1938

Current Proposals for the Reorganization of the Federal Regulatory Agencies

Ralph F. Fuchs
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Administrative Law Commons, and the Organizations Law Commons

Recommended Citation
Fuchs, Ralph F., "Current Proposals for the Reorganization of the Federal Regulatory Agencies" (1938). Articles by Maurer Faculty. 1596.
https://www.repository.law.indiana.edu/facpub/1596

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
CURRENT PROPOSALS FOR THE REORGANIZATION OF THE FEDERAL REGULATORY AGENCIES

I. THE NATURE OF THE PROPOSALS

The atmosphere at the present time is rife with proposals for sweeping changes in the organization and functioning of the Federal agencies that exercise administrative powers over persons and property. The President's Committee on Administrative Management, the American Bar Association's Special Committee on Administrative Law, and the Brookings Institution in a report to the Senate Select Committee to Investigate the Executive Agencies of the Government, have contributed far-reaching suggestions since the opening of the second Roosevelt administration. The proposals of the President's Committee were partially embodied in a bill to carry out its recommendations, from which, however, the provisions that bore upon the principal regulatory agencies have since been eliminated. Bills prepared by the Bar Association committee in 1937 have not been endorsed in detail, but the committee's report has been approved.

It is of the highest importance that thinking in the legal world develop to the point where the professional judgment upon such proposals as those now made is realistic and, despite inevitable differences of opinion, becomes genuinely helpful to legislators and to the people. Great credit is owing to the individuals and groups that have carried thought and discussion to the stage of producing the suggested measures and indicating the means of evaluating them. There is ground

---

1A bill, S. 2700, 75th Cong. 1st Sess. (1937), embracing the Committee's proposals with modifications, was introduced by Senator Robinson June 15, 1937. After hearings before the Select Committee on Government Organization in August, the committee reported favorably a substitute bill, S. 2970. SEN. REP. no. 1236, 75th Cong., 1st Sess. (Aug. 17, 1937). A bill containing further modifications, S. 3331, 75th Cong., 3d Sess. (1938), is now pending before the Senate. H.R. 3202, 75th Cong., embracing reorganization but not the civil service and other collateral recommendations of the President's Committee (which have been embodied in separate bills) and differing slightly in effect from S. 3331, was passed by the House August 13, 1937. 88 Cong. Rec. 8875.
2(1937) 22 A.B.A.J. 850.
for believing that the current consideration of administrative problems will produce a system of administration that possesses in greater degree than at present the twin qualities of efficiency in furthering the public interest\(^4\) and availability of the process that really is due\(^5\) to affected private interests. It must be confessed, however, that if this end is to be realized the arid conceptualism which is prominent in all of the documents under review where they deal with governmental regulation,\(^6\) must be made to yield to an approach that takes more careful account of actualities.

The report of the President's Committee, as is well known, centers upon the problem of the effective management of the entire executive branch of the Federal Government, rather than upon the issues raised by the impact of administration upon private persons and property. The latter, however, must be considered in administrative management, and the Committee's suggestions with respect to it constitute some of the most controversial aspects of its report.

Briefly, the Committee urges that the entire executive branch of the Government, except for certain "managerial agencies" to be mentioned presently, shall be gathered into twelve departments, each headed by a cabinet officer, and that the President shall have a continuing power to allocate the various Federal administrative agencies and their functions among these departments. Thus a formally unified executive would be created, with the President at its head. He would be aided by an enlarged staff of executive assistants and there would be, in addition, a Civil Service Commissioner, replacing the present Commission, at the head of an all-embracing civil service system; a more adequate Bureau of the Budget outside

\(^4\)The public interest is the standard that guides the administrator in executing the law. This is the verbal symbol designed to produce unity, order, and objectivity in administration." It "is to the bureaucracy what the 'due process' clause is to the judiciary. Its abstract meaning is vague but its application has far-reaching effects." HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936) 23.

\(^5\)One of the connections in which "due process of law," as a legal ideal if not as a constitutional doctrine, will increasingly acquire specific content, is that of administrative procedure. See FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) 217 ff.

\(^6\)The Brookings report (see note 27 infra) does not sin in this manner in dealing with the question of the maintenance of the independence of the regulatory commissions. Infra, text at note 28.
any department; and a permanent National Resources Board as an over-all planning agency for the Nation. Responsibility to Congress—aside from that which grows out of the legislative function of making appropriations—would be obtained through the President and through an Auditor General, replacing the present Comptroller General, whose function of auditing expenditures would be separated from those of accounting, disbursement, and adjustment of claims. These would be transferred to the Treasury Department. 7

This plan for improved management is rested upon a dual basis. First, it is said to accord with certain “canons of efficiency” in administration which have developed from experience in the conduct of large-scale modern organizations, both public and private. These canons require, among other things, “the establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management, . . .” and “the systematic organization of all activities in the hands of a qualified personnel under the direction of the chief executive; . . .”. 8 Second, the plan is based upon a “deliberate design” of the founding fathers which caused them to place the “executive power of the Government of the United States” in the President “and in the President alone,” 9 thus erecting the unity of the executive into a constitutional principle.

The foregoing scheme affects the exercise of administrative powers over private persons and property largely because of its bearing upon the “independent” regulatory commissions, which exercise important powers of that variety. The report of the President’s Committee includes these agencies among approximately 100 separately organized “administrations, boards, commissions, committees, governmental corporations,
and authorities” which either “are under the President but not in a department” or are “totally independent.” The independent regulatory agencies fall into the latter class. They are a “new and headless fourth branch” of the Government and hence violate the canonical and constitutional principle that the executive shall be unified. The former are so scattered as to make impossible the performance of the Presidential duty of over-all management.

The regulatory commissions, moreover, suffer from “a conflict of principle involved in their make-up and functions . . . an internal inconsistency, an unsoundness of basic theory,” in that “they are vested with duties of administration and policy determination with respect to which they ought to be clearly and effectively responsible to the President, and at the same time they are given important judicial work in the doing of which they ought to be wholly independent of Executive control.” Because of these several grave deficiencies it is proposed not only to gather the “independent” agencies into the twelve departments but at the same time also to segregate the judicial functions, where they exist, in judicial divisions which, though nominally within the departments, shall be free of executive control.

The latter proposal coincides with recommendations which the American Bar Association’s Special Committee on Administrative Law, approaching the problem of the regulatory commissions from an entirely different angle, has made in recent reports to the Association. This committee, according to its 1937 chairman, was confronted at the outset of its work in 1933 “by the lack of any administrative tribunal

11Id. at 32.
12Id. at 34.
13The “independent regulatory commissions” embraced within the Committee’s objection are enumerated by Professor Robert E. Cushman in his study of them, which is appended to the Report of the President’s Committee (op. cit. supra note 7), and from which the Committee draws many of its ideas. They are: the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, the Bituminous Coal Commission, and the United States Maritime Commission. Op. cit. supra note 7, at 208.
before which many questions of controversy between the Federal Government and the citizen could be taken and the lack of any independent review of the law and the facts of a great many of such controversies.” Therefore it “has devoted the major part of its time and study since it was organized to devising some workable means to create a remedy for such defect; that is, to provide a forum where Administrative Law could be practiced.”

The committee, furthermore, took “the traditional separation of governmental powers into executive, legislative, and judicial powers as its starting point.” It has been troubled because it has found “a considerable amount of commingling of legislative, executive, and judicial power in the hands of administrative officers—much of which was necessary—whether in the regular departments and establishments of the Federal Government or in the independent boards, commissions, authorities and government-owned corporations.”

In order to accomplish a separation of these commingled powers and to provide a suitable forum for citizens, the committee recommended that, “subject to the successful accomplishment of a segregation of their judicial functions . . . and with certain exceptions,” the independent commissions “be abolished.”

Subsequently the Bar Association committee has brought forward two successive proposals for increasing the means of “independent review” of administrative determinations, whether within the regulatory commissions or in other agencies. In 1936 it proposed to set up a Federal administrative court by consolidating the present Court of Claims, Customs Court, Court of Customs and Patent Appeals, and Board of Tax Appeals. In addition to the present jurisdiction of these bodies, the new court would have exercised reviewing powers in cases of license revocation by regulatory agencies. It was proposed to extend its jurisdiction in the

---

20Id. at 746 ff.
future to an undetermined extent,\textsuperscript{21} possibly with the ultimate result of subjecting all "judicial" administrative determinations to its review. That review would have been exercised in two stages by trial and appellate divisions,\textsuperscript{22} subject to ultimate correction by the Supreme Court in \textit{certiorari} proceedings.\textsuperscript{23}

Because its 1936 proposal was opposed by lawyers who practice before the present, admittedly satisfactory tribunals,\textsuperscript{24} the committee abandoned its recommendation of a consolidated administrative court and in 1937 advocated the creation of means for the "independent review" of administrative determinations, where no facilities for such review are at present provided. These suggested means include (1) review by the Court of Claims of the legality of such general regulations of administrative agencies as may be brought before it by a prescribed procedure\textsuperscript{25} and (2) intra-agency boards for the review of such decisions and orders as may be appealed to them, subject to limited further review on appeal to the circuit courts of appeals.\textsuperscript{26} The committee's proposal with respect to review of general regulations goes beyond the "judicial" aspects of administrative power and hence breaks new ground.

The Brookings Institution's report to the Senate committee\textsuperscript{27} deals with the recommendations of the President's Committee and also with the problem of "independent review" of administrative determinations. As regards the former, after pointing out the inseparability of the "legislative," administrative,

\begin{itemize}
\item \textsuperscript{21}\textit{Id.} at 748.
\item \textsuperscript{22}\textit{Id.} at 761.
\item \textsuperscript{23}\textit{Id.} at 765. There is a possible constitutional objection to direct review by the Supreme Court of proceedings that have not previously been before a constitutional court, as distinguished from a "legislative" court such as the Court of Claims; for the high Court cannot be saddled with original jurisdiction. Keller \textit{v.} Potomac Electric Power Co., 261 U.S. 428 (1923); Federal Radio Commission \textit{v.} General Electric Co., 281 U.S. 464 (1930). It does, however, entertain appeals from the Court of Claims at the present time, under the provisions of the Judicial Code, 43 STAT. 939 (1925), 28 U.S.C. \$288 (1934).
\item \textsuperscript{24}\textit{Report of Special Committee on Administrative Law} (1937) A.B.A. \textit{Advance Program}, at 185.
\item \textsuperscript{25}\textit{Id.} at 169, 194 ff., 224.
\item \textsuperscript{26}\textit{Id.} at 170, 199 ff., 225.
\item \textsuperscript{27}Printed for the use of the Select [Senate] Committee to Investigate the Executive Agencies of the Government, 75th Cong., 1st Sess., 1937. No. 10: \textit{Report on the Government Activities in the Regulation of Private Business Enterprises}.
and "judicial" aspects of the work of the independent commissions, the report states that the issue "boils down, in effect, to the question of executive domination of . . . large new fields of public policy versus control over them by independent authorities. Is it advisable that these social policies be under the direct control of the party that happens to be in power . . . or is it wiser to leave them on a more stable, impartial, non-political basis?" The report prefers the latter alternative, although not without specific suggestions for the redistribution of certain of the present regulatory powers. In the matter of review of administrative decisions it is proposed both that there shall be "impartial review" within each agency when individuals are aggrieved by decisions and that a system of administrative courts be established with, apparently, a very broad jurisdiction.

The Brookings report also recommends that each regulatory agency be required to "implement" its powers by enacting detailed general regulations, to serve as advance notice to affected parties of the legal requirements they must observe. The Bar Association committee likewise has stressed the need for making mandatory the exercise of rule-making powers by the agencies in which they are vested.

II. THE ISSUES PRESENTED

The reports that have just been outlined present the following issues which are of importance to lawyers: (1) whether the "independent" federal regulatory agencies should be incorporated into the executive departments of the government, with departmental control of their "non-judicial" functions; (2) whether the "judicial" functions of these agencies should be segregated from the others and entrusted to separate tribunals which, although nominally within the departments, would be free of departmental control; (3) the extent to which there should be "independent review" within the administrative system of (a) general regulations and (b) decisions and orders; and (4) the desirability of mandatory
“implementation” of regulatory powers over persons and property by means of administrative regulations, in contrast to the gradual development of standards through decisions and orders.

These issues are broadly presented; but in few instances does the recommending group put forth legislative proposals that would translate its views fully into practice. Although the President’s Committee advocates the delegation of power to the President to absorb the “independent” agencies into the departments, it is careful to state that it does not intend to oppose the continued independence of any specific agency, where there may be sufficient reason for it. The limited scope of the 1936 proposal of the American Bar Association committee has already been noted. In 1937 the draft bill prepared by this committee was permissive, not mandatory, in regard to the establishment of intra-agency boards of review. The Brookings report, which concludes with its broad suggestion for review of administrative decisions by an administrative court and for the mandatory exercise of rule-making functions by regulatory agencies, emphasizes in earlier pages the inseparability of “legislative,” administrative, and “judicial” functions and the necessity of working out policies from case to case in the administration of measures of economic control.

The reason for the disparity between opinions and specific proposals in these reports lies partly, no doubt, in the strategy of inaugurating sweeping reforms by piecemeal action, but partly also in the fact that the actual purposes both of discussing the issues and of proposing concrete measures are practical and not doctrinal and, hence, would not support thoroughgoing measures, logically devised. Obviously something more than the theories that have been advanced is required to support proposed legislation. The “canons of administration” of the President’s Committee are not eternal truths; the theory of the unity of the executive possesses no inner sanctity despite its alleged origin in the will of the Fathers; and the principle of the separation of “judicial”

37 Id. at 92.
38 Id. at 89.
functions from others in the work of administrative agencies is not self-validating. Similarly, it is not axiomatic that persons adversely affected by administrative determinations are entitled to "independent review" of those determinations. Such propositions are advanced because there are definite interests to be served thereby; and however broadly the propositions may be stated, their proponents draw back from urging their application at the point at which it becomes likely that the desired interests will not actually be furthered or that other, more important interests will be impaired. What the President's Committee wishes passionately to have the United States achieve is efficient democratic government. What the Bar Association committee has wanted is the protection of affected private interests. In the pursuit of these ends the committees advance their theories, but both tacitly admit that the application of them must be halted where the balance of utility swings against them.

General theories have power, however, when it is not clear where the balance of utility lies—when the data, perhaps, are lacking or have been overlooked. Then it is that canons and principles have force for good or ill; for they point directions, and to follow produces consequences. All of the reports here being reviewed have pointed directions. Their authors have not hesitated to assert that the results of following the arrows they have posted would be good. Thus the President's Committee, warily though it avoided condemning any specific independent commission to absorption by a department, denounced all of them in forceful language and proposed no restrictions upon the President's power to absorb all of them into departments. The Bar Association committee and the Brookings Institution stand committed to the review of administrative determinations by administrative courts to the utmost extent, notwithstanding the comparative mildness of the measures thus far drafted.

III. Judging the Issues

As respects the desirable organization of those governmental agencies that are subject to the President's supervision,
his Committee has supplied a convincing argument in support of its demand for unification. Manifestly it is impossible for an executive to maintain effective contact with more than a limited number of subordinates, even when he is provided with an efficient personal staff. Therefore the multitudinous agencies for whose policies and smooth running he is responsible must be so grouped that their affairs come before him through a few individuals who, in turn, are enabled by similar means to keep sufficiently in touch with the agencies committed to their charge.

From this thesis there has been no word of dissent in the literature or at the hearings upon the report of the President's Committee. The Committee's assertion, on the other hand, that the independent regulatory commissions, which now are answerable to Congress and not to the President, should be brought under his control, has been sharply challenged. So effective has this challenge been that even the bill originally introduced by Senator Robinson to carry out the Committee's proposals contained the qualification that the President, in the exercise of the broad powers conferred upon him, might not "abolish any of the functions of an independent establishment" or transfer any of its functions to any other agency, except "routine administrative and executive functions . . . common to other agencies of the Government, such as the preparation of estimates of appropriations, the appointment of personnel and maintenance of personnel records, the procurement of material, supplies and equipment, the accounting for public funds, and related matters."

Evidently it was the purpose of the draftsman to subject only the "housekeeping" functions of the independent establishments to possible departmental control. At the subsequent hearings it was pointed out, however, that under the

---

41 S. 2700, 75th Cong. 1st Sess. (1937).
42 Id. §§ 5(b), 5(c).
43 These establishments are listed in the bill as "the legislative courts and the United States Board of Tax Appeals, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Bituminous Coal Commission, the National Labor Relations Board, the Securities Exchange Commission, and the United States Maritime Commission."
44 Hearings before Select Committee on Government Organization on S. 2700, 75th Cong. 1st Sess. (1937). See note 1 supra.
bill as drawn the President might impose internal reorganization upon the independent establishments, and it was asserted further that control over their own personnel and estimates was important to their proper functioning.\textsuperscript{45} The friends of the Interstate Commerce Commission rallied to its support in impressive fashion.\textsuperscript{46} As a result the bill as subsequently altered entirely exempts the independent establishments from the powers conferred upon the President.\textsuperscript{47}

One naturally asks how it became known to the President's Committee that an all-embracing management of the executive branch of the government by the President would be better for the country than one to which exceptions were permitted. The only definite suggestions occur in a study, \textit{The Problem of the Independent Regulatory Commissions}, by Professor Robert E. Cushman, which is appended to the Committee's report as one of a number of studies upon which, presumably, the recommendations of the Committee are based.

Professor Cushman points to two specific fields of regulation in which independent commissions make important determinations of policy that should, according to him, be correlated with the President's general policy.\textsuperscript{48} These fields are the regulation of railroads by the Interstate Commerce Commission and the enforcement of the anti-trust laws. That Presidents occasionally have wished to subordinate the policies of the Interstate Commerce Commission to their own is well known, and Professor Cushman cites the evidence. That the anti-trust policies of successive administrations have varied and that the Federal Trade Commission's policy has not always varied in the same manner, is also well known.\textsuperscript{49} The real issue is which policy ought to prevail. Professor Cushman asserts, but does not demonstrate, that it is the President's. Evidently the issue ought to turn upon whether the

\begin{itemize}
\item \textsuperscript{45}\textit{Id.} at 174, 179.
\item \textsuperscript{46}\textit{Id.} at 208--255. Shippers, carriers, and state commissions joined in the defense.
\item \textsuperscript{47}S. 3331, \textsection 2(b), 75th Cong. 3d Sess. (1937). The Board of Governors of the Federal Reserve System is added. H.R. 8202, \textit{supra} note 1, exempts the same agencies, except the Board of Tax Appeals, and three others, "except as to the function of preparing estimates of appropriations."
\item \textsuperscript{48}\textit{Op. cit. supra} note 7, at 219--222.
\item \textsuperscript{49}\textit{The lack of correlation between the Department of Justice and the Federal Trade Commission in this field has been stressed before. See Keezer and May, Public Control of Business} (1930) 35--38.
\end{itemize}
President or an independent agency of presumably expert character is most likely to evolve policies that will contribute to the maintenance of a healthy economic system. It is obvious that in these fields the government fixes the limits within which business management must plan. It seems clear that its policy here should have greater stability than is consistent with dictation by partisan politics and should be more informed than elected officials are likely to make it. It should possess the wisdom that derives from accumulated experience and the resistance to group pressure which is bred by independence and technical competence. Compared with these considerations the mere concept of entire unification of the executive branch has little to offer.

There will be ample scope for effective direction of the country's affairs by the executive if the economic basis of society is stabilized and controlled in the public interest by responsible, expert agencies, subject to legislative determination of fundamental policies. In fact, there would be more to achieve by political means in a nation whose economic life was expertly conducted than in one whose economic affairs were rendered unstable by non-expert manipulation—assuming ultimate legislative control in both instances.

It would, of course, be caricaturing the conclusions of Professor Cushman and the recommendations of the President's Committee to assert that their adoption would result in simple political opportunism in the areas of regulation now occupied by the independent commissions. There is direct evidence to the contrary in the manner in which the Department of Agriculture has exercised important authority over commodities exchanges and the meat industry.\(^5\) It is not even true that "In case the independent boards and commissions were placed within executive departments, there undoubtedly would be a strong control established over the sublegislative and administrative aspects of the regulatory authorities."\(^5\) It is far more likely that the sheer weight of administrative burdens would compel the President and the department heads to leave these agencies rather severely alone.\(^5\) But the danger of

---


\(^5\) Except in so far as the doctrines of the Supreme Court might compel personal exercise by these officers of such regulatory functions as might nominally be vested in them. See Feller, Prospectus for the Further
executive intervention at critical moments in behalf of politically powerful groups or of supposed popular desires would be ever-present. It is not without significance that careful study of the work of the Interstate Commerce Commission has led to advocacy of the maintenance unimpaired of the independence of that body.

It is true that not all of the independent regulatory agencies are as fully charged as is the Interstate Commerce Commission with the duty of promoting the soundness of an essential industry. There is every reason to believe, however, that the powers of the younger bodies that are charged with controlling specific industries will inevitably develop to a similar degree. If the Federal Trade Commission comes to possess, as it should, full powers in the enforcement of the anti-trust laws, it will be charged with the most weighty and delicate duty of all—that of defining the limits of the allowable substitution of management for competition in the control of trade and industry.

As previously noted, the demand of the President's Committee for departmentalization of the independent regulatory agencies is accompanied by a proposal to segregate their present "judicial" functions and to entrust them to judicial sections, which would be "in" the departments only for purposes of "administrative housekeeping." By a "relatively simple" division of work between such sections and the departmentalized administrative sections, the judicial functions would not only be left free of departmental control but


The National Labor Relations Board is in a class by itself. Having only the duty to apply a statute in cases as they arise, it nevertheless has many difficult interpretations to make which, in such matters as the ascertainment of "appropriate" units for collective bargaining, involve determinations of policy. The Board of Tax Appeals and the legislative courts perform their adjudicative functions in an atmosphere less filled with economic strife.


Ibid.
would be purged of present "insidious" aspects "which threaten the impartial performance of those functions"; for as it is now, "the same men are obliged to serve as both prosecutors and judges." Thus their work is under "suspicion," because of a condition which "undermines judicial fairness and weakens public confidence in that fairness."59

The aforesaid "simple" division of work would consist of assigning to the administrative section the function of making general rules (safety regulations, accounting orders, etc.), together with those of initiating action in particular cases, preparing the records in these cases for final decision upon them and actually deciding such cases as are routine in nature, subject to appeal to the judicial section.60 The latter, with cases thus neatly served up to it, "would sit as an impartial, independent body." Professor Cushman sets forth at greater length the proposed division of functions.61 But nowhere is it explained how the decision of a rate case in the Interstate Commerce Commission or Federal Communications Commission or of a case in the Federal Trade Commission involving the further specification of what constitutes unfair competition, can become non-policy-determining. If it cannot, the attempt to segregate the policy-determining from the "judicial" functions must fail. Nowhere, moreover, is the question faced of whether the alleged gain in impartiality from segregating the "judicial" functions would not be offset by a loss in expertness on the part of the deciding body and of efficiency in the conduct of the regulatory function as a whole.

It is precisely in the expertness which springs from keeping constantly in touch with all aspects of a problem and in the efficiency of flexible allocation of aspects of that problem to subordinates as changing conditions arise, that the chief merits of the independent commissions have lain.62 And it is the "quasi-judicial method" of accomplishing the "legislative" elaboration of policy case by case, that has resulted in the realism and fairness of commission decisions.63 That method defies dismemberment in conformity to concepts,

59Id. at 40.
60Ibid.
61Id. at 230–231.
63Id. at 255; Eastman, testimony in Hearings Before Select Committee on Government Organization on S. 2700, cited supra note 1, at 179.
whether the concepts arise in legal or in political science thinking.

The bugaboo of the danger which is alleged to lurk in the supposed combination of "the functions of prosecutor and judge" in the same individuals is drawn by the President's Committee from Professor Cushman, who derives it in turn, at least partially, from the American Bar Association's Special Committee on Administrative Law. The same point is made elsewhere in the literature of administrative law. No one doubts the pernicious character of the prosecutor-judge combination where it actually exists. But the mere assertion, or assumption, that administrative regulatory agencies embody such a combination begs the question. The real question is, Do they really? It is not one whose answer is self-evident.

A prosecutor is an official set apart to perform the function of ferreting out suspected crime and presenting the case against the offender in an adversary proceeding before a tribunal which is informed of the case only through the trial. An administrative agency does not ordinarily perform such a function. Where it deals with an individual in a proceeding against him, it begins by investigating conduct or conditions involving possible non-conformity to statutory rules or standards, and it continues its investigation to the end of the proceeding. More often than not, its process is preventive in character, looking to future rather than past conditions or acts. Only rarely is it charged with remedying previous wrongs. Its efficiency is measured not in terms of convictions but in terms of the successful functioning of the law that is being administered.

It is true that there are dangers of abuse connected with this process. An administrative agency may fall victim to extraneous policies and warp its processes to accomplish improper ends, such as ridding the country of "reds," or

---

67The classic example is the power of the Interstate Commerce Commission to award reparation to shippers who have been compelled to pay unreasonable freight charges. Its decisions in this regard, however, are only prima facie evidence in subsequent court proceedings involving the same matters.
protecting a favored economic interest, or meting out punishment to a business scapegoat whom politicians choose to blame for a depression. If it does, its investigations cease to be open-minded inquiries and adversely affected interests have little chance of a fair hearing. More important perhaps, because more common, is the fact that administrative investigations sometimes proceed, after preliminary inquiry, by the filing of a complaint against persons thought to be violating the law, followed by a trial upon the complaint. The purpose of the complaint is to notify the respondent of the matters being investigated and to define the scope of the subsequent inquiry. Certainly the complaint does not in itself commit the administrative agency to decide the case in accordance with its allegations or to reach one result rather than another—to lower rates rather than raise them, to revoke a license rather than continue it, or to issue a cease-and-desist order rather than withhold one. Undeniably, however—especially in view of the fact that the respondent, where he defends an economic advantage, will defend to the hilt—the trial may come to be an adversary proceeding, with the deciding body or its agents vigorously advancing one view of the case. There may also at times be a disposition toward face-saving on the part of an agency that has issued a complaint.

Whether unfairness results in the work of administrative agencies would seem to be wholly a question to be decided by detailed study of their operations. It probably would be found that the health officer who inspects a possibly diseased animal in order to determine whether it should be destroyed hardly suffers the danger of partiality by reason of the hypothesis upon which, perhaps, he proceeds. Neither, it would seem, should a licensing officer or board or a utilities commission in fixing rates, be afflicted with a bias. In the determination of unfair practices the danger probably is greater, for the matters at issue are partly ethical in nature. Here the hypothesis in a complaint easily becomes a moral precept and the respondent a sinner. Occasionally a situation may arise in which it is fair to say that an administrative body in effect combines the functions of prosecutor and judge.

---

68HENDERSON, THE FEDERAL TRADE COMMISSION (1924), c. III.
69As has been pointed out, this situation is, or may be, greatly mitigated where, within a regulatory agency, the function of preparing a case against a respondent is separated from that of formulating the
But to state that such agencies generally combine these functions is to misunderstand the problem and to prejudge the issue. It is regrettable that the President's Committee and the American Bar Association committee have lent their prestige to an ancient cliché.

One may say the same with regard to all the baggage of fine-spun separation-of-powers doctrine which the reports here under discussion drag along as so much dead weight. Not that the theory of the separation of powers has lost its validity, for it has not. We need today, as we always have, a legislature that really determines fundamental policies and the basic structure of administration; independent courts, more available than they now are to the citizen who has suffered a wrong, whether at the hands of a private party or of the government; and an executive that is strong enough to lead and efficiently equipped for just administration. But we do not need, and we cannot afford, to deny to Congress the administrative aid which it requires in developing sound economic policies and protecting their administration from possible impairment by short-run political expediency. Neither can we afford to hamstring administration by a futile insistence upon its dissection into supposedly distinct legislative, judicial, and administrative processes.

What is required is a separation of tasks according to the requirements of efficiency and justice, rather than a separation of processes. Such a separation can occur both in the government at large and within the several governmental agencies. To this end economist, political scientist, and lawyer must cooperate. The contribution of the lawyer will come through final decision. Bevis, Administrative Decisions and the Administration of Justice (1918) 2 U. of Cin. L. Rev. 1. It was the failure of the Federal Trade Commission to maintain such a separation which led to the evils disclosed in Henderson, op. cit. supra note 68.

70The immunity of the state from tort liability remains an unnecessary injustice in our legal system. Borchard, Government Liability in Tort (1924-5) 34 Yale L. J. 1, 129, 229, (1926-7) 36 id. 1, 757, 1039.

71All attempts to distinguish the inner, psychological nature of these processes have failed. We know that the three branches of government proceed by somewhat different methods, or procedures; that the exercise of discretion, or policy-determination, is of different degrees of importance in their respective functioning, and that their acts, on the whole, assume different forms. That is all we do know and, very probably, all we ever shall; for mental processes cannot be classified according to politico-legal concepts. See Akzin, The Concept of Legislation (1936) 21 Iowa L. Rev. 713.
his understanding of procedure, especially in its incidence upon private persons and property. It is that incidence which ought to define the problem of administrative law for the legal profession, rather than the maintenance of the separation of powers. Nor would such an approach imply a preoccupation with private rather than public interest; for the problem exists and can be regarded from the governmental as well as from the private point of view.

The merits of the other issues, previously noted, which are raised by the committee reports here under review, are similarly obscure except as they are illuminated by information regarding the actual functioning of specific administrative agencies. There is as yet little evidence that "independent review" by administrative appeal boards of the decisions, acts, and failures to act\(^2\) on the part of administrative agencies would result in greater efficiency or justice. Some evidence has been gathered in particular fields,\(^3\) but not nearly enough to found an all-inclusive judgment. The course of wisdom and of true conservatism would seem to lie in limiting the institution of intra-agency boards of review to those fields of administration in which the need for them actually is felt or can be discovered,\(^4\) without unnecessarily imposing\(^5\) a cumbersome procedure in other areas. The same conclusion applies to the jurisdiction that should be given to an administrative court, if one were to be established. To give it jurisdiction, as the Brookings report proposes,\(^6\) over all administrative acts which an individual wished to contest, with complete review of the facts and the law and with a further appeal to


\(^3\)See, e.g., VANVLECK, THE ADMINISTRATIVE CONTROL OF ALIENS (1932); CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE (1931); REPORT, NATIONAL COMMISSION ON LAW OBSERVANCE AND LAW ENFORCEMENT (1931), Part V.

\(^4\)To some extent this policy has been followed in the creation of reviewing boards, to which the American Bar Association committee and the Brookings Institution both point. Op. cit. supra note 24, at 200–205; op. cit. supra note 27, at 63, 95.

\(^5\)The Bar Association committee’s draft bill, as previously noted, does not make the creation of such boards mandatory, but the committee’s argument clearly calls for their establishment in all those areas of administration in which aggrieved persons are likely to wish to take appeals. Op. cit. supra note 24, at 199–200, 203.

an upper division of the court, might seriously impair governmental efficiency without adequate justification in present abuses.

Nor has there been necessity shown for the sweeping proposal of both the Bar Association committee and the Brookings Institution that the enactment of regulations be made mandatory upon bodies that have rule-making powers. The Brookings report suggests further that rule-making be employed more largely than at present, in preference to the case method, for the purpose of giving definiteness to the statutory standards which administrative bodies are called upon to apply. Now of course it has been appreciated at least since the time of Bentham that definite legislative prescriptions are preferable, from the standpoint of the citizen, to unpredictable, retroactive judicial legislation. The demand that such prescriptions be employed is legitimate so long as it does not extend to matters which cannot wisely be treated by this method. But a broad statutory command that this method be employed is too crude a weapon to use in the struggle for certainty in the law. Even where rule-making powers have been conferred, their wise exercises may have to await the accumulation of experience in dealing with specific situations as they arise. And while rule-making powers doubtless should replace or supplement present decisional powers as to some matters, the Brookings report goes much too far in lightly asserting that "each authority given a regulatory function should by rules and regulations so implement the law as to make it directly applicable" and that, for example, "the Securities and Exchange Commission should prescribe in detail what conditions securities must meet in order to be declared marketable." By way of contrast, Professor Sharfman credits the case method of the Interstate Commerce Commission with the realism, flexibility, and equity of the policies which that body has applied in railroad regulation, and he makes no suggestion that this method can or ought to be supplemented by increased reliance upon general regulations.

The American Bar Association committee adds extensive procedural requirements to its recommendation of mandatory

---

77See notes 32 and 33 supra.
78Handler, Unfair Competition (1936) 21 Iowa L. Rev. 175, at 259.
805 SHARFMAN, op. cit. supra note 54, at 269, 365 ff.
administrative rule-making. "Rules and regulations shall not be issued until after notice and an opportunity for interested parties to be heard."81 This requirement is to extend to procedural as well as substantive regulations—to those, in fact, which come under the basic federal statute conferring upon each department head the authority "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property belonging to it,"82 as well as to those which come under the more specific rule-making powers conferred upon particular agencies.83 Nowhere are the "interested parties" defined, to whom notice and an opportunity to be heard are to be afforded, nor is there any suggestion of a differentiation of procedure according to the types of regulations (procedural, interpretative of statutory terms, directory of subordinate officials, and substantive) that regularly issue from governmental agencies. It is stated, however, that the proposal applies only to such regulations as implement statutes "affecting [private] persons or property."84 Officials, confronted by so loose a proposal, may well shrink from the task of attempting to apply it and from the contemplation of the probable length of the hearing dockets they would be compelled to maintain.

On top of these elaborate procedural requirements, the Bar Association committee proposes that, in addition to existing methods of testing the legality of administrative regulations in court, the Court of Claims, upon petition filed with it and after the taking of evidence, shall have jurisdiction to annul such regulations as are found to conflict with the Constitution or with the statutes under which they are issued.85 Although it is suggested that the Court of Claims, by reason of the performance of its existing functions, is "familiar with a great deal of Federal law and regulations,"86 no convincing reason is advanced why that body should be entrusted with the virtually conclusive determination of many difficult legal

84Id. at 224.
85Id. at 170, 194, 225.
86Id. at 195.
and constitutional questions or with the power to delay the administration of important regulatory measures by adverse decisions. Moreover, the proposed review would be of a new type and hence would constitute a vast extension of control by judicial methods; for while it is true that "the validity of a regulation may now be raised in any case where the courts have jurisdiction," it is also true that the attack is almost always collateral and the court is rarely supplied with an administrative record upon which to base its review. The validity of the regulation turns, technically speaking, upon an issue of law and not one of fact. Hence there is no basis upon which to justify the reception of evidence in regard to the question, and the court must assume the existence of circumstances establishing the validity of the regulation, unless no such circumstances can reasonably be supposed to exist, or to have existed. The committee's proposal, by contrast, authorizes the Court of Claims on every appeal to go into the factual basis of the authority for the contested regulation, without establishing any presumption or rule of conclusiveness in favor of the pertinent administrative determinations.

The question of the proper procedure in administrative rule-making is one of which the Supreme Court recently has taken cognizance. Its wise solution will require differentiation of several types of regulations and of many varieties of situations in which rule-making powers operate. The need for judicial review will require determination in specific fields of administration. Clearly no such undiscriminating attack

---

87 The statement that the proposal "will serve to bring the approximately million men and women employed in the administrative branch of the government back under the control of the law" [McGUIRE, THE FEDERAL ADMINISTRATIVE SERVICE AND THE PEOPLE OF THE UNITED STATES (1937) 6] implies a definiteness in the law which, at least in constitutional and statutory interpretation, has not been conspicuous of late.


89 Recent doctrines in regard to judicial trial de novo of facts upon which issues of administrative jurisdiction or of the constitutional right of an appellant may turn, conceivably might lead in the future to the reception of evidence regarding these issues when raised with respect to general regulations. No decisions to this effect have, however, been had. See Fuchs, supra note 3, at 564.


91 See the discussion in Feller, supra note 52, at 667-669.
upon the problem as the Bar Association committee proposes can be adequate to the task or productive of benefits.

IV. THE WAY OF PROGRESS

Thus to reject the broad proposals currently advanced for bringing about improvement in the administration of regulatory laws is not at all to suggest that change is undesirable or impossible. Improvement must come, and come quickly. But it must be genuine improvement, solidly grounded in actualities and carefully devised to cope with the problems to be met, rather than a sweeping rearrangement of functions on the basis of preconceived ideas. The results of decades of governmental evolution should not be lightly destroyed.

There are hopeful factors in the present situation, both in the way of reforms accomplished and in the shape of constructive tendencies now at work. The Bar Association Committee on Administrative Law itself contributed worthwhile to the movement which resulted in the establishment of the Federal Register, in which administrative regulations must now be published before going into effect. Justice in the collection of income and estate taxes by the United States has been substantially improved by the establishment of the Board of Tax Appeals. The administration of the deportation laws, which was filled with abuse, has been cleaned up by administrative action. Further improvement may be expected as a result of studies of particular agencies now under way, or

---

92 Fuchs, supra note 3, passim.
93 Report of Special Committee on Administrative Law (1934) 59 A. B. A. REP. at 552-555. See also Griswold, Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation (1934) 48 HARV. L. REV. 198. Substantial improvement still is needed in this regard. Not only are the regulations of state agencies largely unavailable, but the index to the Register serves as the only means of bringing together the regulations of particular Federal agencies, except in so far as they are separately published and are not out of print. The projected Federal Administrative Code, which is now being prepared pursuant to Public Act 158, 75th Cong. (1937), will be a welcome addition to authoritative legal literature.
in consequence of investigations for which the need is distinctly felt.\(^9^7\)

Encouraging also is the ability of legislators, at least at times, to separate the sound and unsound features of proposals such as those here under discussion. The omission or elimination of harmful provisions from the bills introduced pursuant to the report of the President's Committee has already been noted.\(^9^8\) The hearings upon the report, despite much useless reiteration of obvious matters, did bring out the merits of the controversial points. Senator Byrd, the able if somewhat captious leader of the opposition, exposed the insubstantial foundations of the Committee's recommendations with regard to the independent establishments.\(^9^9\) Senator Byrnes, having wide familiarity with the matters under consideration and no axe to grind, presided with good humor and with ability to direct discussion to the vital questions.\(^1^0^0\) Apparently it is his guidance which has produced the present bill, whose enactment, if followed by vigorous executive action,\(^1^0^1\) in all probability will result in a great advance in the efficiency of the Federal Government.

\(^{9^7}\)Feller, supra note 52; Field, Research in Administrative Law (1937).

\(^{9^8}\)Text at note 41 et seq.

\(^{9^9}\)His summary of the contradictions which members of the Committee had uttered in their testimony (largely because of their confessed unfamiliarity with the actual work of the agencies they were criticizing) was devastating. Hearings before Select Committee on Government Organization on S. 2700, supra note 1, at 251-253.

\(^{1^0^0}\)The Committee's proposal for the transfer from the Comptroller General to the Treasury of the functions of pre-auditing expenditures and administering disbursements was a subject of even more bitter controversy than the proposals with regard to the independent commissions. Upon the former issue as upon the latter, the Senators must have wearied of the contradictory, dogmatic, and even changing arguments of experts in administrative "science." The legislators were confronted with a complete about-face on the part of the Brookings Institution since the making of certain state studies, in regard to the proper lodgment of the auditing and disbursing functions. 75th Cong. 1st Sess., Hearings before the Joint Committee on Government Organization (1937) 306 ff.

\(^{1^0^1}\)Previous acts have conferred even broader authority upon the President to reorganize executive agencies, but they have resulted in only minor changes. 47 Stat. 413, §403 (1932); id. 1518, §403 (1933). They were enacted, however, largely to obtain economy in expenditures. The present measure responds to a definite governmental philosophy and contemplates thoroughgoing action in accordance with the report of the President's Committee. There is reason to believe that greater results would follow its enactment.
Thus there is reason to believe that the means of constructing an administrative system that shall be at once more efficient and more just actually are available and are functioning. The limiting factor at present is the scarcity of data concerning the actual conduct of the administrative agencies—a scarcity which is likely to be mitigated as investigations go forward. In the meanwhile the general issues that have been raised in the reports here under review, when critically regarded, serve to sharpen essential thinking.

Ralph F. Fuchs.

Washington University.