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By Earl W. Kintner

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By EARL W. KINTNER*

INTRODUCTION

Since I am General Counsel of a Government agency which has wide administrative responsibilities,[1] my support of the administrative process will come as a surprise to no one. In this written debate with my good and able friend John Cragun, who describes himself as a skeptic, I feel that my position is a fortunate one, for my cause presents its own best arguments. These arguments are based in equal part upon experience, reason and logic, and authority.

The last 25 years of progress and constant improvement in the administrative process are demonstrated perhaps most conclusively by reference to that basic authority for lawyers, the Supreme Court of the United States. Here is what the Supreme Court has said about a number of administrative agencies.

(a) *Securities and Exchange Commission.* "It [SEC] has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with clarity and thoroughness that admit of no doubt as to the underlying basis of its order."[2]

"... [The Commission's conclusion] is the product of administrative experience, appreciation of the complexities of the problem, realization

* Of the Indiana and District of Columbia bars; General Counsel, Federal Trade Commission. The views expressed are those of the author and do not necessarily reflect the official viewpoint of the Federal Trade Commission.

[1] The Federal Trade Commission, which exercises administrative duties under the following acts of Congress: The Federal Trade Commission Act, 38 Stat. 717 (1914), as amended by the Wheeler-Lea Act, 52 Stat. 111 (1938), and the Oleomargarine Act, 64 Stat. 21 (1950), 15 U.S.C. §§ 41-58 (1952); Sections 2, 3, 7, and 8 of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), and the Anti-Merger Act, 64 Stat. 1125 (1950), 15 U.S.C. §§ 13, 14, 18, 19 (1952); the Webb-Pomerene Act (Export Trade Act), 40 Stat. 516 (1918), 15 U.S.C. §§ 61-65 (1952); the McCarran Insurance Act, 59 Stat. 33 (1945), as amended 15 U.S.C. §§ 1011-15 (1952); the Wool Products Labeling Act, 54 Stat. 1128 (1940), 15 U.S.C. §§ 68-68j (1952); the Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1952); the Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. §§ 1191-1200 (Supp. III 1956); and the Lanham Trade-Mark Act, 60 Stat. 427 (1946), as amended, 15 U.S.C. §§ 1051-1127 (1952), as amended, 68 Stat. 509 (1954), 48 U.S.C.A. § 1643 (Supp. 1956).

[2] Justice Murphy, *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 199 (1947).

of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 800."[3]

(b) *National Labor Relations Board.* "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration."[4]

(c) *Federal Trade Commission.* "In the *Keppel* case the Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice. . . .

In the present proceeding the commission has exhibited the familiarity with the competitive problems before it which Congress originally anticipated the Commission would achieve from its experience."[5]

(d) *Federal Communications Commission.* "The [Federal Communications] Commission's special familiarity with the problems involved in adopting standards for color television is amply attested by the record."[6]

(e) *Secretary of Agriculture.* ". . . a complicated, intricate pattern of operation. . . . any attempt to change the pattern calls for the most expert consideration and administrative judgment—a task that courts are ill-fitted to perform."[7]

(f) *Civil Aeronautics Board.* "And since the [Civil Aeronautics] Board's conclusion that the proceeding should not be reopened represents its informed judgment after a searching inquiry, we accept its conclusion. . . . The Board's opinions show the painstaking consideration given this [on ability to fly certain routes] evidence."[8]

(g) *Federal Power Commission.* "The Federal Power Commission

[3] *Id.* at 209.

[4] Justice Reed, *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 800 (1945).

[5] Justice Black, *F.T.C.* v. *Cement Institute, et al.*, 333 U.S. 683, 720, 727 (1948).

[6] Justice Black, *Radio Corporation of America* v. *United States*, 341 U.S. 412, 419 (1951).

[7] Justice Minton, *Swift & Co.* v. *United States*, 343 U.S. 373, 381 (1952).

[8] Justice Black, *C.A.B.* v. *State Airlines, Inc.*, 338 U.S. 572, 580 (1950).

which devised this procedure has not been an unzealous guardian of the national interests."[9]

(h) *Interstate Commerce Commission.* "The [Interstate Commerce] Commission was well acquainted with the impact of the war upon facilities for transport and upon the transportation business in general. In addition to its own expert knowledge concerning such matters, it had before it not only the facts set forth in the petition for rehearing but also those alleged in the extended replies filed by the applicants."[10]

Doubly blessed is the lawyer in that cause where the opposition ignores experience and authority, and chooses to rely on a highly theoretical argument of 1887 vintage,[11] often used in succeeding years,[12] but which has many years past been shown to be without basis.[13]

In this article, I attempt to state the cause for the creation of the administrative process and recount some of the phases of its historical development, discussing the old and the new arguments involved. I do not support the proposition that ad-

[9] Justice Frankfurter, *First Iowa Coop.* v. *F.P.C.*, 328 U.S. 152, 187 (1946).

[10] Justice Rutledge, *U.S.* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946).

[11] ". . . when the interstate-commerce act originally was in this body, as far back as 1887 and 1888, it was assailed upon the ground that it was unconstitutional; and so ferocious were the assaults that when the time came to vote on that measure—as is reported by my distinguished predecessor in his memoirs; Heaven grant peace to his final rest—so great was the assault, said Senator Cullom, one of the authors of the bill, that when the vote came in the Senators deserted the Chamber, leaving a quorum of but two, by which the interstate-commerce act was passed. So able a lawyer as Senator George, of Mississippi, than whom there was no abler, measured by the standard of constitutional learning, refused to remain in the Chamber. He did not find it agreeable to assail the law. He could not, however, from his viewpoint of constitutionality, give it his approval." Senator Lewis, 51 Cong. Rec. 12925 (1914).

[12] "I think the first time the bill encounters the Supreme Court of the United States, as it will, it will be declared to be void in section 5. Then, in my opinion, the chief reason for the existence of the bill, in the opinion of its friends, will have been removed, and it will have no reason for its existence except as wasteful, extravagant, meddlesome, undemocratic, un-American concern in this country. . . ." Senator Brandegee, 51 Cong. Rec. 13103 (1914).

"I utterly dissent from the doctrine which was maintained here this morning by the Senator from Arkansas that we have authority to confer upon anybody but the courts judicial power, or any part of the judicial power." Senator Sutherland, 51 Cong. Rec. 13109 (1914).

[13] "We saw the Supreme Court of the United States, however, overrule the able Senator from New York, the head of the American bar. We saw that court pause and consider what the American people needed rather than what the distinguished minds of lawyers demanded. We saw that court listen to the needs of the country in order to give relief to its people, rather than that which merely prescribed distinctive lines of demarcation in construction that would give justification to refined distinctions." Senator Lewis, 51 Cong. Rec. 12926 (1914).

ministrative agencies and the administrative system are perfect, for the imperfections are many, and constant vigilance and constant improvement are necessary. For this reason, I do not wish to create an impression of ridiculing the opposition or of selling it short. Improvement thrives on criticism.

In 1937, the President's Committee on Administrative Management described the administrative process as "a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers" which did "violence to the basic theory of the American Constitution that there should be three major branches of government."[14] However, in 1952, the late Justice Jackson described the rise of the administrative process as "the most significant legal trend of the last century."[15]

The gap between these statements, not only in time but in concept, marks the period in which the administrative process came of age, a period in which administrative bodies and administrative law achieved a recognized and successful position in our system of laws. During that period, the administrative process achieved a uniformly high degree of ability to serve the American people with impartiality and with justice and became truly indispensable to modern government.[16]

No matter how uncertain its parentage, the lusty infant has reached a vigorous and useful adulthood, far from perfect as to form and actions, but still capable of improvement and even more effective usefulness to society.

The Administrative Process is a Product of Necessity

The administrative process has become the most significant legal trend of the century because it has filled and continues to fill a basic need in our democratic society. The Supreme Court has aptly described this development as "a

[14] President's Committee on Administrative Management, Report with Special Studies 40 (1937). Note also the recently expressed view of Congressman Celler of New York to the effect that a "commission is a group of the uniformed, appointed by the unwilling, to do the unnecessary," as quoted by Senator Wayne Morse at the closing day of the 84th Congress, 102 Cong. Rec. 13890 (daily ed. July 28, 1956).

[15] Dissenting in *F.T.C.* v. *Ruberoid*, 343 U.S. 470, 487 (1952).

[16] Justice Jackson has described the administrative process as "an indispensable adjunct to modern government." *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 482 (1952).

response to the felt need'"[17] for a new instrument of government to overcome the inadequacy of traditional modes of government. Administrative law has sprung not from a sterile theory of government but from the pragmatic demands of a dynamic society; as Dean Landis has said, "the insistence upon the compartmentalization of power along triadic lines gave way . . . to the exigencies of governance."[18] "No one was thinking," Professor Davis has added, "in terms of judiciary versus bureaucracy, capitalism versus socialism, or laissez faire versus governmental interference. The early agencies were created because practical men were seeking practical answers to immediate problems."[19]

The process has been directed toward fractional parts of our society rather than toward the whole. Administrative agencies attend to particularized commercial activities—radio and television, shipping, telephones and telegraphs, banking, stockyards, commodity exchanges, security exchanges, utilities, railroads, busses and trucking; to matters embracing many activities such as problems of unfair competition, establishment of minimum wages and hours in industry, adjudication of labor disputes; and to the dispensation of governmental benefits such as old age pensions, veterans' pensions, employment insurance, mailing privileges, and control of the public lands.

The common thread running through this complex of functions, and indeed the impelling rationale of all administrative agencies has been the need for specialized attention to specialized problems. Modern administrative government demands men of expertness able to devote their full energy and talents to administration. Legislatures and courts are not fully adapted to the intricate and pressing task of administration. Neither legislators nor judges possess the requisite specialized knowledge, or equally important, the time required for the solution of complex problems met daily in the fields of communication, investment, power transmission, labor relations, transportation, etc.; nor in fact do they have

[17] *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134,142 (1940).

[18] Landis, The Administrative Process 2 (1938).

[19] Davis, Administrative Law 10 (1951).

the desire to immerse themselves in the complexities of these activities.[20]

This situation has forced the legislature to write laws expressing broad outlines, leaving to the administrative agency the task of filling out the details. An English court in one of the earliest administrative law cases described such a law as "a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action [of the administrative body]."[21]

The judicial process has shown itself even less adequate to the task. Administration traditionally includes such disparate functions as investigating, supervising, initiating remedial action, issuing regulations, licensing, fixing rates, in other words, an array of *active* responsibilities. Courts are essentially passive instrumentalities. By their nature and purpose they must wait for someone else to initiate action and to summon evidence.

Judges and legislators, like all of us, are not men of unlimited capacities. They cannot be expected to embody the expert knowledge contained in an agency such as the ICC which avails itself of the collective wisdom of such specialists as rate experts, locomotive engineers, reorganization specialists, experts on explosives, valuation engineers, tariff interpreters, traffic congestion experts, etc.[22] The expertness of an administrative agency includes more than the heads of the agencies themselves. The entire agency, through its specialized staff and experience, is the source of administrative expertness. It is this type of expertness which not even the heads of agencies claim to possess as individuals. This type of expertness, the combined total knowledge and experience of the members and employees of the agency, is the expertness not

[20] Davis states: "A legislative body is at its best in determining the direction of major policy. It is ill-suited for handling masses of detail or for applying to shifting and continuing problems the ideas supplied by scientists or other professional advisors. Experience early proved the inability of Congress to prescribe detailed schedules of rates for railroads or to keep abreast of changing needs concerning the levels of import duties. Gradually our legislative bodies developed the system of legislating only the main outline of programs requiring constant attention, and leaving to the administrative agencies the tasks of working out subsidiary policies." Davis, *op. cit. supra*, note 19, at 13.

[21] *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, 356.

[22] See Davis, *op. cit. supra*, note 19, at 13-14.

of one but of many. No judge, however specialized or able, can lay claim to this type of expertise.[23]

The Rise of the Administrative Process: Sporadic and Unplanned

The growth of administrative agencies in our country has been, for the most part, sporadic, unplanned, coinciding generally with periods of economic expansion, and governed by the exigencies of the time rather than by a philosophical master-plan. Agencies have variously been called Boards, Commissions, Agencies, Bureaus, Departments, Divisions, Corporations, etc. There appears to be no particular reason for the name distinctions beyond the whim of the legislative architect.[24]

The origin of some present-day agencies has been traced as far back as 1789,[25] and approximately one-third of existing administrative agencies find their origins in legislation enacted before 1900.[26] Congress created the first of the great administrative agencies, the Interstate Commerce Commission, in 1887. The particular economic impulses which gave rise to its creation provide graphic illustration of the type of governmental needs which find fulfillment in the administrative agency.

Prior to 1870 the Nation's railroads operated almost en-

[23] "We start, of course, from the premise that on a subject of transportation economics, such as this one, the [Interstate Commerce] Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal." Justice Douglas, *New York v. United States,* 331 U.S. 284, 328 (1947).

[24] Thurman Arnold once gave these definitions of Courts, Commissions and Bureaus:

"1. A court is a body of judges whose decisions are either (1) right, (2) caused by the fault of someone else (usually the legislature), or (3) unfortunate but unavoidable accidents due to the circumstance that no human system can be perfect.

"2. A bureau is a body which, if it happens to make a wrong decision has no one to blame but itself, and if it happens to make a right decision, offers us no assurance that it will do so again.

"3. A commission with quasi-judicial powers is half-way between a court and a bureau." Arnold, the Role of Substantive Law and Procedure in the Legal Process, 45 Harv. L. Rev. 617, 629 (1932).

[25] Report of the Attorney General's Committee on Administrative Procedure in Government Agencies 8 (1941). S. Doc. No. 8, 77th Cong., 1st Sess.

[26] *Id.* at 8, 9. See also Davis, *op. cit. supra,* note 19, at 4.

tirely free of any governmental restraints. By 1880, however, abuses, such as discriminatory and exorbitant rates and irresponsible financial manipulations, were so rampant that the outcry for some kind of governmental reform could not be ignored. What was needed was not the sporadic and inadequate remedies provided by the legislatures and courts but some kind of authority which could maintain continuous and comprehensive supervision of the industry, an authority with power to investigate, initiate proceedings, prosecute offenders and establish regulations. A number of states attempted to achieve these goals through the establishment of state railroad commissions, but in 1886, when the Supreme Court invalidated these commissions[27] the responsibility fell squarely on the Federal Government. The result was the establishment of the ICC in 1887, to the accompaniment of reformists' cheers and mutterings of doom from dissidents who saw in this "radical government incursion" not only a breakdown in the traditional separation of powers but the inevitable disintegration of constitutional government.[28] These direful predictions have found little sustenance in the impressive development of the ICC and in the expansion in administrative government since the passage of the ICC Act, founded in large measure upon the model which it provided.[29]

In the period between the establishment of the ICC and the 1930's, Congress set up additional administrative agencies, agencies such as the Food and Drug Administration, the Civil Aeronautics Administration, the Federal Communications Commission, and, in 1914, the agency which I represent, the Federal Trade Commission. During this entire period, the opposition which had attended the creation of the ICC continued, save for isolated comments.

In 1916, the wise and far-sighted Elihu Root, President of the American Bar Association, told his colleagues: ". . . the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. . . [administrative agencies] furnish protection to rights and obstacles to wrongdoing which under our new social and

[27] *Wabash St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886).

[28] See notes 12 and 13, *supra*.

[29] For a detailed treatise on the development of the ICC, see Sharfman, The Interstate Commerce Commission (1931).

industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."[30] But comments of this sort were few amid the critical comments of the so-called Constitutionalists, comments which Justice Stone later termed "nostalgic yearnings for an era that has passed."[31]

The Articulate Opposition

As late as 1932, a former Solicitor General of the United States wrote: "Uncle Sam has not yet awakened from his dream of government by bureaucracy but ever wanders further afield in crazy experiments in state socialism. Possibly some day he may awaken from his irrational dreams, and return again to the old conceptions of government, as wisely defined in the Constitution of the United States."[32]

Thus the emergence and continuation of the administrative process have hardly been tranquil. In their relatively short history, administrative agencies have variously been criticized as being "unconstitutional," "unnecessary" and "irresponsible." In most cases the criticisms were addressed to imagined rather than real evils, but I do not argue that the administrative process is or has been perfect. Rapid and unplanned growth of the process have caused imperfections. The NRA fiasco seemed to typify all the objections which had been made to administrative law, but regulatory agencies, originating with hardly less fanfare, survived the onslaught. The Securities and Exchange Commission, the National Labor Relations Board, the Federal Deposit Insurance Corporation, the Commodity Exchange Commission, the Railroad Retirement Board,—these were but a few of the agencies emerging in the 1930's.[33]

Still the opposition did not capitulate. In 1937, as I noted at the beginning, the President's Committee on Administrative Management characterized administrative agencies as a "headless fourth branch" and reported that they constituted

[30] Address by Elihu Root as president of the American Bar Association at annual meeting, Chicago, Aug. 30, 1916.

[31] Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 17 (1936).

[32] Beck, Our Wonderland of Bureaucracy ix (1932).

[33] For a full listing of agencies created up to 1941 and their dates of origin, see Report of the Attorney General's Committee on Administrative Procedure in Government Agencies 8-11 (1941). S. Doc. No. 8, 77th Cong. 1st Sess.

"an unwholesome atmosphere in which to adjudicate private rights. . . ."[34] The President, in transmitting the report to Congress, commented: "I have examined this report carefully and thoughtfully, and am convinced that it is a great document of permanent importance. . . . [T]he practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of government for which there is no sanction in the Constitution."[35] This was the high-water mark of the articulate but in many respects irrational opposition to the evolution of administrative agencies.

The Attorney General's Committee and the APA

In response to chronic criticism, in 1939, the Attorney General, at the request of the President, appointed a Committee to report on the advisability of reform in administrative procedure. That report[36]—detailed, reasoned, scholarly—remains today one of the primary source materials on the administrative process. Instead of condemning the administrative process in sterile text-book terms, the Committee sought out the reasons for the development of the administrative method of government. It found, as I have discussed earlier, that administrative agencies were an inevitable development of a highly complex industrial society; and that traditional legislative and judicial modes provided inadequate means to accomplish the specialized, comprehensive, continuing tasks which the rational management of that society demanded.

The change which just a short period of objective research brought to the thinking of impartial students of government is revealed by a comparison of President Roosevelt's statements midway in the study with his earlier comment in 1937.[37] In his veto message on the 1940 Walter-Logan administrative court bill, President Roosevelt stated:

> "Court procedure is adapted to the intensive investigation of individual controversies. But it is impossible to subject the daily routine of fact-finding in many of our agencies to court procedure. Litiga-

[34] See note 14, *supra*.

[35] President's Committee on Administrative Management, Report with Special Studies iii-iv (1937).

[36] *Op. cit., supra*, note 33.

[37] p.———*supra*.

tion has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often the traps for the unwary and technical rules of evidence often prevent common sense determinations on information which would be regarded as adequate for any business decision. The increasing cost of competent legal advice and the necessity of relying upon lawyers to conduct court proceedings have made all laymen and most lawyers recognize the inappropriateness of entrusting routine processes of government to the outcome of never-ending lawsuits.

"The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials, and informal proceedings supersede rigid and formal pleadings and processes. A common-sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decision with an eye that looks forward to results rather than backward to precedent and the leading case."[38]

The Committee focused its study upon the question of whether or not the adjudicating function should be divorced from other administrative activities, and, after thorough deliberation, took a position against such separation. In so doing it eliminated many unsound arguments of the opponents of the administrative process. The Committee pointed out that an internal separation of functions within an agency "can afford substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommitments of the investigator and the advocate."[39]

Moreover, concluding that a complete separation would result in "substantial dangers both to private and to public interests,"[40] the Committee commented:

". . . First, a body devoted solely to prosecuting often is intent upon 'making a record.' It has no responsibility for deciding and its express job is simply to prosecute as often and successfully as possible. Second, it must guess what the deciding branch will think. It can explore the

[38] 86 Cong. Rec. 13942 (1940).

[39] Report of the Attorney General's Committee on Administrative Procedure in Government Agencies 57 (1941). S. Doc. No. 8, 77th Cong., 1st Sess.

Note also at 55: ". . . an administrative agency is not one man or a few men but many. It is important, the Committee believes, not to make the mistake of conceiving of an agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both."

[40] *Id.* at 57.

periphery; it can try everything; and meanwhile the individual citizen must spend time and money before some curb can be exercised by the deciding branch.'"[41]

The Committee's conclusion that complete separation would destroy informal settlement procedures has become a classic:

". . . And, it should be noted, a separation of functions would seriously militate against what this Committee has already noted as being, numerically and otherwise, the lifeblood of the administrative process—negotiations and informal settlements. Clearly, amicable disposition of cases is far less likely where negotiations are with officials devoted solely to prosecution and where the prosecuting officials cannot turn to the deciding branch to discover the law and the applicable policies."[42]

The ultimate conclusion reached by the Committee was:

". . . that complete separation of functions would make enforcement more difficult and would not be of compensating benefit to private interests. On the contrary, both those private interests which the statutes are designed to protect and those which are regulated would be likely to suffer. And, finally, we conclude not only that separation will not necessarily cure bias and prejudice but that the requisite impartiality of action can be secured by the means set forth in this and the preceding sections of this report."[43]

The recommendations of the Attorney General's Committee were in large measure responsible, in 1946, for the passage of the Administrative Procedure Act.[44]

Because of widely varied structures and organizations, practice and procedure, purposes and methods of the administrative agencies, it appeared an almost impossible task to achieve uniformity in procedures and standards; and yet the need was compelling. The APA, culminating years of pressures to achieve uniform standards, separated internal functions of the agencies, provided standards for their hearings, promised to enhance the competence of examiners overseeing

[41] *Id.* at 58.

[42] *Id.* at 58-59. ". . . It seems most desirable that within the administrative field itself, interpretations should not have to be evolved by a series of litigations in which the enforcing branch endeavors to ascertain the mind of the deciding branch. For this would result, not merely in added difficulty of enforcement, which might be warranted if it were necessary to assure fairness, but in added burdens upon many private interests, who would be unnecessarily harassed by complaints and trials." *Id.* at 59.

[43] *Id.* at 60.

[44] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1952).

the administrative hearing, and settled the limits of judicial review. The Act may not have been in every respect an optimum piece of legislation, but it was a landmark in the history of due process, and we are working now in a number of ways to improve it.[45] However, the struggle no longer is over fundamentals. With the passage and implementation of the APA, the administrative process has come of age.

The "New" Opposition

In the face of the great strides made in the improvement of the administrative process spurred by the enactment of the Administrative Procedure Act in 1946, there has been within the past two years a surprising rebirth of opposition, in the form of the current proposal for the creation of an administrative court.

Most recently, the House of Delegates of the American Bar Association approved the proposed administrative court. The proposal had been drafted and approved by a special ABA Committee on Legal Services and Procedure. For its source material, the Special Committee on the ABA used the Hoover Commission report and recommendations published in 1955 which were based upon the recommendations of the Hoover Commission Task Force on Legal Services and Procedure.

As noted by Robert E. Freer,[46] the foundation work relied upon by the members of the new opposition was most inadequate, consisting of the replies to two simple questionnaires. Upon this basis and without more, within the space of a very few months there followed the current recommendations for a complete revision of administrative law. A number

[45] On April 29, 1953, a conference on administrative procedure was called by the President of the United States. The conference was composed of 75 members, including representatives of 57 departments and agencies plus members of the bar and judiciary. The final report submitted March 3, 1955, contained numerous recommendations for the improvement of the administrative process, and many of such recommendations have already been adopted by the Civil Service Commission and individual government agencies. See Report, undated, of the Conference on Administrative Procedure, called by the President of the United States on April 29, 1953. The Department of Justice has just appointed a director of the new Office of Administrative Procedure recommended by the Conference. For duties of office, see *id.* at 3.

[46] Robert E. Freer, The Case Against the Trade Regulation Section of the Proposed Administrative Court, 24 Geo. Wash. L. Rev. 637, 643 (1956).

of expert legal writers[47] have agreed that many of the proposals were unjustified by research, by experience or even by current concern.

A special committee of the District of Columbia Bar Association recently made a study of the current Hoover Commission proposals with respect to the administrative law field and although unanimously approving generally various proposals for improvement, recommended that the District Association defer action on the Specialized Courts. The two-thirds majority report of the Committee cited as reasons for its recommendations: lack of information as to considerations which prompted the ABA Special Committee to single out two agencies out of nine for specialized court treatment; the lack of documentation motivating the Task Force recommendations; necessity of studying the 1910 Commerce Court shortcomings; alarm at the growing tendency toward specialized bars; and the possibility that other Hoover proposals for improvement of the administrative process would achieve the desired end short of the more drastic proposal for an administrative court. The Committee's majority report was approved by the District of Columbia Bar Association after spirited debate.

The arguments used in behalf of the "new" opposition to the administrative process represent a combination of "something old, something new," but they are mostly "old." The chief argument used in opposition is the same argument used in 1887,[48] that the administrative process does violence to the lawyer's traditional beliefs regarding separation of functions. As applied to administrative law, functioning under the Administrative Procedure Act, this argument does nothing more than attempt to resurrect the conceptual fictions so conclusively laid to rest by the Attorney General's Committee in 1941.

The argument that the administrative process is unconstitutional contradicts reason, authority and practicality. The theory of the complete separation of powers, derived from Montesquieu and his disciples, was never explicitly adopted

[47] Fuchs, The Hoover Commission and Task Force Reports on Legal Services and Procedure, 31 Ind. L.J. 1 (1955); Nutting, The Administrative Court, 30 N.Y.U.L. Rev. 1384 (1955); and Jaffe, Basic Issues: An Analysis, 30 N.Y.U.L. Rev. 1273 (1955).

[48] See notes 11 and 12, *supra*.

in the Constitution nor has the Supreme Court ever projected this theory into the administrative realm by holding that the combination in one agency of legislative, judicial and executive powers is unconstitutional. After all, as Dean Landis has said, "Montesquieu knew nothing of regulating airlines and television or even railroads and security exchanges."[49] The development of the administrative process has *had* to keep pace with the increasing complexity of our economic life.

To the extent that separation of functions is necessary for the proper conduct of administrative proceedings, such separation is adequately provided in Section 5(c) of the Administrative Procedure Act. No example of the violation of this section has been brought forth by the Hoover Commission, its Task Force, the Task Force staff, the ABA Special Committee or by anyone else.

The "new" argument is that certain agencies have done their work well and that the functions of such agencies are now ready to be transferred back to the courts where, according to the opposition, handling by the courts would result in increased efficiency. The fact that an administrative agency has developed great competence in its field is the most illogical argument imaginable for remedial legislation resulting in the agency's destruction. The increase-in-efficiency argument is not supported by reason or experience. The ideal of the administrative process has been expeditious, efficient and inexpensive procedures in contrast to the traditional time-consuming and often very expensive judicial procedure. The administrative process has often fallen far short of its ideal but within past years and particularly in the recent past, improvement along these lines appears satisfactory to those of us working to improve the functioning of the administrative process.

One of the most convincing arguments against the "new" proposal is the previous experience with an administrative court. Many years ago, because of criticism by the organized legal profession, Congress created a specialized Commerce Court. This court, composed of judges equivalent in rank to judges of the Courts of Appeals, whose duty it was to adjudicate exclusively those matters within the ambit of operations of the Interstate Commerce Commission, created such con-

[49] Davis, *op. cit. supra* note 19, at 30.

fusion that within three years the court was abolished by the Congress. The record of that specialized administrative court is best summarized by the treatment its decisions met at the hands of the Supreme Court of the United States. The administrative court was almost uniformly wrong. In 12 Commerce Court decisions reviewed by the Supreme Court, the Supreme Court overruled the Commerce Court and supported the appeal of the Interstate Commerce Commission 10 times.

The new opposition implies the existence of strife between administrative agencies and the judicial system. Fortunately, neither the administrative agencies nor the courts have been willing to join in such strife.

The administrative process is not a rival of the courts,[60] although the proponents of the administrative court may wish to present that picture. The courts do not consider us competitive, nor do we consider ourselves to be rivals of the judicial system. Indeed, the courts provide the necessary judicial review that insures the acceptance of the administrative process. Administrative agencies were set up to fill voids and needs which could not be met by the traditional judicial process. This has been conceded by most of the Federal courts.

While the administrative process has exhibited growing pains and failings just as the courts have done, there has been throughout the years a steady improvement in character, in responsibility and in value. I believe it is our duty as Federal lawyers and former Federal lawyers interested in the administrative process to insure that this steady improvement continues.

In my work with the President's Conference on Administrative Procedure, I have had occasion to review comments and statements on our proceedings made by members of the bar throughout the nation. I am still amazed at what those statements have shown—that throughout our bar there is a growing awareness of the importance of administrative law and a remarkable competence to deal with that law.

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[60] "In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice' and not business rivals. See *United States v. Morgan*, 307 U.S. 183, 191; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 et seq." Justice Frankfurter, *United States v. Ruzicka*, 329 U.S. 287, 295 (1946).

I would like to conclude this affirmative argument with one thought. It is this: administrative law will grow in wisdom, will be finally purged of its inadequacies only if the organized bar directs toward the problems of administrative law the same attention and devotion which it has heretofore directed toward courtroom practice. In a branch of law which today affects more persons and more rights than all the courtrooms of our land, the bar can do no less.