

LEGISLATION AND ADMINISTRATION

FEDERAL ADMINISTRATIVE BARS: ADMISSION AND DISBARMENT

J. S. WATERMAN*

I

IT WAS said by Chief Justice Hughes in 1916 that the distinctive legal development of this era is that our activities are largely controlled by federal or state administrative agencies and that as a result a host of controversies as to private rights are no longer decided in courts.¹ In the same year Elihu Root, then President of the American Bar Association, stated that we were entering upon the creation of a body of administrative law different in its machinery, its remedies, and its safeguards, from the old methods of regulation by specific statutes enforced by the courts. He added:

The powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong.²

During the period which has intervened since these statements were made the multiplication of federal administrative agencies, a term used in this article to include executive departments and bureaus, administrative courts, and administrative commissions, has been such as to cause increased alarm to some.³

II

It is not to be expected that parties desiring to protect their rights before administrative agencies, either as petitioners or claimants on the one hand or respondents on the other, should be compelled to appear in person

* Dean of the Law School of the University of Arkansas.

¹ Frankfurter and Davison, *Cases on Administrative Law* vii, 14 (1932). See also Frankfurter and Landis, *The Business of the Supreme Court* 184 (1928); Willoughby, *Judicial Administration* 18 (1929).

² Presidential address, 41 *Rep. Am. Bar Assn.* 355, 368-369 (1916).

³ "The legislation enacted during the first session of the 73d Congress, ending June 16, 1933, represents an advance of federal administrative machinery, on a scale and to an extent never before attempted, into fields not heretofore brought under federal regulation." 58 *Rep. Am. Bar Assn.* 407, 408 (1933); 59 *ibid.* 539 (1934).

for that purpose;⁴ and especially not in those cases in which the government is represented by officials supposedly appointed because of their technical qualifications in the particular field. Therefore what type of persons may represent parties before the varied administrative agencies?

This article will be confined to a consideration of the bars of federal administrative agencies.⁵ Due to the vast number of these federal agencies only a few will be considered, as this article is not a current handbook⁶ on the standards of admission and disbarment of the numerous federal administrative bars.⁷

The privilege to practice before federal administrative agencies is governed by the rules of particular agencies. If a party does not desire to represent himself he must seek a practitioner enrolled in the bar of such an agency or recognized by the agency as one qualified to practice before it.⁸ Whether an administrative agency has the "inherent power"⁹ to control admission and disbarment, as has been alleged to exist in the courts, has perhaps not been answered.

In 1884 Congress enacted legislation pertaining to "departmental practice"¹⁰ before the Secretary of the Treasury and the Secretary of the Interior and empowered them to prescribe rules governing the recognition of agents or attorneys representing claimants. These acts provided that the secretaries may require applicants to show that they are of good moral character and possessed of the necessary qualifications to enable them to render claimants valuable service and otherwise competent to assist the claimants in the presentation of their claims.¹¹

⁴ "In the absence of legislation by Congress, there is probably a right on the part of a claimant to be represented by an agent or attorney in presenting his claim before one of the executive departments." 33 Op. Atty. Gen. 17, 19 (1921). See also *Manning v. French*, 149 Mass. 391, 21 N.E. 945 (1889), dismissed 133 U.S. 186 (1890).

⁵ For the use of this term, see: Pfiffner, *Public Administration* 395 (1935). See also for a discussion of federal administrative bars: Robinson, *Lawyers and Practitioners, A Study in Contrasts*, 21 Am. Bar Assn. J. 277 (1935).

⁶ For a proposal to edit such a handbook see 59 Rep. Am. Bar Assn. 539, 555, 561 (1934).

⁷ For a list of these administrative agencies see 59 Rep. Am. Bar Assn. 556-562 (1934); *Congressional Directory* (1935); *U.S. Govt. Manual* (1935).

⁸ Sec. 35 of the Judiciary Act of 1789, governing federal courts, provided that "the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts, respectively, are permitted to manage and conduct causes therein." Act of September 24, 1789, c. 20, § 35; 1 Stat. 92; 28 U.S.C.A. § 394 (1928).

⁹ For a discussion of this term see Waterman, *The Federal Bar*, 20 Am. Bar Assn. J. 762, 764 (1934), note 31. See also 66 A. L. R. 1512 (1930).

¹⁰ 1 Hughes, *Federal Practice* § 202 (1931). For the departments which do not require formal admission to their bars see Clark, *Departmental Practice: Admission of Attorneys*, 9 Am. Bar Assn. J. 706 (1923).

¹¹ 23 Stat. 101 (1884); 5 U.S.C.A. §§ 261, 493 (1927).

In *Garfield v. United States ex. rel. Stevens*,¹² in 1908, it was said of this act: "Nor is it necessary to consider whether the Secretary [of the Interior], who in these matters is vested with judicial power, and whose relations to attorneys practicing before his department are substantially the same as that of a court to attorneys admitted to its bar, has any inherent power in such matters of which the statute is merely declaratory."¹³

In *Phillips v. Ballinger*,¹⁴ a case decided in 1911, it was said by the Court of Appeals of the District of Columbia that the act of 1884 giving the Secretary of the Interior power over admission of attorneys and agents was nothing more than legislative sanction of a previous practice of the department. The court, however, stated that the source of the department's power to prescribe rules of admission prior to 1884 came from an earlier act which authorized the head of each executive department to prescribe departmental regulations.¹⁵

In some instances a particular bureau within a department, such as the Patent Office¹⁶ which is now under the jurisdiction of the Secretary of Commerce,¹⁷ has been given authority by statute to prescribe rules, subject to the approval of the secretary of the department, governing the recognition of attorneys and agents.¹⁸

The Board of Tax Appeals, created as an administrative agency in the executive branch of the government, but independent of any department¹⁹ and described as an administrative court,²⁰ was not invested by Congress with express authority to prescribe rules for the admission of practitioners. In *Goldsmith, Certified Public Accountant v. Board of Tax Appeals*,²¹ the petitioner alleged that the board was not empowered to

¹² 32 App. D. C. 109 (1908).

¹³ 32 App. D. C. 109, 140 (1908). See note 15, *infra*. ¹⁴ 37 App. D. C. 46, 49 (1911).

¹⁵ 5 U.S.C.A. § 22 (1927). See also 5 U.S.C.A. § 481. 13 Op. Atty. Gen. 150 (1869); 16 Op. Atty. Gen. 488 (1880); Walker, *Law Making in the United States* 453 (1934); Butler v. White, 83 Fed. 578, 581 (C. C. W.Va. 1897).

¹⁶ 32 Stat. 830 (1903); 5 U.S.C.A. § 485 (1927).

¹⁷ 42 Stat. 1109 (1923); 5 U.S.C.A. § 597 (1927).

¹⁸ 42 Stat. 390 (1922); 35 U.S.C.A. § 11 (1929).

¹⁹ 44 Stat. 105 (1926); 26 U.S.C.A. §§ 1211, 1212 (1928).

²⁰ To the effect that the Board of Tax Appeals is an administrative court, see McGuire, *Judicial Reviews of Federal Administrative Action*, 19 Am. Bar Assn. J. 471, 472 (1933). See also 42 Yale L. J. 125, 127 (1932); Radin, *The Courts and Administrative Agencies*, 23 Calif. L. Rev. 469, 474 (1935); *Appeal of So. Cal. Loan Assn.*, 4 B. T. A. 223, 234 (1926). Cf. 45 Harv. L. Rev. 1221, 1223 (1931), note 19; Blachly and Oatman, *Administrative Legislation and Adjudication* 122, 126 (1934).

See also *Board of Tax Appeals v. United States ex. rel. Shults Bread Co.*, 37 F. (2d) 442 (App. D. C. 1930); *Comm. of Internal Revenue v. Liberty Bank & Trust Co.*, 59 F. (2d) 320 (C.C.A. 6th 1932).

²¹ 270 U.S. 117 (1926).

adopt rules of admission, because since such power was expressly conferred by statute on the Secretary of the Treasury²² the failure to confer it on the board revealed a legislative intent denying such power to the board. The Supreme Court said, however, that since the board was invested with the power to prescribe rules of procedure by which to conduct business there was impliedly included therein the power to adopt rules for admission of attorneys and agents.²³

The Interstate Commerce Act not only invests the commission with authority to make rules of procedure, but expressly provides that "any party may appear before the commission or any division thereof and be heard in person or by attorney."²⁴ The act creating the Federal Trade Commission, while not conferring on the commission power to adopt rules of procedure, provides that any person may intervene, upon permission, when a complaint has been filed by the commission and appear in the proceedings "by counsel²⁵ or in person."²⁶

III

Since federal administrative agencies, either when empowered to prescribe rules of admission or when empowered to adopt rules of procedure, have the authority to determine who shall practice before them, the next problem to consider is the actual exercise of the power. In other words, what classes of persons may apply for admission to these federal administrative bars and what qualifications must they possess before they are enrolled, registered or recognized?

In general it is provided that corporations²⁷ and firms will not be admitted nor recognized and that the applicant must be a citizen or resident of the United States²⁸ and of good moral character. As a rule an attorney at law who applies for admission must state whether he has ever been dis-

²² Note 13, *supra*.

²³ 45 Stat. 872 (1928); 26 U.S.C.A. § 1219 (a) (1928).

²⁴ 41 Stat. 492 (1920); 49 U.S.C.A. § 17 (1) (1929). For the power of the Federal Communications Commission to prescribe rules of procedure see 48 Stat. 1068 (1934); 47 U.S.C.A. § 154 (j) (1928).

²⁵ Blachly and Oatman, *Administrative Legislation and Adjudication* 77 (1934). See note 40, *infra*, which points out that only attorneys at law are admitted to practice before the Federal Trade Commission.

²⁶ 43 Stat. 939 (1924); 15 U.S.C.A. § 45 (1927). For the nature of controversies before the Federal Trade Commission, see *Fed. Trade Comm. v. Klesner*, 280 U.S. 19 (1929).

²⁷ *Cf. Public Service Traffic Bureau, Inc. v. Haworth Marble Co.*, 40 Ohio App. 255, 178 N.E. 703 (1931).

²⁸ For the oath to be taken by members of administrative bars, see 12 Stat. 610 (1862); 31 U.S.C.A. § 204 (1927); § 3(d), *Treas. Dept. Circ. no. 230*, 4 (1934).

barred or suspended in any court, and by some administrative agencies a similar statement is required as to suspension or disbarment by a department or agency of the United States.²⁹

The acts of 1884 empowering the Secretaries of the Treasury and of the Interior to adopt rules of admission prescribe that the applicants, who are described as "agents, attorneys, or other persons," must show that they possess the necessary qualifications to enable them to render to claimants valuable service and are competent to advise and assist them in the presentation of their claims.³⁰ In addition the regulations of the Treasury Department provide that:

while practice before the Treasury Department is not restricted to duly licensed attorneys at law and certified public accountants, agents who are neither . . . will not be enrolled unless they are able to present . . . convincing evidence that they possess the educational background, technical knowledge, and ability essential to the proper understanding and presentation of Federal tax questions.³¹

The Patent Office³² designates all those who represent others before it as "patent attorneys," though the act authorizing it to make rules governing the recognition of persons representing applicants describes such representatives as "agents, attorneys or other persons."³³ The Patent Office will register as attorneys those who possess the necessary legal and scientific qualifications to render applicants valuable service. In order to determine whether a person seeking to be registered as a patent attorney possesses these qualifications examinations are conducted. No person is permitted to take the examination unless he submits proof of sufficient basic training in scientific and technical matters. In the case of a person who has served for three years in the examining corps of the Patent Office the examination may be dispensed with.³⁴

The Commissioner of Public Lands, an official in the Department of the Interior,³⁵ has formulated rules of admission permitting two classes of persons to practice before his bureau. A person who desires to represent a

²⁹ Rule 2, Rules of Practice, United States Board of Tax App. 1 (1935). See note 38, *infra*.

³⁰ 23 Stat. 101, 258 (1884); 5 U.S.C.A. §§ 261, 493 (1927).

³¹ Sec. 3, Treas. Dept. Circ. no. 230, 3 (1934).

³² 42 Stat. 1109 (1922); 5 U.S.C.A. § 597 (1927).

³³ 42 Stat. 390 (1922); 35 U.S.C.A. § 11 (1929). See note 67, *infra*.

³⁴ Rule 17, Rules of Practice, U.S. Pat. Off. 4 (1935). See Robinson, *Lawyers and Practitioners*, 21 Am. Bar Assn. J. 277, 278 (1935) for a discussion of the method of conducting this examination.

³⁵ 43 U.S.C.A. § 1 (1928). 50 C. J. 1076 (1930); Pierce, *The Land Department as an Administrative Tribunal*, 10 Am. Pol. Sci. Rev. 271, 278 (1918); McClintock, *The Administrative Determination of Public Land Controversies*, 9 Minn. L. Rev. 542, 551 (1924).

claimant before a district land office must file a certificate with the local register of lands³⁶ that he is an attorney at law in good standing. If he is not an attorney at law he must file a certificate executed by a judge of a United States court, a state or a territorial court having common-law jurisdiction, except a probate court, to the effect that he is a person possessing the necessary qualifications to render his client valuable services in the presentation of claims.³⁷

The Board of Tax Appeals registers attorneys at law who are admitted to practice before the Supreme Court of the United States or the highest court of any state or territory or the District of Columbia and also "certified public accountants duly qualified under the law of any state or territory or the District of Columbia."³⁸

The Federal Trade Commission confines practice before it to attorneys at law, though under its rule on "appearance" the Commission, in its discretion may permit a party upon application and for good cause shown to be represented by a person having the requisite qualifications to represent others.³⁹ Perhaps this rule is due to the fact that the act of Congress⁴⁰ creating the commission provides that persons who intervene may appear in person or by "counsel" and does not refer to "agent, attorney, or other person" as in other acts.⁴¹

The Interstate Commerce Commission registers two classes of practitioners; one consists of attorneys at law and the other class consists of those persons "possessed of the necessary legal and technical qualifications" to enable them to render valuable service before the commission and otherwise competent to assist in the presentation of matters before the commission.⁴² In 1929 the Interstate Commerce Commission pre-

³⁶ 43 Stat. 1145 (1924); 43 U.S.C.A. §§ 71, 72 (1928).

³⁷ Circulars and Regulations of the General Land Office 167, 174 (1930). See also 18 Stat. 317 (1875); 43 U.S.C.A. §§ 2, 1201 (1928); 5 U.S.C.A. §§ 485, 493 (1927); Regs. Dept. Int. Governing Recognition of Agents and Attorneys (1927).

Twenty-four persons were admitted to the land office practice for the fiscal year ending June 30, 1932. Ann. Rep. Comm. of Gen. Land Office 4 (1932).

³⁸ Rule 2, Rules of Practice, U.S. Board of Tax App. 1 (1935).

The certified public accountant must state in his application whether he has been expelled from any professional society of public accountants or his right to practice has been revoked in any jurisdiction or by any department or agency of the United States. See note 29, *supra*.

For the various state statutes governing the qualifications of certified public accountants, see: Certified Public Accountant Laws (1930); Green, History of Accountancy 77, 166, 191, 222 (1930); Yearbook Am. Inst. of Accountancy 268 (1932).

³⁹ Rules 2 and 3, Rules, Policy and Acts, Fed. Trade Comm. 1 (1934).

⁴⁰ See note 25, *supra*. ⁴¹ 23 Stat. 258, 101 (1884); 5 U.S.C.A. §§ 261, 493 (1927).

⁴² Rule I-B, Rules of Practice, I. C. C. 4 (1932). See note 24, *supra*.

scribed a register for all admitted to practice before it. From September 1, 1929 to December 1, 1930, 4,351 persons were entered upon the register. Of these only 1,765 were admitted upon presentation of certificates showing admission to the courts; the remainder were admitted upon showings as to their qualifications.⁴³

IV

This article does not purport to discuss whether the various administrative agencies, which have been vested with the power to prescribe qualifications for admission and also with the discretionary power of determining whether the applicant is qualified, have exercised these powers in such a manner as to assure to claimants or petitioners a competent administrative bar from which to select. It has been said, however, that "as the ideal that administrators possess technical skill in the fields in which they deal has come nearer realization, the practitioners in those fields have also developed a competence for their tasks. Important administrative tribunals now have before them specialized groups of counsel."⁴⁴

It is to be noted that the rules of admission for practice before the administrative agencies, even when based on acts of Congress which specifically set forth the qualifications of applicants for admission to practice, vest almost unlimited discretion in the official who passes on the qualifications. In only one instance, it is believed, has the procedure of written examinations been adopted as prerequisite for admission to an administrative bar.⁴⁵

The Attorney General in 1921 in an opinion, based on the act of 1884⁴⁶ pertaining to the Treasury Department, stated that since the act required notice and hearing only in disbarment proceedings, it was to be inferred that it was not the intention of Congress that a hearing be granted in

⁴³ 44 Ann. Rep., I. C. C. 74 (1930).

⁴⁴ From October 16, 1932, to October 15, 1933, 405 applicants were admitted to practise before the Interstate Commerce Commission. Of these, 242 were admitted upon presentation of certificates showing admission to practice in the courts, and 163 upon showing as to qualifications." 47 *ibid.* 34 (1933).

⁴⁵ McFarland, Administrative Agencies in Government, 59 Rep. Am. Bar Assn. 326, 345 (1934). The practitioners before the Interstate Commerce Commission formed an association in 1929; at that time a code of professional ethics modeled upon the code of the American Bar Association was adopted. 44 Ann. Rep. I. C. C. 74 (1930). See the I. C. C. Practitioners' Journal, Washington, D.C. Cf. Reed, Training for the Public Profession of the Law 297 (1921).

⁴⁶ For a requirement of written examinations for admission to a federal district court bar, see: 4 Bar Examiner 423 (1935). See Rule 17(c), Rules of Practice, U.S. Pat. Off. 4 (1935); note 34, *supra*.

⁴⁶ 23 Stat. 258 (1884); 5 U.S.C.A. § 261 (1927).

passing on an application.⁴⁷ By a regulation of the Treasury Department the Secretary has delegated to a committee of three, known as the committee on enrollment and disbarment, control over admission. The regulation provides that the committee may grant a hearing on an application at the applicant's request.⁴⁸ The Attorney General in this opinion would not express his views on the right of an applicant to review by a court of the decision of the Treasury Department upon a refusal to enroll an applicant or upon disbarment of a member of that administrative bar.

The rules of the Interstate Commerce Commission provide that if the commission is not satisfied with the sufficiency of the applicant's qualifications he is entitled, on request, to a hearing for the purpose of showing his qualifications.⁴⁹ By statute, if an applicant for admission to practice before the Commissioner of Patents is refused recognition he is entitled to a review of his petition before the Supreme Court of the District of Columbia.⁵⁰

When the register of a district land office refuses to enroll an applicant to practice, the application, under the rules of the Department of the Interior, must be forwarded to the Commissioner of the General Land Office, who notifies the applicant and permits him to file a reply.⁵¹ The regulations of the Department of the Interior provide that the action of all bureau heads on admission must be forwarded to the Secretary of the Interior "for his consideration and action thereon."⁵²

In *Goldsmith v. Board of Tax Appeals*⁵³ the Supreme Court of the United States in 1926 stated that the rule of the board which provides that in its discretion it might deny admission to any person not possessing the requisite qualifications or lacking in good character, must be construed to mean a discretion:

to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.⁵⁴

In view of the fact that the granting of the application for admission to a federal administrative bar is within the discretion of a department or bu-

⁴⁷ 33 Op. Atty. Gen. 17, 19 (1921).

⁴⁸ Secs. 1, 3(c), Treas. Dept. Cir. no. 230, 1, 3 (1934).

⁴⁹ Rule I-B (4), Rules of Practice, I. C. C. 3 (1932).

⁵⁰ 42 Stat. 390 (1922); 35 U.S.C.A. § 11 (1929).

⁵¹ See notes 35, 36, 37, *supra*.

⁵² Sec. 5, Regs. Dept. Int. Governing Recognition of Agents and Attys. 3 (1927). See also note 63, *infra*.

⁵³ 270 U.S. 117 (1926).

⁵⁴ 270 U.S. 117, 123 (1926).

reau head or a commission, and is not based on examination, the right to a hearing on the application seems justified.⁵⁵

In a discussion before the United States Senate in 1931 on admission to practice before the Patent Office, it was stated that the applicants should be subject to examination as in admission to the bar of a court.⁵⁶ This view was based on the allegation that the Commissioner of Patents was vested with too great discretionary power in determining whether the applicant should be admitted to practice before his bureau.⁵⁷ If examinations were substituted for the discretionary action of the administrative agency, it is submitted that this would serve as sufficient hearing on the technical qualifications of the applicant.⁵⁸

V

Since petitioners and claimants must select their agents or attorneys from the bar authorized to practice before the particular administrative agency, they should be assured not only that those admitted possess the necessary qualifications to render valuable service in the presentation of their claims but also that they have retained these qualifications. Accordingly in a case involving the Court of Alabama Claims it was held that since Congress had granted to this commission the power to make rules of procedure, the commission had the power to prescribe the qualifications of those appearing before it, to determine whether the applicant possessed those qualities, and also whether he had retained the requisite qualifications.⁵⁹

The congressional acts of 1884 investing the Secretaries of the Treasury and of the Interior with control over admission specifically gave them power to suspend and disbar but only after notice and hearing.⁶⁰

⁵⁵ "In general, no hearing is required upon an application for license to practice a profession, trade or occupation. . . . But, to revoke a license, notice and opportunity to be heard must be afforded the licensee." Right to Hearing on Application for Admission to Practice before Administrative Tribunals, 24 Mich. L. Rev. 846 (1926). "It is true that notice and hearing is generally required for the revocation (though not for the refusal) of a license. . . ." 21 Ill. L. Rev. 493 (1926).

⁵⁶ In 1934 the Patent Office prescribed examination for applicants. See Rule 17(h), Rules of Practice, U.S. Pat. Off. 5 (1933). See note 34, *supra*.

⁵⁷ 74 Cong. Rec. 5723-5725 (1931).

⁵⁸ It might be argued that while an examination would determine technical qualifications for admission to the bar, the administrative agency could act in an arbitrary manner with regard to moral qualifications and therefore that a hearing should be permitted if the applicant is rejected for the latter reason. Cf. *Bratton v. Chandler*, 260 U.S. 110 (1922).

⁵⁹ *Manning v. French*, 149 Mass. 391, 21 N.E. 945 (1889), dismissed 133 U.S. 186 (1890).

⁶⁰ 23 Stat. 258, 101 (1884); 5 U.S.C.A. §§ 261, 493 (1927).

In the Treasury Department the committee of three, composed of subordinate officials, is constituted a committee on enrollment and disbarment. An enrolled agent or attorney against whom disbarment proceedings have been instituted may be represented at the hearing by an attorney. The report of the committee on disbarment is submitted to the Secretary of the Treasury for approval. Upon disbarment, notice of the same is given to all interested branches of the government.⁶¹

The acts of 1884 provide that the department may suspend or disbar any agent or attorney:

shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner, deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement.

The rules of the Treasury Department adopted in pursuance of this act list fifty-seven grounds for reprimand, suspension, and disbarment, which include action contrary to the canons of ethics of the American Bar Association, advertising of certain types, disbarment by a court of record, cancellation of the certificate of a certified public accountant, disbarment or suspension by another department or agency of the government, or conduct showing the attorney or agent to be disreputable or incompetent.⁶²

The rules of the Department of the Interior provide that if any bureau head recommends that an agent or attorney be disbarred the record and recommendations shall be transmitted to the Secretary for action.⁶³

As previously stated, the act of 1922 investing the Commissioner of Patents with control over admission and disbarment expressly confers on the agent or attorney who has been disbarred the right to a review by the Supreme Court of the District of Columbia.⁶⁴ By an act of 1870 the action of the Commissioner of Patents in disbaring a "patent-agent," the word attorney not appearing in the statute, was subject to the approval of the secretary of the department.⁶⁵ By an act of 1861 the action of the Commissioner of Patents in disbaring a "patent-agent" was subject to the approval of the President of the United States.⁶⁶ Practitioners before the

⁶¹ Sec. 8, Treas. Dept. Cir. no. 230, 6 (1934).

⁶² Sec. 9, *ibid.*, 9-13. The names of those disbarred, followed by the cause, are published in the Treasury Decisions. See 65 Treasury Decisions 1791 (1934).

⁶³ Sec. 12, Regs. Dept. Int. Governing the Recognition of Agents and Attys. 5 (1927); Circs. and Regs. of Gen. Land Office 173 (1930). Note 37, *supra*; 9 Land Decisions 520 (1889).

⁶⁴ 42 Stat. 390 (1922); 35 U.S.C.A. § 11 (1929). See also Waterman, *The Federal Bar*, 20 *Am. Bar Assn. J.* 762, 763 (1934), note 3.

⁶⁵ Act of July 8, 1870. c. 230, § 17; U.S. Rev. Stat. § 487 (1875).

⁶⁶ 12 Stat. 247 (1861).

Patent Office are described in the rules of practice as "patent attorneys," though these earlier statutes used the term "patent-agents."⁶⁷

The rules of the Interstate Commerce Commission, the Board of Tax Appeals, and the Federal Trade Commission provide for notice and hearing in disbarment proceedings. In general, if the commission finds that the agent or attorney is lacking in the requisite qualifications to represent others, or "is lacking in character, integrity, or is guilty of unprofessional conduct" it may in its discretion disbar or suspend him.

Not only does the power to disbar rest in the discretion of the administrative agencies, but this power when vested in department secretaries may be delegated under certain conditions to subordinate officials. It has been held that if a member of a departmental bar has had a hearing before a subordinate of the department, and the ruling is subsequently approved by the secretary of the department, the member is not entitled to a hearing before the secretary.⁶⁸ It has also been held that the approval of the disbarment ruling may be delegated to a subordinate in the department, such as an assistant secretary, if he has been authorized by congressional act to perform the duties of the secretary.⁶⁹

VI

The fact that the federal administrative bars are composed of both lawyers and non-lawyers has given rise to two interesting situations in state courts involving state statutes on the practice of law. An attorney at law, engaged both in the general practice of law in Arizona and as a representative of claimants before the United States Land Office in that state⁷⁰ had advertised, thus following a custom of land office agents. This custom while apparently sanctioned by the Department of the Interior⁷¹ is a violation of the code of ethics of the American Bar Association. Under the law of Arizona a violation of these canons by an attorney at law constituted grounds for disbarment.⁷² The attorney at law defended his actions in part on the ground that practice before the land office was not to

⁶⁷ See note 33, *supra*.

⁶⁸ *United States ex rel. Wedderburn v. Bliss*, 12 App. D.C. 485 (1898).

⁶⁹ *Robertson, Comm. of Patents v. United States ex rel. Baff*, 285 Fed. 911, 914 (App. D.C. 1922). See 48 C. J. 173 (1929).

⁷⁰ 12 Stat. 409 (1862); 43 U.S.C.A. § 121 (1929); 1 Hughes, *Federal Practice* 163 (1931).

⁷¹ The Secretary of the Interior may exclude from practice before his department any person "who shall with intent to defraud in any manner, deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement." 23 Stat. 101 (1884); 5 U.S.C.A. § 493 (1927).

⁷² *Ariz. Rev. Code* 1928, § 201. See also 55 A. L. R. 1313 (1928).

be considered as practice of law. The state supreme court refused to accept this argument and held that his behavior justified disbarment.⁷³

In Arizona, therefore, in the absence of any federal administrative regulation, an agent who is a member of an administrative bar may advertise whereas the attorney at law who is a member of the same administrative bar will be disbarred by the state if he advertises in relation to his federal administrative practice. In turn, disbarment by a court of record of a state is often made grounds for disbarment by the federal administrative agency.⁷⁴

It should not be inferred that the rules of administrative bars permit advertising without restriction. The acts of 1884, pertaining to the bars of the Treasury and Interior Departments,⁷⁵ and also the act of 1922 pertaining to the Patent Office, provide for the suspension of any attorney or agent who uses deceptive or misleading advertising.⁷⁶ The rules of the Treasury Department on improper advertising are quite detailed.⁷⁷ By the rules of the Patent Office a registered patent attorney must submit to the Commissioner of Patents for his approval every proposed advertising matter, circular, letter, or card, intended to solicit patent business. A violation of this rule is ground for suspension or disbarment.⁷⁸

In another state case,⁷⁹ a person had held himself out as a patent law attorney, a counsel in patent causes, and a solicitor of American and foreign patents, and also advertised that he would represent parties in pensions and in claims against the government. This person was held to have violated the state statute making it contempt of court for any one to hold himself out as an attorney, an attorney at law or counselor at law without having a license from the Supreme Court of the State.

The reported decision does not reveal whether this person had been admitted to practice before any of the government departments. If he had been, the validity of a state statute which in effect prohibits an act of a federal administrative practitioner sanctioned by a federal administrative agency would present an interesting question.

If this person had not been admitted to practice before the Patent Office, under federal law he was immune, as there is no federal law pro-

⁷³ *In re Gibbs*, 35 Ariz. 346, 278 Pac. 371 (1929).

⁷⁴ Sec. 9(2), Treas. Dept. Circ. no. 230, 9 (1934).

⁷⁵ 23 Stat. 258, 101 (1884); 5 U.S.C.A. §§ 261, 493 (1927).

⁷⁶ 42 Stat. 390 (1922); 35 U.S.C.A. § 11 (1929).

⁷⁷ Sec. 9, Treas. Dept. Circ. no. 230, 12-13 (1934).

⁷⁸ Rule 17(h), Rules of Practice, U.S. Pat. Off. 5 (1935); Ann. Rep., Comm. Pat. 4 (1925).

⁷⁹ *People ex rel. Colorado Bar Assn. v. Erbaugh*, 42 Colo. 480, 94 Pac. 349 (1908); Colo. Comp. L. 1921, § 6017. See note 27, *supra*.

hibiting one from holding himself out as authorized to practice as a patent attorney. In 1930 it was pointed out that if persons who had not been registered as practitioners by the Patent Office, or who had been disbarred from that practice, held themselves out as patent attorneys, the Commissioner of Patents was not empowered to take action.⁸⁰

In this Colorado case, if it had not been for the ruling of the state court, the party holding himself out as an attorney could have done so with impunity so far as restrictive federal statutes were concerned. In this situation, it seems that there is need of a federal statute prohibiting an unauthorized person from holding himself out as being a member of a federal administrative bar or entitled to practice before federal administrative agencies.

An act has been under consideration by Congress for some years which would confine applicants for admission to the bar of the Patent Office to those admitted to the bar of a state court or of the District of Columbia. This act would make it unlawful for any one to hold himself out as a patent attorney⁸¹ who was not duly enrolled as such.⁸²

VII

With one exception⁸³ each of the administrative bars discussed consists of two types of members, attorneys at law and others.⁸⁴ In some situations, however, it becomes necessary to secure the services of an attorney at law authorized to practice before federal or state courts. Suppose that an administrative proceeding begins with a departmental ruling,⁸⁵ is followed by a review by an administrative court,⁸⁶ and is then appealed to a

⁸⁰ Ann. Rep., Comm. Pat. 4 (1925); H. R. Rep. no. 728, 71st Cong., 2d Sess., ser. no. 9191 (1930); Sen. Rep. no. 626, 71st Cong., 2d Sess., ser. no. 9186 (1930).

For the English law prohibiting a person not registered from describing himself as a "patent-agent," see: *Institute of Patent Agents and Others v. Lockwood*, [1894] A. C. 347; 22 Halsbury, Laws of England 230 (1912); 36 Eng. and Emp. Digest 856 (1927).

⁸¹ See notes 33 and 67, *supra*.

⁸² H. R. Rep. no. 715, 69 Cong., 1st Sess., ser. no. 8532 (1926); Sen. Rep. no. 554, 72 Cong., 1st Sess., ser. no. 9487 (1932); notes 80 and 57, *supra*.

⁸³ Notes 39, 40, 41, *supra*.

⁸⁴ By the rules of the Treasury Department a member of the treasury bar, who is not a lawyer, may not draft a written instrument transferring title to realty or personalty for the purpose of affecting federal taxes or pass on the legal sufficiency or legal effect of such an instrument. Sec. 2(f), Treas. Dept. Circ. no. 230, 2 (1934).

⁸⁵ Clark, *Departmental Practice: Admission of Attorneys*, 9 Am. Bar Assn. J. 706 (1923); 1 Hughes, *Federal Practice* § 297 (1931), note 25; 65 C. J. 1273 (1933).

⁸⁶ Note 20, *supra*.

federal court.⁸⁷ At this stage it becomes necessary to secure the services of an attorney at law, if the representatives in the two earlier stages are not lawyers.

For example after a taxpayer has filed his income tax return, the Bureau of Internal Revenue, a unit of the Treasury Department, makes an investigation. The bureau may rule that additional income taxes should be paid. The taxpayer may be represented before the bureau either by an attorney at law or agent "enrolled" in the Treasury Department bar.⁸⁸

If the taxpayer desires a review of the ruling of the bureau, requiring that he pay a deficiency, he must petition the Board of Tax Appeals.⁸⁹ Before the Board of Tax Appeals, the taxpayer may be represented by an attorney at law or certified public accountant registered by the bar of that board. If the taxpayer desires a review of the ruling of the Board of Tax Appeals he must petition one of the ten circuit courts of appeal or the Court of Appeals of the District of Columbia.⁹⁰ Since only attorneys at law are permitted to practice before these courts, at this stage the taxpayer must secure the services of an attorney qualified to appear before one of these federal courts.⁹¹

Under the rules of the Interstate Commerce Commission a person may be represented by either an attorney at law or an agent. If such person petitions the commission to award him money damages against a carrier for violation of the Interstate Commerce Act, the commission may make such an award, known as a reparation order.⁹² If the carrier does not com-

⁸⁷ *Comm. of Internal Revenue v. Liberty Bank & Trust Co.*, 59 F. (2d) 320 (C. C. A. 6th 1932). For a discussion of this case see 1 *Geo. Wash. L. Rev.* 121 (1932).

⁸⁸ The taxpayer, if he desires, may present his case to an internal revenue agent in the field. 26 U.S.C.A. § 12, 42 Stat. 1444 (1923); 26 U.S.C.A. § 33, 43 Stat. 845 (1924); 26 U.S.C.A. §§ 1045-1048, 44 Stat. 55 (1926); Montgomery, *Federal Tax Handbook* 806 (1934-35); Hamel, *U.S. Board of Tax Appeals, Practice and Evidence* 21, 22 (1926); *Ann. Rep., Sec'y of Treas.* 103 (1934); *Bureau of Int. Rev., Inst. of Govt. Research* 184 (1923).

The taxpayer, even in the field, must be represented by an agent or attorney duly enrolled. Secs. 2(b), 6, *Treas. Dept. Circ. no. 230*, 1, 5 (1934).

⁸⁹ 45 Stat. 872 (1928); 26 U.S.C.A. § 1219 (1928).

⁹⁰ 26 U.S.C.A. §§ 1225, 1226 (1928); 12 *Am. Bar Assn. J.* 686, 689 (1926); Rule 43, *Rules of the U.S.C.C.A. for the 8th Cir.* 19 (1935); *Frankfurter and Landis, The Business of the Supreme Court* 247 (1928), note 94; 3 *Hughes, Federal Practice* § 1495 (1931).

⁹¹ Admission to practice before the Treasury Department does not carry the right to practice before the Board of Tax Appeals, nor does admission to practice before the Board give the right to practice before the Treasury Department. *Hamel, U.S. Board of Tax Appeals, Practice and Evidence* 32, 49 (1926).

⁹² 49 U.S.C.A. § 13(1) (1929); 44 *Ann. Rep., I. C. C.* 90 (1930); *McFarland, Judicial Control of the Federal Trade Commission and Inter-State Commerce Commission* 122, 162 (1933); *L. & N. R. v. Sloss-Sheffield Co.*, 269 U.S. 217 (1925). See also *Smith, Justice and the Poor* 92 (1924).

ply with this order for payment of money, the complainant may file a petition in a federal district court or a state court of general jurisdiction to obtain an enforcement of the order.⁹³ It is evident that in this situation the claimant, if represented before the commission by one not an attorney, must before filing his petition in a state or federal court employ an attorney at law.

The Special Committee on Administrative Law of the American Bar Association recommended in 1934 that in general the independent or separate federal boards and commissions be abolished⁹⁴ and that their executive and legislative functions⁹⁵ be transferred to the several executive departments of the federal government. In order to divest federal administrative agencies of their judicial functions the establishment of a Federal Administrative Court was recommended.⁹⁶ This Administrative Court would at least absorb the existing jurisdiction of the Court of Claims,⁹⁷ and the Court of Customs and Patent Appeals,⁹⁸ and also the jurisdiction of the ten circuit courts of appeal and of the Court of Appeals of the District of Columbia as pertains to review of the decisions of the Board of Tax Appeals.⁹⁹

At present only attorneys at law may practice before the ten circuit courts of appeals or the Court of Appeals of the District of Columbia or before the Court of Claims.¹⁰⁰ Likewise, the Court of Customs and Patent Appeals permits parties to be represented only by attorneys at law.¹⁰¹ Is practice before this court, if it is to be established, to be confined to attorneys at law or will its bar be considered an administrative one and open to all those possessing the necessary qualifications to render valuable service to their clients and otherwise competent to assist and advise their clients in presenting their case before the court?¹⁰²

⁹³ 49 U.S.C.A. § 16(2) (1929); *Lewis-Simas-Jones Co. v. S. P. R. R.*, 283 U.S. 654 (1931).

⁹⁴ 59 Rep. Am. Bar Assn. 539, 540, 551 (1934).

⁹⁵ *Ibid.* 545.

⁹⁶ *Ibid.* 551. See also 58 *ibid.* 412, 426 (1933); McGuire, Proposed Reforms in Judicial Reviews of Federal Administrative Action, 19 Am. Bar Assn. J. 471 (1933).

⁹⁷ 36 Stat. 1139 (1911); 28 U.S.C.A. § 263 (1928).

⁹⁸ 45 Stat. 1476 (1928); 28 U.S.C.A. §§ 301 a, 309 a (1928).

⁹⁹ 44 Stat. 110 (1926); 26 U.S.C.A. §§ 1225, 1226 (1928).

¹⁰⁰ Rule 2, Rules of Ct. of Claims 1 (1931); Rule 7, Rules of Ct. of App. D.C. 14 (1927).

¹⁰¹ Rule 2, 19 U.S. Ct. of Customs and Pat. App. Rep. 427, 1329 (1932).

¹⁰² Even though the Board of Tax Appeals has been described as an administrative court, its bar is open to certified public accountants. Notes 20 and 38, *supra*.

VIII

Despite the long continued and detailed discussion of standards of legal education and of admission and disbarment in relation to the bars of courts, little attention has been paid to these matters in relation to administrative bars. If administrative agencies are to continue to increase either in number or the scope of their powers, it seems that more consideration should be given to the educational qualifications of these bars, to admission requirements, the method of passing on such qualifications, codes of ethics, and disbarment proceedings.

The same decentralized system of admission and disbarment which characterizes the federal judicial bar¹⁰³ obtains for federal administrative bars; and for both there is lack of uniformity in rules and also much difficulty in securing information about the rules.¹⁰⁴

In conclusion, it is submitted, that a recommendation of the Special Committee on Administrative Law of the American Bar Association merits continued consideration in view of the present status of the rules pertaining to federal administrative bars. The recommendation reads:

Conditions on admission to practice before administrative tribunals should be harmonized and made generally applicable, the machinery for discipline and disbarment should be unified and strengthened, and high standards of professional conduct should be established and rigorously enforced.¹⁰⁵

¹⁰³ Waterman, *The Federal Bar: A Decentralized System of Admission and Disbarment*, 20 *Am. Bar Assn. J.* 762 (1934).

¹⁰⁴ Note 6, *supra*. "Both in original and appellate tribunals there is everywhere evident an extreme lack of uniformity in practice and procedure, in conditions (if any) imposed upon admission to practice, and in other important respects." Report of Special Committee on Administrative Law, 58 *Rep. Am. Bar Assn.* 407, 414 (1933). See also: Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 *Harv. L. Rev.* 198, 214 (1934); Fairlie, *Administrative Legislation*, 18 *Mich. L. Rev.* 181, 197 (1920); Walker, *Law Making in the United States* 453-458 (1934).

¹⁰⁵ 59 *Rep. Am. Bar Assn.* 539, 540 (1934).