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# Causes and Cures of Administrative Delay

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Although administrative agencies have been created to provide expeditious determinations of matters that courts and legislatures could not handle, delay still continues. Three basic methods of attacking the problem have been suggested—reduce the number of cases to be decided; increase the capacity of the system to decide the cases; and reduce the time required to decide individual cases.

UNDUE DELAY IN THE administrative process has been a major concern for a long time. While administrative agencies were created to provide expeditious determinations of matters that courts and legislatures could not effectively handle, a continuing chorus of complaints of delay in the administrative process indicates the ideal has not yet been achieved.[1]

The mere fact that this phenomenon has persisted despite a succession of efforts to ameliorate the situation provides strong evidence that delay in the administrative process is not easily cured. Like court congestion, the provision of administrative justice is a problem that is immensely complex and stubborn.[2] Simplistic solutions, once-and-for-all answers, will not eliminate delay except at the expense of other values, such as party participation.

The concept of "delay" is itself an ambiguous one. Presumably the complaint is that more time is necessary for a particular decision than the critic thinks is necessary. This, of course, presumes the existence of a norm or reasonable time for the handling of average cases. But that yardstick has not been established as yet.

Much of the rhetoric of "delay" is of the "whose ox is being gored" variety. Private persons in the position of applicants seeking government approval or action tend to complain bitterly about delays in the handling of their request or applications. When the shoe is on the other foot, however, and an opposing interest or competitor is seeking something from government which they oppose, there is little talk of administrative delay. The rhetoric at this point is that of "hasty, ill-considered decisions", or of "lack of adequate procedures to reveal the deficiencies of the application". From the latter perspective, the special rights of participation provided by a trial type of hearing are seen as an essential opportunity to educate the decider, resulting in a higher quality decision. Wholly apart from the merits, a trial type of hearing may also be used as a vehicle for delay by parties that wish, if all else fails, to postpone the inevitable.[3]

There is a tendency on the part of many lawyers to believe that tinkering and patching with procedural innovations will somehow provide an over-all cure for administrative ailments. Many years of experimentation with this approach have demonstrated that it offers scant hope for dramatic results. Delegation of decisional authority to review boards of presiding officers,[4] use

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AUTHOR'S NOTE: The views expressed herein are not necessarily the views of the Administrative Conference.

1. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960); Kaufman, *Have Administrative Agencies Kept Pace With Modern Court-Developed Techniques Against Delay?—A Judge's View*, 12 AD. L. BULL. 103 (1959-60); Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968); GARDNER, THE ADMINISTRATIVE PROCESS, LEGAL INSTITUTIONS TODAY AND TOMORROW 108 (1950).

2. Rosenberg, *Devising Procedures that Are Civil To Promote Justice that Is Civilized*, 69 MICH. L. REV. 797 (1971).

3. Instances of the use of procedural rights by incumbent firms as a method of delaying the authorization of new competition by licensing agencies is a common occurrence. Comparative broadcast licensing by the FCC, air route licensing by the CAB, and motor carrier licensing by the ICC provide many examples. More recently, environmental groups have used procedural rights in licensing proceedings as a method of delaying as well as shaping the licensing of new power or other facilities.

4. See generally Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969). The Administrative Conference of the United States has a recommendation on this subject: Recommendation No. 6 of the Administrative Conference of the United States (Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency) (December, 1968).

of prehearing conferences[5] and substitution of written evidence for the testimonial process[6] are examples of procedural innovations that are capable of making marginal improvements. But none of these devices is appropriate for universal application, and each has severe limits. Emphasis on procedural tinkering, moreover, focuses attention on the warts of the system rather than on the fundamental deficiencies that create the problem. What is critically needed is re-evaluation of fundamentals.

A principal reason for administrative delay is our preference for procedural systems in which affected interests are given broad rights of participation in the decisional process.[7] A legislative choice has been made in favor of trial types of hearings for the determination of many matters that are essentially nonjudicial in character.

## Trial Type of Hearings May Not Be Accurate

The allocation of air or motor carrier routes, the consideration of rail merger proposals, the determination of the lawfulness of important rate filings are all species of economic regulation that should rest on fundamental policy considerations, such as the degree of competition or monopoly that is appropriate in a particular area, the persons or places that should receive subsidized service at the expense of other users, and the quality or character of the service that is appropriate. There is substantial doubt whether a trial type of hearing—a determination made on the basis of an elaborate factual record produced in an adversary hearing—is an accurate or efficient method of making decisions of this character.[8] Thousands of pages of unevaluated raw data are often submitted in the hope that some part may prove relevant and persuasive. All too often decisions are reached on a record that is stale.[9]

This system, however, is acceptable to government lawyers charged with regulatory responsibilities, to the regulated firms that are most directly affected and to the courts that review the decisional process. Yet the special rights of party participation that are entailed almost inevitably produce a long, drawn-out proceeding.

"Delay" is a pejorative word. The term assumes that the time consumed for a particular decision is undue or unreasonable. The assumption is that a substantial saving of time is possible without impairing the quality of the decision, the rights of the participants or other social values involved. While improvement in any governmental process is clearly possible—the Administrative Conference of the United States is devoting its efforts toward this end—there are reasons to believe that any dramatic reduction in the time required for a particular decision is likely to have important effects on other values—impartiality, moderation, reasoned decisions—and on substantive outcomes. One should not have illusions about the possibilities of readily getting widespread agreement concerning the elimination of trial type of hearings for many matters for which they are now provided or other devices that would dramatically affect the time in which particular decisions are made.[10]

Indeed, the trend of events is in the direction of more and longer hearings rather than fewer and shorter hearings. The prospects for curtailing "administrative delay" are not promising. One major reason is the legislative and judicial tendency to extend trial procedures into new areas. The spread of protracted hearing requirements into the welfare, grants and benefits, government contracts, and many other formerly proprietary decisions of government is all too familiar.[11] A similar trend toward more formalized proceedings may be found in recent legislation delegating rule-making authority to agencies, particularly as to safety standards.[12]

A second reason for believing that administrative delay will be an increasing problem is the contemporary and legitimate concern for broadened participation in the administrative process. New interests, funded from both private and public sources, are providing effective representation in administrative proceedings of interests that were previously unrepresented.[13] It seems likely that government funds will increasingly be made available to private and public groups that are advancing the special interests of the poor, minorities, the environment or

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5. There has been a great deal of uncritical discussion of the pretrial conference as a device for expediting adjudicatory proceedings. Professor Maurice Rosenberg's classic study of the effects of mandatory use of the device in the New Jersey courts established that mandatory pretrial conferences did not save judge time but did have effects on the outcome of cases. See ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

6. See GELLHORN & BYSE, ADMINISTRATIVE LAW—CASES AND COMMENTS 741-744 (5th ed. 1970).

7. See Cramton, *The Effectiveness of Economic Regulation—A Legal View*, 54 AMER. ECON. REV. 182, 185-186 (1964); Jaffe, *The Effective Limits of the Administrative Process*, 67 HARV. L. REV. 1105 (1954).

8. See Gellhorn, *Administrative Procedure Reform: Hardy Perennial*, 48 A.B.A.J. 243 (1962); Boyer, *An Inquiry into the Use of Trial-Type Hearings for Resolving Scientific, Economic or Social Facts* (a working paper of the Administrative Conference of the United States, 1971).

9. The Northeast Airlines Florida renewal case provides an illustration. After the CAB's decision against renewal of the certificate had been reversed and remanded for "further study . . . and an explicit statement" of reasons, *Northeast Airlines* v. *CAB*, 331 F. 2d 579 (1st Cir. 1964), the board supplemented the hearing record, compiled in 1963, with data concerning Northeast's operations in 1963 and 1964. The board's denial of renewal was again reversed, on the ground that Northeast was entitled to a full hearing to rebut the inferences drawn from the noticed data. *Northeast Airlines*, v. *CAB*, 345 F. 2d 484 (1st Cir. 1965). At this point, a frustrated board abandoned its lengthy effort to remove Northeast from the Florida route. Northeast was first acquired by Storer Broadcasting, and more recently merged with Delta.

10. The stalemate with respect to legislative reform of the surface transportation field is illustrative. There is widespread agreement that the current regulatory framework is inadequate, but the incumbent interests resist any change that may expose them to new competitive pressures or instability. See Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 978-992 (1971); NOLL, REFORMING REGULATION (Brookings Institution, 1971).

11. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) (basic ingredients of trial hearing are required prior to termination of a welfare benefit), is the leading case in the welfare field. See also *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D. C. Cir. 1964) (debarment from eligibility for government contracts); *Green* v. *McElroy*, 360 U. S. 474 (1959) (public employment).

12. *E.g.*, Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1392, 1394 (1970); *Automotive Parts & Accessories Association* v. *Boyd*, 407 F. 2d 330 (D.C. Cir. 1968).

13. See, *e.g.*, Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L. J. 525 (1971), and the materials cited therein.

consumers.[14] The exercise by these groups of the procedural rights long exercised by economic interests of the more traditional sort already has had a substantial impact on the administrative process. Delays encountered by public utilities in the licensing of new electric generation facilities by the Atomic Energy Commission and the Federal Power Commission provide a good illustration.[15]

In sum, the prospects are for more "delay" rather than less. It is for this reason that systematic study of the administrative process, of the utility of trial types of procedures and of the phenomenon of delay and its causes is a crucial need of the years ahead. Otherwise, things will get worse rather than better.

There are three basic methods of attacking the problem of administrative delay: reduce the number of cases which must be decided; increase the capacity of the system to decide cases; and reduce the time required to decide individual cases. Most discussions focus on the third, although there are excellent reasons for believing that the other two approaches offer far greater opportunities for larger improvement. The reason for concentration on this approach is apparent. Minor changes in the handling of special classes of cases will have the least effect on the system as a whole, and they can be made without reconsideration of fundamental policy and without increased appropriations. But this tactic may prove to be shortsighted in the long run.

The heavy volume of cases that require extended trials is a major cause of administrative delay. Trial types of procedures are expensive and time consuming. Even if an ample supply of presiding officers and deciders is available, the participation of a large number of parties and lawyers will inevitably produce reasonable requests for adjournments and delays. Since standards of relevancy and applicable policies are often ambiguous, the scope of a proceeding may be extremely broad. And if fundamental questions, such as the degree of competition to be allowed, are relitigated in every individual proceeding, as tends to be the case in the transportation agencies, an immense effort will be devoted to decisions that inevitably have an *ad hoc* character.[16]

## Three Matters Deserve Serious Attention

Three matters are deserving of serious attention. First, we should consider whether formal hearings of the trial type are really essential for all the governmental decision making to which these requirements are now applied. Do trial procedures in the transportation field, for example, produce better decisions than a more fluid and flexible legislative hearing process in which written comments and some oral argument would be the exclusive basis of party participation? Equally important, most careful thought should be given before extending trial procedures into new areas.[17]

Second, the articulation of policies and standards and the promulgation of rules by agencies can remove many issues from trial-type proceedings and sometimes eliminate the hearings themselves.[18] When the Federal Aviation Administration ruled that pilots over sixty could not fly commercial airplanes, it obviated the necessity of a determination of each pilot's health at the cost, obviously, of substituting an arbitrary rule-of-thumb for a result tailored to individual circumstance.[19] The Federal Communications Commission's exclusion of applications for broadcast facilities that exceed the maximum ownership limitations established by rule is another illustration of the formulation of policy in a form that forecloses a certain number of individualized proceedings.[20] If the Interstate Commerce Commission were to establish some general rules concerning the desirability of increasing competition on motor carrier routes or eliminating the fragmented commodity certificates prevalent now, the current massive number of motor carrier route applications proceedings could be reduced and those remaining simplified.[21] The problem is that clear-cut

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14. See, *e.g.*, Recommendation No. 5 of the Administrative Conference of the United States (REPRESENTATION OF THE POOR IN AGENCY RULEMAKING OF DIRECT CONSEQUENCE TO THEM); H.R. 10835, 92d Cong., 1st Sess. (1971) (a bill creating a consumer advocacy agency empowered to intervene in other agencies' proceedings; passed by the House, it is under consideration in the Senate); S. 2035, 92d Cong., 1st Sess. (1971) (an administration bill that would create an Indian Trust Counsel Authority to represent Indians in administrative and court proceedings involving natural resource matters).

15. See, *e.g.*, ELLIS & JOHNSTON, LICENSING OF NUCLEAR POWER PLANTS BY THE ATOMIC ENERGY COMMISSION (a tentative staff report of the Administrative Conference of the United States) 1-3, 19-24 (1971); Ramey, *Reactor Licensing Delays in Perspective: Problems, Progress, New Directions*, reprinted in *Hearings of Joint Committee on Atomic Energy on AEC Licensing, Procedure and Related Legislation*, 92d Cong., 1st Sess. (1971), v. 3, 1571.

16. See Cramton, *supra* note 7, at 182-185; Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L. J. 931 (1965).

17. The Administrative Conference of the United States is embarked on an ambitious study of the appropriate use of the trial hearing in administrative decision making.

18. See FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970).

19. *Air Line Pilots Association* v. *Quesada*, 276 F. 2d 892 (2d Cir. 1960).

20. *United States* v. *Storer Broadcasting Company*, 351 U. S. 192 (1956) (FCC regulation limiting the maximum number of stations per owner).

21. See, *e.g.*, Note, *Federal Regulation of Trucking: The Emerging Critique*, 63 COL. L. REV. 460 (1963).

policy is sometimes difficult to formulate and even more difficult to live with once formulated. Many agencies prefer an *ad hoc*, subjective approach that leaves the deciders more options at every stage.

Third, the settlement of controversies prior to a trial hearing will reduce the total number of extended proceedings. The adoption of procedures and policies which provide for settlement of controversies by agreement of the agency concerned and the interested participants should be encouraged. While some agencies, for example, the Federal Power Commission, employ these procedures to a large extent, they are little used by others.[22] Yet if there is some basis for predicting with reasonable assurance what the outcome of a formal proceeding is likely to be, procedures that facilitate settlement are highly desirable.

It would be unfortunate if simplistic notions that make trial hearings obligatory were adopted. *Moss v. Civil Aeronautics Board*, 430 F. 2d 891 (D.C. Cir. 1970), in which consumer representatives were excluded from informal rate discussions between the board and air carriers, contains a possible implication that negotiated rate settlements are not in the public interest, but it does not make a formal hearing necessary in all cases. The Administrative Conference has completed a study of settlement and suspension procedures in the rate field, which we hope will lead to more effective utilization of these devices.[23]

Extensions of regulatory authority, growth of the population and the effect of greater affluence in expanding the ability to litigate operate to increase substantially the number of administrative cases that must be decided. Legislative and judicial determinations that particular issues must be given a trial type of hearing also expand the workload that agencies must handle. If it is not possible to reduce the inflow of cases, it may be possible to increase agency capacity to handle the cases that must be decided. Two basic options are available: (1) increase the productivity and capacity of the existing agency staff; and (2) enlarge the agency's staff and resources.

It is doubtful that any substantial reduction in delay can be achieved through attempts to obtain greater productivity from existing staffs. Factors that affect employee productivity, such as morale, diligence and capacity, may be influenced by better agency leadership and by general improvements in working conditions or pay, but dramatic changes are difficult to bring about. In many agencies, moreover, staff attorneys are overextended by existing heavy workloads.

Agency heads and their colleagues also may be working at full capacity now and be unwilling to allocate more time to the decision of individual cases than they now do. And while delegation of decisional authority to hearing examiners or to employee review boards may relieve agency members from a mass of routine cases and allow them to focus their attention on major policy matters, the internal shift of workload may result in only marginal reductions in the time it takes to try a case.[24]

Existing evidence tends to show that the bulk of the time required by most administrative proceedings does not occur in the hearing room itself but during the preparatory stage prior to hearing, during the preparation of an initial decision by a hearing examiner and in the review of that initial decision by the agency staff and agency members. More efficient and timely staff work during the preparatory and decisional stages would increase an agency's capacity to handle administrative cases. Past efforts to increase the productivity of persons engaged in a quasi-judicial capacity, however have not had large success. Independent hearing examiners, like judges, are reluctant to change their methods of presiding over cases or to spend less time on what some may view as overelaborate initial decisions.

Systematic comparative study of the decisional process in various agencies and departments is needed badly. The Administrative Conference has begun modest comparative studies of the handling of important functions by several agencies, for example, rulemaking on a record in the Food and Drug Administration and other agencies and disability benefit proceedings in the Veterans Administration and the Social Security Administration. Another study will attempt to answer the question of whether better management and more efficient use of personnel could result from vesting increased administrative authority in the chairman of an independent regulatory agency. The resources of the Administrative Conference, however, are inadequate to do the total job that is required in this and other areas.

The second method of increasing the capacity of a procedural system is to provide it with larger manpower and resources. The tendency in recent years has been to deprive regulatory agencies of needed funds and manpower despite increasing workloads.[25] The personnel of the Interstate Commerce Commission, the Federal Maritime Commission and the Civil Aeronautics Board decreased during the period 1965-1970 by 20 to 25 per cent. Other agencies, such as the Federal Power Commission and the Federal Communications Commission, have remained unchanged in staff during this same period. Among the independent regulatory agencies, only the Federal Trade Commission and the Securities and Exchange Commission have had modest and recent increases in staff.

While the addition of federal judges has not entirely stemmed the tide of rising delays in civil and criminal litigation, it has prevented a breakdown

22. See, *e.g.*, Spritzer, *The Uses of the Summary Power to Suspend Rates: An Examination and Critique of the Practices of Federal Regulatory Agencies*, 120 U. PA. L. REV. 39 (1971).

23. The article by Ralph Spritzer, *supra* note 22, was the initial product of this study, which is being undertaken by the Committee on Rulemaking of the Administrative Conference. On June 9, 1972, the Administrative Conference adopted Recommendation 35 (Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies).

24. The Administrative Conference, created in 1964 by the Administrative Conference Act, 5 U.S.C. § 571 *et seq.*, and becoming operative in 1968, is an independent federal agency concerned with the improvements of the procedures by which federal agencies and departments affect private interests and rights.

25. See NOLL, REFORMING REGULATION 77-88 (Brookings Institution, 1971).

of our judicial system. When it is considered that more rights affecting more people are decided by administrative agencies than by the courts, it would surely follow that these agencies should be adequately staffed to carry out their responsibilities in a reasonably expeditious manner.

A great deal of thought has been given to devices that will shorten the time required to decide individual cases. The Administrative Conference has made recommendations on the more widespread use of summary judgment techniques, elimination of the delays caused by interlocutory appeals from rulings of presiding officers, greater use of discovery and written evidence, and articulation of standards and policies that simplify the trial of individual cases. Devices that shorten the decisional process by delegating authority to decide cases to hearing examiners or employee review boards have already been mentioned. In addition to improving the capacity of the entire system by releasing the time of agency heads, delegation of decisional authority may shorten the average processing time of particular classes of cases.

Much can and should be done in this area. But this part of the problem has been more fully explored than the others, and we are beginning to reach a stage of diminishing returns. It is becoming more and more obvious that the tinkering and patching approach can never fully resolve delay.

The average citizen is not concerned with the intricacies and details of government. If he needs a two-way radio in his business, he wants it now. If he believes he is entitled to social security or to disability benefits, he does not want to spend months in litigation, mortgaging his prospective income to pay attorneys' fees. The businessman who needs a loan, the broker who wants to sell stock, the manufacturer who bids on a contract, the company that wants to merge, these and thousands of others are entitled to have their claims acted upon promptly and fairly. It is the task of the Government, and the special mission of the Administrative Conference of the United States,[26] to see that this is done.

Some specific suggestions for improvement of the administrative process follow:

**1. Procedural Innovations.** We need to continue to search through agency procedures and devise new techniques for shortening proceedings. Once a case has been designated for hearing, it normally moves to initial decision without undue delay. However, much can be done to expedite the process of handling applications from the time of filing to designation and from the initial decision until final agency action.

**2. Public Participation.** The right of greater public participation in administrative proceedings which affect broad economic and social interests is unquestioned. Procedures must be devised to accommodate this participation without delaying the ultimate disposition of the proceeding.[27]

**3. Settlements.** Agencies should adopt policies and procedures looking to the resolution of proceedings, either in part or in whole, without the necessity of conducting a full formal hearing.

**4. Trial Hearings.** There is general agreement that trial hearings are being employed in proceedings where their utility is highly questionable. Efforts to delineate areas where a legislative type of hearing would suffice should be undertaken, with the necessary statutory or procedural changes to effectuate the changes.

**5. Articulation of Agency Policies and Standards.** Many statutes delegate regulatory authority with almost undefined and unlimited discretion. Agency policies should be articulated, and the standards that guide its determinations reduced to rules to the maximum extent practicable. This would result in a material reduction in the number of case-by-case adjudications now necessary because of the lack of adequate definition of agency policy.

**6. Review of Regulatory Enabling Acts.** While considerable attention has been focused on streamlining procedures in order that agencies may keep abreast of increasing workloads, far too little attention has been given to revising the basic statutory philosophy which underlies the agency's regulatory activities. For example, a re-examination of the laws governing communications and transportation in terms of modern-day needs for regulation may well disclose much unnecessary action which results in a proliferation of litigation of little or no consequence.

**7. Statistical Information.** Little comparative information is available concerning the extent and causes of administrative delay in federal agencies. Systematic and continuous collection of a common body of statistical information concerning administrative proceedings would produce many of the same benefits with respect to the administrative process that statistics gathered by the Administrative Office of the United States Courts have had for the improvement of the judicial process. The problem of administrative delay must be approached in other than an anecdotal fashion if real progress is to be achieved.

**8. Personnel.** There can never be any real substitute for an adequate complement of competent people to carry on the day-to-day operations of government. Congress must be persuaded to provide adequate funds in order that the agencies may attract and retain able people dedicated to public service.

Judge Prettyman stated the problem of delays in the administrative agencies and the responsibility of the Administrative Conference effectively:

> It is all very well to have theories, but I am devoted to the thesis that government is supposed to work. Our administrative system works pretty well, but in lots of cases it has substantial flaws: it costs too much; it takes too long; and the process is too cumbersome.
>
> This Conference has the opportunity to make the administrative part of a democratic system of government work.[28]

26. See *1970-71 Annual Report of the Administrative Conference of the United States* for a review of the conference's current activities.

27. A recommendation on this subject was adopted by the Administrative Conference at a meeting in December, 1971. See Recommendation No. 28, Public Participation in Administrative Hearings.

28. See *1969 Annual Report of the Administrative Conference of the United States* 13.