Politics and the Regulatory Agencies. WILLIAM L. CARY. McGraw-Hill Book Company, New York, 1967. Pp. 149. $5.95.

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Professor Cary has written a very good book. Full disclosure compels me to admit my bias in this judgment, for I was privileged to be a member of the Securities and Exchange Commission while Bill Cary was its chairman. Nevertheless, I can still recommend the book with some objectivity to anyone interested in the realities of the administrative process.[1]

The book is Professor Cary's answer to the important question of how a regulatory agency can retain or regenerate the creativity and momentum which are usually present in the early years of its existence. While drawn largely from his experience at the SEC, the book reflects his observation of the methods and problems of other regulatory agencies.[2] In his view, a satisfactory answer to the question demands an analysis of the realities of the political world within which an agency operates, and, most specifically, of the various checks which are placed upon an agency's freedom of action. To provide this analysis the book explores the complex relationships among an agency, the White House, and the Congress.

Cary is uneasy in his discussions of pressures and controls which he is persuaded the White House can exert over an agency. He believes that the President has a general interest in an agency's work, but becomes directly involved only when this work is not being done well. Because Cary's experience was marked by a lack of direct presidential involvement in the problems of the SEC, he believes that White House aides are often in a position to exert pressure to further their own aims and ambitions, and he cautions against over-involvement with these

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1 The book is based on the Cooley Lectures which Professor Cary delivered at the University of Michigan in February, 1966.

2 Professor Cary limits his discussion to the problems of the CAB, FCC, FTC, FPC, ICC, and SEC. He excludes the NLRB because its organizational structure is basically different from that of the six other independent regulatory agencies.

aides. Cary suggests that despite the lack of overt presidential interest in specific programs and policies, there are formal and informal controls which may materially affect an agency's initiative, willingness, and capacity to seek imaginative solutions to new problems. In his view, the formal power of appointment of agency members; an informal clearance of certain high-level appointments within an agency; the participation in fixing an agency's budget; and the control, through the Civil Service Commission, of the allocation of the "supergrades" of an agency's personnel—all operate continuously and, when improperly used, can severely hamper an agency.

Cary believes, however, that agencies should and do enjoy a considerable measure of independence from the White House in determining policy. He argues that an agency should not be subject to any pressure when engaged in adjudication. In other matters, he believes that an agency should inform the White House of significant actions it intends to take, but that it should not seek prior approval of such actions and should reject White House suggestions which are without merit. He recognizes that this last argument contains the seeds of potential conflict between an agency and the White House, for he believes that the President, in formulating national economic policy, should ultimately be able to compel an agency to reverse a decision which is contrary to that policy, even if the agency chairman is forced to resign because of the conflict.

I agree with much of the analysis of the facts of agency life, but in many respects Cary's experience differs from mine. I do not share Cary's mistrust of White House aides. Nor have I encountered any pressure. Indeed I have been accorded every opportunity to explain the SEC's problems and policies in depth and to seek White House aid in the fulfillment of significant programs, particularly those of a legislative character. No significant conflict, potential or otherwise, has arisen between the judgments of my agency and of the White House. I agree with Professor Cary's suggestion that the resolution of such questions as may arise involves a complex balancing process which depends as much upon the personalities involved as upon the issues. In addition, any agency's relationship with the White House depends upon many other, and perhaps more important factors—not the least of which are the activities (or lack thereof) of the agency at a particular time, and the effect of these activities upon broad national policies. In articulating his thesis, Cary suggests that, during the New Deal, agency chairmen often had direct contact with President Roosevelt, partly because he desired it and partly because the work of the agencies was so

vital to major problems facing the nation. Other presidents have neither welcomed nor encouraged such contact. A close relationship may also develop because the President is interested in specific legislation or existing programs of an agency. Frequently this interest arises because of the ability of the agency chairman, working through the White House staff, to make clear the importance of agency problems or proposals. To an agency seeking legislation, the initial interest and ultimate support of the President is of the utmost importance. The initial interest may result in the legislation receiving mention in a Presidential message; the ultimate support may be necessary when the bill is to be acted upon. The interest and support do not occur by accident; to obtain them, as Cary recognizes, may plunge the agency chairman into the midst of a thicket.

Cary is more comfortable in his analysis of congressional checks on an agency. Although he does not directly say so, it is clear that he considers these to be more significant and more likely to affect an agency's performance than White House interest. This belief stems to a large degree from a disappointment which he experienced shortly after becoming Chairman—the rejection of a Legislative Reorganization Plan for the SEC. The lessons that episode provided deeply influenced his subsequent relationship with Congress—a relationship which was substantial and extremely effective. He was instrumental in the initiation of the Special Study of the Securities Markets[3] and he guided the Securities Acts Amendments of 1964,[4] which implemented many of the Study's recommendations, through Congress. It is small wonder that he concludes that an agency chairman must spend a great deal of his time on Capitol Hill.

Cary believes that Congress properly exercises active supervision over the agencies it created to give substance to broad legislative policies. Congress jealously guards its supervisory role and resists efforts of the White House and the agencies themselves to erode it. Indeed, Cary suggests that, in 1961, Congress refused to enact reorganization plans for some agencies because the White House had not consulted it prior to introducing the plans, rather than because Congress disagreed with their merits.

He points out that one form of congressional supervision or control is the annual review of an agency's budget by the Appropriations Com-

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[3] SEC, REPORT OF THE SPECIAL STUDY OF THE SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. DOC. No. 95, 88th Cong., 1st Sess. (1963) [hereinafter cited as SPECIAL STUDY].

[4] Act of August 20, 1964, Pub. L. No. 88-467, 78 Stat. 565.

mittee in the House and in the Senate. Cary believes that this review is necessary and proper, but questions appropriations committee directions to an agency on how it should spend appropriated funds.[5]

The author attaches greater significance to the control lodged in the committees with jurisdiction over the substantive work of the agency. This is generally manifested through broad oversight of the work of the agency. Occasionally, however, a committee may exercise it by involvement in the merits of substantive matters with which the agency is concerned. Such involvement can lead to conflict, and in his view, it may raise serious questions about the nature and extent of an agency's independence and its proper relationship to Congress.

Cary does not attempt to establish fixed rules for determining the propriety of congressional involvement. Rather, he chooses several recent examples and comments on the propriety of each. He divides congressional action into three broad categories. The first is reversal by the entire Congress of a specific agency rule or decision (for example, the FTC's trade regulation rule governing the labeling of cigarettes).[6] He believes that Congress (rather than a single committee), which enacted the statute administered by the agency, has the right to determine whether to revise specific agency actions or interpretations. When an adverse expression is solely that of a committee and no legislation is enacted (his second category), Cary questions the propriety of the action (he cites the committee's interest and views concerning the FCC's treatment of subscription television). He believes that such committee action may result from undue pressure by an industry or by a powerful constituent of a single congressman. He suggests that such action can paralyze the agency with serious effect on its performance and that the public interest may not be adequately protected. The third category, in which he believes congressional action is clearly improper, includes congressional attempts to affect matters which are under agency adjudication. These may take the form of an *ex parte* communication from a congressman to an agency member or the initiation of congressional hearings during the pendency of an adjudicatory proceedings.[7]

There is little doubt that congressional oversight can be valuable to

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5 Cary cites, as an example, the direction to the Federal Power Commission not to investigate the need for bringing REA cooperatives within that Commission's jurisdiction

6 29 Fed. Reg. 8324 (1964).

7 In Pillsbury v. FTC, 354 F.2d 952 (5th Cir. 1966), the court held that procedural due process was violated by the detailed responses of some commissioners to a Senate committee concerning their mental processes regarding a pending case. Before the initiation of this litigation, Chairman Howrey had disqualified himself from further participation in the agency proceeding because of his appearance before the committee.

Congress and to the agency. An agency which avails itself fully of the advice and assistance of a committee and of its staff frequently receives constructive suggestions. Staff members of a committee, who are usually as overworked as the members of the Congress, are often overlooked in analyses of the relationship between agencies and Congress but, as any agency chairman can testify, an understanding of their role is essential to an understanding of the realities of agency life. The SEC has been fortunate in these relationships. With the active assistance of their staffs, these committees have supported proposed Commission studies, have assisted in the development of legislation, have been helpful in the Commission's daily regulatory work, and have been sympathetic to its needs for personnel and other resources. It is as essential for an agency to have good working relationships with committee staffs as it is to have such relationships with the White House staff, and for similar reasons. These relationships do not develop accidentally, and an agency chairman must devote considerable time and effort to maintaining and strengthening them.

In analyzing the controls which both the White House and the Congress can exert over an agency, Cary is really concerned with the nature of the independence of a regulatory agency. The need to maintain an agency's "independence" is often asserted, but seldom is the word carefully defined. Independence does not mean that agencies can do whatever they please, free from checks by other branches of the government.[8] Agencies are the creatures of the legislature, which can properly condition the exercise of the powers it has delegated. Nor does independence mean that agencies are or should be removed from political pressures—using "political" in the broadest sense. A Congress authorized to enact laws and a President charged with executing them or having related responsibilities will have strong views on how those laws are administered, and ought not refrain from making those views known. What independence does mean, I think, is the authority and practical ability of agencies to make decisions free of interference (or, at the least, improper interference), even if those decisions are ultimately reversed by courts, legislatures, or the President.

The definition of what constitutes improper pressures of interference is, not surprisingly, a subjective one, depending on whether the one making it sits in the White House, on Capitol Hill, or in the agency offices. To complicate matters further, the realities of life do not always permit decisions to be made solely on the basis of theoretical analyses.

Cary is concerned that the checks which Congress and the White

8 Compare Chairman Martin's statement that the Federal Reserve Board is independent "within the Government, not of it." Wall Street Journal, May 5, 1967, at 1, col. 1.

House place upon an agency, even when properly applied, can reduce the agency's ability to act creatively. He also refers to three factors within the structure and operation of an agency which can accentuate the problem of a lack of creativity. One of these is the desire for a "balanced" commission, *i.e.*, one whose members reflect the points of view of everyone affected by the agency, including the general public. Another, present in every agency to some degree, is the tendency to over-judicialize the decision-making process. As many scholars have pointed out, this tendency, which has been accentuated by the Administrative Procedure Act,[9] is contrary to the traditional concept of an administrative agency—a body with the expertise to solve problems for which judicial procedures are not ideally suited and with an understanding of the strengths and weaknesses of the available tools.[10] There is also the claim, easily made, but at best only superficially true, that an agency is the captive of the industry it regulates. To the extent that an agency is burdened with an image of captivity, it has difficulty in recruiting and keeping a good staff, attracting able commissioners, and convincing the public and Congress of the value of its activities. This is a perceptive analysis. Every agency needs balance, but an overemphasis on balance may lead to delays in filling vacancies and may severely handicap an agency's efficiency. The tendency to over-judicialization, which Cary rightly criticizes, is an even greater obstacle, for it undermines an agency's ability to utilize every available technique in determining policy—adjudication, rule making, policy statements, and a variety of informal procedures.

The importance of flexibility in making policy cannot be emphasized too strongly. There are many groups whose different interests may be affected by decisions of any agency. Often the agency's task is to reconcile and resolve the conflicts among them. In so doing, the agency often affords the only effective protections for the interests of those who lack representation elsewhere—whether they are small businessmen, union members, manufacturers, or public investors. In making decisions, whether or not they involve the reconciliation of competing demands, it is essential for an agency to formulate and articulate meaningful standards which will be consistently applied by the agency and its staff, so that those whom the agency regulates will be able to order their conduct with a fair degree of knowledge of the potential consequences. As Judge Friendly has pointed out, the pressures on agency

9 60 Stat. 273 (1946), *as amended*, 5 U.S.C. § 551 (1958).

10 J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960) (also in pamphlet form as a committee print of the Senate Judiciary Committee, 86th Cong. 2d Sess. (1960)).

members which have been so widely publicized have arisen, at least in the past, from the belief that there were no standards, or that standards were not being applied consistently. One reason for having more definite standards is to preserve the independence which an agency so highly prizes.[11]

The wide variety of problems facing an agency makes pointless arguments whether adjudication or rule making provides a better technique for making policy. Each is useful and each is clearly important. And they are not the only techniques available. I cannot agree with a popular view that rule making should be used almost to the complete exclusion of adjudication.[12] I am persuaded that the emphasis given to this view by some reflects a concern that the timid use of rule making, and the narrow bases on which adjudicated cases are decided, have impeded development and articulation of policy. Writing for the SEC, I must emphasize that it has used adjudication very successfully in establishing standards for those subject to its jurisdiction, frequently in situations which would have made rule making improbable if not impossible. In *Cady, Roberts & Co.*,[13] for example, the Commission established the important standard that those privy to privileged information must refrain from using it before the investing public is fairly informed. Subsequent litigation and administrative actions have expanded and clarified this standard. As Judge Friendly has indicated, in approving the Commission's *Cady, Roberts* decision, if the Commission wished to adopt rules dealing with this subject, it could do so more effectively after it had considered many more fact situations in adjudicatory proceedings, and after it had considered the possible variations and consequences which those additional cases would bring to light.[14]

A bit of Commission history will illustrate the problems flowing from reliance on rules alone. In the early 1960's the Commission was faced with a proliferation of situations involving the use of high

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11 H. FRIENDLY, BENCHMARKS 104 (1967). This is an excellent collection of writings by one of the country's most knowledgeable observers of the administrative process.

12 *See, e.g.*, Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964). The excellent FTC trade regulation on cigarette labeling, 29 Fed. Reg. 8324 (1964), is an example of an agency's discussion of the issue. I have elsewhere discussed this controversy in the context of an important area of the work of the Securities and Exchange Commission. *See* Cohen & Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication in Their Development*, 29 LAW & CONTEMP. PROB. 691 (1964).

13 40 S.E.C. 907 (1965).

14 H. FRIENDLY, BENCHMARKS. 146 (1967). *See also Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 900-01 (1967).

pressure techniques by securities dealers to sell speculative securities, usually to relatively unsophisticated customers. In addition to instituting administrative proceedings and injunctive actions in the courts, the Commission published for public comment a so-called "boiler room" rule which would have defined specified conduct as being violative of the antifraud mandates of the Securities Exchange Act of 1934.[15] The Commission felt that this rule would serve several purposes; it would articulate the Commission's views and, perhaps, make enforcement more effective. The comments which the Commission received reflected the tremendous ingenuity and imagination of the Bar. Numerous situations clearly not within the Commission's contemplation, but conceivably within the literal provisions of the proposed rule, were brought to the Commission's attention. After a number of attempts to meet these objections, the Commission withdrew the proposed rule, and articulated meaningful standards which dealt with the problems in its opinions in a number of hotly contested adjudicatory proceedings.[16] The important point here, of course, is that the Commission found it impossible in a real sense to define a species of fraud in a manner which would specify the full range of improper conduct without encompassing other activities not intended to be reached.

On the other hand, rule making is often the best way for an agency to marshal the facts and relevant policy considerations and to develop standards to govern the conduct sought to be regulated. Rule making affords the agency the opportunity to hear the views of many interested persons who could not participate in particular adjudicatory proceedings.[17] Rule making may also provide a better way for the agency to plan the development of policy. Adjudication inevitably takes time, and the record which comes to the agency for decision may be incomplete or may provide a narrow ground for decision which would lessen the need or discourage the attempt to articulate in the opinion

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15 Proposed Rule 15c2-6, Securities Exchange Act Rel. No. 6885 (August 16, 1962). *See* Note, *A Symptomatic Approach to Securities Fraud: The SEC's proposed Rule 15c2-6 and the Boiler Room*, 72 YALE L.J. 1411 (1963).

16 *See, e.g.*, Mac Robbins & Co., Securities Exchange Act Rel. No. 6646 (July 11, 1962), *aff'd sub nom.* Berko v. SEC, 316 F.2d 137 (2d Cir. 1963). It is possible for a doctrine to be *too* successfully established. After *Mac Robins*, respondents argued that their misrepresentations in selling speculative securities were less serious if they were not made in connection with the operation of a boiler room than if they were. For the Commission's answer, see Huntington Securities Co., Securities Exchange Act Rel. No. 8090 at 4 (June 2, 1967).

17 The *amicus curiae* brief, which an agency could accept in an adjudicatory proceeding, is generally not as effective a device for obtaining a wide range of views so necessary to a determination.

standards not necessary for decision in the case but important to a fuller statement of related principles. It is often true that the questions suggested by a particular case may be much broader than the simple facts of the case. There is also the view that it may be as unwise as it is difficult for the agency to establish meaningful standards through dicta inappropriate to the disposition of the case.

I must stress that the choice between adjudication and rule making is not the choice between making inconsistent ad hoc decisions and formulating comprehensive standards. An agency should not, and normally does not, bring cases indiscriminately. It can and does utilize its power to institute proceedings with sufficient care to assure that cases which raise important policy questions come before it. And every agency attempts to be consistent in its decisions, an effort usually assisted by vigorous counsel. This results in a body of case law from which meaningful standards can be distilled readily.

While stressing the positive uses of adjudication, I should point out that the Commission has used rule making to a considerable extent as a tool in formulating policy. Our rule books are thick—in the view of some, too thick. The Commission has issued statements of policy or interpretation and has published memoranda of the administrative practices, indulged in by it and by its staff, all of which provide guidelines for those subject to the rules and related procedures of the Commission. One recent example concerned the Commission's net capital rule,[18] the rule which specifies the amount of capital required of broker-dealer firms to enter and remain in the securities business. To clarify problems which had arisen under the rule (which occupies one page), the Commission issued a release (of 29 pages) explaining precisely (and with examples) for the benefit of the layman subject to the rule, as well as his lawyer, how the rule operates in a variety of situations.[19]

Still another important technique, which Cary mentions in connection with enactment of the Securities Acts Amendments of 1964 but which has wider application, is the use of informal discussions with interested persons before the adoption of rules or forms. When proposals are very complex or of far reaching effect and importance, I believe the Commission proposes better rules, with which both it and those subject to the rules can live happily, when it discusses these proposals with representatives of business and professional groups before they are formally published for general comment. In some cases, these discussions have led a self-regulatory body to take action,

18 17 C.F.R. 240.15c3-1 (1962).

19 Securities Exchange Act Rel. No. 8024 (January 16, 1967).

thus obviating the need for Commission action. In other cases, they resulted in the abandonment of a proposal or development of a rule or form which was quickly accepted and adopted. This technique permits prompt remedial action, so that the agency can devote its energy and the talents of its limited staff to a wider band of urgent problems.

The Special Study of the Securities Markets, authorized by Congress in 1961 and transmitted to Congress two years later, provides the vehicle which ties together many of Cary's ideas. His analysis does not provide a blueprint for every agency, but there are lessons in it for all. He points out that in 1961, the SEC was not hampered by some of the problems discussed. No claim of captivity could be raised against the Commission. There was no problem of balance; the distinction between pro-consumer and pro-industry commissioners had never been meaningfully applied to the SEC. There was also a long tradition of staff competence at the Commission. Of equal importance, however, is the fact that a principal function of the Commission is to maintain or elevate high standards in the securities industry rather than to grant licenses or to resolve competing demands for economic benefits.

The discussion of the initiation and conduct of the Special Study is instructive. It was recognized that the structure and functioning of the securities markets had undergone dramatic changes which presented problems meriting serious study. These might, in turn, require far-reaching solutions. The Commission never considered the Study a means for mounting an attack on the securities industry. Such an approach would have been highly irresponsible and might have provoked a needless unsettling of sensitive markets. Further, the Commission believed that it would need some industry support for any major legislation it might recommend, support which would not have been forthcoming had the entire industry viewed the Study and consequent recommendations as such an attack.[20] The Commission decided that the most responsible approach would be a careful, comprehensive, well-documented study of the securities industry, conducted by an independent group within the Commission which would be led by someone outside the Commission and aided by outside consultants. The Commission hoped that such a study would encourage, where reasonably feasible, the self-regulatory bodies subject to the Commission's oversight to undertake their own reforms.

Perhaps the most fascinating part of the book is that devoted to the

20 Too much discussion and argument may create its own problems. During the hearings on the bill which was ultimately introduced, some Congressmen were suspicious of the bill because there was not enough opposition.

development and passage of the Securities Acts Amendments of 1964. Cary traces the bill from its drafting stage through final passage, carefully describing many of the hazards it faced. He points out that, since the bill was not sponsored by the Administration, the first problem facing the agency was the preparation of a bill of such popular appeal that the Committee Chairmen would hold hearings on it. The Special Study did generate such interest and the Commission was able to surmount this first hurdle. Although the SEC had unsuccessfully sought enactment of significant parts of the bill for many years, the bill as introduced was considered to be noncontroversial. Nevertheless, it encountered difficulties at every stage. Committee reports, floor debates, conversations in halls, conferences in congressmen's offices, final negotiations and concessions—all are set out and all are reflections of the fascinating and sometimes frustrating paths and detours which are encountered in the enactment of important legislation. I remember the relief when the bill passed without the need for conference; that moment and all of the emotions and excitement surrounding the path of the bill are perceptively captured here. The bill was the culmination of Cary's chairmanship and, although he does not claim credit for its passage, it would not have been realized without his skillful leadership.

In the final part of the book, Cary moves to an issue of continuing interest to scholars of the administrative process. In doing so, he takes issue with two former chairmen (of other agencies) on how to improve the administrative process. Louis Hector, former Chairman of the CAB, and Newton Minow, former head of the FCC, had criticized the performance of these regulatory agencies.[21] They contended that the agencies had failed to develop clearly articluated policies and standards, and had performed their judicial functions poorly because of a lack of time and staff, and because of the combination in one agency of prosecutory and adjudicatory functions. They also argued that the country's economy suffers under the present regulatory structure because there is inadequate coordination of policy among related agencies. To cure these problems, they would transfer the agencies' judicial functions to an administrative court or series of courts, and would have agency policy determined by a single executive who would be appointed by and be responsible to the President.

Cary agrees with their broad objectives—greater efficiency and better policy development—but he suggests different means for achieving

21 Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Letter from Newton N. Minnow to the President of the United States, May 31, 1963 (available from the Federal Communications Commission).

these objectives. His experience leads him to conclude that good management requires that the authority to plan and the responsibility to execute and enforce be centralized in the same hands.[22] He feels strongly that the interaction of various policy-making techniques assists the agency in formulating meaningful policy. Unlike Hector and Minow, Cary believes that adjudication is a useful policy-making tool, and with this I concur,[23] as I do with all of Cary's views in this area.

Cary also suggests, correctly, that although a Commission does have the potential to concentrate primarily on policy determinations, this potential is substantially diluted when the Commission consists of too large a number of members. I sympathize with the frustrations which Hector and Minow experienced; every chairman, indeed every member, of a commission feels, at times, that the agency is not performing well and has lost sight of its goals. The cure for such frustration is not, however, punishment of the agency—and thus of the public and the affected industries—by taking away its policy-making function. This, Cary reminds us, would lower the quality of administrators and seriously fragment the regulatory process.

This book is more than an informed essay on how agencies are and should be operated; it is more than an illuminating description of how one particular agency did, in fact, operate at a particular time and place. It is a carefully documented essay demonstrating how an agency and its chairman, indeed all of its members, are inextricably bound up in the political process. Agencies must learn how to use the political process for the benefit of the public interest they were created to protect. The great virtue of this book is that it provides tools for analysis and instruction to anyone interested whether he be lawyer, political scientist, congressman, or agency member.

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22 Cary, characteristically, points out that his conclusions had been reached earlier by other scholars; he believes that practical experience supports these conclusions. *See* 1 K. DAVIS, ADMINISTRATIVE LAW § 1.04 (Supp. 1965); Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 WIS. L. REV. 183; Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 WIS. L. REV. 95; Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 441 (1960).

23 *See* Cohen & Rabin, *supra* note 12, at 691.