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Michael Conant

University of California, Berkeley

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IN DEFENSE OF ADMINISTRATIVE REGULATION

MICHAEL CONANT †

I. INTRODUCTION

As Professor Davis has so ably demonstrated, the many complex economic institutions in our society which are inadequately controlled by the automatic forces of competitive markets make administrative regulation a necessity.¹ Since continuance of the administrative process is a necessary fact of an industrial society, the material issue is the solution of its major problems.² The foremost problem is to obtain efficient regulation in the public interest while protecting those regulated from possibly vague or arbitrary rule.³ The thesis of this study is that the Constitution itself and many related common-law concepts contain at least part of the answer to this key problem.

Instead of deprecating the constitutional separation of powers as an impediment to administrative regulation, it will be argued that separated powers can be a valuable instrument in creating effective regulation. Using rigorous definitions of the three departments of government, it will be shown that (1) there has never been a constitutional impediment to the delegation of secondary legislative functions, (2) intelligible standards in enabling statutes are the prime protection against arbitrary administration, (3) many executive functions of administrative agencies are incorrectly classified as adjudicatory or quasi-judicial, and procedures for them inappropriately judicialized, (4) since legislatures have no judicial power to delegate to administrative agencies, attempts by such agencies to exercise clearly judicial functions are unconstitutional usurpations of judicial power, and (5) courts can perform clearly judicial functions with greater speed, efficiency and fairness than can administrative agencies.

† Associate Professor of Business Administration, University of California (Berkeley); Member, Illinois Bar.

1.  I Davis, ADMINISTRATIVE LAW TREATIES § 3.14 (1958).

2.  See generally Jackson, The Administrative Process, 5 J. SOCIAL PHILOSOPHY 143 (1940).

II. THE LOGIC OF SEPARATED POWERS AND DELEGATED SECONDARY FUNCTIONS

The doctrine of separation of powers is a basic constitutional principle of free government. The prosecutor who is also judge in the same actions and the judge who has authority to amend or ignore valid statutes are men with more power than is consistent with free society. The checks and balances of separated governmental powers were designed so that our trial courts could forestall in their incipiency all extra-legal uses of power. Recently, former regulatory commissioners have charged that the concentration of powers in their agencies has fostered arbitrary actions, curbed only slightly by limited judicial review. This study will demonstrate that regulatory agencies can be structured so that the many safeguards of separated powers can be observed without impeding administrative regulation.

The fundamental idea of separation of powers is (with specified exceptions) the initial vesting of the powers of government in three separate and independent departments—legislative, executive and judicial. The first essential of independence is that persons holding office in

4. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers." Madison, 1 Annals of Congress 581, in Myers v. United States, 272 U.S. 52, 116 (1926). "Our government, like all other free government, . . . consists of departments, and contains a marked separation of the legislative and judicial powers. . . . No maxim has been more universally received and cherished as a vital principle of freedom." Dash v. Van Kleeck, 7 Johns. R. 477, 508-09 (N.Y. 1811) (Kent, C. J.). See Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1880); Vanderbilt, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE (1953).


6. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference
one department do not owe their tenure to the will or preferences of persons in another of the departments.\textsuperscript{7} The second essential of independence is that officials in one department may not concurrently hold office in either of the other two departments,\textsuperscript{8} and may not usurp or encroach upon the powers which the Constitution clearly assigns to another department.\textsuperscript{9} But it will be demonstrated that, in spite of the confusion in some early decisions, this absolute prohibition on the usurpation of power of another department does not limit the voluntary delegation by the legislature of some functions.

The doctrine of the separation of powers is a general constitutional principle, and it was neither conceived, nor has it ever operated, as a rigid rule.\textsuperscript{10} The special cases where one department performs some particular function of another department are both explicit and implied by the very nature of government. But the special cases are determinable and limited, for the rule of separation of powers is meaningless if it can be circumvented completely. There are four categories of special cases: (1) allocation to each of the three departments of some specific powers which are

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\item to each other neither of the departments “ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.” \textsuperscript{1} Story on the Constitution (4th ed.) § 530. To the same effect, the Federalist (Madison) No. 48.
\item O'Donoghue v. United States, 289 U.S. 516, 530-31 (1933).
\item Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), holds that the President may not at his will and in violation of statute remove a member of the Federal Trade Commission, since FTC commissioners perform other functions in addition to their executive functions. But observe the confusion of the court on whether compensation of judges of inferior federal courts may be diminished during their continuance in office in violation of article III, section 1 of the Constitution. Although all such judges perform clearly judicial functions, the President's power of removal depends on whether these courts have been labeled constitutional or legislative. \textit{Compare} O'Donoghue v. United States, 289 U.S. 516 (1933), with Williams v. United States, 289 U.S. 553 (1933).
\item Effective separation of powers in England is said to date from the passage of a statute making judges removable from office only by impeachment by Parliament for misconduct. 12 Will. 3, c. 2 (1701). See Parker, \textit{Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy}, 12 Rutgers L. Rev. 449, 450 (1958).
\item U.S. Const. art. I, § 6.
\item This is not to deny the existence of interstitial legislation by courts when the decision of a case requires them to rule which of two or more conflicting precedents shall be applied. See Cardozo, \textit{The Nature of the Judicial Process} 69 (1921), quoting from Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J.).
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usually peculiar to one of the other departments as a checking function to balance the powers of the other two; (2) exercise by the other departments of minor legislative and executive functions incidental to and necessary for carrying on allocated constitutional power; (3) allocation of power at the state level, as the separation of powers doctrine in the Federal Constitution does not apply to the states; and (4) delegation by Congress of secondary legislative functions to the other two departments. Only the fourth special case will be examined in detail here.11

The one power under which some functions must by their very nature be delegable to other agencies of government is the legislative power.12 The legislative power is the sovereign power to make general rules of conduct for the political community enforceable in the future by the physical force of the state.13 The legislature, though vested with this power, is basically a duty-assigning body, since in making law it directs the executive to do such acts as are necessary to achieve the results required by the statute.14 But the degree of generality in statutes varies; controversy between factions in a legislature may cause it to choose more general language as a compromise.15 In our technically complex society, the legislature may lack the skill to develop the detailed rules that will carry out a general regulatory policy.16 In addition dynamic changes in industry may make it essential that some detailed rules be under almost

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16. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officers the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

constant change. To the extent that the legislature leaves for the executive the making of detailed secondary rules in enforcing a statute, there is necessarily a delegation of some legislative functions, and it can be argued that the Constitution gives Congress explicit authority to make such secondary delegations.

Before turning to the constitutional aspects, it should be noted that the analogies from agency law do not apply to the constitutional vesting of the sovereign coercive power of government in the legislature, executive and judiciary. The people as electors are not principals, delegating authority to government to do acts they could do themselves. Governing one another is something which they could not do themselves, without government. Congressmen are not agents; they are not bound to follow directions from any single elector or group of electors. Their power is sufficient to pass laws that force many electors to do acts which those electors do not wish to do. For these reasons, this ancient agency maxim prohibiting the unauthorized subdelegation of agency power has no application to the election of legislatures and their delegation of rule making functions to administrative agencies.

The vesting of sovereign legislative power in a legislature is more closely analogous to the creation of a trust in those persons elected to office. For, in a democracy, it is a public trust to govern by use of the state's monopoly on the physical force of organized society for the benefit of the society as a whole. Following the trust analogy it is significant that a trustee may not delegate his general discretionary powers to

17. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 404-06 (1929), holding that a delegation of power to the President to adjust tariffs to equalize costs of production is constitutional.
18. "The Congress shall have the power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8.
an agent. However, as long as he retains the full responsibility, he may employ agents where reasonably necessary to carry out his duties and especially for matters in which he is not experienced.

There is a clear application of these rules in democratic government. In our Constitution, the people have vested the legislative power in the Congress and have thus given it the primary lawmaking task. Surely this will forbid the delegation by Congress to the executive or judiciary of the authority to exercise its entire legislative power or its entire power over any particular subject matter. Such unlimited delegation would reallocate the constitutional distribution of governmental powers, and the legislature has not been given the constitutional power by itself to amend the constitution.

The separation of powers into three independent branches thus incorporates a constitutional mandate to Congress that it alone may exercise the plenary legislative power in the sense that only Congress may adopt the primary rules of conduct for the nation. But this does not preclude the voluntary delegation by the Congress to the executive of the secondary or subsidiary rule making functions. Hence the agency analogy seems to have force here. A principal, in delegating specific contracting authority to his agent to act in a representative capacity for him, does not lose any of his own power to contract. He may intervene in the negotiations carried on by his agent, give special directions to the agent for the making of particular contracts, or

22. Washington Loan & Trust Co. v. Colby, 108 F.2d 743, 747 (D.C. Cir. 1939); Meck v. Behrens, 141 Wash. 676, 252 Pac. 91 (1927); 2 Scott, Trusts § 171.1 (2d ed. 1956).
23. See In re Whipple's Estate, 19 N.Y.S.2d 105, 110 (Surr. Ct. 1940); In re Barnes' Estates, 339 Pa. 88, 14 A.2d 274, 276 (1940); Ewing v. Foley, 115 Tex. 222, 280 S.W. 499, 500 (1926); Ex parte Belchier, 27 Eng. Rep. 144 (1754); 2 Scott, Trusts § 171.2 (2d ed. 1956).
27. “That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the ‘power to fill up the details’ by prescribing administrative rules and regulations.” United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).
terminate the representative authority of his agent at will. 29

Similarly, having exercised its constitutional power and duty to make the primary rules of conduct for the state, the legislature may delegate some of its functions by creating a partial agency in an executive department or administrative commission to make the more detailed secondary rules. 30 The statute which states the primary rules—the standards for regulatory control—in effect also states the scope of the partial agency. 31 The legislature retains the power, by amending or repealing the statute which created the agency, to change the agency’s authority to make the secondary rules or to revoke the agency. 32 The legislature’s sovereign law-making power, which includes plenary powers of control over administrative structure and procedure, is thus unimpaired by the delegation of secondary legislative functions.

It is significant that, in spite of the past and present confusion of many judges and scholars, the above rule of non-delegable legislative power but delegable secondary legislative functions has always been our law. 33 Madison explained this when commenting on Montesquieu’s interpretation of the meaning of separation of powers in the English Constitution. 34

[It] may clearly be inferred that, in saying “There can be no liberty where the legislative and executive powers are united in

30. “Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946). See Sears, Roebuck & Co. v. FTC, 258 Fed. 307, 312 (7th Cir. 1919).
31. “The only authority conferred, or which could be conferred, by statute is to make regulations to carry out the purposes of the act—not to amend it.” Miller v. United States, 294 U.S. 435, 440 (1935). “The Secretary of the Treasury is bound by law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law; yet, neither he nor those who act under him, can dispense with, or alter, any of its provisions.” Tracy v. Swartwout, 10 Pet. (35 U.S.) 80, 95 (1836).
33. Comer, Legislative Functions of National Administrative Authorities 121 (1927).
34. The Federalist No. 47, at 331 (Bourne ed. 1947) (Madison); see also Landis, The Administrative Process 10 (1938).
the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

The first Congress realized the necessity of delegating secondary legislative functions, because it did so in three statutes, two pertaining to customs and a third to pensions. The Supreme Court in two early cases upheld the constitutionality of two statutes delegating contingent legislative functions to the President. In *Wayman v. Southard,* the issue was whether Congress could delegate legislative functions to federal courts under its power over court procedure. In upholding the delegation, Chief Justice Marshall said:

But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.

Many state legislatures, in dealing with the separation of powers in state constitutions, early showed an understanding of the delegation problem. In a leading case, the Illinois legislature had delegated to the majority of voters in an area the authority to approve formation of new counties. The Illinois Supreme Court approved the delegation of this secondary function as follows:

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37. 10 Wheat. (23 U.S.) 1 (1825).
38. *Id.* at 41.
We see, then, that while the legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandably or advantageously do itself. Without this power legislation would become oppressive, and yet imbecile. . . . [T]he legislature may delegate authority, either to individuals or to bodies of people, to do many important legislative acts, . . . but in doing this it does not divest itself of any of its original powers. It still possesses all the authority it ever had. It is still the repository of the legislative power of the State.

On the federal level, the Supreme Court has made unqualified statements that Congress may not delegate its legislative power, but these statements must be interpreted to mean that Congress may not abdicate its constitutional duties by delegating its plenary legislative power over any given subject matter. For, no delegation of secondary legislative functions by the Congress was held unconstitutional before 1935. In *Buttfield v. Stranahan*, the Court approved a delegation of rule making power by Congress to the Secretary of the Treasury to set standards for tea to control its importation. Approval was given to similar broad delegations to the Secretary of War to determine unreasonable obstructions to navigation, to the Interstate Commerce Commission to regulate safety appliances, carriers' accounting systems, and rate discriminations, and to the Secretary of the Treasury to administer the federal income tax. The more recent Supreme Court opinions clearly indicate that broad delegations of secondary legislative functions are in conformity with a plenary legislative power vested in Congress. If the statute containing the delegation has intelligible

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Griner, 16 Wis. 423, 433-38 (1863), holding constitutional a delegation by Congress to the President of the power to make rules under a military draft law; Locke's Appeal, 72 Pa. 491 (1873), upholding delegation in local option law; and Georgia R.R. v. Smith, 70 Ga. 694 (1883), upholding legislative delegation to public service commission of power to fix rates.

40. Field v. Clark, 143 U.S. 649, 692-93 (1892). In this case the Supreme Court held a delegation of authority to the President to suspend provisions of a tariff act constitutional.

41. 1 Davis, Administrative Law Treatise § 2.06 (1958).

42. See note 16 supra.

43. Union Bridge Co. v. United States, 204 U.S. 364 (1907).


48. See Yakus v. United States, 321 U.S. 414, 423-27 (1944), and cases cited there-in; Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 146 (1941); Parker, *Separ-
standards so that the courts can determine that Congress has exercised the primary legislative power on the subject matter, the delegation of secondary legislative functions is constitutional.49

III. LEGISLATIVE FUNCTION IN ADMINISTRATIVE AGENCIES: SOME PROCEDURAL AND CONSTITUTIONAL CONSIDERATIONS

Administrative legislation, the secondary legislative function of administrative agencies, includes both rule making50 and rate making.51 The enabling statute may expressly or impliedly52 delegate to an agency the authority to make legislative rules.53 In making such rules, the agency utilizes its expertise to assist the legislature in delineating a code of required conduct, and the courts value such delineations when construing a statute.54 If administrative rules are within the scope of the enabling statute, have a rational relation to the ends of the statute, and are issued pursuant to proper procedural requirements, they have the force of law.55 Once the regulations are adopted and become part of


50. "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations costs, or accounting, or practices bearing on any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule. Administrative Procedure Act § 2(c), 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1958). See Willapoint Oysters v. Ewing, 174 F.2d 676, 693 (9th Cir.), cert. denied, 338 U.S. 860 (1949).


53. Legislative rules are distinguished from interpretive rules, which are narrower in scope and more subject to reversal on review, since they merely define the terms of the enabling statute. Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952). See 1 Davis, ADMINISTRATIVE LAW TREATISE §§ 503-04 (1958); Comer, op. cit. supra note 33, at 137-69; Parker, Administrative Interpretations, 5 Miami L.Q. 533 (1951).

54. See Kirschbaum v. Walling, 316 U.S. 517, 523 (1942); Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 461 (1948); Freund, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 213-23 (1928); Blatchly & Oatman, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 43-53 (1934).

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the law, the same presumptions attach to them as to statutes. The rebuttable presumption in favor of their validity with the burden of proof on one who challenges them results in widespread, voluntary conformance to their mandate. Thus, the rules perform the vital legislative function in a democratic society of informing the public beforehand of what specific classes of actions are approved and forbidden.

The varying circumstances under which regulations are prescribed by administrative agencies affect the way in which administrative discretion is exercised. For example, an administrative agency engaged in economic regulation usually has substantial discretion in adopting rules to carry out its assigned tasks. Under constitutional theory, the basic substantive constraint on administrative discretion is that the rules which are adopted must conform to the standards and limits of the enabling statute. Following the analogy of agency law, the rule making must be within the actual authority delegated to the administrative agency by the legislature. Any attempt by an agency to make a rule which exceeds the scope of the enabling statute is ultra vires and void. Such rule would also be unconstitutional as an attempt by an administrative agency to exercise the legislative power, which under our constitutions is vested entirely in the legislature. Moreover, an administrative agency may not substitute its own regulatory standards for those


58. Professor Fuchs lists: (1) the character of the parties affected, (2) the nature of the problem to be dealt with, (3) the character of the administrative determination, (4) the type of agency issuing the rule and (5) the character of enforcement which attaches to the resulting regulation. Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259, 266 (1938). See examples id. 273-80; Fairlie, Administrative Legislation, 18 Mich. L. Rev. 181, 183-88 (1920).


stated in a statute. Regulations may not curtail the scope of statutory exemptions or expand statutory prohibitions, nor may they, without authority, extend or modify statutory provisions. Thus, the theory is that the statute sets the channels or limits within which administrative discretion may operate, and an administrative rule may not narrow, widen or divert those channels, but must operate within them.

In actual practice, the division in legislative functions between legislatures and administrative agencies is not nearly so clear. As Professor Davis has shown, Congress has made many delegations of legislative functions to administrative agencies without any intelligible standards, and the courts have upheld these delegations. As a result, in these instances administrative agencies make major policy determinations without proper legislative guidance. This almost unlimited administrative discretion in rule making is well illustrated by the power of public utility commissions to set rates under a statutory standard of "just and reasonable." As long as there is some rational basis for its decision, the regulatory commission is delegated broad discretion concerning the weight to be given each of the relevant, underlying economic factors. As another example, the ambiguous and amorphous standards of the Interstate Commerce Act permitted the Commission to set minimum railroad rates which channeled traffic away from lower cost railroads to higher cost truck transport, thus wasting the nation's resources on over investment in trucks while railroad capacity remained underused. The fault in these instances is not primarily that of the administrative agencies, which are not empowered to decline all authority because of vague enabling statutes. Rather the fault lies with the legislatures which fail in their constitutional duty to adopt meaningful

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standards in enabling statutes and with the courts which fail to force legislatures to be rigorous by not declaring vague enabling statutes unconstitutional. Professor Davis favors such unguided discretion in administrative agencies, believing they are many times more capable of making general legislative policy than is the legislature. Those who prefer that private political pressures be centered on elected legislators rather than appointed administrators reject this outright violation of the principle of separation of powers.

Legislative due process is the main constitutional requirement of administrative rule making. Since legislative action deals with classes of rights rather than the treatment of individuals, its due process requirements are different from executive or judicial due process. In addition to the constitutional procedures required to enact a statute, the elements of legislative due process include the power to act on the subject matter, a constitutional objective or purpose, and a means which has a rational and substantial relation to the objective. In addition a statute must not be discriminatory, and it must have certainty or definiteness.

These established principles of legislative due process for statutes also are applicable to rules made by administrative agencies. As noted above, the power of an administrative agency to make rules on a subject matter is derived from the enabling statute. Acting beyond that power would violate due process in the sense that unconstitutional assumption of legislative power by an executive agency is an unauthorized proced-

69. Davis, op. cit. supra note 66, § 2.05.
72. An arbitrary or capricious means may not be adopted to effect a constitutional objective. Butler v. State, 352 U.S. 380, 383-84 (1957) (prohibiting sales to adults of books found unfit for children not rationally related to objective of protecting youth); Tot v. United States, 319 U.S. 463, 467-68 (1943) (possession of firearms not rationally converted to presumption that they were transported in interstate commerce); Pierce v. Society of the Sisters of Holy Name, 268 U.S. 469, 534 (1925) (prohibiting private schools not rationally related to objective of compulsory education).
The objective or purpose of an administrative rule also must be found in the enabling statute, since it is the constitutional duty of the legislature to exercise the primary rule making function. Consequently, the key problems of legislative due process as applied to administrative rule making center on whether there is a rational and substantial relation between the rules adopted and the purpose stated in the enabling statute. If there is no rational relation between the administrative rules and the statutory objective, the rules are arbitrary and a denial of due process.\(^7\) Administrative regulations also must be non-discriminatory,\(^6\) and they must not be vague or uncertain.\(^7\)

It is significant that legislative due process does not require hearings\(^7\) or findings\(^8\) before an administrative agency adopts a rule or regulation. Some enabling statutes, however, do impose the formal, time-consuming requirement of a hearing on rule making.\(^8\) Section 4 of the Administrative Procedure Act requires only publication of notice in the Federal Register before rules are made.\(^6\) Those affected by the proposed rule are thus able to make their views known to the administrative agency and, though no formal method of submitting such views is established, Section 4 permits more opportunity for expression than Congress or state legislatures must provide when enacting statutes.\(^8\) If the expertise of officials in making administrative rules is for the


76. Epley v. Commissioner, 183 F.2d 1020, 1022 (5th Cir. 1950); Inland Steel Co. v. NLRB, 109 F.2d 9, 19 (7th Cir. 1940).


regulation of economic and other activities in the public interest, those immediately affected should have no special procedural rights to interfere with or to influence the rule makers. Those who are to be regulated are unlikely to exert a benefit to the public interest by their influence on legislation.

The one other constitutional limitation on administrative legislation which must be noted is the eminent domain limit to rate making. Since no business firm has a constitutional right to a monopoly profit, all prices may be regulated in the public interest. The lower limit on rates which may be set before eminent domain applies is not clear from the decisions. The Supreme Court has held, however, that railroads may be required to carry some commodities at noncompensatory rates so long as rates as a whole afford just compensation. The eminent domain protection against confiscatory rate regulation is interrelated with the due process protection, for confiscatory rates are also arbitrary because they are not rationally related to a statutory objective of "just and reasonable charges." Consequently, many of the decisions do not clearly distinguish which of these two protections is controlling when ruling on the constitutionality of particular rates.

IV. EXECUTIVE FUNCTION IN ADMINISTRATIVE AGENCIES
A. The Nature of the Executive Function

The executive or purely administrative functions of administrative agencies constitute the bulk of their tasks. The expertise and efficiency which specialized agencies develop in performing the regulatory tasks are the reasons for their creation and for their being termed administrative.

The executive or administrative function is the power to perform all acts necessary and appropriate to applying or enforcing statutes and

87. See, e.g., cases in note 84 supra; HALE, FREEDOM THROUGH LAW 467 (1952).
88. ADMINISTRATIVE PROC. REP. 35.
89. This section will treat only regulatory agencies and will not discuss the internal management problems of government, such as government-employee relations and government contracts.
administrative rules, other than clearly judicial functions. An un-
fortunate and misleading dichotomy in classification of the cases and
in the Administrative Procedure Act resulted in most executive actions
of administrative agencies being erroneously classified as part of ad-
judication. As a result of this misleading failure to distinguish ad-
ministrative from judicial types of activities, many unnecessarily formal
and extended judicial procedures have been required in statutes assign-
ing executive functions to agencies. Professor Gellhorn has noted
that judicial hearings, for example, are neither necessary nor efficient
for execution of most purely administrative functions.

A most important and valuable characteristic of purely administra-
tive functions is that, unlike judicial proceedings, there is no constitu-
tional limitation on the method of executing them other than that the
method must not be arbitrary or discriminatory. In an enabling
statute, the legislature may design a method for execution of the statu-
tory objective or delegate this authority to an administrative agency.
In either case, managerial efficiency can be the key criteria for the
method adopted. Thus, the second large area of discretion delegated to
administrative agencies (rule making being the first) is in the exercise
of the purely administrative function—including enabling actions, di-


91. Activities of administrative agencies have been classified either as rule making or adjudication. Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 27 (D.C. Cir. 1954).

92. Under the Administrative Procedure Act, "the definition of adjudication is largely a residual one, i.e., 'other than rule making but including licensing.'" U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 13 (1947). An entire volume purporting to deal with the judicial function but which makes no clear distinction between executive and judicial actions is Chamberlin, Dowling & Hays, The Judicial Function in Federal Administrative Agencies (1942).

93. Elias, Administrative Discretion—No Solution in Sight, 45 Marq. L. Rev. 313, 336 (1962). The formal adjudicatory procedures of sections 5, 7 and 8 of the Administrative Procedure Act apply only where some other statute requires agency action "on the second after opportunity for an agency hearing." U.S. Dep't of Justice, op. cit. supra note 92, at 41.


rective actions and ministerial duties. A review of this function in some state and federal regulatory agencies will illustrate the problem of administrative efficiency.

**Issuance of licenses.** Many common-law rights to engage in particular activities have been abolished by statute. They have been replaced by privileges to acquire limited rights through securing a license or permission from an administrative agency of the state. Among these are use of public lands, waterways, highways and airways, entrance into many businesses and professions and the sale of securities. In order to receive a license, an applicant must demonstrate to an administrative officer that he fulfills the statutory and regulatory prerequisites. Thus, administrative licensing pursuant to statute is an exercise of the police power of the state to protect the public health, morals, or welfare. Since the granting of a license creates a legal right which did not previously exist in the applicant to engage in an activity which is otherwise prohibited by law, the issuance of individual licenses by an administrative agency is clearly an executive function.

Regulatory licenses are of two main types: (1) those which are issued in unlimited numbers to all qualified applicants, and (2) those which are issued only in limited numbers and which restrict entry even

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96. ICC v. Parker, 326 U.S. 60, 72-73 (1945); NLRB v. White Constr. & Eng'r Co., 204 F.2d 950, 952 (5th Cir. 1953). "Administrative discretion is the freedom of choice or judgment with which an executive officer or an administrative agency is entrusted in order to insure the constant and complete effectuation of the legislative policy in any situation which might arise in connection with the enforcement of the statute." Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L. J. 577, 581 (1938). See Patterson, *Ministerial and Discretionary Official Acts*, 20 Mich. L. Rev. 848 (1922).

97. "The word 'license' means permission or authority; and a license to do a particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license." Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1, 213-14 (1824). See Saxe v. Street Comm'rs, 307 Mass. 495, 30 N.E.2d 380, 381-82 (1940); Bloomfield v. State, 86 Ohio St. 253, 99 N.E. 309, 310 (1912); Barnett, *Public Licenses and Private Rights*, 33 Ore. L. Rev. 1 (1953).


99. Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464, 467 (1930); Gouge v. David, 185 Ore. 437, 202 P.2d 489, 495 (1949). Although the legislature could issue individual business professional licenses itself, when it chooses to pass an enabling statute delegating to an administrative agency the authority to issue licenses pursuant to a stated standard, the function becomes executive. See 1 Benjamin, *Administrative Adjudication in the State of New York* 68 (1942); Rock Island Motor Transp. Co. v. Murphy Motor Freight Lines, 239 Minn. 284, 58 N.W.2d 723, 727 (1953). For a carefully reasoned opinion indicating why the issuance of licenses is not judicial see Cromwell v. Jackson, 188 Md. 8, 52 A.2d 79 (1947). See also Household Fin. Corp. v. State, 40 Wash.2d 451, 244 P.2d 260, 263 (1952).
though the qualified applicants are in excess of the established quota. The first category includes, for example, licenses for automobiles, drivers, fishing, to sell or issue securities, to enter the professions, or to engage in most businesses.\textsuperscript{100} The key administrative problem for these licenses is creation and control of an examining board which will set up reasonable standards for admission to the particular activity. These standards must not create undue barriers to entry nor may they be discriminatory.\textsuperscript{101}

Licenses of the second type may be designed to effect a public policy of restricting entry, such as those for selling intoxicating liquors or operating taxicabs.\textsuperscript{102} Or they may be limited in numbers by physical constraints, such as the number of channels available for radio and television.\textsuperscript{103} In either case, the license becomes a scarce resource—an opportunity to make a monopoly profit for which people will bid in the market. In a free society there is only one rational, nondiscriminatory way to allocate a scarce resource among equally qualified bidders—the public auction. After adopting detailed rules on qualifications for and licensee's use of any scarce license, the administrative agency should then sell the license to the highest qualified bidder.\textsuperscript{104} The rights or privileges arising from scarce licenses are in the nature of public property, and if they have a money value, they should not be given away. Any purely administrative (non-monetary) method of allocation among equally qualified bidders is likely to be based on political influence of


\textsuperscript{102} See Glicker v. Michigan Liquor Control Comm’n, 160 F.2d 96, 100 (6th Cir. 1947); Schreiber v. Illinois Liquor Control Comm’n, 12 Ill.2d 118, 145 N.E.2d 50, 52 (1957); Stouffer Corp. v. Board of Liquor Control, 165 Ohio St. 96, 133 N.E.2d 325, 327 (1956).


\textsuperscript{104} If preservation of competition or prevention of monopoly is one of the statutory criteria in issuing particular types of licenses (such as television channels), the statute or administrative rule may make the firm or group holding one license unqualified to bid on another. See, e.g., the Communications Act \textit{§} 314, 47 Stat. 1087 (1934); 47 U.S.C. \textit{§} 314 (1958); Schwartz, \textit{Antitrust and the FCC: The Problem of Network Dominance}, 107 U. Pa. L. Rev. 753, 766 (1959); Hale & Hale, \textit{Competition on Control II: Radio and Television Broadcasting}, 107 U. Pa. L. Rev. 585 (1959); Friendly, \textit{The Federal Administrative Agencies: The Need for Better Definition of Standards}, 75 Harv. L. Rev. 1055-72 (1962).}
Dispensing public benefits. Dispensing actions of administrative agencies involve the distribution of public benefits, either in money or in sanctioning a deviation from established laws or administrative regulations.\textsuperscript{107} Examples are the award of veterans benefits,\textsuperscript{108} a zoning board permit for zoning variances,\textsuperscript{109} and permission by utility commissions for firms to discontinue particular services or to consolidate when such an approval creates a statutory exemption from the antitrust laws.\textsuperscript{110} Actions of the Interstate Commerce Commission in allowing particular rate reductions or increases on a single commodity to the sole carrier on a route are borderline cases between rule making and administrative dispensation.

The exercise of administrative discretion in dispensing public benefits is greater than it is in most types of licensing. Each dispensation case involves a unique fact situation which the proponent argues is sufficient for creating an exception to general law. The possibilities of confused issues, bias, discrimination and even ultra vires action are very great.\textsuperscript{111} Two legislative controls are needed for effective judicial review of alleged arbitrary abuse of such broad discretion: (1) a set of statutory standards which indicate at least in some general way which of the standards are of prime importance and should be given the greatest


\textsuperscript{106} In one case of rival applicants for television channels, the toilet facilities of studios were urged as a material basis for decision. Elias, supra note 93, at 336.

\textsuperscript{107} Freund, supra note 54, at 128.


\textsuperscript{111} See Dukeminier & Stapleton, The Zoning Board of Adjustment: A Case Study in Misrule, 50 KY. L.J. 273, 322-35 (1962); Freund, Power of Zoning Boards of Appeals to Grant Variances, 20 NAT'L MUNIC. REV. 537 (1931).
weight, and (2) a statutory requirement that the administrative agency make detailed, written findings of fact, so that a reviewing court is able to pass on an allegation of ultra vires action.

Administrative (executive) orders. The executive order of an administrative agency informs a citizen of the particular way he must perform an existing statutory duty. It differs from the judgment of a court in that it does not determine existing legal rights but deals with the execution of rights which are not in contest. Executive orders are issued by agencies in exercising supervisory powers pursuant to enabling statutes over the activities of business firms, labor unions, and other groups. The Federal Communications Commission, for example, has the power to order a daytime broadcasting station to cease predawn operations when the station's license permitted the FCC to issue such order upon a finding of undue interference.112 Other examples are the notices of acreage allotments and marketing quotas under the Agricultural Adjustment Act,113 and the certification by the National Labor Relations Board, after an employees' election, of the proper bargaining representative.114 Where a court leaves enforcement of its decree to the Federal Trade Commission, an order by the FTC to defendant to file a report on compliance is also clearly executive.115

It is notable that the investigative functions of an administrative agency in preparation of an executive order are different from investigations which precede rule making. Moreover, administrative investigations vary greatly in form even for different types of executive orders. An investigation of a charge of deceptive television programming, for example, would take a form radically different from the holding of an employees' election under the National Labor Relations Act preparatory to certifying the proper bargaining representatives. The only aspect which these types of investigations seem to have in common is that both are subject to the constitutional due process prohibition or arbitrary action.116

116. See note 124 infra and accompanying text.
Mediation and arbitration of private disputes. Administrative mediation and arbitration pursuant to a statute are two means of settling disputes (1) where there is no judicial remedy or (2) where administrative findings of fact are clearly more accurate and efficient than those of a jury. The Federal Mediation and Conciliation Services in the field of labor-management disputes over wages and working conditions is an example of the first category.\textsuperscript{117} The state and federal workmen’s compensation statutes are examples of the second category.\textsuperscript{118} Depending on the state, workmen’s compensation statutes either replace or offer as an alternative to common law tort remedies a system of compulsory insurance for job injury plus either compulsory or voluntary arbitration of the amount of the injury. In an action to set aside such an arbitration award, the compensation commission’s expert finding of fact of the amount of injury will not be set aside unless arbitrary (without rational basis), but the jurisdictional fact of whether claimant was an employee is in part a legal issue subject to trial de novo in a court.\textsuperscript{119}

Prosecuting violations, negotiating settlements and consent decrees. One of the largest executive functions of administrative agencies is the investigation of statutory violations, preparing prosecutions, negotiating settlements or consent decrees, and filing complaints. Examples are prosecutions of unfair labor practices by the National Labor Relations Board\textsuperscript{120} and the prosecutions of unfair methods of competition and unfair or deceptive acts or practices in commerce by the Federal Trade Commission.\textsuperscript{121} The special knowledge of its particular subject matter may enable the administrative agency to detect violations and assemble evidence thereof more easily than could the Justice Department. Like-

\textsuperscript{119} Crowell v. Benson, 285 U.S. 22, 60-65 (1932). Where petitioner in injunction action to set aside award concedes that all evidence is in Commission record, trial de novo may be denied, since the court can determine jurisdictional questions from record on a motion to dismiss the action. Morrison-Knudsen Co. v. O’Leary, 288 F.2d 542 (9th Cir.), cert. denied, 388 U.S. 817 (1961). See Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953 (1957); Manuel, Administrative Law: May Either a State or Congress Vest in an Administrative Tribunal the Conclusive Determination of a Question of Law?, 26 Calif. L. Rev. 683 (1938).
wise, a determination of what constitutes an adequate settlement or consent decree in order to prevent similar later violations may require the expert knowledge of the administrative specialist.\textsuperscript{122}

B. Constitutional and Statutory Limitations.

The primary constitutional limitations on executive action are those of due process and equal protection of the laws.\textsuperscript{123} The essence of executive due process is that the action of the executive officer not be arbitrary; \textit{i.e.}, his action must have a rational relation to the execution of a valid statute within his assigned duties.\textsuperscript{124} It is in the context of protecting those who are regulated from arbitrary action that the importance of clear and intelligible standards in enabling statutes can be seen. In the usual appeal of an administrative action to the courts, the courts will have to search the statutes and rules to determine the validity of the challenged acts. Absent intelligible standards, the courts may be unable to determine whether the acts are rationally related to the objectives of the statute and not ultra vires.

Like legislative due process, and in contrast to judicial process, executive due process does not require any established formal procedure.\textsuperscript{125} As long as the executive officer does not violate specific statutory or constitutional limitations, he may devise what he considers the most efficacious method of accomplishing his tasks.\textsuperscript{126} Thus hearing or oral argument is not a required element of constitutional due process in the issuance of licenses.\textsuperscript{127} Nor is there a right to an informal conference before a stop order suspends registration of shares under the Securities Act of 1933.\textsuperscript{128}

\textsuperscript{122} See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 150 (1941).
\textsuperscript{124} General Protective Comm. v. SEC, 346 U.S. 521, 536 (1954). See also note 95 supra.
\textsuperscript{125} Inland Empire Dist. Council v. Millis, 325 U.S. 697, 710 (1945); Lacomastic Corp. v. Parker, 54 F. Supp. 139, 141-42 (1944); Louisville Gas & Elec. Co. v. FFC, 129 F.2d 126, 134 (6th Cir.1942).
\textsuperscript{126} American Power & Light Co. v. SEC, 329 U.S. 90, 112-13 (1946); Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 580-82 (1940); Western Air Lines v. CAB, 184 F.2d 545, 551 (9th Cir. 1950).
\textsuperscript{127} FCC v. WJR, 337 U.S. 265, 281 (1949); Bourjois, Inc. v. Chapman, 301 U.S. 183, 189 (1937); American Broadcasting Co. v. FCC, 179 F.2d 437, 442 (D.C. Cir. 1949); Clapp v. Ulbrich, 140 Conn. 637, 103 A.2d 195, 197 (1954); Thayer Amusement Corp. v. Moulton, 63 R.I. 182, 7 A.2d 682, 689 (1939).
\textsuperscript{128} Columbia Gen. Inv. Corp. v. SEC, 265 F.2d 559, 565-66 (5th Cir. 1959).
V. THE JUDICIAL FUNCTION AND JUDICIAL REVIEW

The judicial power is the authority to hear and make enforceable decisions of controversies concerning the alleged invasion of existing legal rights. The judicial power thus has two necessary elements: (1) interpreting what law is applicable to controversies over alleged existing legal rights, and (2) issuing an enforceable order which extinguishes the original claim by finally determining what legal rights and duties exist in the parties (subject to appellate court review). The judicial function—the exercise of the judicial power—includes determination of what common-law courts have traditionally characterized as legal issues, as opposed to the finding of facts. It is distinguished from the legislative function of creating or extinguishing classes of legal rights (determining what the law shall be) by its particularity and by its determination of presently existing, but contested, rights of the parties under laws which existed when the controversy arose. The judicial function is distinguished from the executive function of enabling or directing action when legal rights are not in contest and the prosecution of claims when existing legal rights are in contest (administering the law) by its final and conclusive determination of contested legal rights, subject to review only by appellate courts.


130. Controversy is used here in the broad sense to include the imminent controversy subject to declaratory judgment. See Borchard, The Constitutionality of Declaratory Judgments, 31 Colum. L. Rev. 561 (1931).

131. See Green, Separation of Governmental Powers, 29 Yale L.J. 369, 378 (1920); Warp, Independent Regulatory Commissions and the Separation of Powers Doctrine, 16 Notre Dame Law. 181, 190 (1941).

132. Findings of fact in a controversy, though sometimes made by judges, are not peculiarly a judicial function. This may be made by a jury, stipulated by the parties, or found by an expert fact-finding body, such as a workmen's compensation commission. Crowell v. Benson, 285 U.S. 22, 51 (1932). See also Reconstruction Fin. Corp. v. Bankers Trust Co., 318 U.S. 163, 170 (1943); Sullivan v. Union Stockyards Co., 26 F.2d 60, 61 (8th Cir. 1928).


134. Sullivan v. Sao Paulo, 122 F.2d 355, 358 (2d Cir. 1941); Devine v. Brunswick-Balke-Collender Co., 270 Ill. 504, 110 N.E. 780, 782-73 (1915). See Pillsbury, Adminis-
"The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."136 Except for the impeachment power which is vested in Congress, the Constitution vests the entire federal judicial power in the Courts.135 Unlike the English Constitution, under which the legislature exercises appellate judicial powers, our written Constitution implicitly prohibits the legislative assumption of judicial powers.137 Nor may the executive assume any judicial powers except those vested in it under the war powers.138

The separation of governmental powers under our Constitution is thus found in its most strict and complete form in separation of the judiciary from the legislative and executive.139 Under our system of judicial supremacy, the judiciary is the operative check on possible arbitra-

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The holdings that Congress may create "legislative" courts, which render enforceable legal judgments but which are not part of the federal judiciary as defined in article III of the Constitution, are clearly inconsistent with the mandate for a separate and independent judiciary. The decisions which upheld the mixing of judicial and executive functions in such courts and the removal of judges by the President seem to be in error. Williams v. United States, 289 U.S. 553 (1933); see Ex parte Bakelite Corp., 279 U.S. 438 (1929); Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894 (1930).


139. At the formation of our constitution, whatever might have been the prior connexion between the legislative and judicial departments, a great solicitude existed to keep them, thence forward, on the subject of private controversies, separate and independent. [1 B.L. Apx. A: Letter of judges sup. court of United States, April, 1792.]

It was well known and considered, that "in the distinct and separate existence of the judicial power consists one main preservative of the publick liberty" [Bl. Com. 269]; that indeed 'there is no liberty if the power of judging be not separated from the legislative and executive powers" [Montesquieu, B.I. Ch. 6]. In other words that "Union of these two powers is tyranny" [7 Johnson 508]; or as Mr. Madison observes, may justly be 'pronounced the very definition of tyranny' [Fed. No. 47], or in the language of Mr. Jefferson, 'is precisely the definition of despotick government' [Notes on Vir. 195].

trary action by legislatures or executive officers. The effectiveness of
the judicial bar to arbitrary and oppressive government is dependent
above all on the independence of the judiciary.\footnote{140} In the classic state-
ment of Lord Coke: "No man may be a judge in his own cause."\footnote{143}
Neither the legislature which has exercised the sovereign law-making
power in enacting a statute nor the executive officers charged with en-
forcing a statute may sit in judgment of a defendant charged with
violating the statute. For both the legislature and executive, in their
efforts to govern, have a vested and therefore biased interest in un-
limited statutory enforcement.\footnote{142} They cannot be impartial judges of
the constitutional limitations on their own acts;\footnote{143} only an independent
judiciary can perform this function. Blackstone held an independent
judiciary essential to the preservation of liberty.\footnote{144} His views coupled
with the unhappy colonial experience with the exercise of judicial powers
by legislatures must have impressed many of the founding fathers with
the importance of establishing an independent judiciary, with its own
inviolable province.\footnote{145}

\begin{itemize}
\item 140. O'Donoghue v. United States, 289 U.S. 516, 531-34 (1933); Evans v. Gore, 253 U.S. 245, 248-53 (1920). "The complete independence of the courts of justice is peculiarly essential in a limited constitution." \textsc{The Federalist} No. 78, at 100 (Bourne ed. 1947) (Hamilton).
\item 143. "From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to influence their construction; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in that of judges." \textsc{The Federalist} No. 81, at 121 (Bourne ed. 1947) (Hamilton).
\item 144. "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservation of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated from the legislative." \textsc{Blackstone, Commentaries on the Laws of England} 269, in Sharp, \textit{The Classical American Doctrine of "The Separation of Powers," 2 U. Chi. L. Rev.} 385, 392 (1935).
\item 145. \textit{Id.} at 393. See also Wright, \textit{The Origins of the Separation of Powers in America}, 13 \textsc{Economica} 139, 169 (1933). Chancellor Kent is an authority for the view that an independent judiciary is a keystone of the federal Constitution: "The constitutions of several of the United States . . . have an express provision that the legislative
\end{itemize}
Consonant with the constitutional mandate for an independent judiciary as a separate department of government is the rule that the judicial power is non-delegable.\textsuperscript{140} Unlike the legislature, the judiciary is not a duty-assigning branch of government.\textsuperscript{147} Judges are appointed or elected for their personal qualifications to perform the judicial function, and unlike legislators, judges are not laymen chosen from the population as a whole. Because the judiciary is a true example of a body of men with specialized skills and technical knowledge, the act of judging is unquestionably a personal duty.\textsuperscript{148} Hence, any attempt by a judge to delegate his clearly judicial functions to a legislative or administrative agency would seem to violate both his oath of office and the constitutional separation of powers.

The legislative and executive departments are subject to an additional constitutional constraint: under the Constitution they have not been vested with any general judicial power.\textsuperscript{149} Ipso facto, they also are constitutionally unable to delegate clearly judicial functions to administrative agencies.\textsuperscript{150} From these constitutional premises, it necessarily and judicial powers shall be preserved separate and distinct, so that one department shall not exercise the functions belonging to the other. . . . [W]e have a most commanding authority, in the sense of the American people, that the right to interpret laws does, and ought to belong exclusively to the courts of justice.” Dash v. Van Kleek, 7 Johns. R. 477, 508-09 (N.Y. 1811) (Kent, C. J.). See also note 4 supra. Also echoing this view was Chief Justice Marshall: “The Judicial Department comes home in its effects to every man’s fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted on an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary.” MARSHALL, DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, 616, 619, in O’Donoghue v. United States, 289 U.S. 516 532 (1933). And Justice Story’s quotation of the Federalist Papers affirms this position as his also. 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 391-93 (4th ed. 1873).


148. “One of the conditions which attaches to formal judicial proceedings is the rule that the judges shall personally hear and determine the matters to be decided. A judge who absented himself habitually from court and installed a friend as permanent locum tenens, or who handed over part of a trial to a subordinate, would not be permitted to remain on the bench.” ROBSON, JUSTICE AND ADMINISTRATIVE LAW 68 (3d ed. 1951).

149. The judicial power is vested entirely in the courts. See note 136 supra. The legislature and executive are prohibited from assuming or usurping judicial power. See notes 137-38 supra.

ADMINISTRATIVE REGULATION

follows that the courts may not acquiesce in legislative attempts to delegate to administrative agencies clearly judicial functions. Since the legislature has no judicial power to delegate, it would merely be directing the administrative officers to usurp judicial power. And the Supreme Court has held without exception that the constitutional separation of powers doctrine prevents the judiciary from approving any usurpation of judicial power by legislative or executive officers. This elementary logic prevails in all jurisdictions where the constitutions vest the entire judicial power in the courts.

It would be an inadequate counter argument to maintain that politicians in administrative agencies, dependent on the chief executive and his party machine for renewed or higher political appointments, may perform trial court functions so long as their decisions are subject to judicial review. The procedural due process which the Constitution requires in judicial proceedings (full, fair and unbiased hearing) does not commence at the appellate level; rather it is of utmost importance at the trial level. A trial before an executive officer, who is untrained in law and whose superiors are the prosecutors, cannot be made the equivalent of a fair trial on the basis of a finding in a reviewing court that there is support for the trial decision within the conflicting evidence in the record. If the American people had wished to trust politicians subservient to the executive with the power to judge controversies by making enforceable initial determinations of legal issues (or mixed questions of law and fact), their representatives would have written this exceptional allocation of judicial power into the Constitution. Since the power to amend the Constitution is reserved to the people (states), appellate courts are constitutionally unable to sanction any legislative attempts to transfer trial court functions to administrative agencies. Judicial due process can be obtained only in a court.

Some commentators have suggested that in a few classic cases the

cert. denied, 248 U.S. 578 (1918). A statute may not delegate to an executive officer the power to make a final determination whether a person seeking entry to the United States is a native-born citizen, if that person’s petition for judicial review and for trial of issue of citizenship is accompanied by at least sufficient evidence to make out a prima facie case. Sing Tuck v. United States, 128 Fed. 592, 593 (2d Cir.), rev’d on other grounds, 194 U.S. 161, 170 (1904). This right to judicial determination of alleged citizenship is now codified and supercedes the former constitutional procedure in these cases of habeas corpus. Samaniego v. Brownell, 212 F.2d 891 (5th Cir. 1954).

151. See notes 139-40 supra.


153. See Berger, supra note 141, at 218, on the inadequacy of judicial review as a substitute for a fair trial.
Supreme Court has approved the summary but final determination of legal rights by executive officers. This is not so. In Murray's Lessee v. Hoboken Land & Improvement Co., a case often cited in support of this proposition, it was held that the Treasury Department could determine the amount due from a delinquent revenue agent and issue an enforceable distress warrant against him. Yet this was merely an executive action similar to attachment, because the statute gave the tax agent the privilege of filing an action before the levy was completed so that he received a court determination if he chose to contest the alleged delinquency. In Coffin Bros. & Co. v. Bennett, Mr. Justice Holmes held that a Georgia statute did not violate due process because it provided that the state superintendent of banks might issue summary executions against bank stockholders to enforce statutory double liability to depositors. By the statute, stockholders were permitted to file an affidavit of illegality, which entitled them to raise and try every possible defense in a court. Here again the execution was in effect an attachment—a lien dependent for its effect upon the result of the suit. In Lawton v. Steele, the Court held that a statute allowing an executive officer to destroy summarily as a public nuisance fish nets used in violation of statute was not a denial of due process. In summarily abating the alleged nuisance, the executive officer made no conclusive determination of legal rights. The claim of the property owner was subject to trial in an action for replevin of the nets or in damages against the officer.

There are, however, a number of federal and state administrative agencies which determine legal issues and mixed questions of law and fact in controversies, whose decisions are enforceable and not subject to trial de novo in a court. Under the analysis above, these exercises of clearly judicial functions by administrative agencies are unconstitutional usurpations of judicial power by them. The courts which have

154. 18 How. (59 U.S.) 272 (1855).
156. 277 U.S. 29 (1928).
157. Id. at 31.
158. 152 U.S. 133 (1894).
160. "Without doubt the most acute problem of our administrative system is created by the so-called combination of prosecuting and adjudicating functions within one agency." Jaffe, Basic Issues: An Analysis, 30 N.Y.U.L. Rev. 1273, 1278 (1955) ; Administrative Proc. Rep. 206.
sanctioned such action seem to have overlooked the strict application of the separation of powers as applied to the guarantee of an independent judiciary. In such cases, the courts have sanctioned abolition of the right to due process in a trial court for the initial determination of legal issues. A discussion of four types of such judicial orders follows.

**Cease and desist orders.** The cease and desist order, directing a person not to engage in specific acts in the future, is equivalent to the civil remedy of injunction. Seven federal agencies are empowered to enforce statutory prohibitions of unfair methods of competition, unfair practices, or violation of licenses and rules in commerce through issuance of cease and desist or similar orders. Cease and desist orders of the Federal Trade Commission—the largest group of such orders—are enforced in the appropriate United States Court of Appeals. In such proceeding the statute provides that the FTC's findings of fact are conclusive if supported by substantial evidence; and this rule is also applied to mixed questions of law and fact. In a false advertising case, for example, the finding that the advertisements deceive the public is also a legal holding that an unfair or deceptive act or practice has occurred. Thus, the decisions of an administrative commission, charged with the executive duty of enforcing a statute, determine legal issues and are given the weight of those of a trial court. Such a case may be heard before as many as five different hearing examiners, who are...


165. Vacu-Matic Carburetor Co. v. FTC, 157 F.2d 711, 713-14 (7th Cir. 1946), cert. denied, 331 U.S. 806 (1947).
not bound to follow legal rules of evidence. While the Commission is not required to accept the findings of hearing examiners, it must nevertheless appraise the credibility of witnesses which it has not seen. And the Commission's rulings of violation of the Federal Trade Commission Act, though the evidence is so conflicting that it might have supported the contrary, are upheld unless they are arbitrary or clearly wrong.

In reviewing the constitutionality of cease and desist orders, the courts have sidestepped the issue of separation of powers. Even though such orders of administrative agencies determine mixed questions of law and fact and very limited review is available upon application for enforcement, the courts have uniformly refused to recognize that they are a clear exercise of judicial power. In early cases, such orders were labeled quasi-judicial. Though they determined legal issues, they were held not to be judicial because they were not issued by courts and the Commission had no power itself to issue execution. In these cases, the authorities cited uphold congressional delegations of secondary legislative functions, not judicial functions. None of the reviewing courts recognized that the legislature has no judicial power to delegate, nor do any of them offer a rigorous definition of the judicial power.

The courts have also sidestepped the issue of the constitutional right to due process in trial proceedings. They have uniformly held that the provisions for judicial review satisfy due process requirements and make the Federal Trade Commission proceedings constitutional.

166. FTC v. Cement Institute, 333 U.S. 683, 704-05 (1948); Concrete Materials Corp. v. FTC, 189 F.2d 359, 362 (7th Cir. 1951); Stanley Laboratories v. FTC, 138 F.2d 388, 392 (9th Cir. 1943); Arkansas Wholesale Grocers' Ass'n v. FTC, 18 F.2d 866, 871-72 (8th Cir. 1927). Similar holdings can be found in unfair labor practice hearings: NLRB v. Hearst, 102 F.2d 658, 662-63 (9th Cir. 1939); Consolidated Edison Co. v. NLRB, 95 F.2d 390, 395 (2d Cir.), modified on other grounds, 305 U.S. 197 (1938).

167. Goodman v. FTC, 244 F.2d 584, 601 (9th Cir. 1957).

168. Corn Prods. Refining Co. v. FTC, 324 U.S. 726, 739 (1945); Erickson v. FTC, 272 F.2d 318, 321 (7th Cir. 1959); Tractor Training Serv. v. FTC, 227 F.2d 420, 424 (9th Cir. 1955).

169. Carter Prods. Co. v. FTC, 268 F.2d 461, 496 (9th Cir), cert. denied, 361 U.S. 884 (1959); Standard Distrib. v. FTC, 211 F.2d 7, 12 (2d Cir. 1954); Excelsior Lab. v. FTC, 171 F.2d 484, 486 (2d Cir. 1948); Gulf Oil Corp. v. FTC, 150 F.2d 106, 108 (5th Cir. 1945); Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393, 395 (2d Cir. 1943).

170. FTC v. F. A. Martoccio Co., 87 F.2d 561 (8th Cir. 1937); FTC v. A. McLean & Sons, 84 F.2d 910, 912 (7th Cir.), cert. denied, 299 U.S. 590 (1936); National Harness Mfrs.' Ass'n v. FTC, 268 Fed. 705, 707-08 (6th Cir. 1920); Sears, Roebuck & Co. v. FTC, 258 Fed. 307, 312 (7th Cir. 1919).

171. Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 594 (7th Cir. 1945); Ostler Candy Co. v. FTC, 106 F.2d 962, 964 (10th Cir. 1939), cert. denied, 309 U.S. 675 (1940); National Candy Co. v. FTC, 104 F.2d 999, 1004 (7th Cir.), cert. denied, 308 U.S. 610 (1939). Similar holdings can be found for National Labor Relation Board orders to cease and desist from unfair labor practices: Precision Castings Co. v. Boland, 13 F. Supp. 877, 883-84 (W.D.N.Y.), aff'd, 85 F.2d 15 (2d Cir. 1936).
This is a non sequitur. Just because limited judicial review is permitted does not mean that executive usurpation of trial court functions fulfills judicial due process. A member of the Federal Reserve Board, without legal training, responsible only to the prosecuting executive agency, is surely unqualified to preside at an antitrust trial, make findings of fact and the initial determination of legality. Yet this clear violation of the traditional due process concept of unbiased trial hearing before independent judiciary took place in Transamerica Corp. v. Board of Governors. Surely, remand for retrial of an erroneous, biased decision to the same or another unqualified and politically dependent administrative "judge" would not accomplish procedural due process. Nor is denial of cross-examination or bias of the trier of fact ever approved as judicial due process in trial courts. Yet denials by the Federal Trade Commission of cross examination in a false advertising prosecution and denials of affidavits of Commission bias in two antitrust prosecutions were upheld on review. In these administrative injunction cases, appellate courts seemed to have unwittingly and erroneously accepted the idea that constitutional due process in judicial proceedings begins at the appellate level. As was noted above, this is error.

Orders for deportation of resident aliens. "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." In other words, any alien who claims to have entered the United States lawfully on an immigration visa can be said to have acquired a "right" to remain here, of which he cannot be deprived without the full and unbiased hearing that constitutes compliance with the dictates of due process of law. A determination of whether an alien entered

172. "The view sometimes adopted that the right of appeal to the courts, either in wide or limited measure, saves action of an executive board from a valid charge of judicial invasion is not considered to be sound in principle. Authority to correct its errors does not alter the character of its undertaking." In re Opinion of the Justices, 87 N.H. 492, 179 Atl. 344, 346 (1935).

173. The erroneous findings and decision of the Federal Reserve Board were reversed in Transamerica Corp. v. Board of Governors, 206 F.2d 163, 168 (3d Cir. 1953). See Task Force Rep. 252-53.

174. Concrete Materials Corp. v. FTC, 189 F.2d 359, 362 (7th Cir. 1951).

175. FTC v. Cement Institute, 333 U.S. 683, 700-03 (1948); Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589, 592-93 (7th Cir. 1954).


177. "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon,
lawfully or of whether he committed an act that is a statutory ground for deportation becomes a determination of his legal right to remain in the United States. This determination of legal rights in a controversy, not subject to trial do novo in a court, is clearly the exercise of a judicial function. Even though the Supreme Court has held banishment not to be penal, one would expect at least the full due process of a civil case in a trial court. Yet our deportation proceedings are administrative. Although the courts say that due process requires a hearing before deportation, the present statute provides for hearing only before an untrained executive officer. Rules of evidence applicable to judicial proceedings do not obtain, and a decision for the defendant by the inquiry officer who heard the case can be reviewed and reversed by an executive review board. The administrative arrest pending deportation provides for hearing only before enforcing officers and the constitutional protections for criminal defendants do not apply.

No matter how strictly the appellate courts should try to enforce judicial due process before executive officers, the likelihood of success is small. Moreover there remains the grossest constitutional denial in


179. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

180. Only where the alleged alien makes a claim of citizenship is he entitled to a judicial proceeding. Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922).


184. Brunner v. Del Guercio, 259 F.2d 583, 585 (9th Cir. 1958).


the violation of the doctrine of separation of powers. The hearing officer who will judge the case instigated and prosecuted by his superiors for the purpose of deporting the alien is asked to weigh fairly both sides of the evidence and give his impartial judgment on the merits. "It is hard to defend the fairness of a practice that subjects judges to the power and control of prosecutors. Human nature has not put an impassable barrier between subjection and subserviency, particularly when job security is at stake." In addition to this political dependence of hearing officers, few of them could qualify even to be recommended for federal judicial appointment. One post World War II study showed that only 26.8 percent of full-time hearing officers even possessed a bachelor's degree. It is hard to believe that such personnel have the qualifications to afford judicial due process to an arrested alien, even if the attempt was made.

The early decisions upholding the executive trial of legal issues in deportation of aliens confuse the power to exclude non-resident aliens with the power to deport resident aliens. The constitutional rights of resident aliens as persons under the due process clause which were recognized in the cases requiring hearings were overlooked in the cases approving executive deportation. Hence, the courts failed to realize

187. The record discloses a very lax regard for the fundamentals of a fair hearing. Much is tolerated in such proceedings, and that toleration has apparently borne its fruits. We will not say that we can put our finger on this or that to reverse, but the attitude of the examiner, the introduction of confused and voluminous evidence taken elsewhere, the strong indications that the appellant was vaguely regarded as undesirable, and that deportation was thought the easiest way to get rid of him and to avoid the normal process of law—all these warn us of the dangers inherent in a system, where prosecutor and judge are one and the ordinary rules which protect the accused are in abeyance. It is apparent how easy is the descent by short cuts to the disposition of cases without clear legal grounds or evidence which rationally proves them. These are the essence of any hearing in which personal feelings of the tribunal are not to be substituted for prescribed standards.


191. Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893). Although the deportation order in this case was issued by a judge pursuant to statute, it was without hearing and was based on the legal determinations of executive officers. Id. at 702-03. Heikkila v. Barber, 345 U.S. 229, 234 (1953) ; Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) ; Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912), citing procedure in three non-resident exclusion cases; see also United States ex rel. Turner v. Williams, 194 U.S. 279, 291-92 (1904).

that the deportation hearing determined legal rights of a resident under law. Since the issue was not raised that the separation of powers doctrine which vests the entire judicial power in the judiciary would prohibit the executive from conclusive determination of legal rights, there is as yet no clear Supreme Court determination on this executive usurpation of judicial power.

Revocations of licenses for cause. A governmental license to enter a business or profession, once issued, creates in the licensee the right to engage in the activity for the period of the license. Unless the regulatory statute or the license itself expressly states that the license creates no rights and is revocable at will, the license can be revoked before expiration only for cause. In other words, "once a going business has been established on the basis of a license or certificate of authority, property rights attach. This means that such license or certificate may not be revoked, nor may renewal be denied, without procedural and substantive due process of law." The revocation of a license for cause under such circumstances concludes a particular controversy which resulted from charges of violation of a regulatory statute. It thus makes an application of law to the alleged facts and determines the existing legal rights of the defendant. By definition, this is clearly a judicial function, which, under the separation of governmental powers, is vested


194. Where the licensing statute is for the purpose of restricting entry, such as regards liquor dealers' permits, the statute may expressly provide that no rights vest in the licensee. The uncertain term of such license should discourage investment in that line of activity. Beckastin v. Liquor Control Comm'n, 140 Conn. 185, 90 A.2d 119, 123 (1953); State v. Superior Court, 233 Ind. 563, 122 N.E.2d 9, 10 (1954); Gamble v. Liquor Control Comm'n, 323 Mich. 576, 36 N.W.2d 297, 298 (1949); State ex rel. Zugravu v. O'Brien, 130 Ohio St. 23, 196 N.E. 664, 666 (1935); Olds v. Kirkpatrick, 183 Ore. 105, 191 P.2d 641 (1948); Pinzino v. Supervisor of Liquor Control, 334 S.W.2d 20, 27 (Mo. App. 1960); Green Mountain Post v. Liquor Control Bd., 117 Vt. 405, 94 A.2d 230, 233 (1953). For an earlier statement of the rule see Siggins v. Chicago, 68 Ill. 372, 378 (1873) (auctioneer's license); Mortimer & Dunne, Grant and Revocation of Licenses, 1957 U. Ill. L. F. 28, 45-49.

in the courts.\textsuperscript{196} Even though the original revocation hearing is held before an administrative board, the defendant is still entitled to trial de novo in a court.\textsuperscript{197}

In spite of the clearly judicial nature of revocations of licenses for cause, many courts have upheld revocations by administrative agencies after only limited appellate review.\textsuperscript{198} The revocation of a license to practice medicine or dentistry, for example, is surely penal, requiring strict construction, since it deprives one of earning a livelihood in the field of his training.\textsuperscript{199} Yet, trials of revocations of such licenses are given limited appellate review even though held before a board of non-lawyers, who are not and cannot be expected to understand rules of evidence or the meaning of judicial due process.\textsuperscript{200} In many license revocations, the courts have failed to recognize that revocation of a license for cause is an enforceable determination of legal rights—a judicial act.\textsuperscript{201} In others, while recognizing the function to be judicial,\textsuperscript{202}


\textsuperscript{197} \textit{Jordan v. United Ins. Co. of America}, 289 F.2d 778 (D.C. Cir. 1961).


the courts rationalize its exercise by an administrative body by relabeling it quasi-judicial.\(^{202}\) In none of these cases has the issue of the separation of powers been met. Combination of prosecutor and judge in one body is overlooked or sidestepped,\(^{203}\) and alleged bias of commissioners is held unremediable because the statute purporting to delegate judicial power to administrative agencies to revoke licenses creates no remedy for agency bias.\(^{204}\)

An outstanding present example of the federal agency power of administrative revocation of licenses for cause is that of the SEC to revoke registration of over-the-counter brokers and dealers under the Securities Exchange Act.\(^{205}\) The power of the Commission to expel members of national securities exchanges also has the same effect as license revocation.\(^{206}\) In both types of cases, the Commission must try the contested issues and find that the parties have violated one of the securities acts before it may revoke their right to continue in business.\(^{207}\) In spite of the judicial nature of this determination and the limited review available,\(^{208}\) there has been no court decision on the constitutionality of this administrative exercise of clearly judicial power. In many such cases the Commission charges the defendant with fraud in the sale of securities and upon hearing makes a finding that the de-


\(^{207}\) One decision presents as legal doctrine the non sequitur, that because revocation of registration is only a means to protect the public interest, it is not punitive, not a penalty imposed on the broker. Blaise D'Antonio & Associates v. SEC, 289 F.2d 276, 277 (5th Cir. 1961).

\(^{208}\) Upon review in the United States Court of Appeals, "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 48 Stat. 901 (1934), 15 U.S.C. § 78y (1958). See Archer v. SEC, 133 F.2d 795, 799 (8th Cir. 1943); Norris & Hirshberg v. SEC, 163 F.2d 689, 691 (D.C. Cir. 1947).
fendant committed fraud. Requiring strict adherence to the notice and hearing requirements of the Administrative Procedure Act may insure partial compliance with due process, but such requirements leave unanswered the charge of usurpation of judicial power by the combination of prosecutor and judge in the Commission.

**Imposition of money penalties; awards of reparations.** Money penalties are presently imposed by a number of federal agencies. In some cases, executive officers have power to force payment of penalties by withholding permits to continue the particular business operation. The Hoover Commission Task Force recommended that all such imposition of money penalties and the authority to remit money penalties be transferred to the courts. In the examples cited by the Task Force, however, executive officers merely assessed penalties and tried to force collection. In such instances, there has been no directly enforceable determination whether the executive officers have acted legally. Rather the parties affected may refuse to pay and let the regulatory agencies sue for the penalty, or they may pay the penalty and then sue for its recovery on the ground that its assessment was illegal. In either event, the party against whom the penalty was assessed received a trial in court to determine the legality of the assessment. Hence an argument that the mere assessment of penalties by an administrative officer is a judicial function cannot be supported.

Awards of reparation by the Interstate Commerce Commission and by the Department of Agriculture under the Packers and Stockyards Act are entered in proceedings to determine whether particular rates are reasonable. Neither agency has the power to enforce its re-

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212. The Attorney General may deny clearance to any vessel or aircraft until penalties relating to passenger lists and manifests are paid. 66 Stat. 195 (1952), 8 U.S.C. § 1221(d) (1958).
213. TASK FORCE REP. 243-44. See also Nelson, Administrative Blackmail: The Remission of Penalties, 4 WESTERN POLITICAL Q. 610 (1951).
214. TASK FORCE REP. 243-44.
paration orders. In a court action to enforce a reparation award the agency decision is given prima facie effect. It is thus hard to argue in these cases that the reparation order is judicial when defendant has a right to trial de novo in the courts. Yet, the absence of legal rules of evidence before the Commission and the prima facie effect of Commission decisions may impair the chance for fair trial in the courts. The Interstate Commerce Commission has itself recommended that Congress transfer all such actions to the courts,\textsuperscript{217} since two hearings for a single damage action seems wasteful of government resources.

VI. CONCLUSIONS

The majority of problems of the administrative process today are executive.\textsuperscript{218} Undue delay and excessive costs in the performance of purely administrative functions of regulatory agencies are problems of managerial efficiency. Unduly complicated procedures are the prime cause. In addition, that minority of administrative officers who are incompetent or irresponsible can use its delegated discretion in ways that unlawfully injure those who are regulated, thereby wasting the nation's resources. A partial solution is more detailed enabling statutes which limit administrative discretion by specifying the elements of the public interest and detailing which of these elements shall take priority over others. Another needed preventative is the imposition of strict fiduciary responsibility (with criminal penalties) upon administrative officers. The remaining solutions to the managerial problems of administrative agencies are not legal in nature. Efficient public administration will result only when these problems are met and solved in terms of the governmental objectives of the particular agencies.\textsuperscript{219}

A minority of significant problems of the administrative process arise from a misunderstanding of the meaning of the doctrine of separa-

\textsuperscript{217} See, \textit{e.g.}, 1930 I.C.C. ANN. REP. 90-93; Auerbach, \textit{Should Administrative Agencies Perform Adjudicatory Functions?}, 1959 Wis. L. REV. 95, 113.


tion of governmental powers. Primarily there is a confusion of purely administrative (executive) with judicial functions, resulting in an unnecessary, time-consuming judicialization of procedures for executive functions. Judicial-type hearings are even applied to some legislative functions, such as rate making. The solutions to the problem of unnecessary judicialization of legislative and executive functions in administrative agencies must begin with rigorous definitions of the functions of the three departments of government.\textsuperscript{220} The Administrative Procedure Act and many other regulatory statutes must be revised to replace the rule making-adjudication dichotomy with the constitutional threefold classification; purely administrative functions must be recognized if their judicialization is to be prevented. Even though the borderline cases between legislative or executive functions on one side and judicial on the other are troublesome, the distinctions are essential and must be maintained. The broad discretion in administrative legislation and execution is sacrificed, and the modified application of the due process limitation to them is misapplied when their procedures are inappropriately judicialized.\textsuperscript{221}

Rigorous definitions of governmental powers are needed for a reason more compelling than prevention of unnecessary judicialization of legislative and executive procedures. That is, the preservation of constitutional limitations on administrative officers demands a precise definition of the judicial function. The broad discretion of these officers in the use of combined secondary legislative and executive functions opens the possibility of great abuse of power and oppression of the persons regulated. Under our system of judicial supremacy, the judiciary and, especially, judicial due process in trial courts operate as the major checks on possible illegal oppression by administrative officers. Since the entire judicial power of the United States is vested in our independent judiciary, administrative agencies may not constitutionally perform judicial functions. Furthermore, recent studies have shown that the expediency arguments for administrative performance of judicial functions, lower costs and less delay, are unsupported in fact.\textsuperscript{222}


\textsuperscript{222} "Over half a century's experience with the administrative process in operation has proven the claim of its proponents that it would realize the basic goal of every legal system—that of dispensing speedy and inexpensive justice—to be more or less a will-o'-
Thus the only solution is to transfer all clearly judicial functions from administrative agencies to constitutional (Article III) courts. Such proposals have been made in the past and have been supported recently by leading lawyers in the field of administrative law. As Judge Friendly has so ably demonstrated, the attempted internal separation of functions in administrative agencies has been a failure. There is no substitute for an independent judiciary.


223. Although the courts may be specialized, such as a Trade Court and a Labor Court, they would still have to meet the constitutional requirements for Federal Courts. See note 136 supra.


226. As stated by Judge Friendly: "I trust no one is so naive as to think that the separation of staff function decreed by the Administrative Procedure Act really works." Friendly, A Look at the Federal Administrative Agencies, 60 Colum. L. Rev. 429, 438 (1960). See Berger, supra note 225, at 206-11.