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THE REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE*

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THE social legislation of the Roosevelt administrations brought to the boiling-point the long-simmering agitation as to the appropriate form of administrative procedures. These procedures were not novel in 1933, but their extension into fields of hotly-contested measures of economic control intensified the objections. Much of administrative procedure was indeed vague and obscure, often accidental and lacking in a consistent application of principles which might be admitted as valid. The attack pressed by those hostile to the legislative purposes involved was usually indiscriminate and argued for a wholesale condemnation of the entire corpus, based on its departure from the assumed norm of a common law litigation.¹ The reply of those jealous for the preservation and extension of the new reforms was apt to be nearly as indiscriminate in its suggestion either that there were no grounds whatsoever common to administrative and judicial procedure, or that in any case there were no abuses or no abuses other than were likely to occur in any system of administration. In response to this somewhat unyielding attitude the conservative forces and their lawyers devised legislation, of which the various Logan-Walter bills² were typical, which attempted to reform the entire system of administration, en bloc, by hasty and ill-digested generalizations. After much legiti-

* The Final Report of the Attorney General's Committee on Administrative Procedure (hereafter cited as Report) was submitted to Attorney General Jackson on January 22, 1941, and transmitted by him to the Vice President two days later. The bill proposed by the committee for adoption by Congress (hereafter cited as Committee Bill) accompanied the report.

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¹ For a description of this controversy and the nature of certain condemnations, see Jaffe, *Invective and Investigation in Administrative Law*, 52 Harv. L. Rev. 1201, 1232 (1939).

² See e.g., H.R. 6324, 76th Cong. 3d Sess. (1940).

mate ridicule³ of these jerry-built proposals, many persons became convinced that the occasion demanded a detailed study of each of the administrative agencies of the government.

In the early part of 1939 President Roosevelt, at the suggestion of the Attorney General, appointed a committee to make a "thorough and comprehensive study . . . of existing practices and procedures with a view to detecting any existing deficiencies and pointing the way to improvement." The committee,⁴ with a small staff, investigated nearly all of the important federal administrative establishments whose activity affected the rights, duties and privileges of the public.⁵ Each study attempted to set forth and criticize in considerable detail the procedure of the agency. The committee, before issuing the studies, conferred with the agency whose practices were to be described and evaluated, and some attempt was made to secure

³ For an acute analysis of the Logan-Walter bill vetoed by the President, see Landis, *Crucial Issues in Administrative Law*, 53 *Harv. L. Rev.* 1077 (1940).

⁴ The committee as originally appointed were James W. Morris, chairman, D. Lawrence Groner, Carl McFarland, Golden Bell, Arthur T. Vanderbilt, and Dean Acheson. Somewhat later there were added Robert H. Jackson, Henry Hart, Harry Shulman, Lloyd Garrison, Ralph Fuchs and E. Blythe Stason. Dean Acheson subsequently became chairman. All of the above-mentioned with the exception of Golden Bell, who, I assume, resigned, and Robert H. Jackson, who became Attorney General, submitted the final report. In addition, the report was signed by Francis Biddle who, apparently, became a member at some later time. Professor Walter Gellhorn of Columbia served as director of the study.

In addition to the committee's report, there is a statement entitled "Additional Views and Recommendations of Messrs. McFarland, Stason and Vanderbilt," in which views Justice Groner concurred. Justice Groner also submitted a separate statement entitled "Additional Views and Recommendations of Mr. Chief Justice Groner." These additional views were accompanied also by a proposed bill for adoption by Congress. I can find no convenient word with which to refer to the men who submitted these additional views other than the word "minority," which word I will use, although it is not entirely appropriate since this group agrees with almost all of what the committee says or recommends. In the sense, however, that they adopt a more critical attitude toward administrative agencies, the word is not entirely inappropriate, although I hope it will not be thought that it is used invidiously. (The minority's proposed bill will be cited as *Minority Bill*.)

The individual agency studies made by the research staff published in mimeograph form will be cited by the name of the agency and monograph number. Thirteen of these monographs were reprinted as S.Doc. 186, 76th Cong. 3d Sess. (1940).

⁵ The committee restricted its study to "agencies which in a substantial way affect private interests by their power to make rules and regulations or by their power of adjudication in particular cases." It did not thereby deny the importance of the many agencies which provide services to the government and to the public, but it believed that the criticism and controversy which was the cause of its reference related primarily to the agencies which made and adjudicated law determinative of rights and duties of those outside of government. In a certain sense, of course, the distinction is arbitrary. The "law" affecting the civil service affects more directly and intensively a larger section of the public than perhaps any other one law. Nevertheless, the committee's choice, in view of the circumstances of its appointment and the amount of time and money available, was, I think, a sound one.

the reaction of those affected by the activities of the agency. After the studies were completed, but before the issue of the final report, public hearings were held.⁶ The committee says nothing about the contribution of these hearings, but one is led to believe that it was very little. It has been said that those who were disposed to criticize administration were prone to look upon the committee as advocates of the administrative process with minds closed to criticism, a judgment which the report demonstrates, I am sure, to be wrong.

It is important to notice that the committee, even in its individual studies, has not attempted to assess the fairness or value of any procedure in terms of specific instances of injustice. The relative lack of protest over a long period of time indicates that there is little sense of injustice, and this was true of a great majority of the agencies. In the case of the Interstate Commerce Commission there was the more positive evidence, offered at the public hearings, of the satisfaction of the ICC bar with the commission's work. It was known to the committee, of course, that there were a few well-known "bad" cases, but in no case did the committee seek to prove whether the complaints made were justified in terms of the actual injustice of specific determinations. I believe that this was in part attributable to the limitations of resources and the political pressure for a report because of the pending Logan-Walter bill, but probably more to the belief that such an investigation at this time would have been futile.

The most satisfactory criticism of a system is one which can demonstrate that its particular judgments have been wrong in the sense that they are not responsive to the actual facts—be they facts concerned with individual guilt or with social need. It is sometimes possible to make this demonstration. Study of the records of a few cases may reveal a persistent thread of perverse or deficient judgment. Even here there will be difficulties, because it is first necessary to secure some agreement that the cases are typical, and, secondly, to determine from what—whether system or personnel—the deficiency arises. A convincing demonstration may be provided (as was true with the labor injunction by a record over a long course of years) which satisfies a substantial public that consistent hostility to a given group has resulted in judgments almost uniformly adverse. The situations are rare, however, which permit of conclusive demonstrations in terms of specific unjust results. It would obviously have been impossible for the committee to examine the records of all dispositions made by all government agencies, and it is not clear that much would have been gained if

⁶ Report 259. More than a hundred thousand copies of the notices of these hearings were distributed.

it had done so. The wrongness of particular decisions or the sum of them can rarely be sufficiently demonstrated, particularly in the face of violent public controversy, to convince the outsider that it springs from systemic defects. It seems unlikely, for example, that an attempt by the committee to evaluate the performance of the National Labor Relations Board by reading even a fair sample of its records and conclusions would have enabled a majority to arrive at any demonstrably convincing result. A more manageable test might have been the incidence of reversal by the courts, but the narrowness of the scope of review probably precludes agreement on this test as a valid one. Questionnaires might have been sent to the respondents or their attorneys asking them to specify whether their objection to an agency was an objection to the legislation administered by the agency, to the personnel, or, more particularly, to its procedure. If there were a likelihood that these answers would or could be honestly answered, the questionnaire might have revealed that the objections were not to the procedure as such and were, consequently, outside the scope of the committee's study. A detailed study of this sort by a private individual might yield conclusions which at a later date would carry conviction. Furthermore, it must be admitted that the individuals of a committee such as the Attorney General's, composed of distinguished representatives of different points of view, cannot express themselves with the same freedom nor conduct research with the same abandon as a private individual. The function of such a committee is to a degree political, in the sense that it is to seek to find the greatest amount of common ground; certain questions and certain methods might dissolve the committee back into its component parts. I would conclude, therefore, that it would have been impossible for the committee to have attempted to judge the performance of the NLRB in terms of a demonstration either of the existence or non-existence of unjust conclusions.

The committee has evaluated and criticized the procedures of each agency in terms of assumed or expressed "axioms" of value, at least insofar as problems of fairness or justice were involved. This, as I have indicated, was probably the only course open to the committee. Some time ago I suggested⁷ that judgments as to the justice of administrative activity should not be made on the basis of general charges addressed to the whole system. A study of particular agencies might demonstrate the insubstantiality (as it has) of most of these claims—but at some point a specific claim of procedural unfairness can be answered only in terms of the applicability of some agreed-upon "axiom." This inability positively to dem-

⁷ Jaffe, *op. cit. supra* note 1, *passim*.

onstrate injustices may limit the scope to be given to axiomatic reasoning. Particularly is this true where the consequences of administrative reform may seriously impair the fulfillment of public policy and where there can be no assurance that the violation of the axiom is the source of the sense of injustice. But, given these qualifications, the response to a claim of systematic injustice must be shaped by the moral force which in a coherent society is attributed to first principle. This is made quite evident from a reading of the special studies and the Final Report of the Attorney General's Committee, in which the broad criteria of evaluation are consistently assumed and practically never debated. Thus, the committee states the two central propositions on which it purported to rest its judgments: "Running through the criticisms of administrative procedure is the desire to prevent either one of two major objectives from being furthered by the eclipse of the other. It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which it has embodied in law . . . but everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others."⁸ These two ideas, we might say, are the great postulates. Though the demands of one may in particular cases tend to qualify the other, it is possible to regard them as not inconsistent in their common contribution to a system of state purposes enforced according to law. The occasional relaxation of even important forms, if felt to be justified, does not destroy the popular notion that law continues to play its appropriate role in the exercise of state power.

In the Attorney General's Committee's report, at least, both in its professions and in its recommendations, I can find nothing to justify the fears of Dean Pound⁹ that administrative law and activity is conceived to be simply what the administrator wills at any one moment, uncontrolled by the terms of the delegation and by general conceptions of justice. It might be said that the report is, at best, the work of a few distinguished lawyers careful for their reputation, and at worst, a work motivated by the expediency of cloaking the administrative process in a mantle of respectability. The latter view is inconsistent with the positive tone and inspiration

⁸ Report 2. As to the validity of a postulated attack on legal problems, see Brecht, *The Myth of Is and Ought*, 54 Harv. L. Rev. 811, 829 (1941).

⁹ 63 A.B.A. Rep. 339 (1938).

of their recommendations. Furthermore, a reading of the careful studies made of the individual agencies demonstrates, I believe, the very great value set by most agencies, indeed I would say by all, on the essentials of a fair procedure as understood by lawyers who do not require an exact correspondence with judicial models. I do not mean to deny that there are deficiencies in their procedure, but I do deny that they are attributable to the completely conscious lawlessness with which the agencies, or some of them, are charged. I do not speak of individuals who may inhabit those agencies. I speak rather of the intention which has motivated the general construction of these systems.

The prosecution of the public purpose requires that to the greatest degree possible there be utilized the full energies and capacities of personnel. The tasks should be distributed consistently with variations of intelligence and of responsibility: this means that time will not be wasted in empty formalities, that the bigger minds will be reserved for the most important jobs and that so far as possible the procedures will assure that the resources of technicians will constantly be employed. One of the most valuable of the committee's contributions is its detailed study of the possibilities of delegation in each agency. It criticizes severely the petty, jealous, and self-defeating attitude of heads of agencies who are incapable of delegating responsibility.¹⁰ The committee recommends delegation to responsible officers of authority to set on foot initial investigations, to issue initiatory and intermediate process, to undertake negotiation and settlement. Novel questions would still be referred up, and control exercised through reports and spot checks. It seems clear that, as the law stands, most agencies may delegate these functions, with the exception of the power to issue determinative orders. The committee, however, proposes legislation¹¹ authorizing such delegation not only to make the law clear, but also to encourage the practice.

The postulate of fair dealing in turn has its axioms. A person charged to obey the law should have a reasonable opportunity to know of its existence, and some time before or after its initial promulgation to protest against its terms. A man charged with violating the law must have adequate notice of the charges against him, an opportunity to know the evidence offered against him, and, normally by some form of hearing, to

¹⁰ Report 20.

¹¹ Committee Bill § 3. Where a multiple-headed board delegates to a single member power to decide, it shall be subject to agency review. But the head of a single-headed agency may delegate final power to an "agency tribunal" which, under § 2(b) may be one or more persons whose decision is irrevocable except by the courts. The minority proposal on this latter point is more guarded but probably amounts to the same thing. Minority Bill § 103(b).

test this evidence and to present countervailing evidence. The committee seems indeed to have carried its axiomatic approach to the subject much further than this. It assumes, practically without argument, that the concept of notice and opportunity to know the evidence is applicable to all proceedings in which the rights, duties, and even privileges, of named persons are determined. In so assuming, the committee has done little more than accept the premises upon which the agencies themselves have operated. It surely is arguable that the grant of pensions does not as an *a priori* matter entitle the pensioner to the elaborations of procedure which are in fact in force. The facts justify the observation of the committee that administrative adjudication in many of its aspects at least, far from being an invasion of the spheres governed by law, represents a subjection to the sway of law of matters initially handled by a crude and unelaborated executive process. "As contrasted with executive action," says the committee, "the alternative of administrative adjudication . . . insures greater uniformity and impersonality of action. In this area of Government, the administrative process, far from being an encroachment upon the rule of law, is an extension of it."¹² Occasionally the committee has criticized an agency for following formalities in situations where they were not applicable, as, for example, in the tendency to "over-judicialize" rule-making.¹³ Generally speaking it has taken for granted the theory of the forms established in an agency, and from the standpoint of that theory has criticized the practice insofar as it falls short of the general conception the forms imply. In doing this, however, it has sought to keep in mind the great variety of administrative activities and to refrain from applying these axiomatic conceptions in an inflexible manner. Nevertheless, the committee has not entirely eschewed general recommendations which it considers feasible and desirable. And it believes that further generalizations may be developed by an Office of Federal Administrative Procedure set up for the purpose of making a continuous study of administrative procedure. Whether the generalizations it has proposed are consistent with its own analysis of the situation is one of the most crucial questions to be considered in a study of the report.

A word should be said at this point concerning the "additional" views of Messrs. McFarland, Stason and Vanderbilt, and of Mr. Chief Justice Groner. In some respects their views are considerably more critical of ex-

¹² Report 11.

¹³ The Fair Labor Standards Administration has, for example, in making wage-hour orders, applied theories of separation derived from the prosecutor-judge analogy, mistakenly, as the committee believes. Report 149.

isting administrative procedures than those of the majority; they suspect the good faith of the agencies somewhat as does Dean Pound. Only a profound distrust could account for their suggestion that the legislature enact that "penalties, recoveries, denials, conditions and prohibitions shall not be imposed, exercised or demanded beyond those authorized by statute, and no sanctions not authorized by statute shall be imposed by any agency or combination of agencies. Rights, privileges, benefits, or licenses authorized by law shall not be denied or withheld in whole or in part where adequate right or entitlement thereto is shown."¹⁴ I know of nowhere else in the law where a public agency is so bluntly and invidiously told that it must not violate the law. "The foregoing provisions," say their proponents, "are rudimentary; there should be no objection to their statement in legislative form." The objection is that to single out certain agencies for admonition will serve only to lessen esteem for them. Because of this suspicion, the minority's proposals differ in two main respects. First, they propound a few additional uniformities, and second, they believe that as many uniformities as possible should be formulated in a statutory code of administrative procedure. They argue¹⁵ that even the courts with a tradition and discipline of hundreds of years' standing are governed by codes. The majority disagree, apparently, with certain of the minority's generalizations and contend¹⁶ that even where these generalizations can be accepted it is preferable or at least not necessary to embody them in a code. Many of these generalizations, they point out, are so qualified as to be little more than hortatory, others so obscure and uncertain of formulation as to make it doubtful what their application will be. I will advert at the appropriate point to certain of the sections proposed by the minority, but I think that viewed as a whole the minority's proposals are subject to the objections raised by the majority. The minority justify the code on the ground that courts are subject to similar codes. But close examination of the various provisions discloses that a number formulate matters which for courts are formulated not by statute but by tradition and experience and which, if they are to mean anything for administration, must be equally the result of tradition and experience. In some respects the proposals go far beyond the suggested judicial analogy. The majority have been content to limit most of their recommendations to

¹⁴ Minority Bill § 310. The minority may have in mind the currently mooted question whether the government may refuse contracts to violators of the National Labor Relations Act where the law is silent on such a sanction. It would seem, however, that that situation is excluded by § 301(g) or (h) of their bill. Furthermore, the question would still remain whether there was any "right" involved. Cf. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

¹⁵ Report 214.

¹⁶ Report 191.

advice. But they too urge that certain of the suggested uniformities be embodied in statute, in some cases because the agencies could not themselves adopt the procedure, but apparently in other cases because they were sure that the generality was either right or politically expedient, and wished to make equally sure that their recommendation would not be ignored. Consequently, though the majority may have legitimate objections to the formulation of a complete code of administrative procedure, they have precluded themselves from objecting to specific proposals simply on the ground of their generality. Hence a complete and detailed study of the report (which it is not possible to make here) must consider which, if any, of the statutory proposals of the minority are valid, if not as a code at least as separate proposals.

ADMINISTRATIVE INFORMATION

Publication of rules and procedures.—The committee believes that a certain amount of dissatisfaction with the administrative process has been due to “a simple lack of adequate public information concerning its substance and procedure.”¹⁷ It believes that all agencies—and here it proposes legislation—should “make available and currently maintain a statement of its internal organization, insofar as it may affect the public in its dealings with the agency, specifying (a) its officers and types of personnel; (b) its subdivisions; and (c) the places of business or operation, duties, functions, and general authority or jurisdiction of each of the foregoing.” The legislation provides further that: “All general policies and interpretations of law, where they have been adopted; rules, regulations, and procedures, whether formal or informal; prescribed forms and instructions with respect to reports or other material required to be filed shall be made available to the public.”¹⁸

The research staff of the committee found that in the Bureau of Internal Revenue, for example, officers engaged in initial action upon the taxpayers' obligation acted upon rulings, interpretations or instructions not revealed to the taxpayer. The taxpayer was thus unable intelligently to meet the theory upon which the officers were acting. This practice may render the attempt to achieve a solution by informal proceedings, a method upon which the committee sets great store, less likely to succeed, at least with fairness to the taxpayer. The reluctance to reveal instructions or policies has in some measure been due to a fear that the policy has not been adequately tested by the agency or that its application should be restricted to special facts so that its publication, which would tend to estab-

¹⁷ Report 25.

¹⁸ Committee Bill § 201.

lish a precedent, might be undesirable.¹⁹ The suggested legislation of the committee attempts to take care of this difficulty by requiring publication of policies only "where they have been adopted"²⁰—words of somewhat uncertain significance which give its suggestion something of that hortatory quality of which the majority accuse the minority. I feel, however, that exhortation may usefully be embodied in a statute. A vast amount of legislation which courts label as "directory" rather than "mandatory" is of this nature, and it is not argued that for this reason it serves no purpose. It is addressed to and has value for the conscientious officer, and for the conduct of others it may provide an authoritative basis of criticism.

Shall formulation of rules be mandatory?—The question of publicity for rules and procedures is closely allied to the demand that administrative tribunals formulate certain minimum requirements so as to enable persons intelligently and with assurance to prepare and submit their cases. The Logan-Walter bill, it will be remembered, attempted to meet this situation by providing that "administrative rules under all statutes hereafter enacted"²¹ shall be issued within one year after the date of the enactment. This rather peculiar formulation created questions as to what the effect would be of failure to issue rules. I suppose the provision might have been considered as simply directory. Furthermore, the phrase "administrative rules" was not restricted to rules of procedure, and this would compel an agency to formulate some sort of rules whether or not there was justification for action. The committee found that there were only a few agencies which had not issued some rules of practice and procedure, though "the rules rarely outline the whole process or indicate alternative procedures. They tend to touch upon the high spots of formality without disclosing the essential patterns of the procedures utilized by a given agency in a given type of case."²² The committee's bill takes care of this deficiency by providing for the publication of procedures whether formal or informal. The minority bill provides that "all regularly available procedures, formal or informal, shall be formulated and promulgated as rules of practice and procedure."²³ The difference between this and the majority is probably only verbal.

The minority bill, however, goes much further in that, like the Logan-Walter bill, it attempts to exert pressure upon the agencies to formulate,

¹⁹ Administration of Internal Revenue Laws, Monograph No. 22, at 155, 157. The position of the Bureau of Internal Revenue with respect to compulsory publication of all "interpretations" is set out in this monograph at page 157.

²⁰ Committee Bill § 201(2).

²² Report 27.

²¹ H.R. 6324, § 2(b), 76th Cong. 3d Sess. (1940).

²³ Minority Bill § 202(e).

to the greatest extent possible, substantive rules of law. In its Section 202, entitled "*Required Types of Rules*" (italics added), it directs the agency "so far as applicable or appropriate in view of the legislation and subject matter with which the agency deals" to issue the following types of information: "Each agency shall, as rapidly as deemed practicable, issue all rules specifically authorized or required by statute . . ." and "shall issue, in the form of rules, all necessary or appropriate rules interpreting the statutory provisions under which it operates, and such rules shall reflect the interpretations currently relied upon by such agency. . . ." So insistent are the minority on this position that at another point their statute provides:²⁴ "Rulings in specific cases shall not, as a method or matter of general practice, be utilized to serve the function of rules" and unless promulgated formally as general rules "shall not be utilized, cited, or have . . . any effect as to third parties." This almost violent prohibition of case-to-case development of the law comes rather curiously from purported admirers of the common law courts. In situations where the persons subject to a regulative scheme may wish legitimately to plan their operations in accordance with it, the promulgation of rules rather than ad hoc decision may properly be demanded if there is the data upon which to draft rules. In certain cases, however, there are formative or probationary periods in which the material for rules must be secured by a more tentative process of which the familiar ad hoc method of the courts may be a part. The above quoted provisions appear at points to be mandatory but with their many qualifications probably do no more than direct the agency to issue rules and interpretations wherever possible. Some agencies no doubt have failed to issue rules out of laziness or an excess of caution. A general statement of statutory policy may therefore not be amiss, but it should be stated as such without any pretense of its being mandatory.²⁵

Declaratory rulings.—Closely connected with the demand for the issuance of general rules is the demand for declaratory rulings as to whether particular situations fulfill or violate the requirements of the law. The committee is sympathetic to this demand, notes that at the present time only a very few agencies can or will give declaratory rulings which are binding and reviewable by the courts, and believes that the time is ripe for providing a procedure in administrative law similar to the declaratory judgment of the federal and state courts. "A necessary condition," says the committee, "of its ready use is that it be employed only in situations where the critical facts can be explicitly stated, without possibility that

²⁴ Minority Bill § 212.

²⁵ Of course, it may be advisable to require particular agencies to issue rules.

subsequent events will alter them."²⁶ This is necessary to avoid later litigation concerning the applicability of the ruling. The procedure may have no place in a complex, shifting problem like that of labor relations, while it may be extremely useful, for example, in determining the legality of a proposed advertisement or other self-contained activity. At the present time persons unable to secure declarations from administrative tribunals have been resorting to the very reluctant courts, either by a bill for a declaratory judgment or injunction, e.g., to secure a declaration of citizenship as in *Perkins v. Elg*,²⁷ or a statement as to whether or not a particular business is within the provisions of the Fair Labor Standards Act or related legislation.²⁸ This procedure is defective in that it may require a court to determine questions of fact over which the agency should exercise primary jurisdiction. The committee has proposed legislation²⁹ which authorizes administrative tribunals to make declaratory rulings binding upon the applicant and the agency and subject to judicial review. The agency is specifically authorized to refuse a ruling where it would not terminate the controversy or for other reasons would be premature or inexpedient. The minority bill³⁰ provides that every agency *shall* issue declaratory rulings when necessary to terminate the controversy. No reason is given by the proponents of this section for requiring the agency to give a declaration regardless of its advisability. The note to the section says simply that the agencies "should be authorized to use a device now recognized in the courts" without alluding to the fact that the judicial use of the remedy is entirely discretionary.

INFORMAL AND PRE-HEARING PROCEDURES

Pleadings and notice.—"Even where formal proceedings are fully available," says the committee,³¹ "informal proceedings constitute the vast bulk of administrative adjudication and are truly the life blood of the administrative process. No study of administrative procedure can be adequate if it fails to recognize this fact and focus attention upon improvement at these stages." The committee finds that informal processes are at present almost universally used and the methods in general are adequate.³² It believes that the agencies have not sufficiently explored the uses of con-

²⁶ Report 32.

²⁷ 307 U.S. 325 (1939).

²⁸ *Belo v. Street*, 35 F. Supp. 430 (Tex. 1940); but cf. *Connecticut Importing Co. v. Perkins*, 35 F. Supp. 414 (Conn. 1940); *Redlands Foothill Growers v. Jacobs*, 30 F. Supp. 995 (Calif. 1940). See discussion *infra* p. 438 as to what in the future will be the relative spheres of administrative vs. judicial declaratory action.

²⁹ Committee Bill § 401.

³¹ Report 35.

³⁰ Minority Bill § 304.

³² Report 41.

ference after the complaint has issued. It recommends greater flexibility in the use of the consent decree. The Federal Trade Commission, for example, will not enter into a consent decree unless the respondent admits the truth of the charges. It seems to regard such an admission as a necessary condition of enforceability. The NLRB, however, does not think so and, as the committee points out, the Supreme Court of the United States did not think so in *Swift & Co. v. United States*.³³ The practice of the labor board in agreeing to consent decrees which do not contain admissions of guilt has been useful in saving time and eliminating unnecessary controversy. It is particularly appropriate where the object of the proceeding is to secure a future observance of the law and where the least controversy may promote the greatest cooperation. The committee criticizes the wasteful and unnecessary practice current in some agencies, of holding hearings in default cases, apparently on the mistaken assumption that their orders will not otherwise be enforceable. The minority bill,³⁴ ex abundanti cautela, provides that orders made without hearing either after default or by consent shall have full force and effect. The minority bill, also relying on the committee's finding that answers are usually so general as to be useless, authorizes³⁵ the agencies, in addition to or in place of answers, to require notice by the parties of a desire to be heard or of intention to appear.

The committee finds much to criticize in the pleadings and notices issued by the agencies. The desideratum should be to put the private party on notice of the charges or issues toward which he should direct his showing. Complaints, for example, after setting forth certain specific charges, conclude that the respondent has violated the act "in other respects." Notices setting down license applications for hearing sometimes call upon the applicant in general terms to prove that his application is within the limits of the statute without stating the particular issue which the agency considers doubtful. In most cases, to be sure, conferences will have defined the issue but the committee believes that the pleading should enable a party to know with confidence the issues on which he is to present evidence. This will save time and money for him and for the agency. The minority bill³⁶ requires specificity of charges and prohibits charges phrased in general statutory terms.

Discovery.—Closely related to this point is the question of disclosure of evidence by the agency prior to final disposition by hearing or otherwise. Lawyers seem to be agreed on the value of pre-hearing disclosure so as to

³³ 276 U.S. 311 (1927).

³⁵ Minority Bill § 307.

³⁴ Minority Bill § 303.

³⁶ Minority Bill § 305.

enable the parties to meet each other's cases and to eliminate uncontested issues. The new federal rules which provide for pre-hearing conferences before the judge and for wide discovery in the discretion of the court not only of evidence but of the sources of evidence illustrate the modern trend in judicial procedure. Pre-hearing conferences before a responsible officer are used in some of the administrative agencies, particularly in the United States Employees' Compensation Commission, the Board of Tax Appeals, the Social Security Board, and above all the Civil Aeronautics Board, which conducts certain proceedings almost entirely by conference prior to hearing. The committee recommends the extension of this practice to other agencies, but goes no further in its proposed statute than to provide that the hearing commissioner³⁷ may participate in a pre-hearing conference called by either the agency or himself. It might also be provided that the private party may move formally before a hearing officer or other designated officer for a pre-hearing conference.

The extent to which in judicial proceedings discovery can be had against the government departments is not entirely clear. The courts and an authoritative commentator³⁸ believe that the discovery provisions of the Federal Rules of Civil Procedure are applicable to the Government.³⁹ The Court of Claims Act⁴⁰ provides specifically that the court shall have power to call upon any of the departments for any information or papers it may deem necessary. But the head of the department may refuse to comply when in his opinion such compliance would be injurious to the public interest. It has been universally held by successive attorneys general and by the courts that, granting the applicability of discovery to government information, an official determination that confidence or secrecy is necessary in the public interest will be respected,⁴¹ and the general provisions in the statutes which authorize heads of departments to make appropriate regu-

³⁷ Committee Bill § 304(f)(3).

³⁸ *Federal Life Ins. Co. v. Holod*, 30 F. Supp. 713 (Pa. 1940); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (N.Y. 1939); 2 Moore and Friedman, *Federal Practice* § 26.03 (1938).

³⁹ Rule 26, providing for discovery, and Rule 37(F), to the effect that expenses and attorney's fees are not to be imposed against the United States for refusal to make discovery, implies that the United States is within Rule 26.

⁴⁰ 36 Stat. 1140 (1911), 28 U.S.C.A. § 272 (1928).

⁴¹ 15 Ops. Att'y Gen'l 378 (1877); 15 Ops. Att'y Gen'l 415 (1877). The department, however, should not keep secret an unsolicited communication to it alleged in a private action to be libelous. Cf. *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (N.Y. 1939), with *United States v. Doheny* (S. Ct. D.C. 1926), reprinted in Morgan and Maguire, *Cases on Evidence* 208 (1934). The English rule is to the same effect. In *re La Société Les Affreteurs Réunis*, [1921] 3 K.B. 1.

lations for the use and protection of the public documents has been construed to authorize rules creating secrecy.⁴²

As matters stand today, private parties are not entitled to the discovery of evidence or the sources of evidence in the possession of, or to be used by, the agency prior to administrative hearing. Ordinarily, however, much of this evidence or at least the general lines it will take will be revealed in the usual informal negotiations and conferences or, as in some agencies, in a formal pre-hearing conference. In certain agencies there has been a considered policy of not revealing particular matters. In dealing with applications for admission to the Federal Reserve System and related privileges, the Board of Governors of the Federal Reserve System in order to secure information as to the applicant will not reveal the identity of its informants should they request that their names be kept secret. The applicant may have difficulty because of this in making his case, particularly as the matter is disposed of without hearing. The Federal Reserve Board believes, apparently, that the advantages of getting information may outweigh the dangers of its being confidential, and the committee is not prepared to say,⁴³ in the absence of substantial evidence that there has been abuse, that this judgment is wrong. A similar problem arises in connection with veterans' claims, a case in point being a proceeding to revoke a veteran's widow's pension because of her adultery. Here the name of the informant is kept secret. The committee concludes that the secrecy is not justified. "Termination of benefits is a serious sanction; an accusation of adultery is even more grave. Rebuttal of charges of this nature is extremely difficult where the accused knows neither the evidence against her nor the identity of her accusers. The interests of the accused in cases of this type seem paramount."⁴⁴

The committee makes no proposal on the subject of discovery, but in the minority bill the following is proposed:

Publicity.—Matters of record shall be made available to all interested persons, except personal data or material which the agency, for good cause and upon statutory authorization, finds should be treated as confidential. . . .⁴⁵

Record in informal proceedings.—Every person involved in any proceeding before, or making any application to, any agency shall be notified of the issues, shall have access to the file or record of information upon which the agency proposes to act or has acted . . . and shall have disclosed to him the names and identity of all persons appearing against him in the matter as well as the available texts or reports of their testimony or statements, together with adequate opportunity to rebut or offer countervailing evidence. . . .⁴⁶

⁴² Rev. Stat. § 161 (1878), 5 U.S.C.A. § 22 (1927). See also *Boske v. Comingore*, 177 U.S. 459 (1900); *Ex parte Sackett*, 74 F. (2d) 922 (C.C.A. 9th 1935).

⁴³ Report 142-43.

⁴⁴ Report 130.

⁴⁵ Minority Bill § 108.

⁴⁶ Minority Bill § 306.

It is not clear whether the latter section applies to matters in which there may be a subsequent hearing. On its face it seems not to do so; yet the note appended to it states that without such disclosure there is "no real hearing." The word "hearing" may, however, be used here in a general sense rather than in the sense of a formal hearing. These sections, as with a number of others, go far beyond the judicial practice which the minority claim for analogy. They seem, for example, to take no account of the familiar rule that public officials need not disclose the name of an informant unless the court is clearly convinced that the disclosure is necessary to absolve a criminal defendant. The committee has pointed specifically (as noted above) to a case where secrecy in this respect may well be justified. Yet the suggested provision overrides all qualifications without explanation. Furthermore, in requiring an agency to turn over intact its file or record of information, it goes far beyond existing discovery procedure either in suits against individuals or against the government. In discovery procedure it is always possible to assert irrelevancy, hardship, and privilege; the court has large discretion in protecting the parties. The section first cited indicates that confidence may be invoked if authorized by statute. Does that require specific authorization and so repeal the present general provision under which by judicial interpretation rules of secrecy may be made? Equally doubtful is the meaning of the phrase "matters of record." The general intention, however, of the section is, I believe, a sound one. With respect to matters in which there is no right at any point to a hearing, it might be well to enact that the agency shall at some stage make a statement of the evidence upon which it proposes to act. In matters which may be the subject of a hearing, provision might be made for motion before the responsible officer for discovery similar in scope to that prevailing under the federal rule and controlled by the discretion of the agency or its delegate. I think that the subject is an appropriate one for general legislation of this type, provided a suitable formula can be found at our present stage of information.

Publicity in individual cases.—The committee recognizes the problem created by official press releases or other publications concerning investigations or complaints against private persons. In some cases, as in the administration of the securities laws, the effect of any publicity suggesting defects in a stock offering or violation of the law may be a disaster which not even a later favorable decision can repair. The committee believes that there is rarely any justification for prior publicity in these cases. It believes that an occasional agency has used the threat of publicizing the issuance of a complaint as a club to secure compliance with its demands.

This it strongly condemns.⁴⁷ The SEC itself has been mindful of this problem and seeks to advise applicants informally of the deficiencies of their applications before issuing any formal process.⁴⁸ The committee does not find it feasible or desirable to suppress publication of the fact that complaints have issued. In this it accepts a practice which prevails in the criminal law, where indictments are given publicity as of course. The committee believes that the agency might follow the practice of not publicizing the complaint in the press until at least it has been received by the respondent so that he may have an opportunity of entering into negotiation or at least of preparing a press release representing his position. It proposes no legislation on this point beyond suggesting that the Director of Federal Administrative Procedure examine the practices of the several agencies.⁴⁹ The minority propose to enact⁵⁰ that: "In all contested proceedings, agency publicity shall be withheld during preliminary or investigative phases of adjudication. When formal proceedings are instituted, publicity and releases may be issued by an agency . . . only upon equality of treatment of representatives of the press and other interested parties and shall contain only the full text or impartial summaries of documents of public records [sic]; and such summaries shall, so far as deemed practicable, cover the public documents or positions of all parties to the proceeding or matter involved."

FORMAL ADJUDICATION

Right to hearing.—In nearly all matters involving adjudication of the status of individuals there is at some point a right to hearing by statute or administrative practice. There are some exceptions. The Federal Reserve Board exercises its licensing powers without hearing, largely because it fears that the sources of its information would dry up if exposed to hearing. The committee doubts that hearing would be valuable since determination rests on "a congeries of imponderables" "calling for almost intuitive special judgments."⁵¹ This reasoning, however, would eliminate hearings from much of administrative adjudication; the need of secrecy remains the stronger argument. In any case the committee in the absence of "substantial evidence that there has been an abuse of power" (does this mean in the absence of complaint?) is not prepared to recommend hearings. The minority, on the other hand, propose that,⁵² with various named

⁴⁷ Report 133-34.

⁴⁸ See generally *Publicity and the Security Market—A Case Study*, 7 Univ. Chi. L. Rev. 676 (1940); 7 Univ. Chi. L. Rev. 150 (1939).

⁴⁹ Committee Bill § 7(4).

⁵⁰ Minority Bill § 108.

⁵¹ Report 143.

⁵² Minority Bill § 308, aside from exceptions provided; note also § 301.

exceptions, "in all cases where informal procedures do not result in consent dispositions of matters, formal adjudicatory procedure for . . . hearing . . . shall be provided. . . ." Considering that there are only a few cases in which hearings are not held, the minority's device of providing hearing for these few exceptional cases without specific mention seems evasive. The changes to be effected should be duly pointed out and the cases considered each on its merits.

Status of adjudicating officer.—The attack on administration has been most intense at the point of formal adjudication. Here the committee enters into controversial analysis and comes out with its most radical proposals; here the differences between majority and minority are most acute. Only a very small number of matters come to adjudication. Adjudication is not for that reason less important. The issues that come to it may be crucial in the formulation of general policy and may involve a measure of conviction which is of moral significance to the parties. The fairness of procedures which ultimately force the conclusions of state authority upon one or another of the parties to a controversy is felt to be one test of the quality of a civilization. The committee emphasizes the importance of an adjudicatory process which embodies both the technical competence and zeal needed to protect the public interest and the detachment which is concerned to limit the application of policy to those whose activities are in fact within its scope.

The Anglo-American common law has separated judging from prosecutory functions, particularly in enforcing laws denoted as criminal: that is to say, carrying punishment of fine, imprisonment, or death. This principle, accepted today as a commonplace of the administration of justice, was only very slowly recognized. Until recent times it was embodied primarily in the jury, and was a product of the independence which very slowly and very painfully was won for that body. The jury served to mitigate the overwhelming power of a theory of criminal law in which the state was both accuser and judge, particularly in a time when all the officers of the court, including the judges, were the King's advocates.⁵³ Yet down to the threshold of the modern political settlement, it was necessary, in order to preserve order and forward necessary policy, to supplement the action of juries with the activities of the King's council, in which there was very little separation of function even in the enforcement of the criminal law. Similarly, county administration was, until the reform in England, carried on almost single-handed by the justices of the peace.

⁵³ Cf. Felix Cohen, Review of Radin, *Law as Logic and Experience*, 54 Harv. L. Rev. 711 (1941).

The principle of separation has thus been qualified by the form of administration, the severity of the sanction, and the exigency of the occasion. Given these qualifications, it testifies to a strong, long-held popular intuition that the judge who is also prosecutor is apt to make distorted applications of state power. Insofar as it is accepted, it is another of those axioms the violation of which cannot be demonstrated to produce injustice, but which are important as long as they are honestly felt.

The application of this principle to administrative law has been most furiously asserted and most furiously denied without very detailed examination from either side. Justice Groner says with respect to adjudication by administrative agencies: "The controversy . . . is finally adjudged and determined by the agency which has initiated and conducted the prosecution, and this, I think, is not only wrong but in the teeth of the principle that separation of the legislative, executive, and judicial is an essential condition of liberty."⁵⁴ Messrs. McFarland, Stason, and Vanderbilt emphasize⁵⁵ that a single agency may make rules, investigate their violation, summon witnesses and "examine them in secret," visit premises without a warrant, threaten the imposition of penalties or prosecutions, and finally judge. This catalogue of powers should, I think, be qualified by noting that it may not enforce its own subpoenas, any intermediate process or any final order without the assistance of a court which may at any of these points review its authority.

The committee has broken ground in attempting a more detailed and discriminating analysis of the problem. The truism that administrative activity covers many disparate forms has peculiar application here. It is clearly inapposite to speak of rule-making and comparable legislative activities as involving an exercise of a prosecutory function. The integration of administrative power may be excessive in the particular case, because it insulates the official from representative opinion and so gives undue weight to the official predilection as originally conceived. But that may be true in all legislative proceedings and calls in a particular case simply for adequate exploration and representation. A closer test of similarities and dissimilarities is provided by the ubiquitous licensing function, a staple of state administrative activity and of increasing importance in the federal region. A narrow, logical analysis reveals the potential presence of "prosecutory" attitudes in the exercise of this function. In investigating an application and setting it down for hearing, the administration may have developed a tentative attitude toward the matter to be

⁵⁴ Report 249.

⁵⁵ Report 204.

heard. Yet in the long history of this function it seems never to have been thought within the principle of separation. This is a popular judgment, but in a very considerable degree it is with a popular conception that we are dealing. It might be said that the preliminary judgments formed in this type of case do not possess the mind in the same degree as one based on a ferreting out of some positive misconduct. Furthermore, licensing is usually the key to a policy of public control involving many other functions and must be exercised consistently with the entire scheme of regulation. Finally, the consequence of refusal of a license, though serious, is not quite so serious as imprisonment or even liability for the payment of money. This is less true, of course, of the revocation of a license upon charges, or the refusal to renew a license for similar reasons, and it is not illegitimate to think of these latter functions as involving a factor of prosecution. However, the questions involved are of the same order as in the original licensing. A regime which placed the power to revoke licenses in one official and the power to grant in another might result in serious conflicts in the application of policy. It would be possible, of course, and there may be cases where such a procedure would be appropriate, to have both the licensing and revocation functions in a single body with an independent prosecutory agent in revocation cases. Typically, however, the entire process has been integrated as, for example, in the administration by the justices of the peace in England of multifarious licensing powers.

There is a related form of administrative activity typified by the regulation of public utilities in which adjudication is the vehicle primarily of future rule rather than consequence for the past. The activities of the Interstate Commerce Commission, the Federal Power Commission and the state public utility commissions are examples. The proceeding may in form call for reparation for "unreasonable" exactions in the past. In the case of the Interstate Commerce Commission not even this activity has involved it in prosecutory attitudes because largely it has left the pressing of these claims to the injured party.⁵⁶ But beyond this it will be admitted, I think, that problems of valuation, of what rate will in the future bring in a just return and promote the maximum use, and of what service is equitable, are problems of a legislative nature, problems of prophecy and compromise rather than of determining the consequences of dereliction. The need is for a responsible organ which is continually sensitive to the total area of relationships, which is ever alert to correct maladjustment and observe the effects of its action and so lay the basis for further action. This job can only be done well by a group of high-minded experts which

⁵⁶ Interstate Commerce Commission, Monograph No. 24, at 28.

can coordinate every stage of official activity and which has unlimited access to the minds of its staff at whatever stage the staff has been engaged.

There comes finally a field of administration which in its nature is least distinguishable from the activities of the judiciary, in which a prohibitory law has been passed, the violation of which carries sanctions of varying degrees of severity, the sole administrative activity being to determine whether the law has been violated so as to provide the appropriate sanction. The committee has named the National Labor Relations Act and the Federal Trade Commission Act as examples of this type of activity. "It is undoubtedly true that agencies whose only substantial task is that of enforcing the prohibitions of a statute through adjudication, especially in such controversial fields as that of unfair methods of business competition and labor relations, are peculiarly in danger of being charged with bias by those against whom the prohibitions are sought to be enforced."⁵⁷ Even these situations may demonstrate important differences from certain typical criminal law situations. Their sanction, which is normally a cease and desist order, seeks to right the future rather than punish the past, though a labor board order carrying back pay may involve, as far as respondent is concerned, a substantial penalty. These are questions of degree. That a sanction speaks only in terms of a cease and desist order does not indicate the absence of strong prosecutory attitudes in the imposition of it; nor is the sanction so non-invidious that the respondent is not entitled to as much protection from the consequences of that attitude as is consistent with the enforcement of the law.

In analyzing the impact of the separation principle on administrative law, the committee has done a good job of analysis more or less on the lines set out above, but it is just at this crucial point in its treatment of the system that the committee comes forward with a general proposal—a proposal which for me has had great attraction, but to which, in the form suggested, serious objection can be taken. The committee believes that much of the criticism of administrative tribunals can be traced to dissatisfaction with the trial examiner system. In agencies with an enormous volume of business the board members cannot themselves hear all cases. They have delegated the function of initial hearing to so-called trial examiners. The caliber and status of the examiners differ widely among the agencies.⁵⁸ In the Interstate Commerce Commission, for example, they are carefully

⁵⁷ Report 58.

⁵⁸ Each of the monographs contains material on the trial examiners, as does also Appendix H of the report.

selected and well-paid. The commission is disposed to give considerable weight to their findings and they have been felt to give reasonable satisfaction. In the Federal Trade Commission and the National Labor Relations Board there has been great variety in their quality and in the past little disposition to give any weight whatever to their preliminary findings. Particularly in agencies dealing with highly controversial matters, problems in which the solutions are yet to be found, the responsible heads have indicated their will to make the decisions according to their own conceptions of policy and without interference from inferior and ordinarily less well-advised officers. This has made it difficult and probably inadvisable in the early stages of an act's administration to develop trial examiners of strong independent character. In what was probably a very logical move, given the circumstances, the Federal Communications Commission did away completely with the pretense of an independent trial examiner, and held its hearings before a member of the staff who had first worked up the case and who later advised the commission on it.

The committee proposes to strengthen the position of the hearing officer. It proposes legislation which will provide that each agency shall nominate its hearing officers, that they shall be approved by a new independent agency, the Office of Federal Administrative Procedure.⁵⁹ The hearing officer will be paid between \$5,000 and \$7,500, hold office for seven years, and be removable only on conviction of charges after trial under the auspices of the Office of Federal Administrative Procedure. The minority members of the committee provide⁶⁰ for a twelve-year term and renewal of the term without the concurrence of the agency which he serves. Justice Groner believes that the hearing officer should be appointed by the Office of Administrative Procedure alone and be assigned by it to cases as called for.⁶¹ These hearing commissioners must be used in any case where the rights of a named individual are adjudicated upon hearing (unless one or more of the heads of the agency presides). In a matter heard by a commissioner an initial decision must be made by him, unless he certifies a novel question, or unless the agency "on petition of any private party and for good cause shown" brings the matter before

⁵⁹ Report 45 et seq.; Committee Bill §§ 302-19. See *infra* p. 439.

⁶⁰ Minority Bill § 309(3).

⁶¹ Report 250. The committee bill provides that where there are five or more commissioners attached to an agency one shall be named Chief Hearing Commissioner whose primary function will be to assign the commissioners to cases. The minority consider this procedure "unnecessary." Report 239 note. This procedure, of course, lessens the power of an agency to force out an unwanted commissioner by not assigning him to cases or to diminish his influence by assigning him to cases which are unimportant or obvious.

itself for determination.⁶² The determination of the hearing commissioner may be reviewed by the agency itself upon objections or upon motion of the agency. The statute as proposed by the committee does not limit the authority of the agency in substituting its own judgment but does require it to state its reasons where it differs from the hearing commissioner.⁶³ The statute does, however, suggest that the agency *may* limit review to whether the findings of fact are "clearly against the weight of evidence,"⁶⁴ and in the words of the minority "clearly contrary to the manifest weight of the evidence."⁶⁵ And the report indicates that the hearing commissioner should not be otherwise overruled. It suggests that the relationship should to a considerable extent be that of trial court to appeal court. "Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown."⁶⁶

The initial reaction to this proposal, on the part of some observers at least, will be that in a field of government whose variety the committee has so well demonstrated its most important recommendation is a general over-all proposal. There is, I think, no necessary contradiction here; there is simply a heavy burden in establishing the proposition that the particular uniformity is a desirable one. Obviously the proposal is a compromise. It is a compromise from the point of view of those who attach importance to the separation of function, particularly in those cases which the committee itself recognizes as involving a prosecutory factor. It is quite true and of great importance, as the committee points out, that in very few agencies has it been the case (and in none need it be so) that the same person who prosecutes participates in judgment. In a large organization handling hundreds of matters a year, unity of control is in part a formal conception rather than a constant reality. It operates along broad lines rather than in each particular case. Inevitably there must be a division of function, a measure of autonomy. It is possible, and in certain organizations usual, to insulate from each other the various units engaged in investigation, advocacy, intermediate judging, and review. It is possible to isolate the personnel engaged in the issuing of complaints from all other personnel. The issuance of complaints may be performed under general instruction from the heads of the agency, so that in most cases the agency

⁶² Committee Bill § 307.

⁶³ Committee Bill § 309(1).

⁶⁴ Ibid.

⁶⁵ Minority Bill § 309(0).

⁶⁶ Report 51.

will be entirely unaware of a particular case. Both the majority and the minority of the committee recommend the adoption of these devices to the fullest extent possible. The minority propose to enact⁶⁷ that "in all cases where agencies or their members . . . make formal adjudications, there shall be a complete segregation of prosecuting from hearing and deciding functions . . . provided that the head, or members of a board may . . . (a) supervise or authorize the institution and general conduct of proceedings or the issuance of preliminary or intermediate orders or process, or (b) supervise the consideration, or reject offers, of settlement or consent disposition prior to or after the institution of formal proceedings. . . ." It is rightly felt that with such a division of function pre-disposition in the ultimate authority or in the hearing officer (insofar at least as it is based on combination of functions) is considerably reduced. It is at the same time admitted that it is not eliminated in quite the same degree as when the judge does not regard himself as part of the prosecutory organization and is not moved by the prevailing *esprit de corps*. It is thus a compromise, since whatever the position of the hearing commissioner, the relation between the agency members and the remaining totality of the staff is left intact.

But it is also a compromise of the principle of unified control, which for certain agencies is the appropriate organization from any standpoint. It sets the judgment of one who is detached from the staff over against that of the administrators whose conclusions are the product of a close and fruitful integration. It has been noted that the proposed legislation does not in terms restrict the scope of the agency's final judgment. But its implication is, indeed it is so expressed in the report, that the hearing commissioner's judgment in case of a close dispute on the evidence is to be preferred to that of the agency, since it is not to reverse unless the findings of the commissioner are "clearly against the weight of the evidence." At least one court recently has indicated⁶⁸ that the findings of the agency have less presumptive validity when it reverses than when it affirms the trial examiner, even where the trial examiner is the feeble instrument that he is today. This judicial attitude might be considerably reinforced where an explicit attempt has been made to make the hearing commissioner semi-independent and give his conclusions *prima facie* validity. This might be true even though the statute governing judicial review continues as in its present form to limit the court to the question of whether there is

⁶⁷ Minority Bill § 309(a).

⁶⁸ *A. E. Staley Mfg. Co. v. NLRB*, 7 Lab. Rel. Rep. 302 (C.C.A. 7th, Nov. 14, 1940), noted in 54 Harv. L. Rev. 687 (1941).

evidence to support the *agency's* findings. Justice Groner in his concurring statement⁶⁹ proposes that where the agency rejects findings of fact of the hearing commissioner, its action be reviewed "in the light of the court's own impressions of the weight of the evidence." To be sure, the courts might not adopt this attitude, particularly where the reversal has been on questions of policy, law, and interpretation rather than of the happening of certain defined events. The court might in the former field recognize that the conceptions of the responsible agency heads as to the policy to be pursued are of controlling weight. It is, nevertheless, something of a paradox that as between a single isolated hearing commissioner and the responsible, presumably more capable heads of the agency, the judgment of the hearing commissioner on a disputed question of fact—and many questions can be so framed—is presumptively to be preferred.

This dilemma would seem to arise in considerable measure from the attempt to strike a compromise between two types of organization for all adjudicatory functions. It may be said, of course, that in no case will it do any harm and in a number it may do a great deal of good. And I do not feel prepared to assert categorically that this may not be so. Yet, as I have indicated, although the hearing commissioner be inferior in opportunity and capacity to the agency head, his judgment may be embarrassing. In rate regulations, valuation proceedings, and certain forms of licensing there appears to be no demand nor particular reason for an "independent" hearing commissioner. The commissioners themselves are the persons best qualified in conjunction with their many related duties to decide the disputed questions of fact where there is a conflict of evidence. To be sure, the Federal Power Commission and the Interstate Commerce Commission, to name two, need the services of trial examiners of intelligence and integrity, and, so far as can be observed, have succeeded in securing such examiners. Most of the cases before the Interstate Commerce Commission can be settled by the trial examiner. If the commission is to save its time and energy for the difficult and novel questions of policy, if it is to act successfully as a coordinator of a vast mass of business, routine cases should be disposed of at the hearing level. This result can best be secured if the trial examiners are persons of self-respect and capacity. It is quite another thing, however, to suggest that in proceedings of this type their judgment should be a measure of the commission's judgment.

It could probably be surmised that the proposal is an attempt to meet criticism directed against certain agencies without pointing the finger. In doing so it has perhaps weakened the position of those who opposed the

⁶⁹ Report 250.

Logan-Walter bill and similar proposals on the ground that the remedies should not be broader than the evils. But how well does it meet the criticism directed to the agencies in question? The committee noted that when the administrative function is limited to dealing with past violations of law and imposing sanctions of a punitive or preventive nature the claim of bias is most likely to be made. The committee faced squarely the question of whether in these particular cases the judging function should not be detached from the other functions and it decided that it should not be. The common control of all functions resulting in judgment offers the opportunity for the most effective administration, particularly where the quick and energetic enforcement of a statutory policy against overwhelming odds is vitally demanded. Neither prosecutor nor judge can escape responsibility by charging the other with dereliction or incomprehension. This method should not, however, in my opinion, be resorted to in the type of case in question, unless there has been a conscious judgment that other methods are insufficient. There has been a tendency to assume that the choice is between judicial procedure with its lack of specialization and motivation, and a completely integrated administrative machine. It is possible, however, to devise a court or board whose sole duty is the determination of a particular kind of litigation. These judges should be picked for their technical competence and their zeal for the policy of which they are the instruments. They should be provided with a staff of technicians adequate to their function. The remaining functions of investigation and prosecution would be handled by an administrator or what you will. This, of course, is the structure under which the tax laws are now being enforced and apparently with reasonable success, although I gather this simply from the lack of spoken criticism and might be required to qualify it if data were brought forward.⁷⁰

The committee speaks of the importance of disposing of matters at the informal stage and believes that informal procedure which now disposes of such a vast proportion of the business would be impaired if there were separation since the prosecutor would feel called upon to make a record or, in doubtful cases, seek the advice of the judge in formal proceedings. I think there is little to support the idea that separation decreases the resort to informal disposition. The committee itself in noting the importance of that avenue of solution cites first the Bureau of Internal Revenue;⁷¹ and today we are witnessing the enforcement of the anti-trust laws by the

⁷⁰ The tax law administration may not be apposite because the BTA decides mostly questions of law.

⁷¹ Report 35.

Department of Justice through the instrument of the consent decree. The committee also notes the expense and confusion of duplicating agencies. This is an appeal again to the same generalization which somewhat dominates this section of the report, namely, that all of the functions in question must be handled alike. The case for separation as an original proposition must proceed on very particular grounds. It is necessary to demonstrate that the function in question is one essentially accusatory. If it is a question of seriously disrupting an already existing organization and lessening its momentum at a crucial period, it should be clear that there exists legitimate dissatisfaction. In this connection it should be noted that much of the dissatisfaction with administrative determinations proceeds not from the combinations of functions but from an objection to the zeal of the agency members. There has been some, although very little, objection to the Federal Trade Commission,⁷² a great deal to the NLRB. Official zeal is a *sine qua non* if new and bitterly fought policies are to be effective; to relinquish it would be to relinquish the objectives of government. Yet this necessary zeal no doubt produces an occasional unjust judgment; probably a greater number than might be thought to result from the combination of functions. I do not believe that it is a sufficient answer to those who raise procedural objections that the objections are only a cloak for their hatred of the law, but it does qualify the force of the objection; it suggests that reform may provide so little relief that risks are not worth taking. Particularly is this so if we are dealing with a procedure whose ill effects are more or less conjectural. But finally, there is a point at which, if our zeal is to be righteous, we must concede the validity of such principles as we would contend for if we were the objects of state power similar in form and equally distasteful in its objectives.

The committee seems, for example, to have correctly criticized⁷³ the splitting up of functions between the Administrator of Civil Aeronautics and the Board of Civil Aeronautics, the former licensing, the latter revoking licenses on its own or on the motion of the administrator. The granting and revocation of licenses are functions of a general scheme of regulation which presumptively must be integrated to be effective. Where one officer may on his own motion revoke a license and another may then grant the same license, a serious conflict of purposes may result. This could be avoided by providing that the revocation board hear proceedings only on the motion of the licensing authority. Even so, it seems to have been largely a doctrinaire conception advanced by the President's Committee

⁷² See, e.g., Henderson, *The Federal Trade Commission* 328 (1925).

⁷³ Report 175.

on Administrative Management⁷⁴ which resulted in this division of authority.

The committee, having rejected for all cases the device of separation, seems to have provided the independent hearing commissioner largely to take care of those cases where there was most dissatisfaction. It might be argued that the proposal is a good compromise if it were restricted to those cases. I think that the device is particularly apposite in passing on questions which are in the common realm, questions in which the technical elements are of a simple nature not requiring the coordination of materials by a large staff nor a special point of view. I think of cases involving the revocation of a seaman's license for drunkenness or incompetency. In an NLRB commissioner, however, I would expect an approval of the purposes of the law, which obviously is not a view shared by all members of the community. Most of the cases before the NLRB turn on disputed questions of fact. Whether a motivated application of the law can be secured by a board which is faced with reconciling the varying judgments of a large staff of "independent" hearing commissioners holding office for seven years is a matter of conjecture. There is at least an argument that a board freed from the suspicions attached to the exercise by it of investigatory functions is in a stronger position to defend its judgments than one which is squeezed between independent trial examiners and the courts. However, agencies may not find it difficult to reverse their hearing commissioners in appropriate cases, particularly if the Supreme Court continues to protect them. The agency will seek and may find commissioners holding views sympathetic to the legislation, who will not compel the agency to a course of inconsistent and embarrassing reversals. On the other side, the circumstances under which the hearing commissioner functions may provide, as far as private parties are concerned, just that quantity and quality of impartiality which they regard as lacking in the present arrangement.⁷⁵ In the more routine cases it will provide a forum which both the agency and the respondent will be willing to accept without appeal to the agency tribunal itself.

Whether decision will be collective or personal.—The famous *Morgan*

⁷⁴ The minority (Report 206) rely heavily on the report of this committee which inter alia criticized combination of functions; this report was transmitted to Congress by the President, who described it as "a great document of permanent importance."

I believe, however, that it was largely the committee's advocacy of over-all presidential control of all agencies which won the President's approval for its report. See Jaffe, *op. cit.* supra note 1, at 1236.

⁷⁵ The report has to date been very favorably received by the conservative press. 27 *Pub. Util. Fortnightly* 238 (1941).

case⁷⁶ announced the proposition (purportedly as a matter of statutory construction) that where the legal position of a named individual was required by statute to be determined upon hearing and evidence, the official charged with decision must act in a "judicial" manner, that is to say, come to a conclusion based on his own personal contact with the materials of judgment. The case did not clearly define how intimate and complete this contact must be. The Chief Justice said that "if the one who determines the facts which underlie the order has not considered evidence *or* argument, it is manifest that the hearing has not been given."⁷⁷ He said further: "This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Arguments may be oral or written." The decision stirred great controversy.⁷⁸ It was admitted that parties would secure greater satisfaction if they might at least argue to the person who was charged with decision. It was admitted also that responsibility for decision might be more clearly focused if the signer of the decision were to make a personal judgment based on some familiarity with the material. It was observed, on the other hand, that as in the Department of Agriculture, where the secretary could not make all the decisions issued in his name, it might nevertheless give the decision greater sanction and prestige if signed by him.⁷⁹ In the famous *Arlidge* case⁸⁰ the House of Lords gave approval to the idea that the secretary would be responsible in Parliament for all the activities of his subordinates, so that this signature, though not indicating personal judgment, was not without significance.

The committee has unqualifiedly accepted the principle of the *Morgan* case, apparently for all situations in which particular interests are adjudicated. "The heads of the agency should do personally what the heads purport to do."⁸¹ Where the decision has been made originally by a trial examiner, "review should be given by the officials charged with the re-

⁷⁶ *Morgan v. United States*, 298 U.S. 468 (1936).

⁷⁷ *Ibid.*, at 481 (italics added).

⁷⁸ The arguments pro and con are stated in Feller, *Prospectus for the Further Study of Administrative Law*, 47 *Yale L.J.* 647, 662 (1938).

⁷⁹ Attorney General Jackson in his letter to the President advising veto of the Logan-Walter bill said: "Moreover, a long-continued policy of Congress has jealously confined the power of final decision in matters of substantial importance to a few principal administrative officers, generally Presidential appointees confirmed by the Senate." H.R. Doc. 986, at 10, 76th Cong. 3d Sess. (1940).

⁸⁰ *Local Government Board v. Arlidge*, [1915] A.C. 120.

⁸¹ Report 52.

sponsibility for it, and the review so given should include a personal mastery of at least the portions of the records embraced within the exceptions."⁸² Whether the agency is headed by a multiple board or a single person such as the Secretary of Agriculture is immaterial. The agency by proper delegations of its functions, by machinery which allows for disposition by the majority of matters at the lower levels can, in the opinion of the committee, acquire this personal mastery of the important matters which will remain for its determination. The Secretary of Agriculture may delegate his authority to individuals or to boards, retaining, if he wishes, a power to review exceptional matters. Here again the committee's recommendation is based upon a choice between competing conceptions, rather than on a demonstration that any other system would work positive injustices. It no doubt feels that the supposed symbolic importance of merely formal connection with the adjudication has been exaggerated or at least is overborne by the values assumed to arise from personal decision. I think its choice is a sound one. The minority seek to embody these suggestions in their bill by providing⁸³ that hearing officers "shall personally master such portions of the record as are cited by the parties." This statutory suggestion seems gratuitous. The *Morgan* case already indicates to conscientious officers what their duty is. If this section lays the basis as it was one time thought the *Morgan* case did for hailing the members of government and administration into court to examine them on their process of decision in particular cases, it is to be unqualifiedly condemned. Such a practice could obviously serve to obstruct government.⁸⁴

Evidence, official notice, and cooperation of staff.—Closely related to the foregoing is the problem of securing the materials (evidence) for decision and the use of technical assistance in interpreting the material. A preliminary concern is the practice of issuing subpoenas. The committee has

⁸² Ibid.

⁸³ Minority Bill § 309(m)(4).

⁸⁴ Probably because of peculiarities of pleading (demurrer by the government to the complaint) the Secretary of Agriculture submitted to examination upon the first remand of the *Morgan* case. The effect of his testimony is indicated in the second appeal. *Morgan v. United States*, 304 U.S. 1 (1938).

After some hesitation the circuit courts of appeals finally put a stop to attempts to bring the members of the NLRB before the courts for examination as to their decisional process. The courts held that shot-in-the-dark affidavits upon information and belief were insufficient to warrant examination or they relied on a presumption of regularity if the record was in proper form. *Inland Steel Co. v. NLRB*, 105 F. (2d) 246 (C.C.A. 7th 1939); *NLRB v. Love Cotton Mills*, 108 F. (2d) 568 (C.C.A. 5th 1940); *Bethlehem Shipbuilding Co. v. NLRB*, 114 F. (2d) 930 (C.C.A. 1st 1940). In an earlier case, however, the board was ordered to answer interrogatives. *NLRB v. Cherry Cotton Mills*, 98 F.(2d) 444 (C.C.A. 5th 1938).

criticized certain agencies for supplying their own staff with an unlimited number of subpoenas and requiring the private party to make an elaborate showing of his need.⁸⁵ This discrimination has no doubt been exasperating to those dealing with the agencies and the committee suggests that the agency officer as well as the private party be required to make a showing as to its need. The Logan-Walter bill provided⁸⁶ that subpoenas issue simply upon request with no other showing than was required by the rules in United States district courts; but the subpoenas of administrative agencies run throughout the United States, whereas those of the courts run within a very narrow compass. Under these circumstances, it is proper that there be some protection for witnesses. The committee has made no legislative proposals with respect to subpoenas other than a suggestion for further study by the Director of Federal Administrative Procedure,⁸⁷ but the minority provided⁸⁸ that administrative subpoenas authorized by statute "shall be issued only upon request and a reasonable showing of the grounds, necessity and reasonable scope thereof, and shall be issued to private parties as freely as to representatives of any agency." I think that a general provision of this sort might well be adopted without prejudice to any further rules that the director may suggest.

The crux of the evidence problem⁸⁹ is the so-called problem of judicial notice. The committee believes that it is clear that all information having an immediate bearing on the particular case, which it calls "litigation" facts, should be considered only if affirmatively placed in the record. The agency's file of the case should not be otherwise available to the adjudicator. "But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become a part of the factual equipment of the administrators, it seems undesirable for the agencies to remain oblivious of their own experience

⁸⁵ E.g., FTC, NLRB. Report 136, 159.

⁸⁶ § 4(c), H.R. 6324, 76th Cong. 3d Sess. (1940).

⁸⁷ Committee Bill § 714.

⁸⁸ Minority Bill § 107.

⁸⁹ Majority and minority are agreed that application of the so-called "rules of evidence" would be unwise and is not at present usually required either by statutes or the courts. The minority, however, propose a statutory provision (§ 309(h)) making applicable "as nearly as may be, the basic principles of relevancy, materiality, and probative force as recognized in federal judicial proceedings of an equitable nature" except "that such principles shall be (1) broadly interpreted. . . ." The committee bill's only reference to this subject is the provision (§ 304(f)) empowering a hearing commissioner "to exclude evidence which is immaterial, irrelevant, unduly repetitious, or not of the sort upon which responsible persons are accustomed to rely in serious affairs." The latter phrase is Judge Learned Hand's in *NLRB v. Remington-Rand*, 94 F.(2d) 862 (C.C.A. 2d 1938).

and strip themselves of the very stuff which constitutes their expertness. It appears far from intelligent, if fairness to the parties permits, not to utilize the knowledge that comes from prior acquaintance with the problems. Laborious proof of what is obvious and notorious is wasteful. . . ."⁹⁰ Yet matter of this sort which might appear relevant to the adjudicator may be disputable and may not control the case. The parties against whom it is used should have an opportunity of demonstrating this. Consequently, although it should not be necessary to "prove" it in the traditional fashion, the party should at some stage in the proceeding be notified that it will be used, and given an opportunity, if he desires, to rebut it. I think this handling of the problem is sound and demonstrates that the need for elaborate distinctions as to what is and is not official knowledge can be completely cut under by a procedural device of the sort suggested.

I am not sure that this view is accepted by the minority. Their bill provides that the adjudicator "may utilize the aid of law clerks or assistants (who shall perform no other duties or functions), but such officers and such clerks or assistants shall not discuss particular cases or receive advice, data, or recommendations thereon with or from other officers or employees of the agency or third parties, except upon written notice and *with the consent of all parties* to the case or upon open rehearing."⁹¹ Of the view that "all specialized and technical advice available anywhere should be utilized in making the decision" the minority say it "is plausible but entirely subversive of every fundamental notion of fair procedure."⁹² I agree with the majority that the case should not be decided on material of which the parties do not have notice, but I cannot agree that the adjudicators should be cut off from securing such material after hearing unless they have the consent of all the parties. Otherwise matters not properly understood at the hearing cannot be either detected or remedied. If the preparation of a case requires the application of technical understanding, it would appear that its decision equally does. This solution requires us, to be sure, to rely upon the good faith of the adjudicator to reveal any additional information received, but there are points at which, even in the administration of justice by judges, good faith is the only safeguard. The minority proposal does permit the hearing commissioner to talk to and use "law clerks or assistants," though literally construed it would not allow these assistants to secure aid from each other; on the other hand, there is apparently no limit to the number of assistants nor to the kinds of skills that

⁹⁰ Report 72.

⁹¹ Minority Bill § 309(m)(4) (*italics added*).

⁹² Report 243 note.

they may have, so that the proposal may mean no more than that the technical staff, all of whom can be regarded as aiding the hearing officer, should not discuss the case with the prosecutory or investigating officers. If so understood, the provision would be less objectionable, but this is not the meaning which the members have attributed to it in their appended note.

JUDICIAL REVIEW OF ADMINISTRATIVE ADJUDICATION

Right to review.—In most cases the kinds of orders, at least the kind of final orders, which may be reviewed is made clear either by specific statutory provision or by rulings of the Supreme Court. In general, there are very few such orders which are not reviewable in some proceeding. In the past a so-called “negative order” was held not reviewable, but this irrational and obscure exception has been done away with. There remain occasional types of action which the Supreme Court holds non-reviewable as in *Perkins v. Luken Steel Co.*⁹³ on the ground that no “right” of the applicant was in question. This type of ruling is likely to be made in connection with the grant or refusal of privileges by the government, or where the claim is closely connected with the conduct of foreign affairs.⁹⁴ The committee is content to allow the Supreme Court within this narrow field to decide the question of reviewability on the considerations of policy which appear from case to case.⁹⁵ The minority suggest⁹⁶ that it be enacted that “regardless of whether the subject is one of constitutional or statutory right, power, privilege, immunity, or benefit, any person adversely affected by any final decision of any agency rendered pursuant to the formal procedures provided herein shall be entitled to judicial review. . . .” In certain of the cases in which the Supreme Court has denied judicial review, the decision might well have been otherwise, and Congress might provide for review in certain cases where it has been denied. The provision, however, suggested by the minority seems to me objectionable because such is its generality that it may subject to judicial review cases where neither Congress nor the Supreme Court has considered the advisability of it.

The committee points out one problem which may be a fit subject for legislation, namely, whether when statutory review is denied on the ground

⁹³ 310 U.S. 113 (1940) (determination by Secretary of Labor of “prevailing wage” to be paid to their employees by government contractors not reviewable).

⁹⁴ Cf. *Z. & F. Assets Realization Co. v. Hull*, 61 S. Ct. 351 (1941).

⁹⁵ Report 86–87. Similarly it believes that questions as to what parties are “aggrieved,” “interested,” or “affected” and what orders are “final” should be left to judicial wisdom.

⁹⁶ Minority Bill § 311(b).

that the order is not a "reviewable order" resort may be had to a suit for injunction, where immediate injury is threatened. Curiously, the committee does nothing more than allude to it, without comment or suggestion. The Supreme Court, to be sure, has already answered that some, at least, of these non-reviewable orders may be reviewed by injunction.⁹⁷ To refuse, as the Court has done, to permit review by the deliberately devised statutory route, and then allow the suit for injunction, seems somewhat foolish. I think it would be in order to suggest to Congress that it define "reviewable order" so as to eliminate this inconsistency. Some such formula as the following might do: "An order which finally determines the rights of a party, or threatens to cause serious or irreparable injury if review is not had."⁹⁸

Courts and methods of review.—Considerable play has been made of the supposedly confusing variety of methods of judicial review or control. It is pointed out that there is common law review by habeas corpus, mandamus, or injunction in the district courts, statutory injunctive suits, and statutory appeals, sometimes before one set of courts and sometimes another. I have never been able to see why this mere fact of variety should be confusing to a lawyer. It seems obvious that certain of these differences were based upon reasons thought valid at the time, that a few no doubt were haphazard but harmless. The committee takes a similar attitude,⁹⁹ noting, for example, that there is little litigation as to the appropriate form of review, so that if lawyers do not know why, they at least know how. Nevertheless, to take care of any mistakes, the committee proposes legislation permitting amendment or transfer if the wrong course is taken.¹⁰⁰

Scope of review.—The objective of judicial review, says the committee, "is to serve as a check on the administrative branch of government—a check against excess of power and abusive exercise of power in derogation of private right."¹⁰¹ The committee notes that despite a certain variety in the provisions defining the scope of judicial review, the Supreme Court today at least is inclined to adopt a theory with respect to all agencies that

⁹⁷ *Shields v. Idaho C.R. Co.*, 305 U.S. 177 (1938); *Utah Fuel Co. v. Bituminous Coal Com'n*, 306 U.S. 56 (1939); cf. *AFL v. NLRB*, 308 U.S. 401 (1940).

⁹⁸ Cf. *American Sumatra Tobacco Corp. v. SEC*, 93 F.(2d) 236 (App. D.C. 1937), in which a similar criterion was used in defining what "orders" of the SEC were reviewable.

⁹⁹ Report 94. But see *Review of Federal Administrative Orders: The Dual System*, 54 Harv. L. Rev. 847 (1941), which takes the position that the three-judge district court review of administrative orders is inappropriate.

¹⁰⁰ Committee Bill § 311(a).

¹⁰¹ Report 76.

their decisions must stand unless there is no reasonable support for them in the record. It is quite likely that even if the courts were instructed to review the "weight of the evidence," the courts would continue to use the same theory of review.¹⁰² And if they were to take it as indicating a broader scope of review, it would turn administrative tribunals into "little more than media for transmission of evidence to the courts. It would destroy the values of adjudication of facts by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications."¹⁰³ If this judgment is slightly excessive,¹⁰⁴ it is still true that it would enable the court as and when it wished to substitute its conception of policy for that of the administrative tribunal, and so threaten the working out of a consistent system of regulation.

The minority admit that judicial review "should not be too broad and searching, or it will hamper administrative efficiency," but "it should not be so restricted or so devitalized as to fail as a check on palpable administrative error or abuse of power." They conclude that the "courts should set aside decisions *clearly* contrary to the *manifest* weight of evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error."¹⁰⁵ But in their suggestions for the present moment, there is little difference between the majority and the minority. The majority admit that in particular cases the courts may fail sufficiently to control administration, and where such cases develop they should be handled by providing greater review. The minority believe that if *manifestly* incorrect decisions must be affirmed under the "substantial evidence" rule, Congress should find some other formula. They believe that Congress furthermore should classify various types of decisions according to their technicality, effect on private rights, etc., and provide for each "special degrees of review."¹⁰⁶ They regard the present standards of judicial review as unsatisfactory because they have grown up in a haphazard way without the aid of legislative distinctions of the type suggested. Congress should act so as to reduce "uncertainty and variability." I find these suggestions quixotic and contradictory. It seems to me that no human mind is capable of stating the distinctions which are called for, and that any statements which might be expected would increase the uncertainty and certainly the variability. The distinctions which the minority call for are just of that sort which can

¹⁰² This is in effect what the New York Court of Appeals has done in *Weber v. Town of Cheektowga*, 284 N.Y. 377 (1940).

¹⁰³ Report 91.

¹⁰⁵ Report 211 (*italics original*).

¹⁰⁴ Report 209.

¹⁰⁶ Report 212.

best be worked out by the intuitive process of judicial legislation. Far from being uncertain and variable, judicial review today, in its conceptual apparatus at least, seems to me to be quite simple and moderately uniform. In view of this prevailing uniformity I do think that where it is felt that the courts in particular cases are not providing adequate review, it would be possible to find a form of words which, because of contrast with the usual formula, would require a conscientious court to widen the scope.

ADMINISTRATIVE RULE-MAKING

Procedure.—The most criticized section of the late Logan-Walter bill was one that required that no rule or regulation could issue without public hearing.¹⁰⁷ Though the bill was riddled with exceptions, Attorney General Jackson was able to show¹⁰⁸ that it would still preclude the issuance of many rules where speed and prior secrecy were of the essence. No part of the researches of the committee's staff are of greater value and interest than those that deal with the process of rule-making in the various agencies. The general impression which I gathered from these studies was that the agencies are much concerned to obtain the reaction of those to be affected by the proposed regulation. This was done either by personal interview, questionnaire, conference, round table discussion, and/or an informal hearing. In important instances where no hearing was held, the situation was of the type which could be completely explored by round table or conference. The committee sees no reason for disturbing procedures which have been found adequate and satisfactory to the interests affected. It does suggest that in cases where the interests affected are numerous, represent conflicting positions, and will be severely and directly affected by the regulation, there should be public hearing.¹⁰⁹ It discourages as wasteful public hearings which can serve no useful purpose.¹¹⁰ One important suggestion the committee does

¹⁰⁷ § 2(2), H.R. 6324, 76th Cong. 3d Sess. (1940).

¹⁰⁸ Op. cit. supra note 79, at 5.

¹⁰⁹ Report 107-8.

¹¹⁰ Report 110-11. The committee proposes no legislation on rule-making procedure. The minority seek to enact in their §§ 208 and 209 the substance of the committee's recommendations; these provisions leave the procedure in the control of the agency, suggesting adequate notice, conferences, hearings, etc., where appropriate. "Certain general types of rule-making procedure," it is said in the appended note, "should be noted and recognized by Congress as general guides for administrators." It is these provisions in particular which the majority regard as "merely hortatory." Report 191. I have no objection, as I have indicated, to exhortation as such, but I think I would confine it to cases in which there was a demonstrated need and in which the exhortation need not be too hedged in with qualifications entirely in the control of the exhorted one. I doubt that in this case these requirements are met.

make to take care of the possibility that interested parties may not have been made aware that the rule was in formulation. It provides¹¹¹ that no regulation shall take effect until forty-five days after its initial publication unless the agency certifies the need of a shorter period or none at all. The minority suggest¹¹² legislation to the effect that after rescission or judicial invalidation of any rule, no person shall be held to incur any liability or penalty for conduct in accordance with such rule until thirty days after publication of its withdrawal, except where the agency publishes a finding of emergency. It is not clear to my mind whether the majority's provision for a waiting period after promulgation of a rule might not apply as well to a rescission. Assuming it does not, there would seem to be a case for permitting a waiting period for objections to rescission as there is to promulgation, since rescission may have an even more serious effect.

The committee's bill provides also that any person may file with an agency a petition requesting the promulgation or amendment of a rule in which the petitioner has an interest,¹¹³ and that the agency in its annual report to Congress shall include a summary of these requests with the reasons for refusal of such as have been refused.¹¹⁴

Judicial review.—The proponents of the Logan-Walter bill believed that under existing arrangements there was insufficient opportunity for judicial review of rules. The Logan-Walter bill provided that any person "substantially interested in the effects of any administrative rule"¹¹⁵ could secure review in the Court of Appeals for the District of Columbia within thirty days of its promulgation. Review was to be limited to the question of "authority" to issue the rule. The bill, however, provided that a determination of validity should not be binding in any subsequent matter in which the rule was involved. Whereas a declaration of invalidity was to nullify the rule, a declaration of validity was of no protection to the agency. The bill apparently proceeded on the theory that there need be no "controversy" in the judicial sense.

There is, as a matter of fact, considerable available procedure for reviewing in one form or another the validity and impact of rules, although no doubt there are certain gaps. In a number of cases such as the rules under the Interstate Commerce Act, the Agricultural Adjustment Act, the Fair Labor Standards Act, the Food, Drug and Cosmetic Act, there is provision for statutory review. Some of these acts specifically provide that the court

¹¹¹ Committee Bill § 203.

¹¹² Minority Bill § 204.

¹¹³ Committee Bill § 204.

¹¹⁴ Committee Bill § 205.

¹¹⁵ § 3, H.R. 6324, 76th Cong. 3d Sess. (1940).

shall consider whether the record of evidence affords rational support for the ruling. But even without such a provision, the Supreme Court in the famous *Assigned Car Cases*,¹¹⁶ involving a rule of the Interstate Commerce Commission, considered that question. Where there is no statutory provision for review, a person may of course raise the issue of validity where the rule is sought to be enforced against him. That procedure, however, is not satisfactory, as it requires risking a penalty to test the rule. There remain the common law suit for injunction, and the statutory Declaratory Judgment Act. These methods require perhaps a somewhat more exacting showing of threatened injury than may be true under the statutory review procedure. In the last analysis, however, no matter what the form of proceeding, it is the court which must determine whether there is that "aggravement," "interest," "threatened injury," or "interference with rights,"¹¹⁷ which makes available the remedy, whether common law or statutory. The Supreme Court in the past has displayed sporadic hostility to all types of declaratory procedure. This attitude, I believe, was primarily a tactic by the "liberal" judges to preclude indiscriminate attacks on the constitutionality of statutes. I think that it has been something of a mistake to apply the same attitude to regulations, most of which are concerned with setting up schemes for the conduct of enterprise and the validity of which thus should be known in time to prevent waste and confusion.¹¹⁸ The requirement that plaintiff show a "threat" of enforcement in addition to a legitimate interest is unnecessary to any concept of controversy and is disingenuous. I think that the most hopeful attack on this problem is not more legislation, but an effort to educate the courts in a sensible use of the Declaratory Judgment Act.

A subsidiary question is whether the court should or can consider the question of substantial evidence if the rule has been adopted after hearing. The committee is of the opinion that the concept of substantial evidence relates primarily to the validity of findings in litigated issues and is inappropriate as a test of the soundness of legislative propositions which

¹¹⁶ 274 U.S. 564 (1926).

¹¹⁷ Cf. *FCC v. Sanders*, 309 U.S. 470 (1940); *Singer & Sons v. Union Pac. R. Co.*, 61 S. Ct. 254 (1940).

¹¹⁸ A number of attempts to secure declaratory judgments as to the validity of rules have failed in part on the ground that there has been no "threat" of enforcement. *Redlands Foothill Growers v. Jacobs*, 30 F. Supp. 995 (Calif. 1940); *Connecticut Importing Co. v. Perkins*, 35 F. Supp. 414 (Conn. 1940); *Lake Wales Citrus v. Jones*, 110 F. (2d) 653 (C.C.A. 5th 1940); *John P. Agnew & Co. v. Hoage*, 99 F. (2d) 349 (App. D.C. 1938). But cf. *Belo v. Street*, 35 F. Supp. 430 (Tex. 1940).

embody policy judgments as to the future.¹¹⁹ It is admitted, however, that the question of evidence may be relevant in determining whether the rule has any reasonable connection with the statutory delegation. The committee is afraid that courts will treat the question of substantial evidence as if the matter were of the adjudicatory rather than the legislative type. Consequently, it recommends that before providing for review on the record generally, we observe how such review functions in the cases where Congress has now provided for it. In some states the court in the exercise of its common law powers may compel certification of the record. The federal courts do not exercise this power as such, but may in certain cases of common law review produce this result by demanding that the agency make a showing.

The courts have on occasion, though they are reluctant to do so, applied the declaratory judgment statute also in cases where not the general validity of a rule but its applicability was in question. As noted above, the committee considers the demand for such rulings to be so considerable and so legitimate, that it has proposed that the agencies have authority to make binding declarations of applicability. This is preferable to the declaratory judgment procedure since it enables the administrative agency to make an initial determination of the facts. The minority bill provides¹²⁰ that when, in an action for a declaratory judgment as to the validity of a rule, a question of applicability arises which turns on the facts, the case should be referred to the agency for initial consideration.

OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE

The committee proposes that there be established an Office of Federal Administrative Procedure composed of (1) a Justice of the United States Court of Appeals for the District of Columbia, to be designated by the Chief Justice of that Court; (2) the Director of the Administrative Office of the United States Courts; and (3) the Director of Federal Administrative Procedure, to be appointed by the President of the United States, with the advice and consent of the Senate, for a term of seven years.

The first function of this Office is to supervise the hearing commissioner system. But beyond this the director's major function will be "to examine critically the procedures and practices of the agencies which bear strengthening or standardizing, to receive suggestions and criticisms from all sources, and to collect and collate information concerning administrative practice and procedure. . . . Not the least of the difficulties which

¹¹⁹ Report 119.

¹²⁰ Minority Bill § 211(b).

have confronted the orderly development and understanding of administrative procedure is the absence of detailed information and study. . . . Knowledge and regularization of procedures should go far toward creating that confidence in the administrative process which is necessary for its successful functioning."¹²¹

The report, buttressed by its excellent and thorough researches, is a heartening document. We should bear in mind that the report issues out of a cauldron of hot controversy, a controversy that has its roots deep in class struggle, a controversy which is concerned with the basic directions and purposes of government. We are in a time when the very premises of democratic government are being radically challenged, when its forms and procedures are condemned by many persons as cynical pretense or obstacles to a millennium. In these circumstances, the work of the committee, balanced and firmly reasoned, is a reassuring achievement. A certain amount of political expediency no doubt entered into its formulation: something given to the "conservatives" (in one respect perhaps too much), a certain tenderness occasionally displayed for favorite ideas or projects of the "liberals." This process of compromise, if not too responsive to every pressure of the moment, is a legitimate mechanism, consonant with the genius of democracy. I feel that the committee has largely succeeded in producing a document which both mediates for the moment and expresses conceptions which we may hope will have vitality at least for as much of the future as anyone in this troubled age dares provide for.

¹²¹ Report 123-24. The committee refers to the director certain specified problems for study, a number of which have been adverted to in this article.