

BOOK REVIEWS

The Administrative Process. By James M. Landis. New Haven: Yale University Press, 1938. Pp. 160. \$2.00.

The object of this review is to summarize the book at hand and to indicate some of the principal ideas contained in it. This review is not considered as a pretext for "panning" the author or his ideas or for expounding the political or juristic philosophy of the reviewer.

This little book contains the 1938 Storrs Lectures delivered at Yale University by Dean Landis of the Harvard Law School. This was a series of four lectures, and, accordingly, the book contains four chapters: I The Place of the Administrative Tribunal, II The Framing of Policies: The Relationship of the Administrative and Legislative, III Sanctions to Enforce Policies: The Organization of the Administrative, IV Administrative Policies and the Courts.

The first chapter, "The Place of the Administrative Tribunal," is the most interesting and informative, and it must be somewhat reassuring to those who fear, or at least say they fear, that representative government is being sacrificed on the altar of bureaucracy. The rise of the administrative tribunal is said to result from two tendencies in the expanding civilization of the last sixty years—the rise of industrialization and the rise of democracy.¹ These tendencies demanded a positive solution of various social maladjustments and these solutions have been found in the form of legislation, the very antithesis of *laissez faire*. "There grows a conception of government as the concern of the common man; politics as the means whereby he may realize the dream of better living."² Dean Landis disagrees with the suggestion of the President's Committee on Administrative Management to the effect that existing administrative agencies should be merged. He rather thinks that "efficiency in the processes of governmental regulation is best served by the creation of more rather than less agencies."³ He thinks that administrative agencies should by all means be independent and not be simply an extension of executive power or of legislative power. This view is based upon the desire of obtaining supervision and exploration with "uninterrupted interest in a relatively narrow and carefully defined area of economic and social activity."⁴ Commenting upon the necessity of the administrative processes resulting from judicial and legislative inadequacy, this statement is made: "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine."⁵

The second chapter, "The Framing of Policies," necessarily concerns the relation-

¹ P. 7.

² P. 8.

³ P. 24.

⁴ P. 30.

⁵ P. 46.

ship between the legislature and the administrative agency. Dean Landis seems willing to trade off the logic of the doctrine of separation of powers and the sanctity of the number "three" in exchange for efficient governance.⁶ He does not share the "hysteria" of the President's Committee on Administrative Management that the administrative process is a "fourth" branch of government. He exposes the confusion existing in connection with the delegation of legislative power as indicated by the distinction between "a roving commission" and a power "canalized within banks that keep it from overflowing."⁷ The need for definitive standards is recognized but it is contended "that the scope of administrative power should not be so narrowly defined as to take away from the administrative its capacity to achieve effectively the purposes of its creation."⁸ No one will dispute the great necessity for wisdom in the formulation of standards for, and in the grant of powers to, administrative tribunals. The author contends that the administrative tribunals should have wide interpretative power, and he suggests the adaptation of some English techniques to our needs. These include (1) giving the administrative power to modify the needs of legislation insofar as it may appear to be necessary to bring the scheme of regulation into operation (the so-called Henry VIII clauses), (2) providing that a regulation becomes effective within a given period of time unless disapproved by the legislature, and (3) providing that a regulation shall not become effective until the legislature approves it. Many readers cannot leave this chapter without feeling that the approach of the American legislature to the administrative process has been decidedly unscientific.

In a third chapter, "The Organization of the Administrative," Dean Landis takes up the complaint of the American Bar Association that the blending within a single administrative agency of both the power to initiate complaints and the power to determine whether the facts justify imposition of a penalty is contrary to "the first and fundamental principles of natural justice that no man shall be judge in his own cause."⁹ The danger in such a blending is recognized but is said to be justified by practical necessity. Several checks on administrative arbitrariness are mentioned: first, an administrative agency moves in a narrow field; second, the administrators develop a professionalism of spirit; third, an order must be supported by a finding of fact; fourth, the relationship of adjudication to policy; fifth, the divorcement of the administrative process from the executive; sixth, the right to judicial review.¹⁰ Incompetence is frankly admitted to be a very serious obstacle to the proper functioning of the administrative process and the importance of this defect is undoubtedly much greater than one would think from a reading of this book. The success of any system is so obviously dependent upon competent personnel that Dean Landis perhaps refrained from emphasizing the point for fear of sounding platitudinous. The writing of opinions to support administrative decisions is strongly urged. Without opinions the author thinks that "general impressions rather than the tightness that derives from the articulation of reasons may thus govern the trend of administrative adjudication."¹¹ In discussing sanctions for the enforcement of an administrative order mention is made of the tendency to use the licensing power in some cases and in others to grant a privilege of great economic value. On the whole, the author feels that the weakness of sanctions so far

⁶ Pp. 47-8.

⁷ Mr. Justice Cardozo's dissent in *Panama Refining Company v. Ryan*, 293 U.S. 388, 435, 440 (1935).

⁸ P. 55.

⁹ P. 91.

¹⁰ Pp. 98-101.

¹¹ P. 106.

devised, rather than their effectiveness, threatens the administrative process. "The instruments of power that we believe we have created too frequently tend to become mere pulpits from which to hurl thunderbolts of talk, not control rooms where the touch of a button releases power or enjoins its surge."¹²

In the fourth chapter is considered the relationship between courts and the administrative agencies. The author states that "courts are not unconscious of the fact that, due to their own inadequacies, areas of government formerly within their control have been handed over to administrative agencies for supervision."¹³ No writer on administrative law problems can overlook the irreconcilable conflict between those cases recognizing jurisdictional and constitutional facts and those cases granting finality to administrative determinations of fact. Dean Landis wisely does not endeavor to explain the inexplicable. In referring to the sanctity of judicial review he states: "The insistence that the administrative process in these phases must be subject to judicial review is to be explained in part, I believe, by economic determinism. But the deeper answer lies in our traditional notions of 'law' as being rules administered and developed by courts."¹⁴ He regrets that the courts, while clinging to the power of judicial review of administrative action, still utilize an old judicial technique not adapted to efficient administrative action. He thinks that the problem of judicial review of administrative adjudication is essentially the same as judicial review of administrative legislation, although this has not yet been recognized.¹⁵ He meets the argument that the administrative process violates our basic constitutional conception of "supremacy of law" with the statement that this reveals a misconception of the content of the word "law."¹⁶ He thinks that courts should restrict themselves to questions on which they are expert and doubts whether they are competent to decide the many economic and social questions which they do decide. The author ends his book with this statement: "Such difficulties as have arisen have come because courts cast aside that role to assume to themselves expertness in matters of industrial health, utility engineering, railroad management, even bread baking. The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts. That hope is still dominant, but its possession bears no threat to our ideal of the 'supremacy of law.' Instead, it lifts it to new heights where the great judge, like a conductor of a many-tongued symphony, from what would otherwise be discord, makes known through the voice of many instruments the vision that has been given him of man's destiny upon this earth."

Throughout the book the author draws frequently upon New Deal legislation and the experiences of New Deal administrative agencies. The work is embellished with many of Dean Landis' own rich experiences as a member of the Federal Trade Commission and as chairman of the Securities Exchange Commission. The chief criticism of many readers will be that Dean Landis has not interwoven enough of this material into the work. His modesty and the limitations of space have undoubtedly prevented his doing this, but many readers will wish that one who had such influence and experience in the administrative field had given more of the practical picture to the world in this book.

PAUL E. RAYMOND*

¹² P. 122.

¹³ P. 123.

¹⁴ P. 134.

¹⁵ P. 151.

¹⁶ P. 152.

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