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Symposium on Administrative Law

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MR. President, Members and Guests of the Association: I suspect that the selection by the Executive Committee of this topic for discussion this afternoon is indicative of a change in emphasis in the field of public law which it seems to me has occurred during the past few years. The great questions of public law—only three or four short years ago—had to do with the scope of legislative power, with the scope of the power of state legislatures and of Congress to regulate industry in such matters as price fixing, with the scope of the commerce power and of the taxing power wielded by Congress. But those questions, for the time being at least, seem largely to have been settled.

With Nebbia v. New York, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469, the power of legislatures to engage in price fixing in fields where theretofore it had been thought impossible was established with reasonable firmness. With West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, the power of legislatures to establish minimum wages for women seems to have been conceded with rather definite effect. The National Labor Relations cases have so materially broadened the scope of the commerce power as to open up to Congress areas of regulation which seem reasonably adequate to the needs of the present situation. Similarly, the Social Security Act cases and others have removed from the field of immediate difficulty the outstanding constitutional obstacles to legislative regulation which existed until a short time ago.

There are, of course, plenty of questions remaining. There still exist on each important constitutional issue two lines of cases, the liberal and the strict. They are there to be invoked, either for the enlargement or for the restriction of legislative power in the future. Federal incorporation of corporations engaged in business will give rise to constitutional litigation. The Fair Labor Standards Act will have to be passed upon before we can be sure that it is within the power of Congress. But, by and large, we can now look at public law with some assurance that the Constitution has been made flexible enough and broad enough to permit of the necessary legislative efforts.

The emphasis, therefore, in public law has shifted in recent months to questions of administrative procedure. The landmark cases that make the front pages as the Supreme Court decides them these days have to do with notice and hearing and the right to be confronted with the evidence against one in an administrative proceeding. The case which has most recently brought to the fore public interest in administrative procedure is the famous Morgan case [Morgan v. U. S.], 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129, decided just last year by the Supreme Court. Before that, the Panama Refining case [Panama Refining Co. v. Ryan], 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, for the first time brought to the attention of the public
and of administrators the doctrine that findings of fact must accompany executive regulations which operate with penal effect, if those regulations are to be held constitutional under the due process clause. With these procedural questions, going to the very root of administrative effectiveness, being dealt with by the Supreme Court in landmark cases, we have had general public interest, almost an unbelievable public interest, in fairly technical questions of administrative procedure; and it is those questions which we are confronted with here this afternoon.

It is perhaps worthy of note, also, that within the field of administrative law itself there has been a shift of emphasis during the past two or three years. The cases I have just mentioned deal with administrative procedure. Before that, the most prominent administrative law decisions were those that dealt with the scope of judicial review. The great question was how far the courts should control administrative agencies in the exercise of their regulatory powers. Back in 1920, we had the case of Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908. In 1932, we had the case of Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598, and in 1937, the St. Joseph Stockyards case [St. Joseph Stock Yards Co. v. U. S.], 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, all of which enlarged the previously prevailing conceptions of the length to which the courts might go in reviewing administrative orders, particularly in the field of public utility rate fixing.

The issues which those cases raise, and which have been dealt with in numerous other cases as well, still remain unsettled. We don't know, with finality or certainty, what the scope of judicial review should be and will be in public utility rate fixing or in other fields of administration, but the questions which concern us now and which are before us this afternoon are the cases dealing not with judicial review but with the procedure in the first instance of administrative agencies themselves.

Each of the recent cases dealing with administrative procedure, I mean the landmark cases which I mentioned, laid down broad propositions whose application to administrative procedure was very difficult to determine. In the Panama Refining case, the opinion gave little guidance as to just how wide an area of executive regulation was subject to the requirement that regulations be accompanied by findings as a condition of their validity. In the Morgan case the Supreme Court again left very much in doubt the question of how far the requirement of the case, which purported to be merely the interpretation of a statute but which had distinct constitutional implications, extended over other fields of administration. The case itself, of course, involved the Packers and Stockyards Act, 7 U.S.C.A. § 181 et seq.; but the court, as the newspapers quickly brought out, spoke of the basic requirements of fair play in administrative procedure generally and asserted that the decision in an administrative proceeding must be by the official who heard the parties, or else that the official who conducted the hearing must make an interim report to the deciding official, with opportunity for argument by those affected by the proceedings. That requirement was put forth by the court in such a way as to make it seem that it had much wider application than merely in the administration of the Packers and Stockyards Act.

Those decisions, with their extremely broad implications and their evident reliance upon constitutional doctrine, even though in the Morgan case there happened to be simply the interpretation of a statute involved, threw the administrative world in Washington into a great deal of uncertainty and confusion. Each of these cases was followed by an offsetting one. The Panama Refining case was followed by Pacific States Box and Basket Company v. White, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853, in which the court did not apply the proposition that there must be findings accompanying an executive regulation to the regulations of a state de-
partment of agriculture governing the sizes and shapes of containers for strawberries and raspberries, saying they were not the same type of regulations which the Panama case involved. The differences, however, are a bit difficult to discern, since both regulations affected numerous business enterprises and both of them operated with penal effect. Thus the offsetting case, while it lent assurance that strict procedural requirements would not necessarily be applied over the entire field of administration, still left widespread the doubt into which the original decision had thrown the administrative world.

The Morgan case has been followed by the Mackay Radio and Telegraph case [National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381, at the last term of court, in which the court did not apply the propositions of the Morgan case to a proceeding before the National Labor Relations Board, upon the ground that, in that case, the issues the respondent was having to meet had been sufficiently defined by the Board and that, therefore, some of the procedural safeguards insisted upon in the Morgan case need not be applied. But again, the precise extent of the application of the doctrine of the Morgan case remains in doubt; and administrators are searching, apparently, for criteria whereby they can determine what procedures are constitutionally necessary in the first place, and what procedures are desirable and effective in the second place, in the administration of the acts which are entrusted to them to carry out.

Practicing lawyers who must appear before administrative commissions likewise seem to be searching for criteria of what constitutional issues they can properly raise in cases which they present in behalf of their clients. Law teachers, scholars in the field of law, presumably are searching also for criteria which will aid them both in teaching and in public discussion of the problems of administrative law—criteria which will assist them to lay out the field in an understandable manner.

The actual determination of administrative procedure takes place, of course, in three stages, the stage of statutory drafting, the stage in which the administrative agency within statutory limits determines its own procedure, and the stage in which a court, upon judicial review, has an opportunity to pass upon procedure that has been adopted and, expressly or by inference, to lay down requirements for future administrative procedure.

At all these stages in the determination of administrative procedure the central question is, or ought to be, what procedure will be most conducive to the successful performance of the particular administrative function for which the procedure is being devised, having in mind, also, due protection to affected private interests. That question must remain a specific one. It is a question which in each instance bears directly upon the procedure of a particular administrative agency. The approach of the legislator, of the administrator and of the judge, must be an approach which is specific, which centers upon the problem immediately confronting the official, in whatever branch of the government he may happen to be. But in searching for guidance as to what to do, it is not only the practical considerations arising in the particular field but possibly also categories and analogies that may be established by study of the problems of procedure that can be made a reliance in the framing of new administrative procedures.

That is where the group of law teachers enters the picture. If we have a function in connection with the devising of administrative procedures, it is the function of investigation followed by the establishment of categories which will be of assistance to officials in the devising of new procedures. Neither legislators nor judges nor administrators have the time or the facilities to engage in the research and in the thought which might lead to the establishment of the categories that would be useful to them.

So I suggest that, in the course of this discussion this afternoon, we remain
conscious of the approach which the particular speaker is making. He may be making the approach of the official who is concerned with the problems of the particular agency with which he is dealing and who does not purport to draw generalizations in regard to administrative procedure as a whole. The value of his material for law teachers, as such, lies largely in the contribution which the data make to the consideration of the general problem. If the speaker, on the other hand, is endeavoring to draw generalizations from data, then he speaks in the capacity which most of us occupy.

It is a question, of course, whether administrative procedure can be treated in a generalized manner. It is possible that generalizations may simply obscure the difficulty rather than help in the solution of problems. If each administrative agency is so unique that its problems cannot fruitfully be considered in connection with the problems of other agencies and in connection with categories of procedure that may be established, then the effort of scholars to establish categories must necessarily fail. But I believe that that is not the situation. It seems to me that adequate analysis necessarily reveals that it is possible to examine administration, to consider the problems of procedure, and to establish categories and suggestions which are realistic and fruitful in the solution of particular problems as they arise.

I should like, before closing, to suggest a few considerations that seem to me to bear upon the problem of establishing categories for administrative procedure with which we are confronted at the present time.

In the first place, I think it is clear that the attempt to establish a significant classification of administrative functions on the basis of the theory of the separation of powers has definitely failed. It is impossible to define three functions of government which correspond to the three aggregates of powers that have been conferred upon the three departments of government. The attempt to say that administrative functions are quasi-legislative on the one hand, quasi-judicial on the other, and that procedure can be framed which is suitable for those two categories, considered more or less distinct from each other, is leading to increased confusion rather than to the solution of our problems. We meet, for example, with the oft-repeated proposition that rate fixing is a quasi-legislative proceeding in which quasi-judicial methods are employed. Such a proposition is not helpful in the solution of practical problems. It has led recently to a decision in a United States District Court, although only a tentative one in the course of the granting of a temporary injunction, that a minimum wage order applicable over an entire state and to numerous occupations within the state is an order which must be formulated by means of the strict procedure contemplated in the Morgan case. Now, when you consider the nature of the problem confronting a state board in laying down a minimum wage of such extensive application, it seems to me that you must concede that the very careful quasi-judicial type of procedure which the Morgan case contemplates is necessarily inapplicable. You cannot grant to every party affected by such an order the type of hearing which the court, in the Morgan case, had in mind. You cannot frame the issues with sufficient definiteness. Certainly you cannot isolate a sufficiently small number of issues so that the evidence may bear directly upon each of them and be subject to successful handling in this quasi-judicial manner.

In the second place, I think we will have to consider it as established that the gathering of data through intensive study of particular administrative agencies is going to continue to be the most definite and fruitful method of enriching the study of administrative law. In the work that has been done along these lines we have our principal body of information for devising more realistic administration procedures. The studies of Henderson and Sharfman and Patterson and Dodd in different fields of ad-
administration give us what we have in the way of information upon which to go. We need more of that kind of work, and we are not going to progress far in solving the problems of administrative procedure unless we do get more.

But, after the data have been gathered, it is still necessary to discern common elements in the functioning of different administrative agencies and to lay down criteria which are useful for procedural purposes on the basis of those common elements. And I believe it is possible to analyze administrative processes in such a way as to make generalizations possible which incorporate the results of the study of particular administrative agencies.

An administrative investigation which must precede the issuance of an administrative order of some kind is certain to have the elements which any investigation must have, namely, in the first place, the formulation of questions involved in the problem that is to be taken up; second, the receiving and considering of evidence bearing upon those questions; thirdly, arriving at conclusions, or findings if you will, in regard to those questions involved in the problem; and, lastly, the reaching of the answer to the problem in terms of the findings that have been made and in the light either of the provisions of a statute or of administrative discretion exercised within the limits fixed by statute. That is to say, we can assert that in administrative investigations there must be the definition of the issues; there must be the reception of evidence; there must be the formulation, if not explicitly then by implication, of conclusions in regard to those issues; there must be a decision; and that decision may be either a decision of law or a decision which is discretionary, within limits defined by law. If that is true of administrative investigations generally, then we are some distance along the road to fruitful generalization.

In considering what procedures are most useful and best adapted to carrying forward these several steps in any particular administrative proceeding, I believe there are certain other factors that we can well keep in mind and which may be the basis of more particular rules that still have a wider application than a single administrative agency.

In the first place, we do distinguish and need to distinguish between regulatory administrative functions and the non-regulatory; the regulatory which bear directly on some particular interest, usually of a private nature, and the non-regulatory which have to do largely with the administration of the government, the Army regulations, for example.

In the second place, if you have a regulatory function, sometimes the proceeding will affect many parties, sometimes only a few. The procedure which is adapted to the investigation is necessarily going to vary with the number of parties affected. You can't grant as careful a hearing when there are many as when there are only a few. Furthermore, you often cannot get many parties represented before an administrative agency which is passing upon a general problem. Representation of the affected parties has got to be taken care of by other means than their own appearance or the appearance of counsel in their behalf.

In the third place, I think that we must give attention to the nature of the problems which are involved in different types of administrative proceedings. You have problems which involve public health and safety, for example, which are quite different in the procedures they call for, from problems of economic control.

Within any particular field of administration there are different types of determinations to be made. If you take the recent Food, Drug and Cosmetic Act, 21 U.S.C.A. § 301 et seq., for example, you can see in the rule-making power of the Secretary of Agriculture, conferred by that Act, at least three classes of questions with which the administration has to deal. There are questions of scientific determination such as the amount of spray residue, poisonous spray residue, which can be permitted on fresh fruit without harm to consumers—a strictly
scientific problem, which calls for a different procedure of investigation from the problem, for example, of determining what is the minimum acceptable standard for canned peaches, because there the standard is not a standard affecting health and safety but a standard of quality involving the judgment of consumers and the custom of the trade with regard to the matter in hand. The type of investigation needed in that kind of administrative rule-making is quite different from that which is adapted to determining a scientific question. The third kind of question which the Secretary has to determine under the Act is the psychological effect, for example, of labels on food and drug products—whether certain sizes of type, whether certain wordings, will effectively produce the desired impression upon the mind of consumers, or not.

We have also to consider, in arriving at generalizations in regard to administrative procedure, such questions as the nature of the sanctions which are going to be applied in order to enforce an administrative order. If the sanctions are penal, as the Supreme Court recognized in the Panama Refining case, then in all probability greater care in procedure is called for than if the sanctions are other than penal. But, of course, the deprivation of a license upon which the livelihood of an individual or the financial solvency of a corporation depends is an equally drastic sanction.

If we take these several elements which bear upon suitable procedure, and if we have them in mind as we examine the data growing out of study of particular administrative agencies, then I think it is possible that, as scholars, we can contribute to the solution of our administrative problems generalizations which will be at once realistic and yet broad enough to furnish effective guidance. I believe also that we should be acutely conscious as we consider the task confronting us, that upon its successful performance there may turn the continued existence of our capitalist democracy, if one may call it that. It is through administrative control that this country today is seeking to preserve the system that it has. If that control works efficiently, if it results in the satisfaction of those human demands which are made upon our economic and political system, then our capitalist democracy may endure. But if the administrative system is tied up with procedural handicaps, if it is prevented from functioning efficiently by the poor performance of the procedural tasks, then the system may break down. It is the legal profession, it is the law teachers, to whom falls the task of devising suitable procedures; for lawyers have been, from the beginning, the experts whom society has provided, whose services it has employed, in solving the problems of procedure where government bears upon group and private interests.

J. WARREN MADDEN
Chairman, National Labor Relations Board

President Arant, Ladies and Gentlemen of the Association, and your Guests:

Coming as I do, from an atmosphere which, upon occasions, is something less than calm and philosophical and contemplative, I think I can appreciate more than I ever did before the mastery which teachers have an opportunity to acquire and do acquire over subjects, by their academic study and observation of them, which is quite impossible to the people who are in the midst of them.

So, this fine introduction, showing as it does the understanding of the generalizations which do or may run through administrative process, has struck in me, particularly, admiration.

The enforcement of legislation through administrative procedures has two primary aims. One is to place the initial enforcement proceedings in the hands of a body of experts sympathetic with the purposes of the statute and possessing the specialized knowledge essential to an
adequate handling of the complex problems with which much of our present day legislation deals. The other is to achieve a more rapid and more efficient disposition of the numerous controversies bound to arise out of almost any piece of legislation dealing with our more serious problems. The administrative process has developed in response to the inevitable extension of government regulation designed to bring some order into the increasing complexities of modern economic society. I think it cannot be doubted that some such procedure is vital if the techniques of government are to keep pace with the development of our economic, social and political life.

The National Labor Relations Act, 29 U.S.C.A. § 151 et seq., well illustrates the field in which administrative procedures are essential to the successful operation of legislation. The problems of labor relations are delicate and complex. Prosecuting and judicial agencies in existence at the passage of the Act were in general ill equipped by training or experience to deal with problems arising in this field. At the same time the need for speed and dispatch is urgent. A labor situation does not remain in statu quo for long. It is likely either to develop rapidly into an explosion or to subside quickly into nothing. In short if the rights of workers to self-organization and collective bargaining are to be preserved, it must be done through machinery that is directed by experts and designed for swift and efficient disposition of controversies. The fate of Section 7 (a) of the National Industrial Recovery Act—the enforcement of which was attempted through non-administrative procedure—adequately points the lesson in this respect.

At the same time there is much concern expressed today over the expansion of the administrative process in the field of governmental regulation. Without doubt a good deal of this concern is based upon opposition to the regulation itself rather than the method of its enforcement; and the propaganda of those with this point of view is unquestionably responsible for even more of the fears that have been expressed over the rapid development of the administrative process. Nevertheless it must be admitted that the establishment of general safeguards, to be administered by the judiciary where necessary, is vital to the preservation of the democratic process. These safeguards must not be so restrictive, or applied with such disregard for the problems to be solved, that they jeopardize legitimate methods or objectives of the administrative process. The unintelligent, or unsympathetic, application of general procedural restrictions could readily cripple and destroy the functioning of almost any administrative agency. On the other hand the safeguards should be sufficient to guarantee against abuse of the administrative process.

Fundamental to any such check upon the administrative process is the requirement of a "fair hearing." I agree with Professor Fuchs that the question whether general rules can be laid down to guarantee a fair hearing must be approached first through a consideration of the specific procedures of specific administrative agencies. I will endeavor, therefore, to outline briefly the procedure of the National Labor Relations Board and then to consider certain problems of fair hearing which have been raised by our experience in administration thus far.

Under the National Labor Relations Act, the National Labor Relations Board has two general functions, the administration of each of which has a procedure somewhat different from the other. First the Act guarantees to employees the right of freedom in self-organization and the right of collective bargaining with their employer. Interference with the right of self-organization by employers, and the refusal by an employer to bargain collectively with the representatives of his employees, are unfair labor practices. Where an employer has engaged or is engaging in unfair labor practices the Board is empowered to prevent their recurrence and to require affirmative action necessary to restore the status quo. Secondly, the Act sets up machinery by which the Board may determine who has been selected as the rep-
representative of the employees in an appropriate bargaining unit and who, therefore, has exclusive rights of collective bargaining with the employer.

The Board administers the Act through a staff at Washington and through twenty-two regional offices throughout the country. Each regional office consists of a Regional Director, with his assistants, and a Regional Attorney, with subordinate attorneys. I will consider first the Board's procedure with respect to its functions of preventing and remedying unfair labor practices.

Upon the filing of a charge that a violation of the Act has occurred, the regional office sends an agent to investigate. If the charge seems justified, the Regional Director or his agent attempts to obtain an adjustment through voluntary compliance with the Act. As in the case of most other statutes, the great majority of the cases are adjusted in this manner without resort to formal legal proceedings. Throughout the period of its existence thus far, a little over three years, the Board had handled a total of more than 18,000 cases. Of these, 14,000 cases, or over three quarters, have been closed, and of the cases closed more than 95 per cent were closed by voluntary adjustment. Thus only 5 per cent involved the necessity of a hearing or other formal action under the Act.

Where it is impossible to secure an adjustment and the facts seem to point to a violation of the Act the Regional Director issues and serves upon the employer a complaint setting forth the facts upon which the Board bases its jurisdiction and the alleged facts relating to the unfair labor practices. Accompanying the complaint is a notice of a hearing before a trial examiner designated by the Board. The trial examiner, it should be noted, is appointed by the Chief Trial Examiner who is responsible to the Secretary of the Board and who is not a part of the Legal Division.

At the hearing the Board's attorney presents the evidence in support of the complaint. An attorney for the labor organization involved is often present and may likewise participate. The respondent may of course appear through its attorney and offer evidence in its defense. Under the Act the rules of evidence prevailing in courts of law or equity are not controlling. Nevertheless the hearing in general is conducted in accordance with the usual rules of evidence and departures therefrom are permitted by the trial examiner only where adequate reason is shown.

At the conclusion of the hearing the trial examiner normally issues a so-called Intermediate Report containing his findings as to the facts and his recommendations as to relief. The Intermediate Report is served on the parties to the proceeding, who are notified that exceptions and requests for oral argument or briefs should be filed with the Board within a stated period. If exceptions to the Intermediate Report are filed or if the recommendations of the trial examiner are not complied with, the case comes before the Board for decision. In a few cases the Board transfers the case to itself immediately after hearing without an Intermediate Report from the trial examiner. In such instances the Board, prior to issuing a final decision, issues proposed findings of fact, proposed conclusions of law and a proposed order, to which the parties may file exceptions and request oral argument or briefs in the same manner as in the case of an Intermediate Report.

Oral argument is heard before the Board itself in Washington whenever requested by any of the parties or, occasionally, upon request of the Board itself. Briefs are always accepted and considered upon the request of any of the parties or likewise occasionally upon request of the Board.

The case is now ready for decision by the Board. Despite the relatively small number of cases which go to hearing, the absolute number of cases which come before the Board for decision is large. During the past three years the Board has issued some 1,200 decisions. At the present time there are several hundred cases pending before the Board for decision. The average record in each case is well over 1,000 pages. It can readily be
seen from these figures that the Board members themselves cannot expect to read the records. In making its decisions the Board therefore avails itself of assistants known as review attorneys who are under the direction of an Assistant General Counsel and a group of supervisors. The review attorneys analyze the evidence, inform the Board of the contentions of all parties and the testimony relating thereto, and make initial drafts of the Board's findings and order.

In every case the Board's decision contains findings of fact and an order either dismissing the complaint or requiring the respondent to cease and desist from its unfair labor practices and to take certain affirmative action to restore the status quo and effectuate the purposes of the Act. The order of the Board is not self-enforceable. If the respondent does not comply with the Board's order it is necessary for the Board to petition the appropriate Circuit Court of Appeals for enforcement. The respondent may likewise petition a Circuit Court for review of the Board's order. On any review in the circuit court the Board's findings of fact, if supported by evidence, are conclusive. The Court has of course full leeway to consider and decide questions of law. Among the questions of law properly before the Court is the question whether the Board's procedure has been proper and whether a fair hearing has been accorded the respondent under the Act and under the due process clause of the Constitution.

The procedure for the certification of representatives follows a somewhat similar pattern. Upon the filing of a petition for certification, the Board's agent investigates and, if it appears that a question concerning representation has arisen, attempts to secure adjustment through an informal check of union membership, through a consent election, or through other similar informal proceedings. Where such adjustment is impossible the Board, upon recommendation of its Regional Director, authorizes an investigation. The Regional Director issues a notice of hearing which is served upon the employer involved, upon the labor organization filing the petition and upon any other labor organizations known to the Regional Director to be claiming members among the employees involved. A hearing is held before a trial examiner. In these cases no complaint is issued and the role of the Board's attorney is one of an investigator rather than prosecutor. In general if the labor organizations involved are represented by counsel, the primary burden of establishing the case is left to such counsel.

Upon the conclusion of the hearing the trial examiner does not submit an Intermediate Report. He issues an informal report for the guidance of the Board alone. The Board then, with the assistance of a review attorney, makes its decision. It may either dismiss the petition, may certify representatives upon the basis of the record, or may direct an election. In the latter event the election is held under the supervision of the Regional Director.

The method of conducting elections cannot be considered in detail at this time. In general it may be said that the election is supervised directly by an agent of the Board but that representatives of interested labor organizations are entitled to participate as observers and under normal circumstances an agent of the employer is likewise permitted to participate.

Following the ballot the Regional Director issues his Intermediate Report containing his conclusions as to the results of the election. Any of the parties, including the employer, has the opportunity to file objections to this Intermediate Report. If no objections are filed, the Regional Director submits the report to the Board and the Board thereupon certifies representatives, or if no representative has been chosen, dismisses the proceeding. If objections are filed to the report of the Regional Director but the objections do not raise any substantial or material issue the Board proceeds in the same manner as if no objections were filed. If the Regional Director considers that the objections do raise a substantial or material issue, he serves further notice on the parties to appear be-
fore a trial examiner in support of their objections. In such cases the trial examiner takes testimony but again does not render any Intermediate Report. The record of the testimony is transferred to the Board for decision and the Board, on the basis of the record of the hearing and the Regional Director’s Intermediate Report, makes its decision either dismissing the petition or certifying representatives or taking such other action as seems necessary.

A certification of representatives has no enforceable effect. It is merely evidence of a right to representation. The employer is not bound by the decision nor is any order issued against the employer. Consequently there is no direct review in the courts of the Board’s certification of representatives. If, however, the employer refuses to bargain collectively with the representatives certified by the Board, and the Board thereupon brings an unfair labor practice proceeding against the employer based upon such refusal, the employer may obtain a review in the courts, not only of the record in the unfair labor practice proceeding but also of the record in the prior certification proceeding.

It will be seen from the foregoing that the Board is not endowed with law making functions. Under the Act the Board’s powers are limited to the initial adjudication of controversies involving individual employers charged with violation of law, and to the investigation and certification of facts relating to the representation of employees. The problems of fair hearing with which the Board is concerned have therefore been confined to these two types of administrative action.

During the three years of its existence the Board has had ample opportunity to consider certain major problems of fair hearing. It need hardly be said that counsel for employers have not been reticent in urging upon the Board and upon the courts alleged deficiencies in the Board’s procedure. Consequently it may be assumed that in the three years of operation thus far our attention has been directed to most of the important questions of fair hearing which are likely to affect employers appearing before the Board. The same applies, perhaps to a somewhat lesser degree, to our procedure as it affects the rights of labor organization.

First to be noted are various matters which relate to questions of pleading. To what extent must the complaint recite in detail the alleged unfair labor practices? Under what circumstances is the respondent entitled to a bill of particulars? To what degree can the Board’s attorney amend the complaint during the course of the hearing? If such an amendment is made what notice is the respondent entitled to for the purpose of answering and preparing its defense? To what extent is a variance between pleadings and proof fatal to the validity of the Board’s order? To what extent may the Board adopt a theory of the case different from that alleged in the complaint or pursued by the Board’s attorney at the hearing?

Problems of this sort have been particularly acute during these first years of the Board’s operations. The legislation is new. That body of specific interpretation and application of the more general provisions of the Act—which grows up around every statute—takes years to work out. As time goes on, and as the scope and implications of the Act become clear, there will undoubtedly be less difficulty with pleading questions of this sort.

However, even at the initial stages of the Board’s operations, it seems to me feasible to set up general rules of guidance which, if intelligently and sympathetically applied by the courts, should assure the respondent in each case adequate protection on issues of pleading. A good illustration of such general principles is furnished by the decision of the Supreme Court of the United States in National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S.Ct. 904, 82 L.Ed. 1381. The facts in the case were these:

After a period of unsuccessful negotiation between a labor organization known as the American Radio Telegraphists Association and the Mackay
Radio and Telegraph Company, the union ordered a strike of its members for the purpose of enforcing its demands upon the company. The strike was nationwide but the facts before the Board pertained only to the company's San Francisco office. There the strike soon proved unsuccessful and after several days the employees reported back for work. The company put most of the strikers back to work but refused to take back certain of the more active union leaders. The Board issued a complaint alleging that the respondent had "discharged and refused to employ" the five men who were not reinstated for the reason that they had joined and assisted a labor organization, and that by such discharge the respondent had discriminated in regard to the hire and tenure of employment of such employees contrary to Section 8 (1) and (3) of the Act. After completion of its testimony the Board's attorney filed an amended complaint to conform with the evidence in which it was alleged that the respondent had "refused to re-employ" the five men in question for the reason that they had joined and assisted a labor organization, and that such refusal of reemployment constituted discrimination in regard to hire and tenure of employment contrary to Section 8 (1) and (3) of the Act. The respondent entered a general denial of the amended complaint and then presented its evidence. The Board found that the respondent refused to reinstate the five men, "thereby discharging said employees," and by such acts discriminated in regard to tenure of employment contrary to Section 8 (1) and (3) of the Act. I may interject here that, when I read this variety of words and then look down and see Professor Cook, who taught me common law pleading, sitting right here before me, it does bring back old times and make me wonder whether we are going to go through the kind of evolutions which took place in common law pleading in its classic day.

In the Circuit Court of Appeals and in the Supreme Court the respondent contended that the original complaint had alleged a discrimination by discharging five men; that after all the evidence was in, this complaint was withdrawn and a new one presented alleging that the respondent had refused to reemploy the five men; that the Board in its findings had reverted to the original position that the respondent had not failed to employ but had discharged the employees; and that thus the respondent was found guilty of an unfair labor practice which was not within the issues upon which the case was tried. The Supreme Court rejected the respondent's contention and laid down the applicable general principle in the following terms:

"A review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence, pro and con, was directed to the question whether, when the strike failed and the men desired to come back and were told that the strike would be forgotten and that they might come back in a body save for eleven men who were singled out for different treatment, six of whom, however, were treated like everyone else, the respondent did in fact discriminate against the remaining five because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory."

A somewhat similar question arose in Consolidated Edison Co. v. National Labor Relations Board, 59 S.Ct. 206, 83 L.Ed. ---, decided by the Supreme Court, December 5, 1938. In that case the Board had ordered the respondent not to give effect to certain contracts which the Board found had been entered into as part of the respondent's unfair labor practices. The respondent and the labor organization adversely affected contended that the validity of the contracts was not in issue in the Board's proceeding and that the Board's order on this point was therefore void. Although the mem-
bers of the court disagreed upon the application of the rule there was no disagreement that the governing principle in the case was whether or not the issue of the validity of the contracts had been "actually litigated."

In general it may be said that the foregoing problems of pleading with which the Board has been concerned are not materially different from those which confront most other administrative agencies having functions similar to those exercised by the National Labor Relations Board. And, on the whole, it can be said that general principles, such as those enunciated by the Supreme Court in the Mackay and Consolidated Edison decisions, are equally applicable to the proceedings of such other administrative agencies and can give full protection, on matters of pleading, to the rights of parties appearing before them.

A second series of questions with which the Board has been concerned relates to matters of evidence. As I have stated, the National Labor Relations Act provides that in proceedings before the Board "the rules of evidence prevailing in the courts of law or equity shall not be controlling." This provision is similar to that appearing in other laws creating administrative agencies to handle the initial enforcement of legislation. From the point of view of swift and efficient enforcement, in a proceeding where the issues are presented not to a jury but to a trained body of experts, there can be no doubt of the wisdom of dispensing with the requirement that the strict rules of evidence be followed. Nevertheless, such freedom in the acceptance of testimony, especially when coupled with the provision that the Board's findings of fact if supported by evidence are conclusive, may well give rise to serious problems of fair hearing.

To what extent can the Board ignore the hearsay rule? Should the Board adhere to the best evidence rule? Is it proper for the Board's trial examiners to permit leading questions on direct examination? May counsel impeach his own witnesses? To what extent and under what circumstances are employers entitled to subpoena the records of a labor organization? To what extent may the trial examiner cut short examination or participate in examination himself? These are some of the questions which frequently arise. It is impossible to consider all of them in detail at this time, but it may be worth while to discuss briefly what is probably the most important of them—the hearsay rule:

It will readily be acknowledged that most hearsay testimony has little or no probative value. Nevertheless the Board has not found it wise to exclude hearsay evidence altogether. For one thing, many of the witnesses before the Board have not had the benefit of formal education and are quite unaware of the significance of various facts which may be relevant to the proceeding. Consequently it is often advisable for the trial examiner to allow considerable leeway with respect to hearsay upon the theory that it may introduce or point the way to important leads hitherto undeveloped. Again, testimony which, though hearsay, is within the power of the respondent to deny or explain, but which is left uncontradicted on the record, may under certain circumstances be reasonably relied upon as having probative value.

I think of a situation of that kind. John Smith has been discharged, as he claims, for union activities. He says that the company told him, when it discharged him, that there was no more work for him to do. He says that fellow workers told him later, when he had no access to the plant to find out for himself, that immediately upon his discharge another man was put into his place and the work went on.

Now, there you have a situation where it is perfectly easy for the company to show what the truth of the matter is. So, if that hearsay is admitted and then the company makes no response to it at all, probably reasonable people would have a right to assume that the truth was in accordance with the hearsay.

In general, as I have said, the Board adheres to the hearsay rule unless good reason appears for making an exception thereto. And in no case that I recall has
the Board relied solely upon hearsay to support an essential finding of fact.

What I have said is, I think, sufficient to show the advisability of leaving the Board free to admit hearsay evidence, and to rely upon it where reasonable to do so. The question before us is whether there can be laid down any general rule, applicable by way of judicial review, which would check the Board in the event of extravagant use of hearsay evidence. Necessarily such a rule would have to be stated in broad terms, and its application would have to vary with the circumstances. Yet the guiding principles which, again if intelligently and sympathetically applied, should afford adequate protection against real abuse can probably be stated. In National Labor Relations Board v. Remington Rand, Inc., 94 F.2d 862, the circuit court of appeals for the second circuit (Learned Hand, J.) has already attempted the statement of such a principle:

"(The Trial Examiner) did indeed admit much that would have been excluded at common law, but the act specifically so provides, Section 10(b), 29 U.S.C.A. § 160(b); no doubt, that does not mean that mere rumor will serve to 'support' a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." (Italics supplied.)

In the Consolidated Edison case the Supreme Court stated a similar principle, coupling it with the rule that the Board's findings of fact must be supported not merely "by evidence" but by "substantial" evidence:

"The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by 'substantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' Section 10(e), 29 U.S.C.A. § 160(e), means supported by substantial evidence. Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142, 147, 57 S.Ct. 648, 650, 81 L.Ed. 965. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F.2d 985, 989; National Labor Relations Board v. Thompson Products, 6 Cir., 97 F.2d 13, 15; Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 2 Cir., 98 F.2d 758, 760. We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence. Ballston-Stillwater Knitting Co. v. National Labor Relations board, supra.

"The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 24 S.Ct. 563, 568, 48 L.Ed. 860; Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431; United States v. Abilene & Southern Ry. Co., 265 U.S. 274, 288, 44 S.Ct. 565, 569, 68 L.Ed. 1016; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 442, 50 S.Ct. 220, 225, 74 L.Ed. 834. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (Italics supplied.)
In certain important respects the problems of evidence with which the National Labor Relations Board deals are peculiar to the field of labor relations and the application of the foregoing principles must be made with these peculiarities in mind. Thus, as I have said, the absence of formal education on the part of most witnesses appearing in Board proceedings has an important bearing upon the application of the hearsay rule and upon the advisability of permitting leading questions. So, too, to mention but one more example, the need of a labor organization to keep its membership and activity concealed from a hostile employer is of extreme significance in determining the extent to which an employer may be permitted to inspect union books and records. I think it may safely be said, however, that the foregoing rule, which necessarily must be stated in general language, can serve equally well as the guiding principle for other administrative agencies making determinations of fact. Variances between agencies, such as have been pointed out above, can be normally taken care of in the application of the rule to the circumstances of the particular case.

A third problem of importance has been the question whether a fair hearing requires the issuance of an Intermediate Report by the trial examiner or, in lieu thereof, the issuance of proposed findings of fact by the Board, with the opportunity to file exceptions thereto and argue orally before the Board. After the decision of the Supreme Court in the second Morgan case (Morgan v. United States, 304 U.S. 1, 23, 58 S.Ct. 773, 999, 82 L.Ed. 1129) it was contended that the Board's procedure was fatally defective in a few cases where it had dispensed with the trial examiner's report and had not issued proposed findings of fact. This contention was answered by the Supreme Court in the Mackay case and again in the Consolidated Edison case. In the Mackay case the court said:

"At the conclusion of the testimony, and prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board. It denied respondent's motion to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report. In the Circuit Court of Appeals the respondent assigned error to this ruling. It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. The respondent now asserts that the failure of the Board to follow its usual practice of the submission of a tentative report by the trial examiner and a hearing on exceptions to that report deprived the respondent of opportunity to call to the Board's attention the alleged fatal variance between the allegations of the complaint and the Board's findings. What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States, 298 U.S. 468, 478, 56 S.Ct. 906, 910, 80 L.Ed. 1288. The contention that the respondent was denied a full and adequate hearing must be rejected."

In the Consolidated Edison case, in response to a similar contention that the lack of an Intermediate Report or proposed findings constituted a denial of a fair hearing, the Supreme Court stated:

"It cannot be said that the Board did not consider the evidence or the petitioners' brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But, aside from the question of the Brotherhood contracts, we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them. National Labor Relations Board v.
Mackay Radio & Telegraph Co., 304 U. S. 333, 350, 351, 58 S.Ct. 904, 912, 82 L.Ed. 1381. The points raised as to the lack of procedural due process in this relation cannot be sustained."

On this question of the Intermediate Report and proposed findings the considerations applicable to the Board's procedure would seem to apply generally to any administrative agency having comparable procedure. In other words, in any administrative proceeding where a specific complaint is issued which defines the issues and apprises the respondent of them, it would seem clear that a fair hearing does not require an Intermediate Report or proposed findings. It is to be noted, however, that the Chief Justice in the Consolidated Edison case expressed the opinion that the issuance of an Intermediate Report by the trial examiner, or presumably the issuance of proposed findings in lieu thereof, would be “better practice,” and, in fact, the Board has, since the decision in the second Morgan case, adopted the policy in unfair labor practice cases of issuing proposed findings whenever the trial examiner, for whatever reason, does not prepare an Intermediate Report.

It does not follow from the foregoing, however, that an Intermediate Report is “better practice” in every type of administrative proceeding. Thus somewhat different considerations apply in proceedings before the Board for determination of representatives. There the factor of speed is more important than in the normal unfair labor practice case. It is vital, from the viewpoint both of averting industrial strife and of assuring to employees the full rights guaranteed by the Act, that the determination of representatives proceed with dispatch. Furthermore, as stated above, the Board's representation proceedings result merely in a certification of fact and not in an order binding upon the employer or upon anyone else. Consequently the Board, in the interest of promptness, dispenses with the Intermediate Report in a representation case, both after the initial hearing and after the hearing upon objections to the ballot, if one is held. If the Board could be concerned only with giving the parties all possible procedural protection an Intermediate Report could be provided for in such situations. But to do so would afford the parties only a slight additional procedural benefit while at the same time materially impairing important substantive rights guaranteed under the Act. Under such circumstances it would not seem that the general principles of a fair hearing would recommend the procedure of an Intermediate Report or proposed findings.

Finally, there is another problem of fair hearing which has been raised in connection with the Board's procedure but which has thus far not been finally disposed of by the courts. Some of the respondents in cases decided by the Board, relying principally upon the second Morgan decision, have contended that they have the right, as a matter of determining the fair hearing issue, to inquire into the Board's internal operations with a view to discovering whether the Board itself has considered the evidence and made its own findings, or whether those functions were improperly delegated to subordinates. This question has normally been raised by pleadings before the Circuit Court of Appeals alleging on information and belief that the Board members themselves did not consider or appraise the evidence or did not make the findings of fact which were issued as the Board's decision. Such pleading has usually been supplemented by a motion to require the Board members and others to answer interrogatories, or a motion to take depositions of the Board members and others, or both.

The considerations which should be determinative of this issue in so far as the National Labor Relations Board is concerned, seem to me equally applicable to all administrative agencies which have the function of adjudication, and in fact to the courts themselves. And it can scarcely be doubted that the issue is a vital one in judicial procedure. A somewhat similar inquiry into the functioning of the Secretary of Agriculture in the Morgan case occupied several days
of trial. In the case of a court or board which makes hundreds of adjudications during a year, if a litigant in each case could, upon allegations based on information and belief, subject the court or board to an inquisition as to its methods, its work would be seriously impaired. Without going into the issues further it seems clear to me that if the procedure of an administrative agency makes provision for a complaint which defines the issues, for an Intermediate Report or proposed findings which redefine the issues after hearing, and for an oral argument, or opportunity for oral argument before the agency itself, the requirements of fair hearing do not permit an inquiry into the internal operations of the administrative agency, at least in the absence of specific allegations of fraud.

In conclusion, I may perhaps be permitted to repeat what I have already stressed. With the expansion of administrative procedure into numerous fields of government operations, I conceive it to be of vital importance to develop general principles, such as rules implementing the requirement of fair hearing, which will serve to prevent abuse of the administrative process. On the whole I believe that satisfactory principles broadly applicable to the procedure of the various administrative agencies can be worked out. However, these principles will of necessity be general in nature, and their application to specific circumstances must depend upon the factors governing the particular situation. In the end they will serve their purpose only if they are applied with a sympathetic grasp of the functions of the administrative process and an intelligent understanding of the problems to be solved.

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Mr. Chairman and Members of the Association of American Law Schools: I must tell you at the outset that I do not propose to, indeed I cannot, answer this question entirely responsively. For me to try to set the limit beyond which fairness cannot go, to try to define the wide variety of administrative tribunals and administrative proceedings to which any given set of rules of fairness must be applicable, would be to assume a breadth of experience and a certainty of knowledge to which I have no claim. To me, administration, and administrative law, are very broad terms, used to cover one general present-day aspect of the continuing socio-legal system which we have inherited and under which we are now living. I can not follow the popular use of these words to convey condemnation of a supposedly new type of bureaucracy, a New Deal oddity invented in political desperation to gloss over governmental ineptitude by concentrating public attention on the evils of big business. Administrative action is not, as many critics would have it, a servant girl recently hired from the neighboring employment agency, of uncertain antecedents and doubtful utility in the household, to be praised or criticized, educated or restrained to the end that she may be made worth her wages, and finally to be discharged without a character if she does not live up to her references.

It is too little understood that administrative law, even though the development of its techniques may be but another phase of the servant problem, is no newcomer in our midst. Administrative law is an honorable and legitimate product of the permanent relationship between organized society and the individual, with an ancestry in the direct line going back many decades. We are all familiar with the process by which over centuries the demands of an expanding society induced the conscience of the chancellor to implement the rigid forms of the common law by the more flexible and humanistic procedures and doctrines of equity. By a process of de-
development in many ways parallel, our modern administrative law is a product of the conflict between the conventions of judicial procedure and the needs of an ever-increasingly complex industrial society. I have no thought of tracing the history of this conflict—that is for the legal historians; but I do assert that a realistic view of the problems of administrative law today requires an understanding that those problems are not antithetical nor even of recent birth. The conflict from which they arose has been going on for nearly a century, and almost every issue now discussed was raised long before 1933.

This point may be well illustrated by examining the course of affairs which led, in the heat and frayed emotions of the summer of 1914, to the creation of the Federal Trade Commission. On January 24, 1914, just after President Wilson had proposed his legislative program, there appeared in the columns of the New York Times this dispatch (page 11, column 1):

“C. Stuart Patterson, banker and director of the Pennsylvania Railroad, and ex-attorney general William Hensel united tonight in condemning the Wilson anti-trust legislation in addresses before the Terrapin Club.

‘A revolution is going on,’ said Mr. Patterson, ‘and it will go still further. This vexatious interference with business is dangerous to the whole people. It affrights capital and halts investment; and in turn, it hurts labor. When this interfering legislation is enacted, the man of wealth is able to look after himself, but the man who depends upon his weekly wage is the one who suffers. So this becomes class legislation.

‘You cannot in justice create adversity for one class and prosperity for another. Every class must be treated alike.

‘... Sober sense will call a halt on the interference of little Politics with Big Business, and there will be a demand for legislation that will put all men on a common equality.

“If it is proper to legislate good wages for the shop girl, it is also iniquitous to impose a starvation income upon railroads. And if it is wrong for business interests to form combinations to regulate prices and protect their business, then it is equally unlawful for labor to combine to dictate to capital.”

Not unexpectedly the National Association of Clothiers, the Chamber of Commerce, the Merchants’ Association of New York, and the editorial columns of the various newspapers joined the chorus of protest.

Criticism of the President’s legislative program was finally centered against the proposal to entrust the Federal Trade Commission with functions of investigation and decision. The Commission, it was said, might be satisfactory if it did no more than make recommendations to Congress, if, like the old and useless Bureau of Corporations, its functions were limited to “appeals to reason and publicity.” One bitter opponent of the Federal Trade Commission declared that the proposed administrative body’s “efficiency is that of a monarchy... and has no place whatever in a democracy.” New York Times, 8-17-14; page 12. And Representative Montague stated at the hearings before the Committee on Interstate and Foreign Commerce (page 80): “Your bill proceeds on the theory... that the division of this government into three branches... should be practically abolished... and the rights of the individual should not be considered. ... Does not your bill... go back 400 or 500 years to the old days of tyranny?”

The parallel is obvious. The newspapers told of the bitter fight between government and “big business.” Business demanded a cessation of governmental interference that it might have a “breathing spell.” President Wilson accused business of creating a “psychological depression” to defeat his legislative aims. But the Federal Trade Commission was created and there is little suggestion today that it be abolished.

In thus recalling historical parallels I am far from suggesting futility in the
discussion of problems of administrative law. For even though no problem be a new one, there can be no doubt that the expansion of administrative functions in recent years has given new importance to the role of the administrator which demands the most careful reexamination even of old problems which appear to have been solved. We have passed many years from the days when the Interstate Commerce Commission, narrow as its powers were, stood out in solitary prominence as a Federal administrative agency. As Professor Gardner points out in his piquant review of Dean Landis' book on "The Administrative Process," we now have: "the Interstate Commerce Commission, which more and more governs transportation and travel, the Federal Reserve Board, which more and more governs banking, the Securities and Exchange Commission, which tries to govern all our investments, the Federal Trade Commission, which tries to govern the marketing of our manufactures, the National Labor Relations Board, which interferes in the making of these manufactures, the Reconstruction Finance Corporation, which taxes all of us to lend to whom it thinks fitting, and the Tennessee Valley Authority, which taxes all of us to make over that valley according to the hopes of a few gentlemen's hearts." 52 Harv.L.Rev. 336, 338 (1938).

This expansion of the administrative process has undoubtedly caused severe anguish of soul to many sincere men besides Professor Gardner; but undoubtedly it has also been bitterly fought by many whose articulate distress marked only self-interest and callous unconcern with public needs.

In spite of the intense conflict which has regularly attended the growth of the administrative process, I suppose there are few informed persons who will not in all honesty admit that the administrative commission is not merely a useful handmaiden, but an indispensable agent of modern democratic government. Even Professor Gardner concludes, although indefinitely, that "they are very good things to work for us—but that they are very bad things to rule our lives." Nevertheless, at least those of us whose business is administrative law are fully aware that neither design nor function in administration has been finally perfected; and criticism even from prejudiced sources may be helpful, particularly criticism of administrative methods and procedures. For uncertainties and differences in procedural methods, and in the administrative policies which shape those methods, are irritating and may even be oppressive. Indeed, their effect may be to weaken respect for the whole administrative process.

With the thought of inviting your comment and criticism, I propose, not to respond definitely to the question before me, but to try to give you a picture of the salient outlines of procedure in the one agency of the government with whose work I am closely familiar, the Securities and Exchange Commission. I recognize that conditions in one agency may differ widely from those in another, and that the techniques we have adopted in our effort to assure administrative fair play might be entirely inadequate to the problem of administrative bodies charged with the enforcement of other types of statutes. However, the Securities and Exchange Commission itself is by now far from being a simple organism; with the steady increase of its statutory jurisdiction it has undertaken the conduct of almost every type of proceeding known to administrative law. Our Commission, it seems to me, affords an admirable opportunity for clinical study of the question which has been posed.

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The distribution of securities, mechanics and practices of securities markets, and the management of gas and electric utility holding companies. Each of these statutes confers power upon the Commission to promulgate rules and regulations of general applicability and legal effect, prescribing in every instance appropriate standards for the guidance of the Commission. This rule making power itself raises questions for discussion, among the more interesting of which is whether hearings, on notice to interested groups of the community, are necessary or appropriate to the exercise of this essentially legislative function. I propose, however, to limit my inquiry to the order making power. For under each of the statutes the Commission may, after notice and hearing, issue final orders, which adjudicate the rights and liabilities of individuals and companies with the force and effect of law, and which are reviewable by the appellate courts in much the same manner as final judgments of courts of first instance. It is the fairness of hearings in proceedings culminating in such quasi-judicial orders that I assume forms the principal subject matter of this discussion.

As I said, the work of the Securities and Exchange Commission involves a wide variety of types of proceedings culminating in final quasi-judicial orders. From a procedural point of view, however, there has been developed within the Commission a rather clear line of demarcation between two broad classes of proceedings: one, actions of a prosecutorial nature instituted by the Commission itself with a view to the suspension of some privilege, either pending compliance with law or as a penalty for its infraction, and the other, actions begun by formal application of private parties to secure from the Commission the grant of some privilege or relief from some statutory prohibition. These classifications are not water-tight, but I propose to accept them for purposes of discussion. For purposes of convenient distinction I will call the former adversary proceedings, and the latter administrative proceedings.

Typical of adversary proceedings are stop order proceedings under the Securities Act to suspend the effectiveness of a registration statement, and proceedings under the Securities Exchange Act to suspend the registration of a security listed on a national securities exchange. Typical of administrative proceedings are applications under the Securities Exchange Act for the extension of unlisted trading privileges on national securities exchanges, and applications under the Public Utility Holding Company Act for exemption from the restrictions imposed by the statute upon the applicant as a holding company or as a subsidiary company, or for authority to issue or acquire securities or utility assets. It may be helpful to consider in detail one example of each class: the stop order proceeding under the Securities Act, and the application for authority to issue securities—the declaration—under the Public Utility Holding Company Act.

Briefly stated, the purpose of the Securities Act is to protect the investor against fraudulent or unethical practices in the sale of securities. This protection is in part achieved by means of injunctions and criminal sanctions against fraud in the sale of securities, through the mails or in interstate commerce. These sanctions are enforced only by the courts on application and proper showing by the Commission or, in the case of criminal proceedings, by the Attorney General. But the Act also contains prophylactic provisions—provisions designed to protect the investing public from misrepresentation or concealment by requiring full disclosure of all facts bearing materially upon the value of securities sold through the mails or any other instrumentalities of interstate commerce. To achieve this end, Section 5 (a) of the Act provides, with certain exceptions, that no security may be offered, sold, or delivered after sale, through the mails or in interstate commerce, unless there is in effect as to such security a "registration statement" describing the security and the issuer in appropriate de-
tail. Under Section 8 (a) a registration statement, in the absence of amendment by the issuer or action by the Commission postponing the effective date, becomes effective automatically upon the twentieth day after its filing with the Commission.

Although the Commission has no authority under the Act to approve or disapprove of securities, or in any way to pass upon their merits, the role of the Commission in connection with registration statements is not a passive one. Unless the Commission were empowered to examine into the truth and completeness of a registration statement, and to require the correction of false or inadequate data, the purposes of the Act would fall far short of achievement. Section 8 (d) of the Act therefore confers upon the Commission the duty of suspending the effectiveness of any registration statement which, after notice and hearing, is found to contain material misstatements or omissions. Specifically, that section provides as follows:

If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

It will be seen that to some extent the statute itself prescribes procedural details to be followed in the institution and conduct of stop order proceedings. The statutory requirements, however, are of the broadest, and have necessarily, and I believe appropriately, been implemented by general Rules of Practice, applicable to all proceedings alike. These Rules of Practice embody, at least in part, the Commission's own self-imposed standards of judicial self-limitation.

The proceeding for a stop order is begun after examination of the registration statement by an examining group in the Registration Division of the Commission. If the Registration Division concludes that the statement is materially false or misleading, authorization for a hearing under Section 8 (d) is sought from the Commission. Thereupon, if the Commission agrees that the registration statement does not appear to comply with the statutory standards of disclosure, confirmed telegraphic notice of opportunity for hearing within fifteen days is sent to the registrant together with a "Statement of Matters to be Considered" in the nature of a detailed bill of particulars. The Rules of Practice specifically provide that:

"Such notice shall state the time and place of hearing and shall include a statement of the items in the registration statement by number or name which appear to be incomplete or inaccurate in any material respect, or to include any untrue statement of a material fact, or to omit a statement of any material fact required to be stated therein or necessary to make the statement therein not misleading. Such notice shall be given either by personal service or by confirmed telegraphic notice a reasonable time in advance of the hearing. The personal notice or the confirmation of telegraphic notice shall be accompanied by a short and simple statement of the matters and items specified to be considered and determined." Rule III(b).

In the proceeding the Commission is represented by an attorney from the staff of the Registration Division, which in judicial analogy may be regarded as the plaintiff. The hearing is public in character and held before a trial examiner designated by the Commission; all testimony is stenographically reported and made part of the record; copies of the transcript are made available to all parties to the proceeding. Trial examiners
as a matter of internal organization are not subordinated to any official other than the Commission itself, and the Registration Division has no voice in the selection of a trial examiner for any particular case. At the conclusion of the hearing each party (which term, as I am using it, includes the Registration Division) may then file with the trial examiner "statement in writing in terse outline setting forth such party's request for specific findings, which may be accompanied by a brief in support thereof". Rule IX (e), Rules of Practice. Both the requested findings and the supporting briefs are also served upon all parties. Ten days after the receipt of the transcript of testimony the trial examiner is required by the Commission's Rules of Practice to file with the Secretary of the Commission an advisory report containing his findings of fact, copies of which are immediately transmitted to each party. Within five days after receipt of the report exceptions may be taken to the findings proposed by the trial examiner, to his failure to make findings, or to the omission or exclusion of evidence. Briefs may be filed in support of such exceptions, and, upon written request of any party, oral argument may be had before the Commission. Thereafter the entire record, including a transcript of the oral argument before the Commission, if such argument was requested, is transmitted to the Commission's General Counsel, whose office is as a matter of internal organization entirely separate and distinct from the Registration Division, for consideration and the preparation of an appropriate opinion containing the necessary findings in support of a stop order, or dismissing the proceeding. The actual drafting is done by attorneys in the Opinion Section of the General Counsel's Office, under the guidance of an Assistant General Counsel and a Supervising Attorney. The draftsmen are under strict instructions not to confer with the trial examiner or with trial counsel in the Registration Division. In the initial stages the draftsmen, as like as not, have only the most general intimation of the Commission's tentative viewpoint or approach to the case. The first draft of the opinion is thus prepared on the basis of the record itself, without conference with any party to the proceeding, and without pressure or suggestion from any source outside of the Commission and the General Counsel's Office. Copies of the draft opinion are circulated among the members of the Commission for individual consideration, and later the opinion is called for joint discussion among the draftsmen and the Commissioners in Commission meeting. By that time each Commissioner is familiar with the record, has read the proposed opinion, has reached some decision in his own mind, and is prepared to discuss the issues and offer suggestions as to the form and content of the opinion. I admit frankly that in most cases the opinion is not acceptable in its first draft and must be rewritten in accordance with the matured conclusions of the Commission. Occasionally a completely new opinion, or even alternative opinions, must be prepared. If a Commissioner dissents from the determination of the majority, he will himself ordinarily write a dissenting opinion containing the reasons for his dissent.

I take it that this procedure is "fair," "proper," and "judicial" under any decision heretofore rendered by the Supreme Court, and indeed goes far beyond the current judicial requirements of due process. The position of the trial examiner, however, deserves further consideration. In many agencies, at least, adjudication is now largely centered in the trial examiner. The rules of procedure are formulated chiefly for the hearings before him. In a real sense he is becoming a lower administrative tribunal, and the regulatory authority is itself in fact, if not in theory, becoming a tribunal of second instance. Should this be clearly recognized and written into the law? I suggest the possibility that there may be enough likeness between the judicial functions of the trial examiners in the various regulatory agencies, to justify placing them by law or Executive Order on a unified basis. Many questions must
be answered, however, before progress can be made. The following questions have been asked, not with reference to the Securities, and Exchange Commission specifically, but with reference to trial examiners generally. "Should trial examiners be under the Civil Service? Should they have specialized training in the field of economics with which they are respectively concerned, as well as in the field of law? Should they make real decisions, such as are made by the individual members of the Board of Tax Appeals? Should their decisions be given to the contesting parties, who shall have a right to take exceptions to them? If exceptions are taken should the case then be heard by the Board or Commission? In case no exceptions are taken should the case be considered as closed by the Commission? Should the trial examiners continue to be the mere agents of the Board or Commission, or should they be given a more independent status? Should the principle be further developed that all cases of a regulatory nature be heard de novo before trial examiners, or should certain cases be reserved to the Commission itself? Should the Commission have the right to call up any case pending before trial examiners for its own consideration?" See Blachly, Working Papers on Administrative Adjudication, page 3.

Other questions arise regarding the scope of his activities. At the present time the report of the trial examiner for the Securities and Exchange Commission includes only findings of fact together with a recommendation for action. There is no statement of the principles of law involved. The Rules of Practice provide, moreover, that the "report shall be advisory only, and the findings of fact therein contained shall not be binding upon the Commission." So far as our Commission is concerned, this provision is taken seriously; the record in each case is reexamined meticulously by the impartial Opinion Section of the General Counsel's Office, and reconsidered by the Commissioners, and only such weight is given to the trial examiner's report as in the particular case it appears to deserve. This practice, however, adequate as it may be to assure fair and impartial treatment to the respondent, suggests a real necessity for reexamination of the functions of the trial examiner. If the Commission is free wholly to disregard the trial examiner's report, it may be questioned whether the report adequately serves one of its most important supposed functions, that of notifying the parties of the issues involved. The issues discussed in such a report may not be the issues which move the Commission. Exceptions and argument directed to a report which has no binding quality may be futile. One alternative, therefore, might be to eliminate the trial examiner's report altogether, or at least to utilize it merely as a confidential document for the Commission's assistance in analyzing the record.

However, although the Mackay Radio & Telegraph Co. case (304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381) shows that the trial examiner's report is not a sine qua non of administrative fairness, its value in this regard is clearly suggested by the opinion of the Supreme Court in the second Morgan case (304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129), and it may well be doubted whether further limitation of the trial examiner's functions would fully exploit the advantages in the trial examiner device. Serious consideration might therefore be given to the possibility, as an alternative solution, of giving to trial examiners greater authority in the making of their reports and findings, with power to write their decisions into intermediate orders which, unless excepted to by one side or the other, would become the final orders of the Commission. I do not urge such a solution, but it is at least one that cannot be disregarded. I am aware that existing statutory provisions may not permit such a delegation of authority by administrative agencies, but as one commentator has recently pointed out, "Legislative draftsmen continue to copy slavishly the procedural provisions of old statutes, since they have no means of determining how those provisions can be improved." Feller, Prospectus for the Further Study of Federal
Symposium on Administrative Law

Administrative Law, 47 Yale L.J. 647 (1938). It is conceivable that our experience may crystallize into concrete suggestions for statutory improvement, at least for future statutes. I also recognize that merely conferring the powers of a judge upon men who have no competence for judging, by no means solves the problem. There is much weight in the current criticism that trial examiners are too frequently yes-men for the commissions they serve, and in Dean Landis's statement that "Today trial examiners' staffs on the whole have too little competence." Landis, The Administrative Process, page 104. However, we must at least recognize that if we are to retain the trial examiner, improvement cannot be secured by lessened responsibility and continued impairment of function, but only by greater responsibility and higher standards of personnel.

Now let me describe somewhat more briefly an example of what I have referred to as administrative proceedings. Section 6 (a) of the Public Utility Holding Company Act provides that it shall be unlawful to issue or sell any security except in accordance with a declaration effective under Section 7 and with an order under Section 7 permitting such declaration to become effective. Section 7 describes the information which must be included in the declaration and lays down standards to guide the Commission in determining whether or not the declaration shall be permitted to become effective. A declaration upon filing is submitted at once to an examining group in the Public Utilities Division. Amendments may then be called for to clarify or amplify the information originally submitted; conferences are often held between the management and the Commission's staff, and finally the matter is set down for hearing. Since the proceeding is instituted by the declarant, he is of course fully aware of the questions to be considered; the notice of hearing, therefore, merely states the time of the hearing, the place, and the subject matter. Rule XII (a). The hearing, like a hearing in a stop order proceeding, is held before a trial examiner designated by the Commission, and the Commission is represented by attorneys from the staff of the Public Utilities Division. The trial examiner does not prepare any report, but within five days after the transcript of testimony is filed with the Secretary of the Commission, any party may submit requests for specific findings, together with supporting briefs, copies of which are immediately served upon all parties to the proceeding. Fifteen days after requests are filed for specific findings, plenary briefs may be filed in support of all contentions and exceptions. Upon written request, moreover, oral argument may be had before the Commission. The case is then submitted to the Commission "on the moving papers, the transcript of the testimony and exhibits received at the hearing, requests for specific findings, if any, the briefs of the parties and counsel to the Commission, if any, and oral argument before the Commission, if any." Rule XII (b).

Frequently the applicant chooses to submit his case on the declaration without hearing and without further evidence. In such case an attorney for the Public Utilities Division appears before the trial examiner on the date set for hearing, offers the formal papers and the declaration in evidence, and closes the record without trial. Ordinarily these are cases in which the staff of the Public Utilities Division are satisfied that the proposed issue complies with statutory standards, and are prepared to recommend that the declaration be declared effective. The draft opinion, under these circumstances, is prepared by the trial attorney, and thereafter submitted to the Commission for consideration and correction. If the case is contested, however, or if adverse action, or qualified approval, is proposed by the Public Utilities Division, the matter is transmitted to the office of the General Counsel where the findings and opinion are prepared by an independent attorney in the Opinion Section and the case proceeds as if it were a stop order proceeding or some other adversary proceeding.

In my opinion the procedures followed by the Commission in both adversary and
administrative proceedings, as I have called them, are more than adequate to meet all sensible demands of due process or of ordinary fair play. Regardless of whether a trial examiner's report is used, the issues in each case are clearly delineated by the statutory requirements, the rules and regulations of the Commission, and the forms provided by the Commission; the position of the Commission's staff on any particular matter is plainly disclosed not merely by conference, hearing, and cross-examination, but by the proposed findings of fact, briefs, and oral argument; the Commission's final decision is based upon its own independent consideration of the case, with the assistance of a qualified and impartial group of attorneys in every case of real or threatened disagreement between the Commission and the respondent or applicant. Moreover, the petition for rehearing is available to offset error or surprise in final adjudication. Rule XII (d).

In thus outlining to you in specific detail the procedure followed by the Commission in two of its commonest types of proceedings, I should be disingenuous if I left you with the implication that precisely the same devices of procedure are followed in all proceedings before the Commission. As I have said, our Commission deals with a wide variety of quasi-judicial proceedings, each of which, for its most efficient dispatch, may require a different ‘technique. Furthermore, administrative law in its very nature is itself flexible, designed primarily for the purpose of affording relief from the rigidity of judicial forms. And perhaps even more important from the point of view of our Commission, the Commission itself is young—young in experience, young in years, even young in the years of its members and its staff. I am proud to say that no practice of the Commission can yet be regarded as immutable, that the Commission itself is constantly reexamining and criticizing its own procedure, and readjusting it to bring it into closer conformity with the high standards of efficiency, fair play and public interest which the Commission has set before it.

Thus far I have confined myself to the administrative practice of the Commission itself, without regard to the protective features afforded by the possibility of judicial review. Under each of our statutes, any person aggrieved by an order of the Commission may obtain judicial review of such order in the Circuit Court of Appeals by filing in the appropriate court, within sixty days after the entry of the order, a written petition praying that the order of the Commission be modified or set aside, in whole or in part. The Commission is required, upon service of such a petition, to file in the court a transcript of the complete record upon which the order complained of was entered, and upon the filing of such transcript the court is given exclusive jurisdiction to affirm, modify, and enforce or set aside, such order, in whole or in part. Each Act also contains the usual provision that the judgment and decree of the court is subject to review by the United States Supreme Court upon certiorari or certification. Candor compels me to admit, however, that the remedy of judicial review, in most cases, has no practical content. Business transactions cannot wait upon the exigencies of appeal. The overwhelming mass of administrative determinations are never reviewed by the courts. Time is of the essence. Even appellate procedure within the administrative by no means insures that the unfortunate results of action unwise or arbitrary will be cured. The remedy of appeal is not adequate.

The recognition of this fact has undoubtedly given impetus to the attack on the so-called “Judge-Prosecutor” combination. No man, we are told, should be a judge in his own case; one agency should handle prosecution, another should adjudicate. Lewis Carroll's cunning Old Fury is quoted with abandon, and, viewing him with alarm, serious minded but, I believe, misguided citizens enter on a campaign for separation of functions. Much has been said and written on this subject—separation of functions—which seems to me to disregard the reali-
ties of administrative practice and procedure. Certainly it is wise that an administrative agency should conduct its formal proceedings according to the rules of fair play which have been developed over centuries by the conscience of the bench, the bar, and the man in the street. And I cannot reasonably quarrel with the belief that rules and standards of conduct in administrative hearings may appropriately be codified even in statute, if not for the control of the administrator at least for the reassurance of the public. But let us not be deceived as to the importance of rules and standards in the conduct of formal administrative hearings. Whether the Securities and Exchange Commission on final consideration will actually decide to enter a stop order is interesting, but not very important; for only a rare investor would purchase securities from an issuer threatened with the administrative bar. When the Securities and Exchange Commission actually delists a security, the news is important; but the market drops when the order for hearing is announced. When a court actually issues an injunction against a continued violation of the Public Utility Holding Company Act, the news will be found in the back pages of the financial columns; the filing of a bill for injunction, however, is front page news. If nine out of ten Commission orders never reach the courts for review, ninety-nine out of a hundred business problems presented to the Commission for solution never reach the stage of formal proceedings even before the Commission. If the Commission were stripped of every vestige of judicial power, the problem of administrative fair play would remain substantially undiminished.

Furthermore, separation of functions would necessarily mean impairment of functions. Rule-making and enforcement cannot be separated from interpretation and adjudication without sacrifice of efficiency and of the public interest sought to be protected or advanced. Coordination is imperative. I venture to assert dogmatically that the regulatory function of any board or commission would suffer irretrievably if enforcement and policy-making were completely divorced. If a rule is simple in its form, and easily understandable in its application, its enforcement may be left to the courts by prohibition and punishment. But business and industry are no longer simple, and the rules required for their control are exceedingly complicated; they are no longer rules, indeed, but codes of regulation, as ramified as the business they regulate. Administration, therefore, no longer entails mere prohibition, but the sympathetic understanding of complicated business facts, uniformity of approach, and a constant time-consuming supervisory interest. These are the minimum demands of business itself. And successful administration in the narrow fields of social and economic enterprise entrusted to the administrative agencies requires in addition sensitive awareness of the legislative intent, a keen recognition of the sources of abuse and evasion against which the legislation was aimed, and a constant zeal for justice and the public welfare. To require that the rules and regulations under the Securities Exchange Act regarding the solicitation of proxies should be drafted by one agency and interpreted by another is to deprive those who are subject to regulation of the thought, the experience, and the understanding of those who know the most about the rules—the draftsmen. If we concede, as I think we must, that the implementation of statutes by rules requires the aid of experts, it seems to me clear beyond question that those same experts are alone qualified to implement the policy expressed in the rules. Conflict, waste, and inefficiency must attend any separation of powers. While the current attack on the blending of functions undoubtedly stems in part from those who are sincerely concerned with the perfection of the administrative process as an instrument of public welfare, care must be taken to discount the fulminations of those whose real motive springs from antagonism to all public regulation. To them it is easy to answer that they come too late; but we must not let them cloud the issue.
And finally what I have said must surely indicate that within the administrative there are already available numerous and adequate protective devices against the possible abuses of combined powers. So far at least as our Commission is concerned, trial examiners are wholly independent of the trial attorneys and are subject directly to the Commission. Trial attorneys have no contact with the Commission in contested cases, and in no way are permitted to shape the final decision otherwise than by evidence included in the record. The Opinion Section in the General Counsel’s office is entirely separate from both the staff of trial examiners and the trial attorneys. Trial examiners, it is true, are paid from the Commission’s budget; but so are the budgeting and general servicing of the Federal judiciary handled by the Department of Justice. So far as I know, no one has yet intimated that this control has resulted in domination of the courts by the executive. The trial examiner and the trial attorney are both appointed by the same group of men—the Commissioners; but does this make their independence and integrity more subject to question than those of the District Attorney and judge elected to office simultaneously on the same political party platform? On behalf of the trial examiners I resent the suggestion that they are less honest than other judges.

In the second place, every order of the Commission must be supported by appropriate findings of fact, and reasons for every determination must be formulated in a Commission opinion. Arbitrary action, or even patently erroneous action, is not likely to overcome the power of the balance wheel of enforced publicity.

Thirdly, it should not be forgotten that no governmental agency can long exist if its basic policy, as expressed in both enforcement and adjudication, operates in a manner contrary to the public interest. Businessmen are by no means an inarticulate group; unfair or unreasonable practice is not likely to continue long.

And lastly, it is of the greatest significance that most of the newer administrative agencies today are independent tribunals, almost completely free from interference by members of the executive and legislative departments. The tradition of independence, we may at least hope, will develop rather than deteriorate with the passage of time. And with the tradition of independence there is developing in the government today what Veblen has called the “instinct of workmanship”—an attitude that, more than rules or functional safeguards, affords assurance of informed and balanced judgments. The “ultimate protection,” as Professor Frankfurter has pointed out, “is to be found in ourselves, our zeal for liberty, our respect for one another and for the common good”. Frankfurter, The Public and its Government, page 159.

ELMER A. SMITH
General Attorney for Illinois Central Railroad

President Arant, Ladies and Gentlemen: It is an old saying that happy is the country that has no history. The Interstate Commerce Commission has been fortunate in that it has so conducted the hearings before it during its fifty-one years of life that the Supreme Court in only two or three cases has had occasion to find that the Commission’s procedure resulted in a denial of procedural due process.

It is not too much to say that the kind of hearing the Commission has sought to give during these fifty-one years reflects the kind of hearing that the Commission’s first chairman, Judge Cooley of Michigan, thought it ought to give. Perhaps after all Judge Cooley’s claim to
enduring fame lies in the fact that he as the Commission's first chairman laid the foundations of the Commission's work and thus really contributed to the growth of American administrative law.

The Commission's approach to procedural due process has doubtless reflected the fact that the Commission in almost all its cases acts as a judge between private interests. This is a characteristic of the cases before the Commission that should not be overlooked. In almost all cases the Commission has on one side the railroads and on the other the shippers or localities or commercial associations. In most cases the parties are represented by lawyers. Thus we have not had the questions now before us arising out of the fact that in many instances the staff of an administrative tribunal investigates, prosecutes, briefs and argues before the tribunal itself.

It may be that it was the adversary nature of the cases before the Commission that gave rise to the expression of the Supreme Court (Inter. Com. Comm. v. C. R. I. & P. Ry. Co., 218 U.S. 88, 30 S.Ct. 651, 54 L.Ed. 946) that from whatever standpoint the powers of the Commission may be viewed, they touch many interests and have great consequences, and they are expected to be exercised in the coldest neutrality.

But surely what is here said has equal application to any administrative tribunal that passes upon disputed questions, even though such questions be new and novel ones in the realm of the law.

There isn't any doubt that the Commission's reputation today is due in large measure to the manner in which it conducts its hearings. The rules of pleading are of the simplest. The Commission said in its first annual report, and undoubtedly Judge Cooley wrote it, that it was the Commission's desire that practice and proceedings before it should be in the simplest form possible consistent with justice. Questions respecting evidence infrequently arise. The Commission has pointed out that it could not conduct its proceedings if the hearsay rule were strictly followed. My experience is that the Commission in matters of evidence undertakes fairly to consider whether the evidence, to use the language of the Supreme Court in the Consolidated Edison Company case, has a rational probative force. The Supreme Court has said that if any party believes that hearsay evidence is really objectionable, proper objection should be made. Spiller v. A. T. & S. F. Ry. Co., 253 U.S. 117, 40 S.Ct. 466, 64 L.Ed. 810.

It would seem that possibly the Commission is justified in relaxing the hearsay rule to a greater extent than those tribunals which do not deal to the extent that the Commission does with statistics and figures taken from reports and records. For example, it might well be that in a case involving a labor dispute, where personal animosities and prejudices are more likely to arise, the hearsay rule could not in fairness to the parties be relaxed to the extent that it is before the Commission.

An example of such a situation is found in the recent decision of the Circuit Court of Appeals in National Labor Relations Board v. Union Pacific Stages, 9 Cir., 99 F.2d 153. See also the decision of Associate Justice Stephens in Tri-State Broadcasting Co. v. F. C. C., United States Court of Appeals for the District of Columbia, 68 App.D.C. 292, 96 F.2d 564.

And then we have the human factor. In the Commission's long life it has built up a personnel that for the most part is efficient and expert. The examiners of course differ in their capacities, their balance, and their judgment, yet on the whole, the personnel of the Commission and its staff and its reputation for fairness and thoroughness justify the views that have recently been expressed, if I may quote Dean Landis in his recent book on "The Administrative Process," that such a reputation attaching to a particular agency seeps through to the judges and affects them in their treatment of its decisions. See also Making Administrative Action Safe, by Professor J. D. Masters, Amer. Bar Ass'n Journal, October, 1938, page 837.

I have appeared and tried a great
many cases before the Commission and have followed many of them into the courts. I do not know of any case in which I thought that there had been a denial of a fair hearing. The fact of the matter is that the Supreme Court has reversed the Commission only twice because of a lack of procedural due process. You are all familiar with the Orient Division case, [U. S. v. Abilene & So. Ry. Co.], 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016, in which the court set aside an order of the Commission because it rested in part upon data taken from the annual reports filed with the Commission but which were not formally put in evidence and to which attention was not otherwise specifically called.

In the Western Grain case, [Atchison, T. & S. F. R. Co. v. U. S.], 284 U.S. 248, 52 S.Ct. 146, 76 L.Ed. 273, the court found that the Commission had denied to the railroads procedural due process in refusing to grant them a rehearing in a very important case, the record in which had been closed for some considerable time before the Commission had entered its decision.

It is true that there are a great many cases in which there are dicta regarding the requisites of a full hearing before the Commission. I refer to only two of them: the Baird case [Interstate Commerce Comm. v. Baird], 194 U.S. 25, 24 S.Ct. 563, 48 L.Ed. 860, which pointed out that the Commission should not be too narrowly constrained by technical rules as to the admissibility of proof, and the Louisville & Nashville R. R. Co. case, [Interstate Commerce Comm. v. Louisville & N. R. Co.], 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431, the language in which has almost become a classic, to the effect that the parties must be fully apprised of the evidence submitted and must be given an opportunity to cross-examine witnesses, and offer evidence in explanation or rebuttal.

Not infrequently the hearings are too long, but I think that this is one of the reasons why the Commission stands well in the eyes of those who are most familiar with its work. The questions presented are sometimes extremely complicated, involving a thousand and one competing interests. The stock example is the Grain case in which the record stretched to well over 100,000 pages. The Supreme Court itself has said that the prospect that a hearing may be a long one is no justification for its denial if justice requires it. Western Grain case, 284 U.S. 248, page 262, 52 S.Ct. 146, 150, 76 L.Ed. 273. See also Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093.

But the result is that no interested parties leave the hearings feeling that they did not have an opportunity of explaining their own interests, and they may have been selfish interests, to the Commission.

Mr. Commissioner Eastman recently gave expression to a reasonable approach to these questions. He said that we can do a good deal to shorten and simplify procedure, but that we cannot avoid it, that on the whole, notwithstanding this vexation, he believed it is well that this is so, that in the long run it is the only sure protection against arbitrary, or unprincipled, or unjust action, and that if a tribunal has to tell why it does things and can point to a record which supports its action, it cannot go far wrong and survive.

The Supreme Court has just pointed out (Morgan v. United States, 304 U.S. 1, page 20, 58 S.Ct. 773, 777, 999, 82 L.Ed. 1129) that the requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. This brings up the form and the fairness in which the written reports of the Commission are cast. A casual examination of the Commission's decisions will show the patience, time, and care that have been put upon them by the Commission's staff and by the Commission itself. It is true that in some cases the Supreme Court has admonished the Commission as it has the lower courts that complete statements showing the grounds upon which the determinations rest are necessary. You
will recall that in two cases the orders of
the Commission were set aside because
of a lack of essential findings. Florida v.
United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291, intra-state rates on
logs, and United States v. Baltimore &
O. R. Co., 293 U.S. 454, 55 S.Ct. 268,
79 L.Ed. 587, power reverse gears on
engines. But generally speaking the de-
cisions of the Commission show the
grounds upon which their determinations
rest.

In one case (Baltimore & O. R. Co.
v. United States, D.C., 5 F.Supp. 929)
a three-judge court in a unanimous deci-
sion set aside the Commission's order
requiring power reverse gears on en-
gines because of the failure of the Com-
mission, as shown by its report, to con-
sider fairly all the pertinent testimony—
not to pick out some of the facts, but to
weigh fairly and conscientiously all of
them. The decision was sustained on a
somewhat narrower ground in the Su-
preme Court (293 U.S. 454, 55 S.Ct.
268, 79 L.Ed. 587)—on the ground that
the findings were not sufficient. I
thought of this decision when I read a
very recent decision of the Circuit Court
of Appeals in a Labor Board case. Na-
tional Labor Relations Board v. Union
Pacific Stages, 9 Cir., 99 F.2d 153. Here
an order was set aside because of the
Board's failure to consider all the evi-
dence. The Court said it did not con-
strue the language in the Act providing
that the findings of the Board as to facts
if supported by evidence shall be con-
clusive, as compelling the acceptance of
findings arrived at by accepting part of
the evidence and totally disregarding oth-
er convincing evidence.

I realize how difficult it is for a person
who is not familiar with all the facts al-
ways to draw the right conclusions from
a reported case, but I do feel that these
two decisions themselves bring out one
of the problems that must be faced fairly
ly and squarely by any administrative
tribunal. There must not only be a
fair hearing before the tribunal but there
must be a fair, impartial, and com-
plete consideration of all the evidence.

This does not mean, as the Supreme
Court has pointed out, that the Board
must recite all the evidence.

The Commission is also to be com-
mended I think for developing a tech-
nique in its procedure that has met with
the approval of parties who appear be-
fore the Commission. The procedure
that the Commission has worked out in
this respect has received implied ap-
proval of the Supreme Court in recent
cases. Morgan v. United States, 304
U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129;
National Labor Board v. Mackay R. &
Teleg. Co., 304 U.S. 333, 58 S.Ct. 904,
82 L.Ed. 1381. As you all know, very
few cases before the Commission are
heard by the commissioners themselves;
they are heard by examiners who make
tentative reports. The parties may ex-
cept to these reports and replies to excep-
tions may be filed. When the case comes
to the Commission, therefore, the issues
are narrowed and the arguments directed
to specific findings and conclusions in the
proposed reports.

There is a rather novel procedure now
under the Motor Carriers Act, under
which these proposed reports become
final if no exceptions are filed by
the parties, and that the Commission itself
does not state it.

Chief Justice Hughes in the first de-
cision in the Morgan case, 298 U.S. 468,
56 S.Ct. 906, 80 L.Ed. 1288, said that
the one who decides shall be bound in
good conscience to consider the evidence,
to be guided by that alone, and to reach
his conclusion uninfluenced by extrane-
ous considerations which in other fields
might have play in determining purely
executive action—"does not preclude
practicable administrative procedure in
obtaining the aid of assistants in the de-
partment. Assistants may prosecute in-
quiries. Evidence may be taken by
an examiner. Evidence thus taken may be
sifted and analyzed by competent sub-
ordinates. Argument may be oral or
written. The requirements are not tech-
nical. But there must be a hearing in a
substantial sense. And to give the sub-
stance of a hearing, which is for the pur-
pose of making determinations upon evi-
dence, the officer who makes the deter-
minations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

Pages 480, 481, 482, 56 S.Ct. page 911.

It is a fair statement that the Interstate Commerce Commission follows the principles herein announced. A world of detail work is done by its staff, but in the end we have the mind of the Commission on the issues presented.

There are cases in which the Commission's staff investigates the facts under the direction of a bureau of the Commission, presents the evidence, and argues the cases before the Commission. I believe it is a fair statement that in these cases the Commission consciously or unconsciously is inclined to give very great weight to the arguments of its own staff. I do not ask you to take my word for this, but I call your attention to the recent decision in Freight Forwarding Investigation, 229 I.C.C. 201, a decision that very largely reflects the work of the Commission's staff in developing the facts. Mr. Commissioner Eastman's dissenting opinion shows to my mind some of the fallacies urged upon the Commission by its own staff and adopted by the Commission. I should state, however, that there appeared in this particular proceeding counsel for the railroad companies, for the forwarders, and for the shippers.

Perhaps one way out may be the plan announced just a few day ago by the Civil Aeronautical Authority in which the Authority undertakes to achieve a separation of the functions of prosecutor and judge. It has set up an Economic Compliance Division which will have the duty of acting as advocate or prosecutor in behalf of the public interest in all cases before the Authority. While the Division will necessarily be responsible to the five-man Authority, the Authority will not undertake to interfere with or control the action of the Division but will leave it free to make its own contentions on behalf of the public interest.

I have been much interested in what has heretofore been said because it appears that a similar plan of organization has already been put into effect in the other administrative tribunals.

It seems to me, however, that there ought to be a further condition and that is that if the Division of the tribunal is free to make its own contentions on behalf of the public interest, the tribunal itself should be freed from any contact with its investigating and prosecuting arm in the consideration that the tribunal itself gives to the case, in the conclusions which it reaches, and the report which it writes.

This plan carries out the thought that Mr. Commissioner Aitchison of the Interstate Commerce Commission expressed in a recent address on "Reforming the Administrative Process" (address delivered at the annual convention of the Association of Practitioners Before the Interstate Commerce Commission, held in Pittsburgh, October 6, 1938, October, 1938 issue of I. C. C. Practitioners' Journal, page 25). He considered the tendencies in administrative action which are the subject of current-day criticism, including the confusion in rate-making, investigation, prosecution, and the functions of the judges, and said that every one of the tendencies cited was within the power of the offending agency to avoid, without additional legislation. And he made this significant statement (page 30): "And the prophecy may be ventured that, with the aid of existing powers of judicial review, public opinion and the pride of every administrative agency in having its determinations sustained will suffice to bring about any needed correction."

This has been touched upon by the preceding speaker but I am giving you my views from the standpoint of a person who is construing an administrative act. A great many questions that arise under the act are never passed on by the Commission in its decided reports.

Here let me say that entirely too much time has been devoted by students of the law to judicial review of administrative decisions and not half enough time
to the very problems we are considering here today and which in the end are of more practical importance. So far as the Commission is concerned, out of the hundreds of cases that it decides every year a bare handful are taken to the courts. We as lawyers ought to devote more time to what an administrative tribunal does and how it does it. That the tide has turned is I think shown by Professor Sharfman’s epochal work on the Interstate Commerce Commission.

Mr. Felix Frankfurter has recently quoted a sentence from Judge Learned Hand that after all the requirement of due process is merely the embodiment of the English sporting idea of fair play. (Mr. Justice Holmes, by Felix Frankfurter). The Chief Justice in the last decision in Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129, used this same phrase: “the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play” (pages 14, 15, 58 S.Ct. page 775).

It does not seem to me that it would be a difficult matter for any administrative tribunal to determine whether under the facts in any case there has been this rudimentary requirement of fair play. I think that any lawyer before an administrative tribunal at the conclusion of the case, if he considers the problem as dispassionately as he can, can himself determine whether there has been procedural due process, and whether the whole approach of the Commission to the problem before it and the decision itself reflect the elements of fair play.

Of course in the last analysis it is the force of public opinion that will determine whether under the facts in any case there has been this rudimentary requirement of fair play. I think the Interstate Commerce Commission has justified itself, in the eyes of those who appear before them and who come in actual contact with their work and in the eyes of the public at large. Here again I do not ask you to take my opinion but the opinion of the shippers of the country who have risen to the defense of the Commission on several recent occasions, the last one when a committee appointed by the President suggested that the Commission be dismembered and many of its functions divided among the executive departments. There is a winning and a losing side of course in every case that the Commission decides, but from the shippers’ standpoint the Commission stands as a check on the power that the railroads would otherwise possess.

It is clear that under present-day conditions administrative tribunals are necessary instruments of a democracy and that unless these economic conflicts in a complicated social structure can be solved by some rule of law, there may be no alternative except recourse to arbitrary power. An administrative body can make itself a real servant of a democratic way of life.

It was said of Judge Cooley that he had made the Commission what its creators never contemplated—a tribunal of justice in a field and for a class of questions where all was chaos before. There isn’t any doubt in my mind that this can be done for other classes of questions involving economic disputes and social relationships if the administrative tribunals can bring to themselves the confidence of those who appear before them and the public at large.

Perhaps it may not be out of place to refer to some views that have recently been expressed on this subject. Mr. Alvin Johnson, Professor of Economics at Yale University, in the current number of The Yale Review, after paying a compliment to the administration of the Labor Board Act goes on to say however that the Act itself presents a color of partiality through failing to set apart the function of investigation and of prosecution from the function of deciding cases at issue, that we have the scandal of witnessing an even boxing match between a government organ and a big industry.

Professor Gardner of the Harvard Law School in a recent review of “The Administrative Process” by Dean Landis, suggests that in some of the things there said we have a re-assertion of the antique conception of royal power. That
this conception of royal power has been advocated on behalf of the commissions is shown by the decisions of the courts. It is only necessary to refer to two of them. In the well-known Louisville & Nashville R. R. Co. case, [Interstate Commerce Commission v. Louisville & N. R. Co.], 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431, it was argued on behalf of the government that where the Interstate Commerce Commission expresses the opinion that a rate is unreasonable, an order based on such an opinion is conclusive and can not be set aside even if the finding is wholly without substantial evidence to support it. I think this shows how far the zeal of the government to win a case will carry it. The Supreme Court, speaking through Mr. Justice Lamar, refused to endow the Commission with any such royal power. But substantially the same contention was more recently made by the Federal Communications Commission when it urged that all it had to do to give binding effect to its order was to make the stark finding one way or the other that public convenience and necessity would be served. The Court said that no commission exercising the judicial function ought to render a decision without knowing the grounds therefor, and that a statement of these grounds must necessarily be drawn from the facts found. The order of the Federal Communications Commission was upheld, but the case is significant as indicating the argument advanced on behalf of the Communications Commission. Missouri Broadcasting Corp. v. F. C. C., United States Court of Appeals for the District of Columbia, 68 App.D.C. 154, 94 F.2d 623. See also Saginaw Co. v. F. C. C., 68 App.D.C. 282, 96 F.2d 554, 555.

Perhaps these newer administrative tribunals could have learned much had they given some time and thought to procedure before the Interstate Commerce Commission, its own decisions touching that procedure, and the decisions of the courts reviewing orders of the Interstate Commerce Commission. I could never understand, for example, upon what theory the National Bituminous Coal Commission assumed that it could fix coal prices without giving the man who produced the coal or the consumer who paid for it a hearing.

What Messrs. Johnson and Gardner have said may well be taken to be straws in the wind, and to suggest to administrative tribunals from the oldest to the youngest that they can establish themselves in the Nation's confidence only by following the Anglo-Saxon tradition of fair play.

RALPH HORWEEN
Formerly associated with the Petroleum Administration

President Arant, Ladies and Gentlemen: I warned Dean Arant that the subject I was to speak on was not directly in point to the very important questions which you have been discussing here today. Nevertheless he suggested that you might be interested in, if not entertained by a recital of a few of the episodes which occurred during the building up of the first federal administrative agency in connection with the oil industry which is functioning today.

Most of the administrative work in the oil industry is done by the state administrative bodies in the oil producing states, but not all the oil producing states have administrative bodies, and that is the trouble.

One of the reasons I think you may be interested in this subject matter is that, perhaps, sooner or later, if the problem is ever attacked in a comprehensive way, and settled on a national basis, it can only be done by a federal administrative body with ample powers under a statute.

In tracing this bit of dramatic history, however, I do not think you will get the most out of it without a little background of the oil industry and the
complexities of the problems which arose.

Oil is irreplaceable. Our present known reserves, recoverable at approximate present day costs, would last us for twelve to fifteen years, at the current rate of production,—about one billion barrels per year. We have, roughly, 25 per cent to 30 per cent of the world’s known reserves, and produce 62 per cent of all the oil produced in the world.

There are a few inexorable laws governing the accumulation and production of oil. Crude oil is found in sedimentary rocks of very ancient geologic basins. It is always associated with salt water. The sedimentary deposits on the floor of these basins are arranged in alternate layers consisting of porous sandstones or limestones (called reservoir rocks or oil sands) and impervious shales (called cap rocks). Oil accumulates where foldings or other non-conformities create a dome or other form of trap, but it did not originate there. Oil and gas probably originated in old seabeds, and after generating high pressures, migrated through the porous rocks or sands until the whole mixture was trapped in an anticline, or dome, or fault structure under the impervious cap rock. Sometimes there is a free gas cap. The greater the pressure in the reservoir the greater the amount of gas which is held in solution in the oil. The oil is not in a lake or a river, but occupies the spaces in the porous sands, in association with gas. These accumulations are known to occur from a few hundred feet to almost three miles below the surface. How much deeper they are, no one knows.

Of course, actual geological conditions are very complex with complicated foldings, faults and other non-conformities. The productive sands vary in thickness; there may be several producing sands in the same structure. Porosity and the oil bearing capacity of the sands vary tremendously. Individual pools range in size from very small ones to the gigantic East Texas field which has an area of some 130,000 producing acres, and an estimated oil content of six billion barrels, of which more than one billion has already been extracted.

The gas, oil and water in the reservoir are confined under pressure in a state of equilibrium; the natural pressure in the reservoir, or what is known as reservoir energy, is stored in the solution of gas in the oil, in the free gas under pressure, and in the water pressing against the oil on the flanks of the structure.

The production of oil is dependent upon the simple principle of creating a point of lowered pressure in the reservoir. When the well penetrates the cap rock, the pressure equilibrium is disturbed. The reservoir becomes in reality a gas and hydraulic engine forcing the liquids and gases to move through the pores of the sands to the point of lowered pressure at the well bore. The lowered pressure permits gas in the oil to expand and comes out of solution, just exactly as the gas escapes from charged soda water when you release the pressure by taking the cap off the bottle. This expansion of the gas in solution, together with the expansive force of the free gas and the pressure of the water against the flanks, drives the oil through the rocks to the well and up to the surface. The gas which is held in the oil by the pressures is the prime motive force for the extraction of oil from the reservoir.

In flush fields, where the natural pressure in the reservoir is high enough, the mere opening of the well valve is sufficient to cause migration to the well and to lift the oil to the surface. These are the gushers. When the pressure has been depleted, the lifting of oil to the surface by pumps creates the necessary pressure differential to cause the migration of free oil to the bottom of the well.

Besides furnishing motive power, the gas in solution in the oil performs another vital function. It makes the oil lighter, less viscous and more fluid, so that it can permeate through the pores of the sands to the well.

As the pressure in the reservoir declines, more dissolved gas comes out of
the oil, leaving it thicker and increasingly difficult to move. When pressures decline to a certain point, there will be so little gas left in solution that the oil clings to the sands and can never be recovered, except by very expensive methods.

The total reservoir energy and the total volume of oil and gas confined in any oil pool are definitely limited. The location of the reservoir has no relationship whatsoever to the lines of property ownership on the surface. However, the drainage of oil and gas and the depletion of the reservoir energy through wells drilled into the common reservoir directly control the total amount of oil which can be recovered, and determine the total amount of reservoir energy which can be used to produce oil from the reservoir.

Oil in a pool is never exhausted. The gas energy is exhausted and the reservoir is abandoned.

The amount of ultimate recovery from any oil pool depends primarily upon the use and maintenance of reservoir gas pressures, not only to furnish the energy necessary to raise the oil, but also to keep the oil in a sufficiently fluid condition to get it out of the sands at all. Wide open flow, or too rapid flow, has this effect: Excessive amounts of gas are released, which quickly depletes the reservoir pressure; dissolved gas leaves the oil; the oil then becomes thicker and tends to remain where it lies in the formation; oil moves out through the well faster than it can be replaced by oil farther away from the well, and salt water (more fluid than oil), rushes into this low pressure area, drowning the well and blocking off other oil from reaching it. This is known as "channelling" or "coning."

The important legal factors are the leasing system and the "law of capture." Because of the hazardous and speculative character of finding and producing oil, the operator does not usually own the fee, but acquires the land under a lease by which he gets only the right to explore, drill and produce oil, in consideration of his agreement to pay the lessor a royalty when, as and if oil is produced. Rarely is the surface over an oil pool held by one or even a few owners or lessees. Even though one interest may hold a large part of the surface under lease, his acreage is usually checkerboarded over the pool. The ownership of the royalty interest is almost invariably held by a large number of individuals.

Very early in the game the courts held that, since the real consideration for the lessor having leased his property was the royalty to be paid out of the production of oil, the lessor (or the royalty owner if the lessor had transferred his royalty interest) could compel the lessee to drill and produce at least as rapidly as other producers in the same pool, in order to protect the leased land from drainage. The penalty was forfeiture for failure to live up to the implied covenants of diligent operation.

The second legal factor is the so-called "law of capture." It is briefly this: A producer may drill as many wells as he pleases and may take and keep all the oil and gas which he can produce from his wells, regardless of whether he wastefully blows gas into the air, drains oil and gas from another man's property or uses more than his share of the reservoir energy in the entire pool; the only recourse of other surface owners in the same pool to protect their properties against drainage and destruction of reservoir energy is to drill offset wells and produce in like manner, in the hope of setting up counteracting drainage. The cost of drilling such superfluous wells, the waste of oil and gas, the plundering of reservoir energy, and the consequent destruction of the correlative property rights of all the co-owners in the common pool are completely ignored by this primitive dogma "go thou and do likewise."

This principle was first laid down by the courts of Pennsylvania in the early days. Although there was ample common law precedent for a rule of law which would protect the correlative rights of land owners (analogous to the principle of shoring up), so little was known of the nature of oil and gas in those days that the courts conjured up a
Although adopted in deep ignorance of the physical laws and engineering principles applicable to oil and gas, the law of capture became so firmly established by constant judicial repetition that the courts speak of it as a “vested property right.” Unbelievable as it may seem, this shibboleth has been held responsible for the colossal waste and for the periodic demoralization in the oil industry.

The basis of the doctrine is supposedly the impossibility of obtaining reasonably accurate knowledge of the sub-surface movements of oil and gas. Nevertheless, when the lessor sued for damages or forfeiture, claiming breach of implied covenants of diligence, the courts have not hesitated to receive such evidence as was available to show the amount of drainage sustained by the lessor because of the lessee’s failure to protect against drainage.

Now the economic factors: There is a large initial investment in the drilling of a well. The cost of operating a well in a flush pool is negligible—merely the opening of a valve. A low price for oil, strange as it may seem, results in increased production—the producer striving for the same number of dollars to meet his overhead costs, regardless of the number of barrels of oil. Because of the cumulative effect of the leasing system, the law of capture and the physical factors, it is always to the greatest economic advantage for an individual operator to drill more wells and to produce his wells at a faster rate than his neighbors who also draw from the same common reservoir; because he can increase the total amount of oil which he can drain from the common pool at their expense; and he can decrease his costs of production per barrel by producing a greater volume of oil under conditions of flush production. He also gets an advantage over his neighbors by using more than his just share of the reservoir energy. The one who flows his wells at the most rapid rate sets the pace for the other owners in the pool, because they must do likewise in order to prevent drainage, loss of ultimate recovery and forfeiture. It is a run on the bank, except that each depositor, in addition to trying to get his own money out, does his best to get the other fellow’s as well; all of them must sell their oil as fast as it is produced, regardless of the demand or the price; no one can reduce his production unless every other producer in the same pool does likewise. If some sensible producer should want to produce more slowly, he would not only have his oil drained away by the others (and with no recourse), but he would be in constant danger of forfeiture by his lessor. Oil from newly found flush fields of low production cost was constantly offered at progressively lower prices, and wiped out of the market the wells of settled production until these new flush fields literally “blew their heads off,” and went on the pump. The resulting waste was almost incalculable, not only in the flush fields, but because of the premature abandonment of stripper wells, and 40 per cent of our reserves are under these stripper wells of settled production. Wells were located, not with reference to position on the structure, not for purposes of efficient drainage, but by the purely accidental location of property lines. Wells bottomed in the gas cap were blowing gas to high heaven in the hope of getting some oil out, and wells drilled in the oil belt were flowed wide open in the mad race to drain the other fellow. It is safe to say that in many of our great fields which were developed in this way, only about 10 per cent to 15 per cent of the oil content was recovered. In the absence of legislative protection, operators were compelled to drill thousands of unnecessary offset wells under threat of drainage and forfeiture of their leases. Even today, about $100,000,000 is the annual bill for unnecessary offset wells. Based on our annual production of one billion barrels, this is a production tax of 10 per cent for the privilege of worshipping the law of capture. The consumer will pay it, sooner or later.

Of course, the obvious answer is that
the pool is the economic unit, and should be operated as such, with a division of the oil, after it is brought up, in proportion to the oil in place under each holding. This has been done in this country in a few fields by agreement, and is the uniform practice in the big fields in the Near East and elsewhere. Wells are drilled for efficient drainage, and for no other reason. The gas pressure is conserved by proper rates of withdrawal; the wells flow naturally for almost the entire life of the field, and from two to four times as much oil is recovered at one-half to one-third of the cost.

This is the intelligent way of assuring to each owner his just share, based on modern engineering knowledge. Under the law of capture, he can only try to get his just share by drilling offset wells and producing as fast as his neighbor,—at a terrific cost, in the waste of natural resources, and expense of utterly unnecessary wells.

New Mexico—Oklahoma

Of course the application of modern engineering in repressuring or reflooding operations in order to increase the amount of ultimate recovery is impossible except in a unitized operation. Oklahoma enacted the first comprehensive conservation statute in 1915, 52 Okl.St.Ann. § 271 et seq. This legislation prohibited waste in the production of oil and empowered the Corporation Commission to make the necessary orders to prevent waste by the regulation of production methods, by curtailing total production to market demand, and compelling ratable taking by owners in a common pool. The statute defined waste to mean physical waste both below ground and above ground, and also economic waste arising from production in excess of storage and transportation facilities and in excess of market demand. Things went along fairly smoothly until the orgy of the Oklahoma City field in 1930, coupled with the immense uncontrolled production in the East Texas field in the same year, broke the price of crude oil to 25 cents or 30 cents a barrel. There was an interlude of martial law in which the governor shut down all the wells. In the meantime the Champlin case [Champlin Refining Co. v. Corp. Comm.], 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403 reached the Supreme Court of the United States and the power of the Corporation Commission was upheld.

Texas had a similar law with the exception, however, that the statute, while expressly authorizing the Railroad Commission to curtail and prorate production, contained the proviso that waste should not be construed to mean economic waste. The Commission employed its powers very sparingly until there was a sudden cry for conservation when the excess production of the East Texas field cracked the price of crude oil to 10 cents a barrel in 1930 and 1931.

The history of the proration of oil production in Texas by the Railroad Commission is a fascinating story in administrative law. It illustrates the tremendous powers and influence of such administrative body and presents an illuminating picture of the Commission's conflict with the Federal courts and their final reconciliation.

For two years the Federal courts struck down order after order of the Commission, without, however, holding the statute to be invalid. No sooner was one order enjoined than the Commission held new hearings, recorded more testimony, made new findings and new orders. By the summer of 1931, production in this great new field alone reached one million barrels a day. Reservoir pressures were dropping in the traditional fashion; the freebooters flowed their wells wide open to steal their neighbor's oil, the law of capture reigned supreme, and the legitimate producers were tempted to operate in the same way in self defense, and crude oil was selling for 10 cents a barrel,—less than the price of drinking water. The engineers testified almost unanimously that withdrawals in excess of 400,000 barrels a day would plunder the field by reducing pressures prematurely and permitting the irregular intrusion of salt water, which in turn
would reduce the ultimate recovery from the field by colossal amounts. In August, 1931, immediately after the Federal courts enjoined an order of the Commission, Governor Sterling declared martial law and ordered the troops to shut in all the wells in the field. The Federal courts enjoined the Governor and his Adjutant General. Pending appeal to the Supreme Court, however, the Governor left the troops in the field as peace officers, subject to the orders of the Commission, and not as soldiers subject to the orders of the Chief Executive. In December, 1932, the Supreme Court affirmed the injunction.

Under an amended statute, the Commission finally made its first proration order for the East Texas field that was sustained by the Federal court in April, 1933.

During all this period, however, and also after the date of the first valid order, hot oil production in amounts estimated up to 500,000 barrels per day was coming out of the field. The national price-structure for oil was based on East Texas crude at 10 cents to 25 cents a barrel. Quite apart from the waste in the East Texas field itself, the economic cost was still greater. Older fields either had to lose their markets or open wide to meet this kind of competition. Oklahoma could not produce rationally if Texas ran wild, and as a result, the Oklahoma proration orders could not be enforced. Curtailment, plus 10 cent oil, spelled bankruptcy. The public got cheaper gasoline temporarily—but the cost was yet to be paid.

Then came the NRA legislation, with Section 9 (c), 15 U.S.C.A. § 709 (c).

9(c) provided: The President is authorized to prohibit the shipment in interstate commerce of petroleum or its products produced in violation of state law, with penalties of fine and imprisonment for violation of the statute or regulations issued thereunder. The President, by executive order, did so prohibit, and designated the Secretary of the Interior, as his agent. Regulations under 9(c) were made, and a force of Federal investigators swarmed into the East Tex-
representation. Most of the violators didn’t even bother to get tenders.

The Federal regulations required each producer, each of the 85 refineries in the field, each of the numerous gathering systems and interconnecting pipe line systems to file elaborate reports, and to make records available for inspection. They also provided that each bill-of-lading for interstate shipment must be accompanied by a sworn affidavit that the products tendered were legally produced. The form was designated as Form “O. E.S.” These were soon affectionately known in the field as the “Oh Yeah” affidavits. Thousands of them were solemnly filed with the railroad signed “Harold L. Ickes, Franklin D. Roosevelt” and others, and showing the consignee as “George, the Fifth” and “John D. Rockefeller” and so the game went merrily on.

The field was dotted with hundreds of huge open air storage pits, which were merely earth embankments, holding several hundred thousand barrels. (Best estimates were that some 20 million barrels were stored right in the field in this way.) These bottomless pits were always mysteriously full, no matter how much oil was pumped out to the refineries in the field, and a check-up by Federal agents was revealing that hot oil was run into them by concealed underground connections from hundreds of wells. This, and the fact that the hot oil refiners kept no records, made it impossible to make proof against them without an actual check of their operations. So some of the boys went into the Federal courts and got an injunction against the Federal agents coming on their property, on the grounds that 9(c) was unconstitutional as beyond the commerce power. This was the Panama Refining case [Panama Refining Co. v. Ryan], 293 U. S. 388, 55 S.Ct. 241, 79 L.Ed. 446. The Circuit Court of Appeals reversed, but left the injunction in force pending certiorari to the Supreme Court.

Although thus stymied, the Federal Government tried again to protect the legitimate industry from the competition of stolen oil. The allowable was 28 barrels a day for each well; many hot wells were running 10,000 barrels a day, and the unequal intrusion of salt water was drowning out big sections of the field. The law-abiding producers were about to open up their wells in self-defense unless the theft of their oil was stopped—and East Texas, the world’s largest pool, would have gone the way of so many others.

To bolster up the price of gasoline and as a desperate attempt to stop hot oil, during the spring and summer of 1934 under the authorization of the Petroleum Code there were a series of so-called “buying programs” (the predecessors of the alleged buying programs of the Madison indictments). Under express urging sanction and authority of the Administrator (which meant a command in those days) a group of the larger companies, by agreement, purchased so-called “distress gasoline” from independent refiners who had been deprived of their markets by the flood of bootleg gasoline from East Texas. In the East Texas field, too, the program was carried on by purchases from all the refiners there who would sign the approved form of contract. Some, but not all, signed up. These contracts were in effect a bribe and provided that their gasoline would be purchased at a fat price on condition that they abide by the proration orders of the Texas Railroad Commission, and made the required reports. But the higher price merely brought on increased hot oil production by those who did not sign up. It was like trying to bail out the ocean, and after many thousands of cars of gasoline were purchased over a period of about nine months, the attempt was abandoned.

Stymied again, the Federals, in October, 1934, tried a new scheme. Under the authority of Section 9 (c) a new set of regulations was issued which prohibited any interstate carrier from shipping or accepting for interstate shipment any crude or refined oil from the East Texas field unless the shipment was accompanied by a Federal shipping permit. These were known as Federal tenders. The regulations set up a so-called Federal
Tender Board to hold hearings in the East Texas field and to issue such Federal permits if the applicant demonstrated that the shipment was manufactured out of legally produced oil.

This was administrative law de luxe. The statute did not provide for any method of review; consequently the only remedy available to persons who differed with the Board or its authority was by injunction in the Federal courts. Although the Federals had been enjoined in the Panama case from coming on the properties of the plaintiffs, by this simple expedient the same plaintiffs were compelled to come before the Board with records and testimony to prove the legal origin of their oil if it were to move out of the state—and there was no market available in Texas.

As one of the three members of this administrative body, the scenes are still vivid in my mind. We held forth in a one-story shack, hastily nailed together, in a thickly wooded part of this tremendous field, close to the same building in which the Texas Railroad Commission had its local office and held its hearings for state tenders. We soon learned a few things about administrative law as practiced in Texas. Anyone had a standing to be heard. Picture a room blue with smoke, a rough table at one end, and filled with a dense crowd of producers, drilling rough-necks, oil company scouts, pirates, state investigators and a general crowd of the oil fraternity. The costumes were picturesque. Oil derricks were in sight all over the place. In the hearings for state tenders it was a common occurrence, when an application for a tender was presented, for a dozen people in the crowd to shout that the so-and-so had been accused last year of running hot oil or running out hot gasoline at night and that therefore his present application should be refused. Then the free-for-all argument was on until the local officer of the Texas Railroad Commission would call a halt and make his ruling.

A storm of injunction suits in the Federal courts hit us when it became clear, after the first few hearings, that we were going to stand on two principles: First that the Federal Board was not bound by the finding of the state Board as to the legality of the oil tendered, but would rely on its own investigation as well. (The hot oil group were pretty well identified.) The only penalty provided in the Texas statute for violation of the proration orders was a maximum fine of $1,000 for each offense. Violators, having paid a fine of $1,000 for having run 150,000 barrels of hot oil, applied for a state tender for the shipment (either in the form of crude or refined products), solemnly taking the position that since they had paid the fine there was nothing more illegal about this oil. The state courts actually compelled the Commission by mandamus, to issue tenders. The Federal Board, however, was unable to distinguish between hot oil and the same oil anointed by the payment of $1,000 fine. Federal tenders were refused. Secondly, the Federal Board adopted the so-called co-mingling theory. Due to the millions of barrels of oil stored in open pits with no pedigree (and everyone knew they could not be emptied), it was a simple matter for the hot oil refiners to scramble up, in the figures of their refining operations, a little legal oil with the unpedigreed oil and to obtain state tenders for shipments out of the co-mingled mass. The Federal Board put the burden on the applicant to segregate the legal molecules from the hot molecules in the co-mingled mass. Since no one was able to solve this problem of chemical geneology, the findings were: “Tender refused.”

Then came the decision of the Supreme Court in the Panama Refining case on January 8, 1935. A month later Congress passed the so-called Connolly Hot Oil Act, 15 U.S.C.A. § 715 et seq. A Federal Tender Board still functions in the East Texas field. The field allowable has been held to about 425,000 barrels a day ever since, and by the slow equalized withdrawals, probably a billion barrels of recoverable reserves have been saved from destruction. Hot oil is no more.
President Arant, Ladies and Gentlemen: The question before us is, to what extent is administrative action efficient, and particularly to what extent does it protect private personal and property rights as demanded by constitutional provisions and our general Anglo-American concepts of justice.

It is natural for common law lawyers to test the procedures of administrative agencies by the extent to which they correspond with the practices of the ordinary courts of justice with which they are familiar. Nevertheless a vital difference exists between the two types of bodies. A court of justice is essentially passive, acting only when its jurisdiction is appealed to, undertaking on its own part none of the burden of preparing and presenting the cause, and rendering its decision only on the case as presented to it by the parties litigant. The function of most administrative tribunals is much more dynamic than this. They are not mere substitutes for courts of law. The administrative tribunals are invested by legislative mandate with the positive duty of executing and carrying into effect certain public policies and orders. The National Labor Relations Board is not merely a court to decide disputes between employers and employees. By statute it is empowered to prevent any person from engaging in any unfair labor practice affecting commerce, and the Board itself is the party complainant in proceedings before it. Failure to appreciate this positive dynamic character of administrative law is to miss its very essence and reason for existence.

But administrative tribunals possess a power far greater than that of the ordinary executive agent. They not only investigate and prosecute. They also decide and, in view of the limited court review permissible, with practical finality. In this phase of their functioning they act as courts. There is therefore a mingling, contrary to the principles of the separation of governmental powers, of the executive and judicial functions, and a violation of that ancient precept of the law that no man should be a judge in his own cause. The principle back of these doctrines should not, I believe, lightly be dismissed as outmoded and inapplicable to our present economic and governmental structure. Any individual who has at one and the same time the duty of prosecuting and judging, labors under a psychological handicap which may either dull his zeal as an advocate or warp his judgment as an adjudicator. Many proposals have been made for separation within our administrative organization of the executive and judicial functions. In large administrative bodies, such as N. L. R. B., this may be possible. In the smaller state commissions such a separation of personnel would, however, involve a duplication of effort and an expense that seems impractical. The matter is one, however, to which continuing attention should be given.

In adopting a procedure for the conduct of their business, administrative bodies have been singularly unhampered. Legislatures have often declared that their procedures shall be informal and free from legal technicalities. While it is universally admitted that an individual who is affected in his private right by action of government should at some time in the proceeding have an opportunity to be heard, it is only recently that much attention has been given to the question of just what constitutes this loosely defined "right to a hearing." With that question courts and administrative bodies are today wrestling. May I be so bold as to make a few suggestions?

Analyzed, the so-called "right to a hearing" consists I believe of at least five cardinal primary rights. (1) The party affected by the tribunal's action must have the right to present his own case. (2) The party affected must be advised of, and be given opportunity to
meet the case against him. This is what was decided in the second opinion of the Supreme Court in Morgan v. United States. Whether this notice be given by pleadings as at common law, by the making of oral or written arguments, or by the device of a tentative report to which exceptions may be made, is apparently immaterial. (3) As a corollary to the right of the parties to present evidence and to know the evidence against them comes the third principle, that the administrative tribunal must render its decision solely on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected. Interstate Commerce Comm. v. L. & N. R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431. Only by confining the administrative tribunal to the evidence disclosed to the parties, can the latter be protected in their right to know and meet the case against them. This requirement quite definitely regards the administrative tribunals as of a quasi-judicial character. It should not, however, detract from their duty actively to see that the law is enforced, and for that purpose to use whatever evidence is available, whether presented by the parties to the hearing or not. The dilemma is usually surmounted by having the Commission’s own agents or deputies make investigations and then as witnesses testify concerning what they have discovered. (4) Closely connected with the third principle is the fourth which was declared in the first Morgan decision, (298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288) to the effect that the person who is vested by statute with the duty of deciding, must act on his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision. This requirement, if strictly applied, would paralyze most of our large commissions. The volume of work is such that it is literally impossible for the titular heads themselves personally to decide all controversies coming before their commissions. Fortunately an easy solution of the difficulty lies in statutory authority to examiners or other subordinates within the department to render final decisions with a right of appeal to the Commission itself if desired. (5) Lastly, the administrative board should in all controversial questions render its decision in such a manner that the parties to the proceeding can know how the various issues involved were determined and the reasons for the decision rendered. An order in the words of a statute applicable to any one of a thousand different situations, is not only unfair to the parties, but a dangerous incentive to hasty and ill-considered action by the tribunal itself.

These hasty generalizations are not offered in any dogmatic mood, but merely as foci about which discussion of administrative procedure may center. I am not sanguine that anything but a very general uniformity can be secured. The tasks that the various commissions have imposed on them vary so widely that no one procedure can fit them all, and the procedure of course must be bent to the task, and not the task to the procedure. I am convinced, however, that the time has come for all persons interested in the use of administrative law—administrators, practitioners, academic men—to consider seriously and laboriously the question of what procedures, if any, are common and essential in government through the administrative agency or commission. How can that procedure be both efficient and at the same time protect the private rights of the parties within the orbit of the Commission’s jurisdiction?

There is much inertia in undertaking a task of this magnitude. Practical administrators are primarily interested in performing the task imposed upon them by statutory mandate quickly and efficiently without complication or delay. Procedural requirements are sometimes regarded as unnecessary legalistic obstructions to progress towards the objective they seek to achieve. This view is often expressed by lay writers. In a report of the National Association of Railroad and Utilities Commissioners concerning public service commission pro-
procedure, a professor at Illinois—not a member of the law faculty—is quoted as saying, “The ultimate and only socially justifiable criterion by which the effectiveness of such regulation should be judged is its social consequences. Results are the major consideration. The method by which such results are attained is of secondary or incidental significance—a mere means to an end. No regulatory agency can properly be held accountable for socially desirable results unless it is free in respect to the procedures necessary to secure those results.”

The proponents of an administrative procedure which would omit many of the most significant safeguards against arbitrary action that the common law has thrown about our ordinary courts, usually justify their position by reliance on the highly expert character of the individuals who head and staff our regulatory commissions. It is inferred that ordinary judicial procedures are inapplicable to a personnel which possesses such a superior insight into and such a refined, scientific and professional approach to the extremely difficult and technical problems with which they are confronted. That there is considerable truth in this position when a commission is dealing with routine matters not of immediate pressing concern to the people and capable of fairly definite proof or disproof, I do not deny. I doubt, however, whether such an admission should be made concerning highly controversial social and economic questions in which a great portion of the public having a vital stake, such as those involved in the prescribing of rates for public utilities and in regulating relations between capital and labor. I am somewhat doubtful whether an absolute scientific objectivity can be attributed even to administrative commissions “appointed by law and informed by experience” though they be. Today it is quite common—and salutary—to point out that the judges even of our highest courts are not deities, but only human beings, each with his distinct social and economic preferences and prejudices. Do not the titular heads and the technical staffs of governmental commissions and boards also have their own pretty definite economic and social views? There is need perhaps to caution some of our publicists that they must not commit the error of attributing to our administrative commissions a godlike omniscience of right and wrong which we now see cannot be attributed to the ordinary courts of justice.

What I have just said has no reference to the remarks of any of the speakers who have preceded me, nor is it an attack on administrative tribunals in general, nor on any administrative tribunal in particular. It is simply to combat a view which I have too often heard expressed which regards as unimportant the formulation of an administrative procedure which will preserve for the private individual his right to present his own case, to know the claim against him, and to be advised of the reasons for the decision made concerning him. From meetings like the present one may grow, I hope, a cooperative effort to design an administrative process which will both be efficient in the performance of governmental tasks and at the same time duly regardful of private right. An administrative process of that type is the only one which has any place in our liberal, democratic form of government.
I want to talk about the speakers who preceded me. I am going to start with the last and go up.

I want to take issue right away with Professor Brown on two points. The first point is that too frequently, in dealing with this problem of administrative procedure, dealing with the problem of the criticism of administrative tribunals, we contrast a system of administrative justice with a very ideal system of judicial justice, which all of us know does not exist.

I think, as Mr. Madden and Mr. Lane might bear me out, the problem of the judge as a partisan is a problem that is with us. Anybody who has had to plan the legal strategy of litigating a single issue throughout the country, picks his courts and picks his judges. I don't think we ought to forget those things when we deal with this problem of administrative justice, because that partisanship that judges have revealed is one of the reasons for the existence of this thing called administrative justice. The very fact that the judges too frequently have been partisan on certain issues has led the legislatures to entrust the formulation and the definition of these issues to tribunals other than courts.

In the field of labor law, that was partly the raison d'être for a body like the National Labor Relations Board, not only the desire to acquire expertness, and it has expertness, from which springs its capacity to contribute to the development of the relationships between capital and labor. But loyalties to the ideas embodied in the legislation is also a reason for administrative tribunals. The desire for a Granger viewpoint partly underlay the creation of the I. C. C. as an administrative agency to defend and protect the rights under the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq. Partisanship on the part of the administrative tribunals is thus to be expected. It is there to carry out the provisions of the legislation.

Partisanship or zeal on the part of administrative tribunals in behalf of the rights they are created to protect is as much expected of them as zeal on the part of judges in the defense of that body of rights we are pleased to call our liberties. We would oppose, for example, the appointment of judges who were not partisan to the liberties set forth in the Bill of Rights.

The second point upon which I would take issue with Professor Brown is in regard to the existence of expertness on the part of administrative tribunals as contrasted with courts.

The average judge has for example before him as the current of his business divorce cases, will cases, contract cases. He has to be an expert in innumerable subjects. He doesn't have the opportunity that the people with the administrative agencies have to think and to spend their time day after day, week after week, year after year, in the effort to solve a single problem, which alone makes for expertness.

To take an illustration from the field of public utility regulation, to which Professor Brown referred. The interference of the courts in the administrative effort to establish a rate base other than upon spot reproduction cost has, in my judgment, bedeviled the law of public utilities for the last twenty-five years. A little more humility, a little appreciation of what the problems of public utility regulations were, would I think have led the courts to leave the solution of that problem in hands that were more competent to bring about a solution.

I want to move on to a consideration of some of the features that were brought out by some of the other speakers. The ramifications of this question of what is a fair hearing, what are the requirements of a hearing, seem to me to be immense. The thing that surprises one about it is how little law there is in
existence on the question of what a fair hearing must be. The few cases mentioned by Mr. Smith, the few cases mentioned by the other speakers are, in substance, about all the law that we have had on that subject.

You take the simple problem as to whether or not a hearing needs to precede the adoption of an order or a regulation, that in itself is a very difficult problem. If you believe the courts who tell you day in and day out that rate-making is a legislative function, you can't blame the Bituminous Coal Commission for taking them at their word and saying, "Well, it is a legislative function; as such, no hearing need precede it"—a perfectly rational argument, and yet one that we know is wrong.

I think we should come to the conclusion, as Professor Fuchs suggested, that we should get away from considering this problem in terms of separation of powers, and approach the thing realistically, realizing that administrative functions are not legislative functions, executive functions, quasi-legislative functions, or the like, but that they are administrative functions, and that we have to fashion, just as other systems of justice have fashioned, modes and means of procedure to see that justice is done in that field.

I have very little patience with the terminology that is so frequently present in writing on administrative law, which tries to bring our complicated society under the doctrine which even at the time when Montesquieu developed it was gone. We still go on with the same language, trying, by an analogical method of reasoning that has really very little content, to discover the answer to problems which should be discovered by empiric methods.

The three outstanding problems that were discussed this afternoon raise some of the great problems facing administrative justice. The first of these problems relates to the fact that administrative agencies of a large size, like the Federal Trade Commission, the National Labor Relations Board with 700 men, the SEC with something around 1450 or 1500, handle an enormous amount of work. Mr. Madden has told us that it disposes of about 1200 cases a year. The very fact that there is this enormous amount of work in the hands of these administrative agencies forces the delegation of the function of deciding. That is the thing that worries me as much as my aspect of the entire administrative problem.

Mr. Smith, in his remarks, said one thing you feel about the I. C. C. is that you had a chance to be heard, and that is a very important thing, this feeling that you had a chance to talk to the man who was going to decide your case.

President Buchanan, before he was President, and when he was acting as Chairman of the Judiciary Committee of the House, made this remark: "Next to the importance of doing justice is the belief that justice is being done." You must satisfy that requirement of the individual who comes before an administrative tribunal, that feeling that he wants to talk to the man who is going to decide that case. If he doesn't know who is going to decide that case and if he has his suspicion that it is going to be decided by some two-pence-halfpenny law clerk down the line, you will never get anywhere, in my judgment, with bringing into existence a feeling that justice is being done. But how to work through that problem is a difficult one.

Mr. Lane has sketched for you the procedure whereby a very busy outfit, the Securities and Exchange Commission, tries to dispose of its cases. I see no objection to the principle of delegating the writing of opinions; it must be done, but the delegating of the problem of judging is another story. The framing of the opinion can be left to outside hands. But the man who decides a thing has to have a sense of the record. He may not have to pore over the record as a whole, but he has to know what is in that record, what the issue is, and to reach his own conclusion with reference to it.

In order to attain that objective, it may be necessary to break up and decentralize the functions of some of our admin-
administrative agencies. Here I believe there is a field that deserves much more thorough exploration than it has yet received.

The second important topic of this afternoon, in my judgment, was the position of the trial examiner. I have very deep feelings about the trial examiner. The trial examiner is a very important individual in the whole administrative proceeding. He is the person that you have to rely upon unless you rely upon your own counsel, which you shouldn't do, to tell you what the facts are in that record, to focus the issue.

Moreover, he is the person whose sense of the fitness of things carries the reputation of the administrative agency into community after community. Whether he disposes of his business with dispatch or gives a sense of fairness is important for he is the commission to thousands of individuals. Unfortunately, it is hard to get good men for trial examiners. Two reasons are responsible for that, in my judgment: One is that the job is of a routine character. You are deciding the same thing day after day. Another is the unfortunate fact—and I say unfortunate at this particular time because of the present position taken by some of the law officers of the government that they would like to put their legal help under the civil service—that the Civil Service Commission, not being able to realize that the difference between good and bad lawyers is incapable of determination by an examination of their paper records, lays down the requirement in the Federal Government that you cannot pay trial examiners more than $4,600 a year. That is an example of the Civil Service Commission's sense of astuteness with reference to this very serious problem in administrative law.

Thirdly, a word of this combination of functions. I think the answer to that was made in large measure by Mr. Smith, namely, that the evils of any such combination of functions can be corrected by the administrative agencies themselves. You don't hear that complaint with reference to the I. C. C. and yet in many of the proceedings before the I. C. C., the Commission takes a considerable part in initiating action. You don't hear the complaint very much with reference to proceedings before the Securities and Exchange Commission these days. You heard it at the start because some of the crooks shouted loudly along this line to still any inquiry into their crookedness. But the Commission now has so arranged functional division within the departments themselves that the criticism is avoided. That it exists elsewhere, however, and that it is a serious matter, I have no doubt is true.

When I went to the Federal Trade Commission, I found that the findings of that Commission were, as a matter of practice, drafted by the Commission's attorney in the case, the prosecuting attorney. It seemed to me absolutely wrong that that should be so. True, the Commission exercised an independent judgment before it said, "Issue an order, or do not issue an order," but the findings supporting that order were drafted by the Commission's own attorney who had presented the case. Naturally, he tied up the respondent, so the respondent couldn't move, with the findings he drafted.

Again and again I have seen abuses of a similar nature. But the violations that occur, occur as the result of an inexpert organization within the administrative. Whereas from another standpoint, this combination of functions, as I intimated before, has a very important social bearing. You need to enforce laws, especially when you have and are likely to have changing political conceptions dominant at any particular time.

A party that comes into power wants not only to put through its program as a matter of legislation; it wants to put through its program as a matter of administration. If it is helpless or is sought to be broken as, for example, the National Labor Relations Board was sought to be broken by an utter disregard of all the recognized precedents in the law—I refer to the action of the lower courts who stepped in and enjoined the Board even from holding hearings—when you run into a situation of that type you can't wait for the occurrence of a shift in judge-made law which though it will
eventually come may be slow in doing so. Speaking of the lag in judge-made law, Dicey said, “If legislative law represents the opinion of yesterday rather than today; judge-made law, because of the ages and training of our judges, tends to emulate the law of day before yesterday.”

That time lag in judicial law-making is a serious matter, and that time lag is one of the important factors for trying to bring about a better coordination between enforcement and policy-making.

Finally, I would make one plea. It is this: Advance in the system of administrative procedure will come only, as I see it, from a thorough understanding of the individual administrative units in our government. The time is hardly ripe today for loose generalizations about the subject.

We are today, as I see it, in a period where large portions of our thinking population resent administrative justice because it is something new. Professional people resent, also, the loss of a jurisdiction that theretofore was in the hands of the courts, especially the lawyers and the courts. From resentment grows criticism, but to make that criticism productive, it does seem to me that we must first have thorough understanding.

I was impressed with Mr. Smith’s remarks when he spoke of a tribunal, of which he knew, criticized it but also recognized that the tribunal gave you as fair a guarantee of getting your rights as other tribunals might.

Such criticisms as are launched against administrative tribunals can, as I said before, frequently be launched against the means of administering justice in our courts. I think it is important for us, in our general consideration of this problem, to recognize that here we are at the beginning, historically speaking, of a period because we have only had fifty years of experience with this problem, of a new method of trying to administer justice, and that method criticizes, certainly impliedly criticizes, certain points in which our thinking has been a little too complacent.

One is our accepted belief that the so-called adversary method is the only method of administering justice. In your administrative agencies there is a tendency again and again to get away from the purely adversary means of administering justice, and, because you get away from that method of administering justice, certain of the accepted maxims that are applicable to the adversary system have very little play in this field.

Consequently, to move in our thinking from one field to another without, at the same time, recognizing that the basic implications of the way you seek to bring about justice have shifted, is frequently to fail to understand what is happening within both systems.