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Administrative Bureaus and the Lawyers

Some Comments Related to Missouri

By Ralph F. Fuchs
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(Editor's Note: Publication of an article in the Journal does not necessarily mean approval by the Journal or Association of all that is said therein. The Journal is open to all shades of opinion, just so they are regarded as being likely to be of interest to our readers. Attention is called to splendid article on the subject of Administrative Law by Arthur T. Vanderbilt, President of the American Bar Association, appearing in the April issue of the American Bar Journal.)

The active consideration by the Missouri Bar Association of the problems of administrative law, which is foreshadowed in the "outline" in the February issue of the Journal, prepared by the chairman of the Committee which has that subject in charge, will be welcomed by all who appreciate the significance of recent developments in governmental regulation. There are few who do not appreciate that major changes are taking place and are vastly enlarging the powers of Federal and state administrative agencies over private persons and property. It is this bearing of administration upon private interest, which is emphasized in the Chairman's outline, that gives rise to the lawyer's chief problem growing out of modern governmental regulation; for it is the lawyer who is society's expert in the procedures by which government enforces the rights and duties of the citizen. Those procedures must always be studied with a balancing of public and private interests in view.

The Association's committee has chosen wisely in deciding to pursue its study through concentration upon the actual functioning of specific administrative agencies in Missouri. The time has passed when progress in administrative law can be made by further uttering of generalities, whether these relate on the one hand to the sanctity of the separation of powers and the rule of law or, on the other hand, to the superior merits of government by administrative experts. A notable literature has grown up in which in the issues have been framed and the considerations on each side clearly stated. The solution of these issues awaits the gathering of further evidence in regard to how public and private interests may best be served.

By the same token one may rightly question the wisdom of the pre-judgment of many of the issues that would be involved in the Committee's endorsement of the sweeping denunciation of administrative agencies which is uttered by the Chairman in his February outline. The Judicial Council, also, may wish when the evidence is in to revise its blanket recommendation that power be vested "in courts to review the facts as well as the purely legal questions involved in 'administrative decisions'." Surely it is questionable whether such a course should be adopted with respect to all the decisions of the Public Service Commission, the Workmen's Compensation Commission, the numerous licensing boards, and the agencies that are now beginning to administer the new social security laws in the State. The effect upon judicial dockets, if nothing else, would seem to be a compelling consideration pointing in the opposite direction.

Doubtless the words of the Administrative Law Committee's Chairman were not intended to mean all that they seem to say. That the bureaus are engaged in overriding "all constitutional guaranties"; that "the victim is never before an open-minded court"; that the bar must rally "to provide ample court protection against the overweening zeal of government bureaucrats"—these are propositions which by their terms embrace every executive agency that exercises powers over persons or property in Missouri. If subscribed to by the public or even by the bar as a whole, they might well kill whatever spirit of service exists in these officials. Surely it is fair to suggest that such derogatory statements ought not to be made unless the facts to support them are produced.

As a matter of fact, the foregoing utterances depart rather widely from the conclusions of the American Bar Association's Special Committee on Administrative Law and also from a Missouri tradition of dispassionate, enlightening discussion of the problems of administrative law. It is not true, as the February outline states, that the national Committee has recommended that "special administrative courts or independent boards of appeal composed of lawyers" (italics supplied) be established in the Federal administrative system. The Committee's 1937 report specifically rejects the suggestion "that the membership of the boards should be composed of lawyers", although it does propose that the chairman shall in each instance be a lawyer. The Committee recognizes that "it takes men and women of many professions today to run such a complex machinery of government"


3. 9 Mo. Bar J. 24 (Feb., 1938).


4. 1937 Advance A. B. A. Program, at 225 (sec. 3 of draft bill).
as we have, and the head of a department or other agency should not be required to limit his selections (of board personnel) to members of the legal profession. This is an age of specialists, even in the practice of law, and specialists are necessary in running the Federal government."

The dispassionate, enlightening discussion of administrative law problems probably has received greater impetus at the hands of the St. Louis Bar Association than from any other professional organization in the English-speaking world. In 1922, as many will recall, the Association sponsored and financed a series of lectures on the subject which subsequently appeared as a book under the title, "The Growth of American Administrative Law", published in St. Louis. To this series such leading figures as Professor Ernst Freund, Judge Cuthbert Pound, and others contributed scholarly essays. This volume is read wherever administrative law is studied, and it has been cited again and again in books and articles in the United States, in England, and in the British dominions. No comparable contribution has been made through any other association, partly because of the careful planning of the St. Louis series of lectures and partly because of its timeliness. The lectures came just at the period when the significant War and post-War developments could be summarized and their significance developed in general terms.

Among the most distinguished of those contributions to thought in administrative law was that of the Missouri statesman and lawyer, Charles Nagel. In words that have been often quoted, he pointed out that the necessities of modern government have given rise to the departures from tradition which are embodied in administrative law and that there can be no turning back. Problems there are in consequence, of course, and they require thought and effort for their solution. But, rather than in denunciation of officials, Mr. Nagel said:

"Our hope lies with those officials who diligently and scrupulously seek to employ the law for its honest intention . . . . The question is, has the executive the strength of character and the practical discernment to give force to that intention.

Apparently one factor in solidifying the opposition of some lawyers to administrative agencies lies in the belief that by reason of the appearance of laymen as practitioners before some of them they contribute to that invasion of the practice of law which rightly is of such current concern to the bar. In the famous recent case of Clark v. Austin, the Supreme Court of Missouri was asked to hold that the representation of parties to proceedings before the Public Service Commission was inherently part of the practice of law and hence, by virtue of the State constitution, beyond legislative control and within the exclusive provinces of those admitted by the Court to the bar of the State. Five of the seven justices of the Supreme Court, exercising a statesmanlike self-restraint for which they have not yet received due credit, declined so to hold. In the opinion which expressed their view, Judge Ellison asserted that the legislature which has the power to create administrative agencies has the power also to control the practice before them. No doubt it will often wish to commit that practice to the bar, as it has in the case of the Public Service Commission; but to assert that it lacks power to do otherwise is to lose sight of the paramount interests committed to its care, which it is entitled to further by appropriate means. These may involve invoking other skills than the lawyer's, not only in the membership of administrative agencies but also in the representation of parties before them.

The Missouri Supreme Court in Clark v. Austin proceeded in the tradition of intelligent discrimination and dispassionate discussion. The problems with which government today is confronted cannot be solved democratically in any other way.
The American Lawyer*

HON. HENRY A. BUNDSCHU

A prejudice exists in the mind of the public against lawyers in general. Naturally, the question arises "Does the American lawyer deserve this criticism?" My answer is "No." There are a few who do, but the rank and file of the Bar today is actuated by high ideals and a determination to perform ethical service in the profession. People have been prone to judge the whole by the actions of a few, and to expect sharp practice and chicanery from all lawyers, because some unscrupulous attorneys have acquired a reputation along that line without being condemned. Some of the clients are responsible for this, because when they get into trouble, they want the lawyer to get them out by any means, fair or foul. Furthermore, these people are willing to pay well for such service, and would not have a lawyer who would frankly tell them they were wrong, and must suffer the consequences. All sight is lost of the other fellow in the case, who is the innocent and injured party and who has been deprived of his public or private rights. The former wins and the latter suffers. The result is injustice. When such an injustice occurs, there has been a miscarriage of justice. The guilty lawyer and client are both responsible, and both should be disciplined, one for malpractice, and the other for inducing it. The high purpose of the law has been thwarted. It is the intent of the nation to allot absolute justice between its citizens and to provide the means for obtaining it. Thus, we have Courts and lawyers. Lawyers are officers of the Courts, and are subject to discipline by them.

The lawyers themselves have recognized these abuses and at their request the Supreme Court of Missouri has appointed an Advisory Committee that has jurisdiction over the State, to hear complaints, make investigations, and institute disciplinary proceedings. As a result, many lawyers have been publicly disciplined for their misconduct, and others have been quietly taken to task. All of this has been brought about by the efforts of the lawyers themselves. Do you know of any other profession or trade that has a better way of enforcing its code of ethics?

Listen for the voice of the lawyer as he speaks through his Bar Association and you will get the true attitude of the profession in all questions that are of interest to the public. I cannot emphasize this point too strongly.

The apathy of the public to the opinions, requests and appeals of the Bar of America expressed by the American Bar Association, the State Bar Associations, and our local Bar Association, is the real cause of the failure to correct many of the evils that exist in our present methods of Government. Won't you join with them in their efforts to raise the standards of admission to the Bar, to take the selection of Judges out of politics, and to effectively use their disciplinary machinery?

For years the Bar Associations have made diligent efforts to correct and revise both civil and criminal procedure. Vast headway has been made in the Federal Courts. About September 1st a new and simplified code of civil procedure will go into effect. By this step, the practice in the Federal Courts will become uniform throughout the United States and antiquated forms and rules will be abolished. The attainment of justice will be expedited and technicalities will largely disappear. All of this has been obtained through the efforts of the American lawyers.

The States should follow the example set by the nation. There is a crying need for the same reform in our State procedure. The public should join with the lawyers in demanding that the legislature of the State follow the example of the Congress of the United States, and make possible the adoption of a new and simplified code of civil and criminal procedure.

The average American lawyer did not have his license to practice law given him on a silver platter. It was obtained as a result of sacrifice and study. It is a thing he dreamed of in his boyhood, a patent from the State which he cherishes, and something which he wishes to preserve in honor and dignity throughout his life. It is a means to a livelihood, but not to riches. It constitutes a trust which must be protected against those who would injure, or defame, to enable the rich and the poor, the weak and the strong, to resist oppression and to obtain justice.

This task is not hard when it is backed by strong sympathetic public opinion.

The lawyer's "responsibility for the public's respect for government is more immediate than that of any other citizen. His opportunity is far greater than that of anyone else. . . . The real responsibility for the system rests with the bar. By its character, its conduct, and its preservation of the ideals will the judicial system and now in some measure even the executive system be judged."146

In that spirit let the Committee on Administrative Law lead the way.