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Discussion of Administrative Procedure

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DISCUSSION*

by ISIDOR LOEB†

This symposium is an evidence of the changes that have occurred in the last half century. While Administrative Law has always existed in this country there was no recognition of it as a separate branch of law 50 years ago. Though I had previously taken my degree in Law I do not recall having heard the term used until 1894, when I was a student under Professor Goodnow who had just published his treatise on Comparative Administrative Law.

The recognized importance of Administrative Law and Procedure today is due to the multiplication of administrative agencies. These have become essential parts of our democratic system in order to enable the people to deal adequately with the complicated problems of our modern social and economic life. Viewed realistically these agencies have profoundly modified the principles of the separation of powers and of a government of laws and not of men. Nevertheless the necessity for their existence is admitted by those who, like the speakers of this evening, have an intelligent understanding of our problems. "Heterodox, at the beginning of this century, Administrative Law is now an orthodox form of governmental procedure."

Both speakers recognize also that restrictions must be imposed upon administrative action as well in the public interest as for the safeguarding of private rights. Finally, there is similar agreement regarding the statement of fundamental principles which should govern administrative procedure in order to make it conform to the constitutional requirements of due process of law: A fair and adequate hearing before the administrative agency and an opportunity for judicial determination whether such hearing has been accorded and whether the authority conferred upon the agency has been respected or exceeded. Differences appear, however, with respect to the interpretation of these principles and their application to particular cases.

Primarily concerned with the matter of public interest, Mr. Feller is naturally opposed to any restrictions which prevent the

* This discussion and those that follow are extemporaneous comments on the papers that were delivered at the symposium. Each address is followed by its correlative discussion.

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efficient dispatch of public business except where these are necessary to prevent impairment of essential private rights. He properly emphasizes that the issue does not involve New Deal or Anti-New Deal nor the desirability or undesirability of particular legislation or of government regulation of business. He is emphatic in his opposition to the implications of the *Morgan* cases and to the pending Senate Bill proposing to extend the scope of judicial review of administrative action to findings of fact and weight of evidence.

Mr. Bikle, on the other hand, strongly supports both of the new developments as necessary for the safeguarding of private interest. He properly calls attention to the fact that conditions of appointment and tenure of administrative officials not infrequently result in lack of training and competence to deal with complicated problems. He also suggests that an administrative authority may become so imbued with what *he conceives* to be the legislative purpose that he may overlook or disregard the mandate of the statute under which he acts. He is unquestionably right in urging the importance of a qualified administrative personnel, free from political or other influences, and it is to be regretted that measures for promoting this condition have not been provided. There is evidence, however, of the development of an *esprit de corps* and an absence of numerous cases of arbitrary and unethical practices. It must be observed, moreover, that the method of selection of federal judges does not always lead to perfect results. It is also true that some judges, as a result of their training and experience in protecting private rights, may become so imbued with what *they conceive* to be the legislative purpose that they may overlook or disregard the statutory mandate made in the public interest.

In attempting to evaluate the opposing contentions it is necessary to keep in mind the conditions that have brought about the expansion of administrative procedure and the purposes which it is intended to accomplish. It has been already indicated that modern social and economic problems made necessary this new form of control. Administrative authorities were intended to provide a flexibility in governmental control of private interests which the three departments of government, acting separately, could not furnish. In order to prevent arbitrary action and to safeguard private interest certain standards of "notice and hear-

ing," "fairness," "reasonableness," *et cetera*, were implied or expressed. In applying these standards to particular cases the courts should use that type of judicial statesmanship which has made possible the development of our Constitution so that it serves the needs of our 20th Century Nation.

We must note, moreover, that this development has not been unattended with difficulty and obstruction. The interpretation of the due process clause was influenced by the economic predilections of certain judges for a considerable period before its proper connection with modern labor relations and other economic problems was established. I recall that nearly 30 years ago I joined with other teachers of Constitutional Law in a published criticism of the opinion of the New York Court of Appeals because it held a Workmen's Compensation Act invalid as violating due process. It is not too much to expect or demand that Congress and the Supreme Court will manifest a statesmanlike attitude towards this same general provision in dealing with the administrative mechanism devised to meet imperative needs of our modern society. As Mr. Feller has so aptly said the procedural predilections of the judges should not be read into the due process clause.

Administrative bodies and their functions and procedures are of the most diverse character. Some of these created hastily are doubtless in need of modification and restrictions of their processes and these should be provided as soon as proper study reveals the changes that are necessary. But to subject all administrative action to uniform and vital restrictions upon procedures that have been developed during years of controversy is not only unscientific but would place administration in an artificial straight jacket which would result in interminable delays, intolerable public expense and prevent it from meeting the popular demand which led to its creation.

It should be remembered that, aside from practical difficulties, many things that are left to administrative discretion could be dealt with by the legislature directly. Such a legislative act would encounter no judicial obstacle unless in conflict with some constitutional principle. So long as administrative authorities conform to the fundamental principles indicated above, the judiciary should manifest the same self-restraint regarding administrative action that it indicates controls its review of legislation.

Arbitrary action by the administration conflicts with our democratic ideals and private interest must be safeguarded from this evil. Administrative inefficiency or ineffectiveness are equally dangerous and have led to the rise of authoritarian governments. Fundamental in our democratic system is the protection of individual rights. Hence individuals in their own interest should insist upon methods which will make possible that administrative efficiency without which the democratic system cannot survive under modern conditions.

by SAM ELSON†

The necessity of having adequate judicial review never struck me quite as forcibly before as it has tonight after hearing these two brilliant lectures; for by administrative fiat of the Dean I am compelled to appear here as one who knows something about administrative law, although the finding that I was such a person was made without a prior hearing, without the opportunity to cross-examine and rebut the finding, and without a scintilla of evidence or competent testimony. I do want to say this, if I may be permitted to, because it is so much easier to state these things in symbols or figures of speech, that Mr. Feller appears here more or less as a representative of the vested interest of the government in preserving administrative rule unrestricted by nasty or irritating judicial interference. And may I characterize Mr. Bikle as the indignant citizen or the irate taxpayer who protests because he is not permitted to carry on his business without some unreasonable restraint by prying governmental agencies.

Now, the surprising feature of these two lectures is this: I anticipated that Mr. Feller, whom I have first symbolized, would come here rather apologetic about the numerous attacks that had been made upon administrative agencies and perhaps prepared to concede that some features of the bill proposed by the American Bar Association should be accepted, and at the same time that he might perhaps moderately criticize others. But instead, I have sensed, despite some calm and deliberate phraseology to the contrary, that Mr. Feller feels very violently about judicial interference at this time and has no apologies. In fact I think he condemns very severely what is happening today, so far as judi-

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cial "interference" is concerned, and would have the courts do even less than they are doing now.

By way of contrast, Mr. Bikle, who, I suppose, has his ears figuratively pinned back almost every day by administrative bureaus and should be smarting with continuous indignation, is rather moderate about the whole thing. He is quite well prepared to accept the existing administrative system with a few changes, which I think are rather minor, and perhaps without any material change or increase in the scope of judicial review.

As I gather Mr. Bikle's points, he emphasizes the fact that the personnel of the administrative bureaus has, to a certain extent, various weaknesses which call for judicial review of their actions. Because of these weaknesses, sometimes latent and sometimes in active operation, essential judicial safeguards should be preserved inviolate, and perhaps strengthened.

But by and large he did not, I think, challenge very much the existing order, and to my even greater surprise he is content with less than the American Bar Association is asking. As I understand Mr. Bikle, he does not agree with the American Bar Association bill that the regulatory agencies which are given power to implement statutory policies by rules and regulations should be required, as the American Bar Association bill provides, to promulgate rules and regulations within a limited time—I believe the draft of the bill I saw (there have been so many drafts) says ninety days, a rather short time and a period which makes it impossible to proceed with the guidance of experience. The bill also requires, as a condition precedent before any rules and regulations are adopted by an agency which has the task of implementing a statute—implementing the statutes is now a nice word of art—that the agency shall have public hearings. That is something the American Bar Association wants. But Mr. Bikle, who presumably is an irate taxpayer and harried businessman, does not even want that. And again, I think Mr. Bikle criticizes the American Bar Association's bill with calmness and extreme moderation, by pointing out that the bill imposes a certain rigidity in administrative procedure, at least in so far as it requires findings by every one of the administrative tribunals that may fall within its purview, whereas Mr. Bikle points out that the functions of these fifty-odd federal agencies, ranging from the independent boards like the National Labor Relations

Board to bureaus and department heads, are of many different varieties and perform many different functions. Mr. Bikle criticizes the American Bar Association bill in requiring that each and every one of these widely varying administrative bodies, regardless of their peculiar problems and regardless of the nature and purpose of the particular administrative intervention, must have a certain rigid type of procedure.

Now, it happens that I agree with Mr. Bikle in both of those criticisms, but I remark upon them as showing his very evident moderation in seeking less than his brethren of the American Bar Association would ask in protecting the interests of Mr. Bikle's clients.

It is certainly clear to me that the indiscriminate mandatory application of a uniform procedural method to all officials or boards possessing administrative and quasi-judicial powers would not only produce inefficiency and waste, but would in some instances have nothing short of a paralytic effect on the functioning of several of the agencies. If time were available, it would not be difficult to illustrate this danger by attempting to apply the provisions of the American Bar Association bill to the wide variety of functions and powers now conferred upon the Securities and Exchange Commission. It would seem that the statutory requirement of a full or fair hearing before the agency, fortified by the constitutional requirement of due process, ought to be ample protection for the private interest. At least this furnished sufficient ground for the Supreme Court in doing what it did, and what Mr. Feller complains of, in the *Morgan* cases. And in passing, let me say that his criticism of these cases, in so far as he charges the Supreme Court with specifying the particular type of administrative procedure which must be followed, appears unmerited. The Supreme Court expressly stated that it was not doing so, nor did it intend to canalize the procedure, and in fact the main opinion in the second case mentions several alternative administrative procedures which would have met the test of a full and fair hearing. I wonder, therefore, if the criticism does not illustrate a certain feeling of impatience and hypersensitivity in the administrative agencies when confronted with anything more than nominal judicial review.

Apart from those general observations, I want to give just a few of what I consider may be practical, though fragmentary,

thoughts in connection with this matter of administrative procedure. These lectures have to a large extent, I suppose, been rather philosophic and abstract. They necessarily had to be because they cover such a large area, the entire realm of administrative law and agencies. But it occurs to me that possibly a few practical thoughts, or rather thoughts of my own with reference to practical or procedural matters, might appropriately be mentioned. Before I do that, however, I want to agree with Mr. Feller in certain general observations he has made. Mr. Feller made the statement, which I believe is correct, that none of the new agencies, and by "new" I mean since 1933, has been created with new "weapons of power" which did not exist in agencies before the New Deal. I believe he is absolutely right in saying that, because quite some time ago, being quite interested in the subject, I made a check of a number of federal statutes and found, with reference to the points he mentioned, such as the combination of the investigating, prosecuting and adjudicating functions, the finality of fact finding by administrative tribunals, the trial examiner method, the power of administrative bodies to implement statutes with rules, the power to issue cease-and-desist orders, the direct judicial review by the circuit courts of appeals rather than by the district courts, and the elimination of common law rules of evidence—all of these features, which many of us assume were simply creations after 1933, existed before the New Deal.

I believe, on the other hand, that Mr. Feller might well be criticized for importing certain extraneous issues into the discussion. For instance, I recall that at the outset of his lecture he asked us to remove from our minds the prejudice inspired by political partisanship or antipathy to the policy of the legislation under consideration. In exemplifying that, Mr. Feller went on to say that people who like the rulings and decisions of the Federal Trade Commission are interested in making the Federal Trade Commission Act effective, whereas people who criticize the National Labor Relations Board do not want effective administration of the National Labor Relations Act. Now I for one challenge that statement. I do not believe that everybody who criticizes the National Labor Relations Board does so from the motivation of dislike for the purposes of the National Labor Relations Act and from a desire not to have an effective adminis-

tration of the Act. There are quite a number of reputable lawyers who in good faith challenge some of the decisions of the National Labor Relations Board, or some of its techniques, not because they do not want effective administration of the Act, but simply because they feel that there has not been a fair or full day in court. In fairness to what Mr. Feller said, he is undoubtedly correct in his statement that most people who have formed prejudices about administrative boards and commissions in general have done so from their experience with, observation of, or newspaper reading about the functioning of the National Labor Relations Board. And to that extent I think their prejudices with respect to administrative procedure in general need give us no serious concern.

The time left is very limited, and you may still be expectant concerning the observations concerning practical procedure which I mentioned. I, for one, am not shocked by the elimination of the traditional common law or statutory rules of evidence from use before administrative tribunals. I do not think those rules of evidence are sanctified or absolutely necessary, and their strict application may well be obstructive in the search for truth in the administrative arena. Experience shows that except in the cases of a few administrative bodies or boards like the National Labor Relations Board, the evidence which goes into the records is mainly in documentary form. Certainly it is clear, subject to minor restrictions, that the best evidence rule can well be relaxed. The hearsay rule, which has been relaxed to the breaking point even in ordinary judicial proceedings, might well be forgotten before administrative tribunals, and that problem treated simply as one of probative value or substantial evidence. I think, however, that, as Mr. Bikle says, an administrative board ought to be confined to the record made before it. Not to be bound by the record evidence in making findings of fact, or to base orders upon hidden reservoirs of judicial or administrative experience received through other channels, which are in no way part of the particular record, is to conclude a respondent by data which it has no way of challenging either on review within the administrative organism or on review by the courts.

There are numerous other comments which deserve to be made concerning the administrative system in operation, but I have time only for one other. The fact that the prosecuting and ju-

dicial functions are often combined in one administrative body is neither damaging, nor a cause for serious alarm. In actual operation it has practical advantages which seem, in general, to over-balance the abuses which sometimes appear. In fact, the well-established and experienced administrative board will so divide its functions and personnel as effectively to divorce the proper bias of the prosecution from the proper detachment of the hearing and of the trial examiner. Certainly there has been little complaint or cause for complaint on this score concerning the functioning of the Securities and Exchange Commission, the Federal Trade Commission, and many other similar bodies. It is unfortunate that in the case of the National Labor Relations Board the highly controversial nature of the policies expressed by the Act has given plausibility, if not some justification, for the criticism.

However, if the combination of the prosecuting and judicial functions is too shocking to our instincts or belief in the separation of powers and functions, the problem does not seem difficult of solution. As the President has so aptly said in another connection, a short, simple statute could be enacted empowering some person or body other than the administrative board or bureau to appoint the trial examiners or other quasi-judicial officers for all administrative bodies or departments possessing administrative powers. Thus the power of naming panels could well be vested in the Circuit Courts of Appeals; and from the panels of experienced officers named by them in each circuit a trial examiner could be appointed by the administrative board for the particular hearing. This is but one illustration, though incomplete, of the manner in which the problem and the charges of bias might be met.

by J. WESLEY McAFEE†

The subject has been given such thorough discussion tonight that I intend to restrict myself to suggesting and questioning. I won't undertake to give the answers. I am glad I haven't time to try. I don't know them. I think it was very wise of the first speaker to suggest that it will not do to attack the problem of administrative law on the basis of particular boards or particu-

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lar decisions that one does not like. I find it a little hard to abide by that suggestion, although I think it a proper one. I have read some opinions of administrative boards recently that reminded me of the incident of the old lawyer from up home, who practiced for many years without wearing a tie. He always wore a collar, but no tie. He finally had a case before the Supreme Court of the State, and his friends said, "Sam, when you get to the Supreme Court you will have to wear a tie." "No," he said, "I won't wear a tie. I don't own one, and won't buy one." He went down to the Supreme Court with his collar, but without his tie. In due course, the Court issued an opinion against him. He had some acquaintance with the judge who wrote the opinion, and on the first opportune occasion he went in and spoke to him. He said, "Judge, I wish you would tell me whether the fact I didn't have a tie when I made my argument in any way influenced you in deciding the case against me." The judge said, "Of course not, Sam. That did not influence me." He said, "Judge, I am awfully sorry. I am sorry indeed." The judge said, "Why?" And Sam said, "Because it would have been a much better reason than any you gave."

The question I have to submit to you is one which might have been included in Mr. Feller's paper. I am sure that it won't be regarded as an inhospitable criticism but rather as a compliment that I should have liked for him to have felt free to take time to discuss it. It is this: To what extent is the public interest affected by fundamental limitations upon the power of administrative bodies? And to give only briefly an illustration of what I am trying to say, I want to know whether the public interest will really be served by abandoning limitations on the delegation of power that have existed so long in our law.

We have always thought that legislative power might not be delegated unless there be first established a standard, and that findings be made upon which to base action in conformity with the standard. Now, many of the statutes on administrative law seem to me to provide no standard, or at least a standard so hazy as to amount to no standard. I think of Section 9B of the Labor Act, in dealing with the selection of an appropriate bargaining unit. I think of the Wage-Hour law, in which the only limitation that I can find upon an administratively-prescribed wage departing from the statutory wage is that it shall not cause unemploy-

ment. That is like saying that it shall create prosperity; a purpose so general and hazy as to not be a standard.

Has the time come when the public interest can be said to demand such broad powers? I am not talking about private interests, for which the second speaker spoke; I am talking of the public. I have no private and personal interest which will be affected by administrative bodies; I am sorry I have not reached that stage of importance. Still I am interested in the problem. I think I have a right to be interested in it. And do I not have a right to consider from my own viewpoint, as a member of the public, whether it is good for us as a people to abandon those principles of government that long experience has shown to be so valuable to us?

Without undertaking to answer the question, because of the lateness of the hour and lack of ability to do so, I invite your thought on that proposition.