn v. Western Union Telegraph Co., as yet unreported; Ewa Plantation Co. v. Wallace, 1 S. C. D. C. (N. S.) 208 (1934).

ters, each of which is now handled by an administrative agency expert in the particular subject matter of the regulatory license and thoroughly familiar with the problems of administration in that respect. One of the basic reasons for the phenomenal growth of administrative authorities and their accompanying powers has been the necessity of having such problems handled by persons of specialized skill and knowledge. As the problems of public administration become more complex through the constant extension of governmental functions, the necessity for at least initial expert or technical determination becomes greater and greater. Proceedings for the revocation of licenses are as much a part of the administrative process as the initial granting or refusal of licenses. In most instances, precisely the same issues are raised in both proceedings. There do not appear to be any substantial reasons for transferring the later process of revocation to a legislative tribunal quite unfamiliar with the elements of public policy and discretion which are so vitally essential to the efficient performance of administrative duties. The possibility of placing judges on this new tribunal who are skilled and experienced in the technical problems of license revocations is extremely remote, as the requisite type of skill must of necessity vary with the subject matter of the license grant.[438]

To require an administrative agency to institute and succeed in an independent proceeding before a licensee could be relieved of his privileges, might often result in great public harm because of the lapse of time involved in such a procedure. Many of these revocation proceedings are emergency matters and should be dealt with as soon as grounds for revocation are discovered. This is particularly true with respect to license requirements in the interest of public safety, health or morals.[439] Although the Logan bill provides that licenses and permits may be suspended during this period of litigation the burden

[438] It would be impracticable to attempt to list in detail the multitude of specialized and technical fields these license regulations affect. See Koons, Growth of Federal Licensing," 24 GEORGETOWN L. J. 293 (1936).

[439] For example, the jurisdiction of the Department of Commerce to revoke the licenses of pilots, the jurisdiction of the Federal Alcohol Administration to revoke permits of distillers of intoxicating liquors, the jurisdiction of the Secretary of Commerce to revoke registrations of aircraft or pilots, the jurisdiction of the Secretary of Agriculture to revoke licenses for the importation or shipment of serums and toxins for use in the treatment of domestic animals, the jurisdiction of the Commissioner of Internal Revenue to revoke licenses for dispensers of narcotics and dealers in firearms, and the jurisdiction of the National Munitions Control Board to revoke the licenses of manufacturers or exporters in arms, ammunition and implements of war, are all matters which require more or less summary action in order to avoid injury to the public in these specific respects.

would be upon the administrative authority to justify this action. Such a provision would not afford sufficient assurance that public harm could be avoided by existing summary process now utilized by administration. In view of these many inherent difficulties, it seems clearly unwise either to attempt to consolidate so many diverse and variegated administrative duties in one tribunal or to reverse the present practice of authorizing summary revocation proceedings in the interest of the general public. It should not be forgotten that arbitrary or unlawful revocation of licenses is subject to direct attack by private litigants in the courts of the District of Columbia.

(6) *Jurisdiction to Review Refusal to Admit to Practice and Disbarment from Practice*

The provisions of the bill granting to the new court the authority to review the action of any department or other establishment of the government for refusing to admit any person to practice before it, or for disbarment of such person, bear little, if any, possible relation to the other jurisdiction conferred upon the suggested court. It should be noted that this is a newly created jurisdiction, not previously vested in any other tribunal or court except to a very limited extent.[440] As a matter of principle, this type of jurisdiction seems to be a particularly unfortunate encroachment upon the established prerogatives of administrative authorities. On its face, jurisdiction of issues involving the right to practice before administrative agencies, appears to be totally out of place in a tribunal established for the purpose of performing the singular function of protecting private rights from administrative action. It can hardly be questioned that the administrative authorities themselves should be endowed with the original authority to determine the qualifications and ability of those desiring to practice before them. Such requirements are made on the basis of specialized knowledge and technical ability to represent clients who are involved in controversies with the agency in question. It has been found necessary to establish these standards of fitness and ability in order to insure a proper presentation of all the issues in each case handled by the administrative authority. This procedure not only protects the interests of private litigants but tends to insure more completely the ultimate effectuation of governmental policies. In this view of the matter it is desirable that the authority establishing the qualifications for practice should likewise be the agency to determine whether these require-

[440] See Part I, 35 MICH. L. REV. 193 at 239 (December, 1936).

ments are met by the individual in question; it should not be subject to interference by some independent tribunal unfamiliar with the particular problems. In any event, it seems unwise to subject these tribunals to uniform rules and qualifications with respect to the persons appearing before them. The presence of an external reviewing authority would undoubtedly tend to produce this result. In the last analysis, these proceedings involving the right to practice before an administrative agency are essentially administrative matters in both form and substance and seldom relate to questions which even approach a judicial function. While the sufficiency of a procedure resulting in a refusal to admit to practice or in a disbarment may raise judicial questions, it should be recognized that not even in this respect should administrative agencies be required to adopt absolutely uniform provisions. Under the present system, a right of appeal is now available to the courts of the District of Columbia, and hence to the Supreme Court, on issues involving the basic sufficiency of the procedure before the administrative authority. Beyond this a right of review should not be extended to those desiring the privilege to practice before a government department.

CONCLUSION

As a result of the foregoing examination, two fundamental observations have been developed which are worthy of a final word. The first concerns the substantive provisions of the Logan bill and their utter lack of relation to the underlying theories advanced by the drafters of the legislation. The second observation relates to certain of these theories which indicate an unmistakable hostility toward a wholesome freedom of administrative activity.

The complete inconsistency between the theoretical purposes of the advocates of the bill and the practical application of these objectives defies reasonable explanation. The drafters of the bill commenced with many assumptions concerning the dangers of administrative lawlessness which, it must be conceded, have a ring of plausibility in certain respects. In translating these fears into practical safeguards a bill is proposed which for the most part results in a substantial emasculation of traditional judicial remedies. The substitution of an administrative court endowed with a few judicial remedies for the regularly appointed judiciary represents a policy which must be viewed with some apprehension. In the single instance in which the legislation vests the proposed court with a true quasi-judicial function in accordance with the judicial segregation theory, there is required the

exercise of skill and experience obviously not possessed by the judges of that or any other similarly constituted tribunal. Instead of relieving the existing confusion in the machinery of governmental administration, the jurisdictional aspects of the Logan bill not only add to this confusion but impinge upon the established safeguards developed by a century of experimentation within the framework of our judicial system.

A careful analysis of the drafters' theories regarding the control of administrative action—particularly the principle advocating a more comprehensive review—reveals what seems to be a fundamental dislike for administrative activity. This basic hostility runs through most of their assumptions and many of their proposals. A counterpart of this attitude is to be found in the wholehearted acceptance of the doctrine of judicial superiority. Unfortunately, much of the hostility toward administration is born of a dislike for governmental interference with private initiative rather than of a fear of unauthorized or arbitrary action by government officials. Those who cry the loudest for a judicially controlled administration are quite frequently the same individuals who openly advocate a return to the doctrine of *laissez-faire*. Within the expanding sphere of governmental functions, administration must be accorded a welcome place free from the paralyzing concepts of legalistic formulae. Judicial supervision and administrative action both have a function to perform within this field of governmental operation; but neither may encroach upon the other's domain without disrupting the entire system of government responsibilities. These observations are not without serious political import. The development of an efficient administration is vital to the existence and operation of any government, regardless of its form. If the idea of an administrative bureaucracy is generally considered to be irreconcilable with the guarantees of individual liberty under a democracy by reference to such dogma as the "rule of law" or the "supremacy of law," popular government will inevitably give way to a more suitable form of political society. Due to the present tendency to rely on government for the correction of economic and social maladjustments, the future of our industrial and political democracy may depend, in no small measure, upon the ability of popular government to assimilate a responsible bureauracy into its governmental framework, without sacrificing fundamental political principles.