Spring 1965

The Administrative Agency as a Paradigm of Government: A Survey of the Administrative Process

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The government acts to control or influence conduct in two basically different modes. Governmental power is exerted by the making of general rules (or laws or regulations) applying to all those subject to the government or to all members of some defined group and also by the making of specific orders applicable only to persons or entities named in the particular order.¹

Traditionally, the making of general rules has been the job of the legislature, and the application of the rules by giving specific orders to named individuals has been the job of the courts. In the American system, the two functions have been constitutionally separated and entrusted to separate branches of government.

However, the Twentieth Century has brought conditions and problems which have made a sharp separation of these functions more difficult and perhaps impractical in some situations. Rapid and radical innovations in technology, transportation, communication, and economic practices have presented problems of government control which have made traditional techniques of legislation and adjudication appear inadequate. To cope with the proliferating and protean nature of these problems new government agencies have been established—with a combination of legislative and adjudicatory functions and the power to make both general rules and specific orders. These are the institutions which we now call “administrative agencies.”

These agencies have grown to considerable numbers in recent years, and today it is not even clear that there is any well defined class of “administrative agencies.” The Government Organization Manual lists forty-five so-called “independent agencies” in the executive branch of government.

¹ Commissioner, Federal Communications Commission.

the government, plus about seventy minor and ad hoc boards, committees, and commissions. A leading treatise on the subject defines an administrative agency as a "governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule making." The Administrative Procedure Act takes substantially the same view, defining the term "agency" to mean any branch or agency of the government "other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia."

It should be noted that under these definitions an executive officer, including the President or a cabinet member, or a governor or a mayor, may be an administrative agency when he exercises the power to affect the rights of private parties. While such a definition is undoubtedly appropriate for purposes of legal control, it is rather broad and diffuse for purposes of study and analysis. A study of the administrative process seems likely to be more illuminating and significant if it concentrates on a few agencies that are characteristic of what is generally recognized as the administrative process.

There is general recognition that there are seven or eight independent federal agencies which are "major" in the sense that they are of most significance to the economy of the country in the regulatory power which they wield. The eight major independent regulatory agencies in the federal government are the AEC, CAB, FCC, FPC, FTC, ICC, NLRB, and SEC. I will attempt to focus my examination on these agencies and to draw some conclusions from this analysis.

The first aspect of administrative regulation which requires examination is the substantive role which these agencies play in relation to the economy and to society. In legal terms this is asking what jurisdiction and powers the respective agencies have. Each of the agencies has numerous powers derived from various statutory provisions, and each is subject to the provisions of the Administrative Procedure Act. There is some risk of over-simplifying in attempting a brief summary description of the functions of the agencies based upon their principal powers and activities. On the other hand, there is an equal risk of losing sight of the significant principles in attempting a complete inventory of all the detailed functions and powers of each agency. Therefore I have attempted to summarize the functions of the major agencies by reference to their principal powers and duties and without attempting a complete or de-

3. Id. at 534-48.
THE ADMINISTRATIVE AGENCY

finitive survey of their respective legal authority.

The Atomic Energy Commission grants licenses for the possession, use, and production of atomic materials. It licenses atomic energy facilities and operators. It regulates the use of atomic energy materials and facilities by rules. It investigates matters relating to the production and use of nuclear material and facilities, and it promotes research, development, and education in the utilization of atomic energy. In addition, the Atomic Energy Commission operates and administers very extensive programs for research and development in the production of nuclear material and the use of atomic energy.

The Civil Aeronautics Board licenses or authorizes the operation of commercial air carriers, and it controls mergers and transfers of such carriers, loans and subsidies paid by the government to such carriers, competitive practices among such carriers, and pooling agreements among such carriers. It also regulates the rates of such carriers. It promulgates general rules and regulations and has broad investigatory powers as to management of air carriers, accidents involving such carriers and other matters. The CAB reviews, on appeal, certain decisions of the FAA. The CAB is also charged to encourage, develop, and promote air transportation.

The Federal Communications Commission has the power to authorize electronic communications in or affecting interstate commerce, including

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the licensing of interstate telephone and telegraph companies,\textsuperscript{23} of submarine cables,\textsuperscript{24} of radio transmitting stations,\textsuperscript{25} and of communication satellites.\textsuperscript{26} It has authority to regulate the rates of communication common carriers\textsuperscript{27} and the consolidation of telephone and telegraph companies.\textsuperscript{28} It has authority to make general rules and regulations.\textsuperscript{29} It conducts appropriate investigations.\textsuperscript{30} The FCC also is charged to promote available, rapid, and efficient communications facilities.\textsuperscript{31}

The Federal Power Commission licenses dams and reservoirs\textsuperscript{32} and the transportation of and the pipelines for natural gas.\textsuperscript{33} It regulates rates for gas and electricity sold in interstate commerce.\textsuperscript{34} It has authority to promulgate general rules and regulations\textsuperscript{35} and conduct investigations.\textsuperscript{36} The FPC also promotes the adequate and efficient distribution of electricity and natural gas.\textsuperscript{37}

The Federal Trade Commission has the duty of defining and entering orders against unfair methods of competition and deceptive practices.\textsuperscript{38} It has the authority to make general rules and regulations\textsuperscript{39} and to conduct investigations.\textsuperscript{40} The FTC has the overall role of advising and guiding

business as to competitive practices.\footnote{41}

The Interstate Commerce Commission has the power to license and regulate railroads,\footnote{42} motor carriers and transportation brokers,\footnote{43} water carriers,\footnote{44} and freight forwarders.\footnote{45} It has the power to regulate the rates of railroads,\footnote{46} motor carriers,\footnote{47} water carriers,\footnote{48} and freight forwarders.\footnote{49} It has authority to promulgate general rules and regulations\footnote{50} and to conduct investigations.\footnote{51} It is charged to effectuate the national transportation policy, which is to promote and foster sound economic conditions in transportation.\footnote{52}

The National Labor Relations Board has the duty to prevent unfair labor practices by prohibitory orders\footnote{53} and to determine collective bargaining units and certify representatives.\footnote{54} It has authority to make general rules and regulations\footnote{55} and to conduct investigations.\footnote{56} The purpose of the statute which it administers is to avoid industrial strife and promote the flow of commerce,\footnote{57} and this is the purpose of the NLRB.\footnote{58}

The Securities and Exchange Commission is authorized to register (which means substantially the same as "license") securities exchanges,\footnote{59} securities brokers and dealers,\footnote{60} securities dealers associations,\footnote{61} invest-
ment companies, 62 investment advisers, 63 and all publicly offered securities subject to the jurisdiction of the Commission. 64 It has authority to make general rules and regulations 65 and to conduct investigations. 66 In general, the substantive rules applied by the SEC are spelled out in somewhat more detail in the statutes than those of the other regulatory agencies, but the Commission has broad general authority to supervise the self-regulating activities of the securities industry. 67

Surveying the various functions of these several agencies suggests that there are certain characteristic functions which are more or less common to all of them. Each of the agencies to some degree has the following functions: (a) to regulate economic conduct by issuing orders or licenses to individual enterprises; (b) to regulate economic conduct by promulgating rules specifying prohibited and permissible conduct (except possibly the NLRB as to this function); (c) to investigate and initiate proceedings rather than merely to respond to the actions of others as the courts do; and (d) to promote and encourage economic and technological progress by cooperation and leadership within their respective areas of activity.

The action of administrative agencies is regulatory and essentially legislative because it creates standards where none exist. Generally the law specifies standards that are capable of application with only marginal interpretation. For example, tax laws, traffic laws, negotiable instrument practice, real estate tenure laws, and other similar bodies of laws consist of general rules which specify rather definite principles. Administrative agencies are established in fields where it is too difficult to state a practical general rule, and hence the standards specified by legislation are put in extremely vague and general terms such as "public interest" or "unfair practice." 68 Within their specified fields of jurisdiction administrative agencies formulate the specific content of general policy, select and license particular enterprises, specify technical standards, and enforce adherence to their specified policies. It thus seems appropriate to call agency action

68. Cf. Yin-Shing Woo v. U.S., 288 F.2d 434 (2d Cir. 1961), where Judge Learned Hand said "... those rights, criminal and civil, that are measured by what is 'reasonable,' really grant to courts such a 'legislative' power, although we call the issues questions of fact." Id. at 435.
"sub-legislative," since it is truly legislative subject to the wide limits set by basic statutes, and it is not merely interstitial like the action of the courts.

Agency action is also quasi-judicial and executive in nature. Administrative agencies, within their respective spheres, decide individual cases involving the application of statutes and regulations in a judicial or quasi-judicial manner. The agencies investigate and report on the state of the economy and the art in their respective fields. The agencies also manage large organizations and operations in an executive fashion since each one has all the personnel, fiscal, and organizational problems of any executive branch department.

Congressman Oren Harris, the distinguished Chairman of the House Commerce Committee, has recently said:

These [regulatory] agencies were created by the Congress in discharging Congress' constitutional responsibilities with regard to the regulation of interstate and foreign commerce. Congress delegated to these agencies some of its legislative responsibilities to be carried out under broad mandates set forth in the enabling acts creating these agencies. Therefore, Congress traditionally has considered these agencies arms of the Congress.

Congress expected these agencies to be independent of the executive branch, except for limited purposes such as budgetary controls, for example, and the general supervision of agency personnel by the President to see, as the Constitution requires, that the laws enacted by the Congress be executed faithfully.

With respect to policy development and execution, however, in the areas under their jurisdiction, Congress sought to avoid executive control, whether such policies were to be developed through rule-making or on a case-by-case basis.

* * * * *

In establishing these agencies, Congress approached its task pragmatically. The enabling acts creating these agencies intermingle legislative, judicial and executive functions. In proceeding in this manner, Congress hoped to accomplish several objectives: (1) to provide expertness in the particular areas to be regulated; (2) to expedite the handling of anticipated large workloads by being able to give undivided attention; (3) to be vigorous in enforcing the policies laid down in the enabling statutes; (4) to evolve more specific yardsticks in applying broad congressional policies; and (5) to assist the Congress in
shaping new and effective policies to meet the changing conditions and new needs. In other words Congress deliberately charged the regulatory agencies with legislative, executive, and judicial responsibilities.69

It may be informative to examine the structure, the procedure, and the operation of the administrative agencies to ascertain the points of similarity and difference, particularly in comparison or contrast to the courts and the other branches of government. In structure all of the major administrative agencies are similar. They have collegiate heads and policy makers, all of the agencies having five members except the FCC, which has seven, and the ICC, which has eleven. The agencies all have large supporting staffs. The AEC is by far the largest since it has substantial research and operating as well as regulatory responsibilities. But each of the agencies has a relatively large staff, the numbers being approximately as follows:

<table>
<thead>
<tr>
<th>Agency</th>
<th>Number</th>
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<tbody>
<tr>
<td>AEC</td>
<td>7,26870</td>
</tr>
<tr>
<td>CAB</td>
<td>84771</td>
</tr>
<tr>
<td>FCC</td>
<td>1,45072</td>
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<tr>
<td>FPC</td>
<td>1,14073</td>
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<tr>
<td>FTC</td>
<td>1,14474</td>
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<tr>
<td>ICC</td>
<td>2,43275</td>
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<tr>
<td>NLRB</td>
<td>2,10076</td>
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<tr>
<td>SEC</td>
<td>1,38877</td>
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</tbody>
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The eight agencies have a total staff of well over 17,000 personnel, with an average of well over 2,000 per agency. This contrasts with the federal judicial system which comprises about 440 judges, with a supporting administrative staff of about 6,000.78 Thus the ratio of supporting administrative staff to judges is about 15 to 1, whereas in the administrative agencies the ratio is more than twenty times as great or over 350 to 1.

70. 1964 AEC ANN. REP. 395. As of June 30, 1964, there were 7,268 employees of the Commission itself, but the total employment supervised by the Commission, including its contractors, was 136,620.
71. 1964 CAB ANN. REP. 80.
72. 1964 FCC ANN. REP. 10.
73. 1963 FPC ANN. REP. 21.
74. 1964 FTC ANN. REP. 1.
75. 1964 ICC ANN. REP. 79.
76. 1962 NLRB ANN. REP. states that 1,934 persons were employed by the agency. Id. at 5. Inquiry of the personnel office discloses that 2,108 were employed as of the end of March 1965.
77. 1963 SEC ANN. REP. 152.
78. GLENDON SCHUBERT, JUDICIAL POLICY MAKING ch. 2 (1965).
Another structural characteristic of the administrative agencies is that in each one each commissioner has his own individual staff which is answerable to him alone. By this means each commissioner is given some degree of independence from complete reliance upon the institutional staff.

The independent regulatory agencies have a complex relationship to the other branches of government. The President, of course, appoints the members of the agencies, designates the chairman (except in the ICC), and approves the annual budgets. The Congress approves the appointment of members, appropriates funds requested in the budgets, establishes the jurisdiction of the agencies, prescribes the general governing principles by the respective statutes, and exercises a general supervisory power by means of investigations and hearings before committees. The courts review agency action in order to insure compliance with constitutional and statutory principles but do not have authority to supervise the exercise of agency discretion or to substitute their own judgment on policy matters. Thus the independent regulatory agencies have no direct accountability to any other official or branch of government for their overall performance or policy and, consequently, possess a very high degree of independence in both theory and fact.

The conventional field of administrative law is the study of procedure before the agencies and on review of agency action. In general, agency procedure is governed by the Administrative Procedure Act, by special statutory provisions, and by agency regulations which are published in the Code of Federal Regulations. Although this is the aspect of agency activity which is most widely studied and considered in most writing on the subject, the importance of the formal procedure tends to be exaggerated since that is the aspect most accessible to students of the law. Of equal and in some respects greater importance is the informal procedure followed in the handling of matters within the agencies.

One of the most notable and significant aspects of the procedure of all agencies is the degree to which authority is delegated and decisions are made in reliance upon staff reports. Whether this is considered desirable or not, it must be accepted as an absolute necessity of agency action. The eight major agencies have a total of forty-eight commissioners as compared to a total of about 440 federal judges, but the agencies decide far more cases than the total of all the federal courts, handle hundreds of times more proceedings, and have a vast amount of additional

work. Furthermore, most administrative matters can be handled quite adequately by the staff, and many technical matters can be handled better by the technical staff than by the commissioners.

All of the administrative agencies handle many matters on the basis of informal investigation and advice. All have regular groups or "clientele," with which they are more or less constantly in communication; and there is much informal discussion between these groups and the agency staffs. Many informal opinions are expressed in the course of such discussions. Although these opinions are not binding, they usually state agency attitudes accurately, and agencies are likely to respect them in most cases.

The bulk of the actions by all administrative agencies occurs in matters which are not contested by private parties but in which some order, ruling, or approval of the agency is required. Examples are licenses or permits sought from the FCC or the ICC, registration of securities or brokers by the SEC, consent elections held by the NLRB, and similar matters. Such uncontested matters are handled almost entirely by the staff although action is taken in the name of the agency. Usually these matters fall well within the scope of established rules or policies. Occasionally, however, such matters involve unusual points; and sometimes rulings in such uncontested matters establish informal precedents which the agency staff itself will tend to follow. Of course, these precedents are established without any public disclosure or consideration by the agency itself although they tend to become known to those who are concerned with agency action. Such precedents are not binding and may be changed by the agency but there is some tendency for the staff and agency to follow them. One of the strongest forces tending to prevent disturbance to such precedents is the tendency of most applicants to secure results by direct negotiation with the staff rather than by raising issues and determining them in litigation. When applicants are seeking some license or operating authority, as in the case of SEC registration and FCC or ICC licenses, there is a strong tendency for the applicant to attempt to fit himself into the patterns which have been found acceptable rather than to try to change the precedents or the patterns.

One of the most critical and delicate problems in administrative agencies is that of separation of investigatory and prosecutory functions on the one hand and the adjudicatory functions on the other. These functions are always invested in different staff personnel, the clearest example being the NLRB where the General Counsel, who investigates and prosecutes, is a presidential appointee not subject to the control of the Board. While this is a somewhat unusual, and perhaps extreme, provision
for separation, the principle is undoubtedly sound and an analogous ar-
angement seems to be a desirable method of meeting this problem.

Aside from the NLRB, the agencies themselves ordinarily authorize
the institution of prosecutory actions. However, this is normally done on
a judgment of probable cause and without any real determination on the
merits of the matter. The degree of influence on the commissioners of
preliminary or informal presentation by the staff members certainly varies
from individual to individual but probably is not as great as is sometimes
feared. It seems more likely that the influence of the prosecutory staff
on the agency heads outside of formal presentation on the record is subtle
and indirect. The staff brings prosecutions because of its view as to the
propriety of the activities involved, and it is in a position to urge its views
upon the agency more often and more intimately than private counsel.

Contested adversary or formal adjudicatory proceedings are seldom,
if ever, held before administrative agencies or even members of the agency
in current practice. These proceedings are almost invariably assigned to
hearing examiners, who are substantially independent officials. As the
Supreme Court has noted:

These [administrative] agencies have such a volume of business,
including cases in which a hearing is required, that the agency
heads, the members of boards or commissions, can rarely pre-
side over hearings in which evidence is required. The agencies
met this problem long before the Administrative Procedure Act
by designating hearing or trial examiners to preside over
hearings for the reception of evidence. Such an examiner
generally made a report to the agency setting forth proposed
findings of fact and recommended action. The parties could
address to the agency exceptions to the findings, and, after re-
ceiving briefs and hearing oral argument, the agency heads
would make the final decision. . . . Congress intended to make
hearing examiners “a special class of semi-independent subordi-
nate hearing officers” by vesting control of their compensation,
promotions and tenure in the Civil Service Commission to a
much greater extent than in the case of other federal employees.80

All agencies follow certain forms of pleadings and procedures
specified in their regulations. It is my own impression that the pleadings
employed in administrative law today tend to be more formal and technical
than the pleadings followed by the courts under the Federal Rules of
Civil Procedure. Similarly pre-trial proceedings are analogous to but

(1953).
more limited than pre-trial motions under the Federal Rules of Civil Procedure. The Administrative Conference has recommended the adoption of a discovery procedure but its recommendation has not yet been fully adopted by any administrative agency. An important difference between discovery in administrative proceedings and judicial proceedings is that the judge of a court has no interest in the case before him whereas in administrative proceedings discovery is most likely to be utilized against the agency.

As to evidence, administrative agencies have never been strictly bound by common law rules of evidence. However, it is sometimes overlooked that these rules were developed and are fully applicable only in jury cases and that courts sitting without juries are not strictly bound by such rules either. An interesting recent district court opinion says that a federal equity court is "run much like present day administrative agencies." The Administrative Procedure Act requires that any agency decision must be based "upon consideration of the whole record" and supported by "reliable, probative and substantial evidence." In practice the rules of evidence are usually followed in administrative proceedings except for specific types of exceptions that are developed and recognized by each agency. In other respects, hearing examiners are often more technical regarding evidence than judges, and administrative law scholars have protested against this, particularly against the strict application of the hearsay rule. The AEC has adopted an exemplary rule on the subject which provides: "Hearsay evidence may for good cause shown be admitted without regard to technical rules of admissibility and accorded such weight as the circumstances warrant."

The decisions of hearing examiners are judicial in the sense that they are personal and usually as impartial as those of judges. However, examiners usually lose all control of their decisions after issuance, whereas judges retain the right to modify their decisions until jurisdiction has vested in an appellate court.

The right to an administrative review of examiners' decisions exists as a matter of course under the statute and such review is frequently sought. The FCC and the ICC have employee review boards which function as intermediate appellate tribunals, and these have worked very well in practice. Proposals have been made for statutory authorization

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84. 10 C.F.R. § 10.27(g) (1963).
for such procedure in all agencies and it seems likely that eventually such proposals will be adopted.

Decisions of administrative agencies are almost invariably institutional, and indeed this is their most notable characteristic. This means that the evidentiary record is reviewed by the staff and summarized in reports to the agency in memoranda which usually contain recommendations. Thus the agency's staff is very influential in determining agency decisions, both through its recommendations and by selection and presentation of the facts which are considered by the agency. In some agencies, such as the FTC and the NLRB, an agency member has some degree of personal responsibility for the opinions which are written. In other agencies, such as the FCC and the CAB, the opinions are almost wholly the responsibility of the staff, and there is no personal responsibility by any agency member for the written opinions, except signed dissenting opinions.

Rule-making proceedings are not altogether similar to adjudicatory proceedings. Many minor and technical rule-makings are more or less routine and handled on an institutional basis. Major rule-makings are usually considered by the agency heads; and there are nearly always hearings before the agency, together with written submissions and oral arguments.

Reconsideration is a device that is far more common in administrative than in judicial proceedings. In many agencies reconsideration is normally given in fact, even when nominally denied, since the agency actually reconsiders the entire matter in denying reconsideration.

In operation, administrative agencies are more complex than courts and have a greater range of input. Agency input includes statutes, facts, precedents, policies, interest group arguments, and technical and economic parameters.

By far the most notable aspect of the input of the administrative agencies is its sheer quantity. While statistics do not necessarily provide an accurate measure of workload, they do suggest something of the order of magnitude of the administrative input. Without implying any comparison among the agencies, the following raw figures may suggest something of the nature of the problem.

The Atomic Energy Commission during 1964 received 8,935 license applications, of which 255 were for facilities and 706 for operators licenses.\footnote{1964 AEC Ann. Rep. 372.} In addition, the AEC supervised operations costing $2.74 billion involving assets of $8.64 billion and supervision of 136,620 em-
ployees. 86

The Civil Aeronautics Board during 1964 had a total of 66,966 applications received or proceedings initiated, which included 59 route and related matters that were processed by formal proceedings and 43,784 tariff filings. 87

The Federal Communications Commission during 1964 received 961,041 applications, including 15,727 in the broadcast services. 88 In addition, it received 38,241 interference complaints and investigated 21,803 interference cases and made 14,468 station inspections. 89 At the end of the fiscal year it had subject to its jurisdiction 4,315,210 radio authorizations outstanding, 90 which included authorizations for 1,445,098 radio stations. 91

The Federal Trade Commission in fiscal 1964 received 5,889 applications for complaints, of which 4,523 related to deceptive practices 92 and 1,366 to unfair competition. 93 It issued 311 complaints and secured 416 assurances of discontinuance. 94 It received about 1,800 requests for advice or opinions relating to deceptive or unfair practices generally but issued a total of 57,310 interpretations and staff opinions under the Wool, Fur and Textile Acts and made 11,837 inspections under those statutes. 95 In addition, the FTC received 511,102 radio and television scripts, plus 267,645 pages of printed advertising material, and of this total it referred 42,646 advertisements to the legal staff for review. 96

The Federal Power Commission in fiscal 1963 received 167 applications for hydroelectric license permits and amendments, 98 1,612 applications for natural gas facilities, 99 360 gas pipeline applications, 100 1,654 applications for independent producer certificates, 101 and 6,127 independent producer rate filings. 102 During that year it initiated 501 rate cases relating to independent producers of natural gas. 103

86. Id. at 395.
87. 1964 CAB ANN. REP. 81-82.
88. 1964 FCC ANN. REP. 27.
89. Id. at 145.
90. Id. at 26.
91. Id. at 19.
92. 1964 FTC ANN. REP. 16.
93. Id. at 19.
94. Id. at 2.
95. Id. at 7.
96. Id. at 27.
97. Id. at 16.
98. 1963 FPC ANN. REP. 79.
99. Id. at 129.
100. Id. at 134.
101. Id. at 140.
102. Id. at 142.
103. Id. at 143.
The Interstate Commerce Commission during fiscal 1964 received 13,041 formal and informal operating matters, opened 8,511 proceedings and cases, issued 18,630 motor carrier authorizations, received 171 applications involving securities, and received for review and filing 203,721 tariffs and schedules.

During fiscal 1963 the NLRB received 25,371 new cases, of which 14,166 were unfair labor practice charges.

The Securities and Exchange Commission received 1,159 securities registrations in 1963, but this was down from 2,307 filed during the preceding fiscal year. During 1963 it also received and reviewed 783 filings for exemptions under various regulations, 17,386 annual reports, 2,396 proxy statements, plus 2,115 other solicitations of securities holders. During that year 679 applications for broker-dealer registrations were filed, plus 238 applications for registration of investment companies and 285 applications for registration of investment-advisers. In addition to the securities exchanges and the dealers associations, the Commission supervised the activities of 5,423 securities brokers and dealers, of 2,137 investment advisers, and of 727 investment companies.

These figures, while covering most of the major activities of the agencies named, are not a complete inventory of the workload of those agencies, and sometimes a single proceeding such as a large railroad merger case or utility rate case may involve as much work and have as great a significance as hundreds, or even thousands, of smaller matters. The significance of the workload handled by the administrative agencies is reflected by the facts that the largest category of cases coming before the United States Supreme Court involves the review of administrative action, mainly reflecting the enforcement of regulatory statutes, and that this category comprises about one-third of all the cases coming

105. Id. at 99.
106. Id. at 102.
107. Id. at 105.
108. Id. at 110.
111. Id. at 32, 35, 36.
112. Id. at 40.
113. Id. at 53.
114. Id. at 54.
115. Id. at 56.
116. Id. at 104.
117. Id. at 110.
118. Id. at 172.
119. Id. at 110.
120. Id. at 99.
before the Court.\footnote{Davis, 7 Administrative Law Treatise § 1.02 (1958).}

Turning to the qualitative aspect of administrative input, it may be observed that statutory principles and provisions establish the field of jurisdiction of the administrative agencies but usually offer little guide to substantive action.

In administrative cases, as in court cases, the facts are of controlling importance. However, in administrative proceedings the facts reach the agency at second-hand by memoranda from the staff, are screened by the institutional viewpoint as to importance and relevance, and are usually very detailed and frequently highly technical. Agency proceedings sometimes become almost immune to judicial review because of the technicality of the facts involved. By the same token, the agency judgment will be largely determined by the staff appraisal since the staff ordinarily is the principal repository of technical expertise.

Precedent is of considerably less importance in administrative proceedings than in court. This is so for a number of reasons. The institutional decision leaves less scope for the influence of precedent because it tends to rely more on factual detail than on principle, and consequently, a body of controlling precedents does not build up. More importantly, agencies feel more free to use discretion to achieve policy objectives than courts do. If an agency decides that it does not favor one of its own precedents, it can, in effect, legislate the precedent out of existence by promulgating a rule changing the precedent. The court can only overrule its own precedent, which an agency can do also.

The precedents followed by administrative agencies are almost wholly confined to decisions of that agency or court decisions involving that agency. The agencies often treat issues as novel if there is no recent experience with such issues in that agency, although there may be analogous cases in other agencies or other fields. Administrative cases are not well indexed, so library research in administrative law is much more difficult than in the case law of courts, and there is a tendency to rely on a few well-cited administrative precedents.

Policy objectives, or legislative goals, are an important agency input. Administrative agencies are more likely to decide cases in order to further policy objectives than courts are. Some cases can be decided only on this basis; and this is probably a legitimate ground of agency action. However, sometimes this leads to a tendency to regard cases as a basis for legislative action and, consequently, to a reluctance to decide individual cases on their own merits.

Interest group arguments and demands constitute an important input
in agency action. These occur through consultative committees and groups, through informal communication, through interchange of personnel, through social contacts, through professional attitudes, and by other means.

Technical and economic parameters, largely arising from the specialized and limited subject matter with which each agency deals, constitute a constant and often unarticulated input in agency considerations. This is apparently consistent with congressional intent. However, it tends to exclude those who are not specialists or technicians from effective participation in agency proceedings.

The decision process within an administrative agency is distinctive and unlike a court or legislative body. The agencies are politically balanced, and partisan political considerations are seldom influential and almost never controlling. Conventional political viewpoints are of equivocal or ambivalent significance in regulatory action. Conventional liberals tend to favor freedom of the individual from government constraint and larger areas of liberty but, on the other hand, also favor strong government control of economic forces. Conventional conservatives tend to favor the protection of economic and business interests but, on the other hand, tend to favor the limitation of government action and weak government power in the control of economic forces. Thus, both conventional liberals and conventional conservatives find that their principles pull them in opposite directions in confronting many regulatory problems.

The institutional viewpoint which each agency develops is probably the most persistent and pervasive bias. It continues through successive generations of administrators and is usually strongest with the professional staff. However, like the conventional political viewpoints, it tends to have an equivocal significance. Most agencies develop an institutional bias which, on the one hand, favors extending the power and authority of the agency but, on the other hand, favors avoiding political controversy where possible. The institutional viewpoint of all agencies seems to include the opinion that agency policies and decisions are wiser than those of other branches of government and much wiser than those of any private parties.

The output of administrative agencies is quite different from that of either courts or legislatures. To begin with, all agencies perform a vast amount of work that is not readily visible. This includes investigations, conferences, vast amounts of correspondence, congressional reports and testimony, public reports, internal reports, ceremonial appearances, informal rulings, and other matters.

The largest quantity of agency output consists of simple formal orders, including licenses, permits, and certifications. Such things number
in the tens and hundreds of thousands for each major regulatory agency. Less numerous but more important are the adversary, or complex, formal orders issued by agencies, such as cease and desist orders, forfeitures or revocations, and refusals to issue or renew licenses. Proceedings of this kind are most similar to court cases.

Another important output of the administrative process is the rules or regulations which are similar to legislation.

Finally, each agency produces numerous opinions which accompany both the adversary or complex formal orders and the rules and regulations that are issued. In many respects, these are the most important of the agency output.

The most characteristic of the agency opinions is the impersonal institutional opinion. While this is in some respects a response to the pressures and necessities of agency operation it does have certain weaknesses as compared to the personal decision. The impersonal institutional opinion does not fully perform the function of either testing the validity of the conclusion reached or of setting forth the attitude of the decision-maker. A staff member is instructed to bring in an opinion reaching a specified result although he may disagree with the result and has no authority to change it. As a consequence, the institutional opinion tends to be a lengthy recital of factual detail with little generalization or reasoning and a great reliance on murky language and institutional cliches.\textsuperscript{122}

A characteristic of administrative decision-making is the presence of feedback of information resulting from the observation and evaluation of the effects of decisions, rulings, and other action. In this respect administrative agencies have a great advantage over courts and some advantage over legislative bodies, since the agencies remain in continuous contact with the groups affected by their actions and have the means for continuing observation. It is difficult to make a pragmatic evaluation of the significance of feedback in the administrative process, but theoretically this should be a highly important advantage.

\textbf{Conclusions}

A number of conclusions emerge from even such a brief survey and analysis of the major administrative agencies.

1. The principal distinguishing characteristic and the compelling

\textsuperscript{122} See, \textit{e.g.}, Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965), where the Court reversed an FCC decision on the ground that the Commission had failed to explain its different treatment of similarly situated applicants. The Court said: \textquotedblleft Whatever action the Commission takes on remand, it must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act." Also see City of Lawrence v. CAB, 345 F.2d 583 (1st Cir. 1965).
problem of the administrative agencies is the vast quantity of their output. While the courts handle thousands of cases each year and the Congress produces hundreds of laws each year, the administrative agencies handle literally tens and hundreds of thousands of matters annually. The administrative agencies are engaged in the mass production of law, in contrast to the courts, which are engaged in the handicraft production of law. The courts have consistently—and, I think, wisely—refused to perform "nonjudicial functions" and thus have largely kept themselves free of the burden of handling a volume of administrative procedures. They have, in this manner, been able to function on a personal and individual case basis, rather than on an assembly line institutional basis. On the other hand, the administrative agencies, as devices for the mass production of law, have necessarily, and perhaps properly, been more concerned with the quantity than with the excellence of their output. As a result, the legal craftsmanship and the careful competence which the courts have brought to bear in the production of decisions is notably superior to that which is generally exhibited by administrative agencies.

The very substantial degree of delegation and of reliance on staff work that characterizes the institutional operation of the administrative agencies is another result of the mass production nature of their operations. In routine and ordinary cases this system works very well. Indeed, it is difficult to conceive of any other system that will handle the normal routine work of the administrative agencies. However, the routine reliance upon staff work inevitably generates a tendency for the policy makers to rely upon the staff for the formulation of policy and creates a natural disposition on the part of the staff to feel that it should control policy. Dean Acheson, the former Secretary of State, has described this tendency in vivid and cogent terms. Mr. Acheson says:

The military substitute for thought at the top is staff. Staff is of great importance. It performs the indispensable function of collecting the food for thought, appraising it and preparing it. It is the means of carrying out decisions made. But, when it also performs the function of final thought, judgment and decision, then there is no top—only the appearance of one. This can happen in a number of ways, but the most insidious, because it seems so highly efficient, is the "agreed" staff paper sent up for "action," a euphemism for "approval."

"One can always," I have said elsewhere, "get an agreed paper by increasing the vagueness and generality of its statements. The staff of any interdepartmental committee has a fatal weakness for this type of agreement by exhaustion." But a chief
who wants to perform his function of knowing the issues, the factors involved and their magnitudes, and of deciding, needs, where there is any doubt at all, not agreed papers, but disagreed papers.\textsuperscript{123}

The institutionalization of agency operation and the tendency for policy direction to be influenced, if not wholly controlled, by the permanent professional staff also has the tendency to establish fixed viewpoints, policies, and procedures which become very nearly immutable. This tendency has been noted and commented upon by the general counsel of the FTC, who says in a recent article:

This is true since bureaucracy (not necessarily particular individuals) is understandably reluctant to change the status quo, thinking patterns, program patterns, work patterns, etc., which have developed over the years or to perform necessary painful amputations. The affected individuals and groups, particularly those of settled status, resist change and such resistance is a formidable barrier to overcome for an administrator who must also continue day to day administration. This resistance is subtle, quiet, unmoving and untractable. The administrator necessarily finds himself spending more and more of his time attempting to implement his reforms and becoming less effective in his normal administrative duties. In frustration, unless he is ruthless in dealing with this immobility, he retreats. If he is absolutely insistent in his objectives, he is accused of destroying morale and finds himself questioned by the Congress on one side and the executive branch on the other. So in retreating, the reforms become diluted or disappear. And eventually a new administrator is appointed. This can be called the system of positive inertia.\textsuperscript{124}

In many respects an administrative agency is like a pyramid. The policy-making officials are the apex of the pyramid. It is the apex which is most visible from a distance and which one sees gleaming in the morning sunlight. But it is the base of the pyramid that supports the structure and determines whether it stands straight upright or leans in any direction. So it is with the administrative agencies. The agency members are most visible and frequently the most vocal representatives of the agency. But for many purposes the significant thrust of agency


action is controlled by members of the permanent professional staff; and in the long run, they will handle vastly more matters than ever come to the attention of the agency members and thus may have greater influence in determining the actual impact of agency operation than the agency members.

One more result of the vast quantity of administrative agency output should be noted. Administrative agencies are far better adapted than courts to handling a large number of routine cases. However, they are likely to encounter difficulty in dealing with unusual or differentiated cases. While any judgment of this sort is necessarily subjective, it appears to me that with respect to speed, efficiency, and procedural flexibility in adjudicatory proceedings the federal courts are now generally superior to the federal administrative agencies. At one time it was thought that the administrative agencies would be speedy, efficient, and flexible; and there are many who still think of them in these terms. However, those who have had experience with litigation in adversary and adjudicatory proceedings before both administrative agencies and courts frequently report that proceedings under the Federal Rules of Civil Procedure are more flexible, more speedy and more efficient than under most administrative agency procedures.

The basic difference between the courts and the administrative agencies seems to grow out of the differing problems which they are required to face. Despite the increase in litigation in recent years, courts are still able to deal with the cases that come before them on an individual and personal basis. There is no administrative agency that can hope to dispose of its volume of work without adopting some kind of assembly line techniques. Thus, we find that the administrative agencies are particularly suited to the mass production of law in relatively routine cases, whereas the courts are best adapted to the handicraft production of law in a wide variety of differentiated cases.

2. The second basic difference between administrative agencies and courts is that administrative proceedings tend to be more regulatory than adversary, more legislative than adjudicatory.

This is true in several respects. In the great preponderance of proceedings handled by administrative agencies the only adverse party is the agency itself. This is in sharp contrast to the courts where there are at least two adversary parties in nearly all cases. A related aspect of this matter is that the purpose of the courts in most cases is to adjudicate the conflicting interests of adverse parties according to some established principle or rule. On the other hand, the predominant purpose of the regulatory agencies is the effectuation of some policy which is thought to be in the public interest, rather than merely the securing of justice
between parties with conflicting private interests. Thus, the administra-
tive agency staff comes to think of itself not as an adverse party to
the applicants or litigants before it but rather as the protector and vindic-
tor of the public interest or the greater good of society. It is un-
doubtedly true that, in many cases, the regulatory agency and its staff
has a broader view and is seeking a socially more desirable objective than
a particular applicant or litigant. However, the judgment of the public
interest and the greater good is necessarily subjective, and there is cer-
tainly much room for difference of opinion regarding this. There are
many cases in which individuals may feel that agency action is unwise
or oppressive. Those who feel sufficiently aggrieved by agency action and
are prepared to bear the burden of expense and delay may, in most cases,
appeal to the courts. However, under prevailing doctrine, courts will not
substitute their judgment as to wisdom or propriety for that of the
agencies. Consequently, the regulatory agencies have a very wide area
of discretion in pursuing their policy objectives.

Even in handling individual cases which are adjudicatory in nature
the regulatory agency has a greater freedom of choice as to the result it
reaches than courts ordinarily do. In this sense the regulatory agencies
are more quasi-legislative than they are quasi-judicial.

The regulatory agencies differ from the courts also in the fact that
they maintain a continuing interest in and surveillance of the fields
of their jurisdiction. When a lawsuit in court has been concluded that is
usually the end of the court's interest in or attention to the matter.
However, when a regulatory agency issues a license, or an order, to a
party within the field of its jurisdiction, it is likely to continue to observe
the operations of its licensee or respondent and to receive reports from
the licensor. Thus, the administrative or regulatory agency has a con-
tinuing feedback as to the consequences of its own action that the courts
generally lack. In this respect the administrative agencies have a con-
siderable advantage over the courts since they have at least the opportunity
to judge whether or not their policies and rulings are achieving the con-
sequences intended.

When the administrative agencies were created one of the purposes
which it was hoped they would achieve was to provide greater specificity
and, therefore, greater certainty to particular areas of law than was
practical by the traditional technique of legislation and adjudication.
Certainty and flexibility have been polar ideals in the law since man first
started thinking about such matters. To the degree that the law has
been able to achieve certainty it has necessarily been inflexible; and insofar
as the law retained flexibility it has necessarily been uncertain.

The possibility of creating a detailed set of rules that would at the
same time provide clear guidance for most situations and yet permit adaptation to variant situations was one of the goals for which administrative agencies were established. However, administrative sub-legislation has introduced a new element. It has been found that, when all the variants of a situation are covered by regulation, the code of regulations itself becomes so detailed and voluminous that new difficulties emerge. The differences between situations involving different consequences may be so small that the area of dispute is shifted to the mode and reliability of the measurement rather than the justice or the wisdom of the result. An example is the engineering standards established by the FCC for the licensing of certain broadcasting stations. Another difficulty is that the problem of examining all the voluminous regulations is so great that the uncertainty arising from ignorance of the regulations may be not much less than that resulting from the inability to forecast the judgment of a judge or jury. Finally, the rigidity inherent in an encompassing detailed code generates demands for exceptions and suspensions of the code which are not really different from the cases that involve the application of a broad general principle. Thus, while the administrative agencies do provide some areas of certainty, they do this at some cost of flexibility and by the creation of new areas of uncertainty, so that the appearance of certainty is likely to be largely illusory. While the administrative agencies serve many purposes, they have not yet solved the dilemma of reconciling the polar ideals of flexibility and certainty in law.

3. My third conclusion concerning administrative agencies is the obvious one that they all deal in a specialized subject matter and a limited jurisdiction. What is not so often noted is that the corollary of a specialized subject matter is likely to be a limited viewpoint.

Each regulatory agency has been given a limited jurisdiction on the theory that it deals with a complex subject that requires a technical expertise. Specialization permits the establishment of a staff of technical experts and the development of an institutional expertise. It is sometimes overlooked, however, that technical expertise carries no greater political insight or social wisdom; and indeed, in many cases the specialization that leads to technical expertise may result in less insight and wisdom than is possessed by a less specialized executive, judge, or legislator.

For example, the technical problems involved in determining how many broadcasting stations can be accommodated within a particular segment of the spectrum requires specialized engineering knowledge. However, such knowledge makes no contribution to the insight needed to deal with the problem of multiple ownership in broadcasting or the relationship between networks and program sources or any of the other numerous policy problems that are involved in the regulation of broad-
casting. Similarly, expert knowledge regarding transportation resources and facilities contributes little to the determination of the degree of competition that is desirable within a particular mode of transportation or between different modes.

As the regulatory agencies deal with a limited subject matter they also deal with a limited segment of the public. Each regulatory agency has its own following that is intensely interested in every act and attitude of the agency, and there is a trade press which reports on the activities of each agency in much greater detail than the general press ever reports on any of the agencies or even the major departments or branches of government. Thus, in the communications field there is an excellent trade journal known as *Broadcasting*, which gives weekly coverage in great detail to all of the activities of the FCC and gives greater publicity within the scope of its circulation to the FCC than the United States Supreme Court gets in any newspaper.

A result of this limited subject matter and limited public is the reinforcement of any institutional bias that may exist. All institutions develop peculiar viewpoints of their own; courts and legislatures no less than regulatory agencies have particular institutional ways of looking at things. However, courts and legislatures deal with a wider and more heterogeneous public than regulatory agencies and, consequently, are subject to the advocacy of institutionally unconventional ideas. In contrast, the successful administrative law advocate soon learns to accept the institutional way of looking at things and seldom mounts a very vigorous challenge to any basic institutional viewpoint.

These influences combine to produce what I regard as the basic endemic vice of the administrative agencies, which is parochialism. The administrative agencies have remarkably little input from any fields other than those of their respective specialized jurisdictions. There is no general source of administrative law precedents and almost no borrowing of precedents from any administrative agency by another. In any event, administrative law cases are generally poorly reported and badly indexed and, consequently, are not well known to any but the specialists in the respective fields. As a result, the administrative agencies become intellectually inbred and reflect the limitations of their jurisdiction in limitations of their viewpoint.

4. The great need today in the field of administrative law is for the development of an administrative common law. I think that we need an administrative common law in the original, literal sense of a body of legal principles which is common to numerous jurisdictions.

The strength of our judicial system has in large measure been due to the development, utilization, and continuously revivifying influence
of the common law. Courts are continuously borrowing from each other and looking to each other for precedent and principle. The judicial techniques are established, are generally similar in all of our courts, are well known and reported from jurisdiction to jurisdiction, and are studied and followed among the different jurisdictions.

In contrast, administrative techniques are new, developing, relatively unknown, not well reported, very little studied, and different from agency to agency. I do not believe that the differing procedural rules and details are either necessary or useful. The range of variety in cases confronting the courts is greater than the range in cases handled by administrative agencies. There is no greater difficulty involved in the development of an administrative common law than there was in the development of a judicial common law. There are differences between courts and administrative agencies, but these are much greater than the differences among the various agencies.

The characteristics of any administrative common law must be such that it is adapted to a technical subject matter, that it can deal with numerous proceedings and voluminous hearings, that it provide for relatively routine means of administrative review. The wisdom of the Congress in establishing an administrative conference on a permanent basis seems clear to me; and I believe that in due time, and it will come slowly, the cooperation of the agencies through the administrative conference will lead to the development of an administrative common law.

5. Finally, it appears to me that the characteristics of administrative agencies and the administrative process are mainly the consequences of the problems and the social conditions which have given rise to these agencies in the first place. There have been some criticisms of the agencies recently, even by former agency members. Some of these criticisms have sug-

125. Louis J. Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 YALE L.J. 931 (1960). Also see Earl W. Kintner, The Current Ordeal of the Administrative Process: In Reply to Mr. Hector, 69 YALE L.J. 965 (1960). Mr. Hector's article consists of a memorandum he submitted to the President upon resigning from the CAB wherein he recited many of the problems and difficulties of the agency and argued that the functions of the administrative agencies should be separated and assigned to executive departments and administrative courts. A similar suggestion was made in 1963 by Newton Minow upon resigning from the FCC, but Mr. Minow argued that the functions of the administrative agencies should be separated and assigned to three types of agencies. It seems somewhat relevant to note that the CAB, from which Mr. Hector gathered many of his observations, now shares regulatory authority in its field with one other agency, the FAA. In the field of banking, regulatory authority is divided among three federal agencies and enforcement authority is held by a fourth, the Department of Justice. This situation has caused much complaint and many observers have urged a change which would centralize regulatory authority in a single agency. While many of Mr. Hector's points are well based and sound, in my opinion, there is little in either theory or experience to suggest that a structural division of administrative agencies on the functional basis suggested by Mr. Hector, if such a thing is possible,
gested that basic structural reforms are needed in order to permit the regulatory agencies to function properly. Congressman Harris has suggested that such proposals seem to come from those who have been frustrated in their efforts to have the agencies adopt their own particular policies and, therefore, have concluded that the agencies require reorganization. Professor William L. Cary, the distinguished former chairman of the SEC, has said that the activities of administrative agencies do not fit the dichotomy of rule-making and adjudication. He says that the interaction of informal administrative decisions, formal cases, and rule-making is both fruitful and necessary and suggests that divorcing the functions of the agencies and assigning separate functions to separate agencies would fragment the responsibility and thus increase the uncertainty and inefficiency which it is sought to remedy. I agree with both Congressman Harris and Professor Cary.

The structure of the regulatory agencies is of secondary importance. The traditions, viewpoints, and philosophies of the administrators are the crucial and controlling elements in this process. In any event, the administrative agencies share most of the faults and virtues of the government at large. These agencies operate in the legislative, the judicial, and the executive areas, exercising powers and confronting problems similar to those of the traditional legislative, judicial, and executive branches. In many respects each agency is a small scale model of government itself. While the administrative agency is sometimes pictured as a parody of government, it is more accurate and more fair to view it as a paradigm of government. It is a modern development and represents a contemporary effort to meet the new problem of mass production of cases in an age of mass production without sacrificing justice. The administrative agency is far from perfect as an institution, but it is the best means yet devised for dealing with the necessity of assembly line government operation in a specialized and technical field. Undoubtedly the administrative agency can and will be improved, but it will probably remain a part of our governmental structure and increase in importance so long as we maintain the technological civilization which gave it birth.

is likely to result in greater expedition, effectiveness, or fairness in the administrative process.