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Some Aspects and Implications of the Report of the Attorney General's Committee on Administrative Procedure*

By RALPH F. FUCHS†

THE COMMITTEE'S REPORT

I shall not use many words in telling about the history and the contents of the Report of the Attorney General's Committee on Administrative Procedure, with which most of you are probably familiar already.¹ The report was made last January, after almost two years of work by a committee of eleven lawyers, some of them practitioners, some teachers, and some in official positions. The work of the Committee would have been impossible without the aid and guidance of its full-time staff. The 27 monographs prepared by the staff upon individual agencies, together with additional information contained in the appendices to the Report, constitute a unique and invaluable body of data in regard to administrative procedure, upon which the Report itself draws heavily.

The Report deals, as you know, with the procedure of Federal administrative agencies in their bearing upon private persons and property. A good many of the principal Report's more than 200 pages are devoted to an account of the development of administrative processes, to a statement of the reasons for various classes of administrative agencies, and to a discussion of the characteristics of the agencies themselves and of their procedure, which spring from these reasons. A great deal of emphasis is placed upon the vast bulk of matters that is

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¹ The Report is outlined in a summary prepared by the chairman of the Committee, Dean Acheson, and published in the March, 1941, issue of the American Bar Association Journal, at p. 143.

disposed of by the agencies informally, without resort to methods calling for the use of hearings or other formalized proceedings. It is also recognized in the Report that the relatively small percentage of matters calling for formal proceedings is very significant, because of the character of the issues and interests involved and, often, because the decisions reached have permanent importance as regulations or precedents for the future. Accordingly, much space is devoted to a discussion of procedure in such matters and to recommendations for its improvement.

The Recommendations and Their Purposes

Procedure is discussed separately in the Report as to rule-making and as to adjudication. As regards the former, the use on a large scale of conferences and other devices which perform the same functions as hearings is recorded and commended; but it is noted that hearings have become frequent in the fixing of prices and wages, the prescription of rules for the construction of vessels and other instruments of transportation, the regulation of the ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. Their use in connection with these types of regulations is regarded as desirable and it is stated that, without a general statutory requirement, it should become "standard administrative practice."

As regards formal adjudication, the report has a great deal to say about detailed points of evidence and procedure. In addition, in order to improve the conduct of adjudicatory hearings and to relieve the burden upon agency heads who now regard themselves in many instances as obliged to decide each controverted case themselves, the creation of a class of "hearing officers" attached to each agency and empowered to conduct hearings and arrive at initial decisions is recommended. To lend weight to the position of hearing officer, which would replace that of the present trial examiners and referees, it is recom-

mended that, except for those handling small cases in certain agencies, they be paid salaries of \$7500, hold office for seven years, be appointed by a recommended Office of Federal Administrative Procedure upon nomination by the agencies, and be removable only by the Office for cause. The Office would be headed by a Director and would have as its other two members an Associate Justice of the United States Court of Appeals for the District of Columbia and the Director of the Administrative Office of the United States Courts. In addition to its powers with respect to the hearing officers, the Office would keep itself informed of the procedure of the several agencies and would recommend improvements.

Four members of the Attorney General's Committee, although they agree that the foregoing recommendations would operate to improve the administrative process and concur in the Committee's Report, feel that additional points and recommendations should be made. In two separate supplementary statements—one by a single member and the other by the other three, in which the former also concurs, they stress the view that it would be ideal if a separation of "prosecuting" and of deciding functions could be achieved. Failing that, the hearing officers should, one of these members believes, be made wholly independent of the agencies they serve, except for the reviewability of their decisions by the agency heads; while the other three members would enlarge slightly the degree of independence which the principal report suggests. These members, moreover, propose a code of administrative procedure for enactment by Congress, the several sections of which require or direct the agencies, as the case may be, to observe specified procedural practices in the successive stages of the various types of proceedings.

Most of the recommendations just mentioned are designed partly, although by no means wholly, to introduce additional safeguards to private interests into administrative procedure of the more formal type and so to improve the quality of ad-

ministration itself and to increase public satisfaction with it. These are the more striking recommendations, both because of incorporation of most of them into the bills which accompany the Committee's report and the additional statement agreed to by the four members. Some commentators seem to have concluded that these recommendations are the only ones worthy of mention and that they express the whole substance of the Committee's thought about the administrative process. Such is not the case. Throughout the report, in comments and recommendations that received the attention of the entire Committee and represent its considered conclusions, emphasis is placed upon the need of furthering efficiency, along with safeguards to private interest, in the work of the agencies. This work and the procedure that is adapted to it are viewed, not as evils to be hemmed in as much as possible, but as means of achieving ends set by Congress and hence as entitled to wholehearted acceptance.

Thus the Committee says at the very outset that "Powers must be effectively exercised in the public interest," as well as that "they must not be arbitrarily exercised." The conclusion is that "Procedures must be judged by their contribution to the achievement of these ends." The extension of the use of informal methods of disposing of cases and the use of competent and well-paid hearing officers where formal proceedings are resorted to are urged both in the public interest and for the sake of the private interests concerned in the proceedings. In reporting upon procedural problems incident to formal adjudication the Committee points to the need for expedition and "the full utilization of concentrated experience" on the part of the agencies, as well as to the necessity of fairness to private interests. The discussion of administrative rule-making recognizes the need of bringing administrative knowledge and experience fully into play, as well as of permitting private interests to participate when they have a stake which needs to be protected in this manner. Finally, of course, the conclusion

of the majority of the Committee that existing regulatory agencies should not be separated into independent "prosecuting" and adjudicatory branches rests upon the need for effective, consistent enforcement as well as upon the view that private interests would suffer from uncertainty and increased litigation if the separation were to be affected.

REACTIONS TO THE REPORT

The reactions to the Committee's Report that have thus far been recorded fall, as might have been expected, into two classes. The first consists of the reactions of many practicing lawyers, typified by that of the American Bar Association; the second consists of the reactions of certain law teachers in law review articles and of the agencies themselves as expressed to the sub-committee of the Senate Judiciary Committee which has been conducting hearings recently upon the bills emanating from the Attorney General's Committee. The House of Delegates of the Bar Association, meeting in March, adopted a statement of the principles which, it was felt, should govern Congress in the enactment of legislation dealing with administrative procedure. These principles emphasize protection to private interest. The academic commentators and the agencies, on the other hand, although they approve most of the Committee's statements, are concerned about the effects of some of the proposals of the Committee upon the ability of the administrative agencies to discharge their functions efficiently. In particular, concern is expressed over the increased independence and semi-judicial dignity that would be given to the trial examiners. The agency heads, it is felt, even though they would retain full power to substitute their decisions for those of the hearing officers, might develop a hesitancy to substitute their conclusions, for those of virtually irremovable, high-calibre men who had heard and considered the evidence and for whose conclusions the courts, upon judicial review of the records containing these conclusions, might display a consider-

able fondness. Thus the boldness and consistency of policy which is essential to effective regulation and which is achieved at present through unified direction and decision by agency heads might, it is felt, be threatened. At other points too, as in the Committee's warmth toward the use of hearings in certain types of rule-making proceedings, some of these commentators see a threat to effective administration.

These divergent reactions to some of the proposals of the Attorney General's Committee are, of course, not expressive of any new philosophies in respect to administrative procedure or, indeed, to the exercise of governmental powers generally. The Committee's Report and the bills that accompany it simply furnish a new focus for discussion at the same time that, one may hope, they provide proposals upon the basis of which all may in the end come to agree. To find out what the chances of agreement really are, it is worth while to examine briefly into the foundations of the practitioners' attitude on the one hand and the academic-administrative attitude on the other—recognizing, of course, that the two groups are by no means mutually exclusive.

Bases of the Divergent Attitudes

What I am calling the practitioners' attitude is, I think we all recognize, in part a carrying forward of the traditional liberal principles of government—the principles of John Locke, John Stuart Mill, Herbert Spencer, and Justices Field, Peckham, and Sutherland. These principles, are compounded of a desire to limit government and a strong belief in the benefits of free private enterprise. Principles, however, do not carry forward through decades and centuries merely because they sound good. It is necessary that they have current validity if they are to retain the allegiance of men, as these traditional principles have retained the allegiance of many lawyers. The current validity of *laissez faire* liberalism is best appreciated from the standpoint of private business enterprise; and this

brings me to a second element in the practitioners' attitude of which I am speaking. This is the element which springs from the fact by far the greater part of the bar is occupied, in its contacts with government, in representing private interests, either in dealings with the government itself or in competing with other private interests for the judgments of courts or for favorable determination from administrative agencies. One engaged in this work necessarily comes to appreciate the problems of clients who are attempting to discharge their responsibilities—many of them legally imposed—to stockholders, employees, and consumers. He comes, too, to fear the danger of arbitrary administrative action by government, which may upset carefully-devised plans and destroy legitimate interests.

The work of the bar properly lies in just this area of the relationships between government and private interests. The procedural law which governs these relationships so far as the executive branch of the government is concerned, we distinguish from the remainder of the law applicable to the methods of that branch and call administrative law. It lies peculiarly within the province of lawyers as distinguished from public administrators. To it the Attorney General's Committee, made up wholly of lawyers, confined itself. To the report of the Committee other lawyers will naturally react, in the first instance, according to the consciousness they have, by reason of training and experience, of the public interest on the one hand and of private interest on the other. Some lawyers must be constantly watchful to protect private interests against government. Many lawyers, as attorneys for the government, view matters from the other side of the fence. Some lawyers manage to maintain a balanced attitude which takes account of all of the competing considerations. The Attorney General's Committee was made up to secure, if possible, a balance among its members, if not on the part of each member separately. The very large measure of agreement among its members shows the possibility of achieving a balanced solution of procedural problems.

Be that as it may, the other attitude which I am calling the academic-administrative attitude toward the report of the Committee differs from the practitioners' in its greater emphasis upon the need of safeguarding the efficient performance of the public functions of the administrative agencies. Those lawyers who serve the Government and its agencies are naturally conscious of the need of effectively accomplishing the ends the agencies were set up to serve, and this consciousness has extended to many teachers of administrative law in the law schools of the country. As the report of the Attorney General's Committee points out, "Taken together, the various Federal administrative agencies have the responsibility for making good to the people of the country a major part of the gains of a hundred and fifty years of democratic government." Each agency has its share of the common task—this one to curb possible abuses on the part of economically powerful groups, that one to assist in the safe and smooth functioning of an industry, and another to distribute directly to those entitled to them some of the benefits of the common life together of the American people. Administrators and those who have studied administrative procedure with full consciousness of the import of this situation cannot but be watchful lest the ability of the agencies to discharge their functions be impaired.

And so, as I have said, divergent reactions to the Report of the Attorney General's Committee naturally arise within the legal profession. Different groups, perceiving most clearly different aspects of the problem of administrative justice, welcome those recommendations that seem to be designed to provide better for the aspects they have in mind and to be distrustful of the recommendations that might militate against these aspects. This situation is no different from those that generally arise when controversial matters are presented to the profession and to the country for solution.

The Bases of Reconciliation

We cannot, however, stop at this point. Conflict must be resolved and a solution found. And, as is usually the case, the possibility of reconciliation exists if we can succeed in probing to the still deeper factors that are present, underlying those that lead to divergence of attitude. For of course it is true, here as elsewhere, that public and private interest, properly viewed, are not antagonistic in the long run. The public has a stake in the welfare of each private enterprise and individual; private interest, on the other hand, can be fully realized only in the setting of a healthy society.

Administrative proceedings are but instances of an over-all problem. That is the problem of giving due recognition on the one hand to claim to the preservation and advancement of personal or property rights which may be destroyed if care is not taken and, on the other hand, to the claim of society that certain short-run advantages be surrendered for the sake of the general welfare. If the right balance is struck between these claims, everyone concerned will be better off from every legitimate point of view.

In relation to the most controversial of the legislative proposals of the Attorney General's Committee, that which relates to the establishment of hearing officers and an Office of Federal Administrative Procedure, it is evident that both groups of the legal profession are correct in their principal factual assertions. It is true that a hearing officer will not afford as insulated a forum for the adjudication of controversies as a court of law. These officers will receive their positions as a result of their initial selection by the agencies they serve; they will be subject to possible removal for cause by the Office at the behest of the agencies, as well as of the public, and to non-reappointment at the will of the agencies; their decisions will be subject to full review by the agency heads; and they will be definitely within the agencies and in contact with the remainder of the personnel except, so far as a particular case is concerned, with the personnel

that has taken part in the preparation and presentation of that case. It is true, on the other hand, that the hearing officer will have been appointed, not by the agency, but by the Office of Federal Administrative Procedure after investigation of his qualifications; that he will not be subject to removal or change of salary during his term of office, except to removal by the Office for cause; that his decisions will be final unless reviewed; and that in reviewing them the heads of the agency and the courts will pay deference to his conclusions of fact and to his reasoning, to the extent, at least, that these are legitimately influenced by first-hand observation of witnesses.

It may also be true, however, as the Committee believes it is, that affected private parties, as well as the public interest, will receive more consistent, expeditious, and informed treatment at the hands of these hearing officers than they could at the hands of still more detached officers. It may develop also that, not only will the agency heads be relieved of a vast burden of work they now attempt to carry, but in addition that the hearing officers will develop more clean-cut records than those often produced at present by trial examiners and that increased satisfaction by affected private parties with the handling of their cases will redound to the advantage of the agencies' accomplishment of their purposes. In short, better administration for all concerned may result from a solution to procedural problems that takes account of the legitimate demands of all, than could result, even from the standpoint of each interest alone, if the solution were patterned after its own conception of its needs. Such, at any rate, must be the hope of sincere students of the problem; and the attempt to reach such a result must now be the whole-hearted concern of the legal profession and of Congress.

CONSEQUENCES AND FUTURE NEEDS

Indispensable to the solution of this and of other national problems is the realization that more is at stake than appears

immediately. Especially in law and government, our entire democratic way of life is bound up with the solution of each major problem. This fact becomes especially clear in relation to administrative justice when we reflect that the principal objects of concern, fairness to individual interests and successful attainment of common objectives, are the twin purposes of the social order itself. We cannot have the only kind of civilization we are interested in building up and maintaining if we cannot supply and preserve individual opportunity and rights and at the same time achieve full cooperative effort in our common tasks. Our traditional social philosophy has emphasized the former; the present threat to our system emphasizes the latter. If we insist too rigidly upon the accustomed means of safeguarding private interest, our way of life will perish because we cannot efficiently secure either the human needs of the people or defense against external enemies. If we become ruthless in pursuing immediately-felt social needs, we shall sacrifice that individual welfare which is the proclaimed end-purpose of our democratic system.

To an increasingly evident extent, the system of administrative justice which we have worked out and which it is now proposed to improve, is an alternative not only to a more highly judicialized system but also to a swift-moving executive system. We have resorted to the executive system before in time of war; we have gone back to it now on a considerable scale during the national emergency. By means of the expansion of the Chief Executive's office and the exertion of his powers through that office, there have recently been instituted far-reaching price and priority controls over much of industry; and these are susceptible of extension to much of the national life. The exercise of these powers, so far as one not closely in touch with their effects can see, has on the whole been fair and considerate. It is a fact, however, that that exercise is largely unattended by legally-secured procedural safeguards, such as the right to be heard before action is taken. There are political

safeguards and safeguards residing in the disposition of the people and of officials, but few which it is the legislatively—prescribed duty of officials or of judges to maintain or which there exist remedies to enforce.

Were the times more settled, we could rest reasonably secure in the belief that the system of executive justice would again pass largely out of existence when the present emergency was past. It is a fact, however, that an emergency of a different sort, which administrative agencies and administrative law have not solved, has existed since 1929; and it is likely that even graver dislocations will exist when the present international emergency has ended. All that we have yet succeeded in doing through the expansion of the Federal credit and the use of administrative agencies during the period of the New Deal and before has been to mitigate some of the worst maladjustments in our system. A start has been made in securing a better distribution of welfare and in conserving national resources; but that is all. Underconsumption and underproduction in relation to both need and potential accomplishment have continued; and it is an open question whether, had the international threat not appeared, we would have had the wit to achieve a more adequate solution to our problems through the use of democratic methods. If that is true, and if it is true that even graver problems confront us in the years ahead, we have no assurance that the system of safeguarded administrative justice can be our main governmental reliance in the future, as it has been until now. It may be necessary to continue and extend the system of executive justice instead, with what possibility of procedural fairness we know not. In this situation, and not in the inner disposition of anyone that may be in power now or in the future, lies the greatest danger to our democratic way of life. To meet it we must obviously, not only frame more adequate economic policies, but attack with redoubled vigor and determination the problem of administrative justice, which lies peculiarly within our professional competence as lawyers, so

as to create a system sufficient for the tasks of today and tomorrow, furnishing a real alternative to the more hazardous executive system.

In this connection, there is one aspect of the executive system which displays, at least potentially, a definite superiority over the administrative system. If the administrative system is to compete successfully, its corresponding deficiency is in need of remedy. The Attorney General's Committee on Administrative Procedure did not concern itself with this aspect of the problem because it was not asked to and because, in any event, the need has hardly been felt by the public, nor has it entered, as yet, into the professional consciousness of lawyers. I refer to the need of over-all direction, without which the efforts of the several regulatory agencies cannot be successfully coordinated or geared to the national objectives. You cannot with sufficient wisdom or effectiveness regulate rates or wages or prices unless the policies of the regulatory agencies are coordinated; and you cannot do all of these together unless you proceed in the light of monetary and credit policy and of policy in managing the volume of agricultural production. It is clear that sooner or later the unification of major policy in the several areas of economic regulation must be achieved. The problem of how to achieve it in the administrative system is partly a problem of organization and procedure that affects private interests directly. As such it falls within the professional purview of lawyers as well as of experts in public administration.

In the executive system, as contrasted with the administrative system we have been studying, coordination can be accomplished through the Chief Executive or through such agencies as he may establish. At present the defense effort is being handled in this way (whether adequately or inadequately is beside the point just here), and there is no doubt about the power of the President or those to whom he delegates his authority to control the policies of the several branches of the

Government that are participating in the common effort. Army, Navy, Coast Guard, Draft Administration, O. P. M., and others can be made to work together in dealing with private interests as well as in other respects.

In relation to the administrative system, the political scientists have been ahead of the lawyers in realizing this need, though not, I happen personally to believe, in devising effective means of meeting it. The report of the President's Committee on Administrative Management in January, 1937, contains an eloquent plea for over-all executive direction of all the Federal administrative agencies, for the "one grand purpose" of making "democracy work today in our National Government; that is to make our Government an up-to-date, efficient, and effective instrument for carrying out the will of the Nation," with "a responsible and effective chief executive as the center of direction, energy, and administrative management." The Committee's famous denunciation of the independent regulatory agencies as a "headless fourth branch of the government" led, you will, recall, to the proposal that all of the agencies be gathered into twelve departments, with a cabinet officer at the head of each, responsible to the President. To preserve and, indeed, increase judicial detachment in administrative adjudication, however, each existing agency was to give birth to a purely decision-making agency within a department, which was to be relieved of all "administrative" duties and carefully insulated from executive pressure in reaching its decisions. The Committee did not succeed in explaining how the President was to succeed in the task, obviously impossible for one man, of coordinating the policies of so vast an administrative machine or how his policy, if and when he formulated it, could become effective through the decisions of insulated boards that would not be under compulsion to follow it. Nevertheless, the need which the Committee saw is actually existing today. Sooner or later—better soon than later—the need must be met in a

manner appropriate to the administrative system if that system is to prove adequate to the national need.

I shall not be so bold as to venture a concrete proposal for meeting this need of over-all direction of the policies of administrative regulation. Whether the device of the future should be a super-commission of representatives of the agencies engaged in economic regulation or whether it should be a central economic council made up of independent experts, I cannot say. Whether it should be advisory or exercise authority over the agencies, I do not know. Whether it should be under the President or independent of him, taking due account of the political will as expressed through Congress and through him, I am likewise uninformed. My point is that we should start thinking of this problem and attempting as lawyers, in conjunction with economists and political scientists, to solve it.

To the foregoing end I wish to suggest too that up to now we have not had a legal or political philosophy adequate to such an attempt or to the other administrative problems that lie ahead. Even the most advanced in our profession have talked of its task in terms of a "balancing of interests," meaning thereby an adjustment of particular controversies in such a manner as to weigh justly the different specific claims advanced and to give effect to as many as possible of those that seem legitimate. Even the legislative process has been viewed in the latest and most respected works upon it as essentially an adjudication of competing demands, and the legislature has been likened to a court in which these demands may be advanced. It lies in the background, of course, that interests and demands must be weighed in the scale of some system of values and that this system derives from some dominating policy. But this fact has been much minimized, and at times it seems to have been assumed that the process is largely one of effecting whatever compromise may "get by," rather than of carrying out any other public purpose than somehow keeping the peace.

The foregoing conception of the work of law is all too often

true to the facts, and it may even suffice for less stressful times than the present; but it will not do for the period ahead. We are faced with sterner tasks than simply living together as pleasantly as possible in a world where each is satisfied, on the whole, with what the prevailing institutions provide for him. We must create a world in which masses of men cooperatively carry on vast enterprises for purposes that are democratically determined and, therefore, are both regardful of individual interests and primary in their importance. When these purposes have been determined, they cannot be compromised but must permeate throughout the law and its administration, shaping doctrines and procedures to accord with them. A legal profession worthy of such a task must be constantly conscious of the purposes with which its functions are shot through. If that does not come to be the case, we cannot stand united; and divided we fall. In relation to administrative procedure our dominating resolve must be to make the system work to serve both the general welfare and that individual welfare which is inextricably bound up with it, as the national will demands.