VOL. XXIV No. 1

THE JOURNAL of the BAR ASSOCIATION of the District of Columbia

The Administrative Court Proposal—A Reply

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Atomic Electric Energy and the Holding Company Act

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Summary of U. S. District Court Opinions

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George Washington U. Law School Spring Semester Courses and January Institute

Next Meeting of the Bar Association — Mayflower Hotel
January 8, 1957

Medical Legal Forum, Association Claimants Attorneys, January 17, 18; 9:00 A.M.—6:00 P.M., Shoreham Hotel; Melvin M. Belli, Moderator.

January 28, 1957, 4 P.M., Ceremonial Courtroom; presentation of plaque of the late Chief Judge Harold M. Stephens; members invited.

JANUARY, 1957

WASHINGTON, D. C.

The Administrative Court Proposal — or Should Judicial Functions of Administrative Agencies Be Transferred to an Administrative Court[1]

(For the Negative—Earl W. Kintner[2])

Mr. Chairman, Mr. Sellers and Other Fellow Members of the Federal Bar Association:

I.

Several weeks ago I bought a house, not a very luxurious or fancy house. In fact, one might say that it looked "beat up". But my wife and I plan eventually to redo the house inside and out, and at the end of that time we expect to have a rather comfortable, pleasant place in which to live.

Before buying the house, I was particularly interested in one feature, that the house has a good, solid, substantial foundation.

My good friend and learned opponent in this debate, from whose authoritative writings I gained much of my early knowl-

[1] A debate before the Annual Meeting of the Federal Bar Association, Washington, D. C., September 29, 1956, Statler Hotel.

[2] President Federal Bar Association, General Counsel, Federal Trade Commission; the argument for the affirmative by Ashley Sellers appeared in the December issue at pages 703-712.

edge of the field of Federal administrative law, has the difficult position of arguing for a structure built upon a most unsound foundation. The foundation of his proposed administrative court consists largely of *abstract legal theory.* To attempt to erect anything of substance upon something abstract must result in the creation of an unsound structure.

To get to the foundation in this case, it is necessary to do considerable digging. Most recently the proposed administrative court was approved by the American Bar Association, House of Delegates. The proposal had been drafted and approved by a special ABA Committee on Legal Services and Procedure. As source material, the Special Committee used the Hoover Commission report and recommendations published in 1955. Going back further, the Hoover Commission recommendations were based upon the recommendations of the Hoover Commission Task Force on Legal Services and Procedure. The Task Force, in turn, relied upon the judgment of its staff, a very small group of three or four able young lawyers not experienced in the field of administrative law.

An analysis of the foundation work carried on by this Task Force staff reveals many reasons for the inadequacy of the result. The Task Force staff obtained its knowledge of the current workings of administrative law by sending two questionnaires to the agencies of the Federal Government. Without more, the Task Force staff, and, in turn, the Task Force itself, within the space of a very few months developed proposals for a complete revision of administrative law. That most of the proposals were unjustified by research, by experience, or even by current concern has already been noted by a number of expert legal writers.

I believe that the Task Force staff set out to recast completely, if not to destroy, the administrative process and that the recasting or destruction was to be accomplished in two ways. First, a number of administrative agencies were to be taken apart immediately. Concurrently, various other proposals were to be adopted which would weaken the remaining administrative agencies so thoroughly as to make them proper victims for succeeding attacks on the administrative process.

The latter proposals are embodied in recommended legislation which would change the rules of evidence and procedure applicable to administrative proceedings, which would curtail the opportunity of agency members to participate genuinely in the decisions for which the agency must accept responsibility, and which in practical effect suggest that an administrative agency cannot function properly or fairly without a court looking over its shoulder at each step taken. These legislative changes suggested by the Hoover Commission Task Force, and adopted in large part by the ABA, would make it difficult ever to complete an administrative proceeding against a party determined to use every delaying action possible.

In my opinion the administrative process is far from perfect. Indeed, I have been one of the most severe critics within the Government of its shortcomings. You will all recall the work of the 1953-1954 President's Conference on Administrative Procedure, which labored for improvement of the administrative process. This is the approach which in my judgment offers the most fruitful possibilities for significant future improvement of the process without destroying or seriously crippling it.

II.

The first object of the changes proposed by the Task Force was the Federal Trade Commission. The National Labor Relations Board was also a prime candidate. Certain duties of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, the United States Tariff Commission, the Federal Power Commission, the Department of the Interior, and the Department of Agriculture were also to be removed to the Trade Section of the Administrative Court.

The arguments of the Task Force were:

a. That the trade court would remove confusion;
b. That it would save money; and
c. That it would be more efficient.

The removal-of-confusion argument was based upon a superficial observation by the Task Force staff of the word "unfair"

in a number of existing statutes. Seeing the same word in five statutes, the Task Force assumed that five agencies were operating in a single field, since each one must decide whether something was fair or not fair. Actually, there is no real overlap among the fields concerned. What is unfair in aviation is not necessarily unfair in agriculture. The determination of what is unfair in any one of the statutes can be made only upon the basis of expert knowledge in each field. An administrative court operating in all such fields would openly and directly conflict with the work of all of the agencies and confusion would be created rather than removed.

With respect to the argument that the administrative court would save money, no argument and no facts were presented by the Task Force, and I shall present none in rebuttal, except to say that in my own experience it appears that the creation of a new agency, whether judicial or otherwise, could not avoid

increased costs. Parenthetically, it has been pointed out many times that the Federal Trade Commission is unique in Government in that it has fewer employees in 1956 than it had in 1918.

The increase-in-efficiency argument makes no sense. The Task Force objects to the handling by the Federal Trade Commission of its famous *Cement Institute* case, apparently criticizing the Commission for having granted due process of law to the respondents before it.

This case, selected as the *piece de resistance* by the Task Force in its argument against the Commission, does not support the Task Force position. In 1937, when the Federal Trade Commission was investigating the cement industry, the President of the United States directed the Attorney General to investigate a similar problem in the steel industry. The Attorney General after study of the problem reported to the President as follows:

> The administrative and quasi-judicial remedies in the hands of the Federal Trade Commission may be better adapted to the control of the subject matter of this particular complaint than action by the Department of Justice. The machinery of the court is not geared to the handling of the social and economic factors necessarily involved; and many persons and communities seriously affected cannot be parties to a court proceeding under the Antitrust Laws. It appears therefore that a problem is presented which can be more satisfactorily investigated and dealt with through the more flexible remedies of the Federal Trade Commission. (White House Press Release, April 27, 1937.)

The Commission's *Cement Institute* decision was affirmed by the Supreme Court.

Although the separation-of-functions argument has been thoroughly dealt with by Mr. Freer in his recent article in the George Washington Law Review, my learned opponent reintroduces that subject but disclaims any intent to harm the Federal Trade Commission. In opposition, I wish merely to say that a Federal Trade Commission without the authority to decide cases will function just about as well as a human body which has been processed by a guillotine.

III.

The Task Force staff was equipped for its recommendations neither by experience nor by study. As a result, the errors were many. As to why such errors were adopted by the Task Force itself and subsequently by the Hoover Commission, I have no satisfactory explanation, but along with Robert Freer, who has long been prominent in the Federal Bar Association and who is a past Chairman of the Federal Trade Commission, I feel that many of the errors were unintentionally carried forward.

The adoption of such errors by the American Bar Association Special Committee is another matter. I cannot understand how modern lawyers, interested in the best interests of their profession and of the public, can accept any proposal to weaken or destroy the administrative process.

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 the proposals for improvement of the process, recommended that the District Association defer action on the Specialized Courts. The two-thirds majority report of the Committee cited as reasons for its recommendation: 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 on the merits.

The Special Committee of the ABA recommends that the Federal Trade Commission be dismantled because its "administrative action is in essence not regulatory but adjudicatory in

the judicial sense." In fact the Task Force indicated that the sound administration of the Federal Trade Commission of its assigned duties was a factor in selecting this agency for judicialization—a novel but poor reason for remedial legislation.

Possible future action against other agencies is hinted at by the following Special Committee language: "Other transfers should be expected as the Congress explores the field and finds other adjudicatory functions to be within that category." This is the piecemeal, or divide and conquer, approach.

The weakness of this recommendation by the 1956 Special Committee of the ABA is indicated, in my judgment, by the work of another Special Committee of the American Bar Association in 1936.

The 1936 Committee, after three years of thorough study, reached a conclusion that cease and desist orders of the Federal Trade Commission are primarily legislative and administrative. That Committee concluded:

> 4. *Directive Orders Analogous to Those Rendered in Mandamus and Injunction Proceedings.*—This classification is so large and so important that it can be treated only superfically. A typical example is the power of the Federal Trade Commission to issue cease-and-desist orders against persons found guilty of unfair methods of competition. . . .
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> . . . Since the exercise of such a function has usually been regarded by the courts as a legislative act, however, it may be excluded from present consideration.
>
> The Logan Bill does not propose to endow the court with jurisdiction over any of the cases belonging to this classification. The committee believes that even eventually it will not be desirable to lodge the original exercise of most of these functions in the court, both for practical reasons and because the functions approach so closely to the legislative field.
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> (Report of the Special Committee on Administrative Law, American Bar Association, 1936, p. 238).

Which Committee was right? The 1936 Special Committee which studied three years and really investigated the administrative process or the 1956 Special Committee which did no more than cast a quick glance at the problem. Any impartial analysis must show that the 1956 Committee was, to take the

most charitable attitude, misguided. I find it difficult to be charitable, and it is my own personal conclusion that the Federal Trade Commission was a cold-blooded selection by the Hoover Commission Task Force staff and the ABA Special Committee as the agency which should *first* be sacrificed. In my opinion the choice was made on the basis of two principal considerations: (1) the Federal Trade Commission has a large measure of quasi-judicial work to which it increasingly has applied accepted judicial standards of due process; and (2) the Federal Trade Commission has no separate, organized specialized bar which could be expected to rise to its defense in the Congress and elsewhere.

The arguments presented to you by my learned opponent are old ones, despite his protestations to the contrary. The same arguments were made in 1887 prior to the enactment of the ICC Act and in 1914 prior to the establishment of the Federal Trade Commission. In 1914, Senator Lewis stated as follows:

"The assault that it [the I.C.C. Act] was unconstitutional for the reasons laid down by the able Senator from Utah [Mr. Sutherland] as to section 5, and the able Senator from Connecticut [Mr. Brandegee] as to the general purpose of this similar bill, was led by Senator Evarts, of New York, accredited to be a distinguished lawyer and head of the American bar, former Secretary of State. So confirmed was Senator Evarts that it was not in the power of the Government to vest this form of inquisition—to use the words of the able Senator from Utah—within an administrative body, that he denounced the act as being a reflection upon the intelligence of this body. Not only would he not support it, but at home, before the bar association of the State of New York, he gave the passage of the act as evidence of a decadence of wisdom on the part of the Senate.

"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 demarkation in construction that would give justification to refined distinctions." (Cong. Rec., Aug. 1, 1914, p. 14291.)

Administrative law was opposed at the time of its creation

as not being in accord with our legal traditions. However, Congress decided that the people of the country needed administrative law despite the fact that it might not be in accord with what the minds of some lawyers demanded. This is 1956. What is now more "traditional" anyway, the "new" administrative court or the Interstate Commerce Commission, founded about 70 years ago?

The next major argument was that administrative law was unconstitutional. The Supreme Court has set us straight as to that argument.

The next phase of the argument was that the administrative process is doomed to failure—it cannot do the job. History has shown the emptiness of this argument. The administrative law has played a very important part in the success of the American system of Government during the last half century.

Thus, I oppose the "new" opposition. Congress' action in response to the needs of the people, approval of the Supreme Court, and practical results evidenced in recent history—all support my position.

IV.

I have felt it important in the brief time of this luncheon to place the administrative court proposal in its proper setting. Time does not permit a definitive defense. But if one were to summarize the various advantages of the administrative process over the proposed trade regulation court, or others of similar tendency, the following points, among others, come to mind:

1. The administrative process performs functions which the courts are not geared to handle and which the courts do not desire to handle.

2. The administrative process performs these functions because it is flexible, and the job which needs doing requires a flexibility not available to the courts.

3. The administrative process works quickly, smoothly, and effectively in areas where the courts have demonstrated an inability to provide results quickly, smoothly, and effectively. I hasten to add that there have been notable examples of excessive delay in the administrative process, as with the courts, and

that the bar should aid in elimination of such delay, as it now is doing with respect to the same problem in the courts.

These examples of advantages of the administrative process only begin to tell the story. They show some of the reasons for the growth of the administrative process. The process is not a rival of the courts, although the proponents of the administrative court present that picture. The courts do not consider us competitive, nor do we consider ourselves to be rivals of the judicial system. In fact the courts provide the judicial review of that administrative process that insures its integrity and due process.

While the administrative process has exhibited from time to time 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, and I believe it is our duty as Federal lawyers and former Federal lawyers deeply interested in the administrative process to see to it that this steady improvement continues.