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Peter Woll

University of California, Los Angeles

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ADMINISTRATIVE LAW REFORM: PROPOSALS AND PROSPECTS

Peter Woll*

Recent years have seen public disclosures concerning the activities of the independent regulatory commissions that have shocked some people, but which were quite predictable to many seasoned observers. In 1957 the House of Representatives established a Special Subcommittee on Legislative Oversight¹ to investigate various phases of administrative procedure.² The committee hired a distinguished scholar of administrative law, Bernard Schwartz, and started on its difficult mission of inquiry into the state of affairs of the "headless fourth branch" of the government, i.e., the independent regulatory agencies.³ This investigation reflected a resurgent interest in administrative procedure that was to become widespread in government circles, culminating in the Landis report in December 1960,⁴ and subsequently in various proposals made by President Kennedy in his message to Congress on April 13, 1961 to reorganize this sector of the bureaucracy.⁵

There is little doubt today that administrative law is of great importance to the community as a whole, and to the legal profession

* A.B., 1954, Haverford College; Ph.D., 1958, Cornell University. Author, *ADMINISTRATIVE LAW: THE INFORMAL PROCESS* presently being published by the University of California Press, and of numerous law review articles. Presently, Assistant Professor of Political Science at the University of California, Los Angeles.

¹ H.R. Res. 99, 85th Cong., 1st Sess. (1957).

² The subcommittee eventually came under the chairmanship of Oren Harris, Chairman of the parent Committee on Interstate and Foreign Commerce.

³ Background material may be found in SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* (1959).

⁴ LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (Dec. 1960); reprinted by the SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMMITTEE ON THE JUDICIARY, 86th Cong., 2d Sess. (Comm. Print 1960); and by PIKE & FISHER, *ADMINISTRATIVE LAW* (Dec. 1960.)

⁵ The President's message to Congress on the regulatory agencies is in 107 CONG. REC. 5356 (daily ed. April 13, 1961).

in particular. This is simply because of the expanding functions of government which bring more and more areas under the jurisdiction of administrative agencies. Whether one likes this trend or not, the fact is that the powers of bureaucracy, already extraordinary, will undoubtedly increase in the future. The scope of administrative law will expand, and it will be of the utmost importance for the legal profession to come to grips with the field, and decide realistically the proper role administrative agencies should have in the legal system. The intricate workings of these agencies will more frequently than not necessitate informed legal advice to private parties within their jurisdiction, and, from the standpoint of the government, much of the work handled by the regulatory agencies will require legal interpretation and advice from government lawyers. The expansion of administrative law will require greater legal attention to the exigencies of the administrative process, which will in turn benefit from informed legal judgment.

The purpose of this article is to analyze current administrative practice in the adjudicative area in relation to various proposals that have been made for procedural reform. It will be necessary, first, to review briefly the nature of administrative law. Second, early attempts made both by the American Bar Association and the judiciary to control administrative procedure will be noted. Third, present proposals for reform, which come from a variety of sources, will be analyzed. Finally, some assessment of the requirements of administrative adjudication from the standpoint of effective and fair government regulation is necessary to indicate possible directions in which the legal profession and the judiciary might move in making realistic proposals for reform. In various sections of this article, where relevant, the position of the judiciary with respect to administrative procedure will be noted.

I. THE NATURE OF ADMINISTRATIVE LAW

The term "administrative law" may be defined in several ways. It may refer to the "law" formulated by administrative agencies through their rule-making powers. In this sense every citizen has a deep interest in the content of administrative law, which, when defined in this substantive manner, is equivalent to legislation. This aspect of administrative law concerns the policy-making powers of bureaucracy, and, although it is not generally the primary subject of the texts in the field, it is inextricably related to the procedural features of agency practice. One of the most difficult problems facing those in the field of administrative law is that of developing, both theoretically and practically, a proper relationship between policy-making and adjudication, *i.e.*, between the sub-

stantive and procedural aspects of regulation. To say that these aspects of administrative law can be completely separated may be a profound, albeit common, error. Of course both policy-making and adjudication involve substantive and procedural issues, but the essential problem is whether or not policy-making and policy implementation through adjudication can be separated. Policy is being referred to here as "substantive," and its implementation as "procedural," regardless of the nature of the issues in each area.

Administrative law is usually defined in terms of its procedural characteristics, and is equated to administrative adjudication. In general terms, adjudication involves an adversary proceeding, in which specific parties participate, and from which a final determination is made subject only to judicial review within definite legal boundaries.⁶ The courts will not accept jurisdiction over an area where their decisions will be subject to extra-judicial review.⁷ The fact that channels of review exist does not invalidate requirements of finality providing the review is carried out within the judiciary. Thus, a lower court is clearly exercising judicial power even though its decisions may be subject to review at the appellate level.

From this general definition of the judicial function it is quite evident that administrative agencies and courts may exercise virtually identical power from the standpoint of procedure. Both dispose of specific cases based upon the interpretation of existing law—whether constitutional, statutory, or administrative. Both may have final power, within statutorily and judicially defined limits of review. In many instances both the judiciary and administrative agencies exercise final power of disposition without the possibility of judicial review, because of statutory limitations or practical circumstances which make such review meaningless. In this respect *de facto* preclusion negates possibilities for review *de jure*. Where administrative finality exists, it will stem either from reasons that preclude private parties from seeking review, or from judicial self-restraint. The courts can always find sufficient reason to review any aspect of an administrative case, even where review is limited or precluded by Congress in the statutes governing the agency.

⁶ Standards of review vary from court to court, and jurisdiction to jurisdiction, in accordance with the statutory provisions, issues, and legal personnel involved. It is nevertheless proper to generalize that the boundaries of such review in many instances theoretically encompass only legal issues, with factual determinations (except where relevant to such legal areas as evidence) finally decided by the initial adjudicative body.

⁷ Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

Nevertheless, the courts generally will defer to congressional intent;⁸ and where such intent is not clear, the judiciary frequently assumes a lack of judicial power to review. In such cases the courts may take the lack of an affirmative statutory provision for judicial review as an indication of congressional intent to preclude judicial scrutiny.⁹ On the other hand, the courts can always intervene through the invocation of *constitutional* issues, regardless of statutory provisions.¹⁰ This is the exception rather than the rule.

Apart from judicial self-restraint, administrative finality stems from such practical considerations as the need, in many instances, of private parties to avoid loss of time and expense, both of which result from prolonged litigation. To take a case to court is often simply not worth the effort, even if it appears that there is a strong possibility of judicial remedy of an adverse administrative decision. Furthermore administrative agencies possess a variety of sanctions, some of which are automatically invoked when the

⁸ For example, decisions of the Administrator of Veterans' Affairs are made conclusive by the statutory provision that such decisions "shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." 48 Stat. 9 (1933), 38 U.S.C. § 211a (1958). Recent decisions supporting this provision include: *Thompson v. Whittier*, 185 F. Supp. 306 (D.D.C. 1960); *Napier v. Veterans Administration*, 187 F. Supp. 723 (D. N.J. 1960); *United States v. Daubendiek*, 25 F.R.D. 50 (N.D. Iowa 1959). Early decisions of importance include: *Silberschein v. United States*, 266 U.S. 221 (1924); *Lynch v. United States*, 292 U.S. 571 (1934); *Meadows v. United States*, 281 U.S. 271 (1930).

⁹ *Schilling v. Rogers*, 363 U.S. 666 (1960) provides an interesting illustration of this point. The case contains a vigorous dissent by Justices Brennan, Black, Douglas, and Chief Justice Warren, who felt that the majority of the Court was too quick to accept preclusion of judicial review in the absence of a clear congressional mandate.

¹⁰ This is essentially what the Court did in the sensitive field of alien deportation in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). Here Congress had not expressly provided for hearings in deportation proceedings, but the Court held that the Constitution requires such hearings; therefore the Administrative Procedure Act § 5 applies regardless of the fact that there is no express statutory hearing requirement. (The Administrative Procedure Act, 60 Stat. 239 [1946], 5 U.S.C. § 1001 [1958], will hereinafter be cited as APA §) As the Court noted, the requirements of the APA "exempt hearings of less than statutory authority, not those of more than statutory authority." Regardless of this relatively clear judicial mandate, Congress specifically exempted proceedings involving the exclusion or expulsion of aliens from the APA in the Immigration and Nationality Act of 1952, 66 Stat. 109, 8 U.S.C. § 1252 (1958). After this act, the courts acquiesced to congressional intent.

agency announces it is going to take formal action against a private party. A good illustration of such sanctions is *publicity* which may result from a formal charge of illegality, and which may produce extreme hardships on the parties involved in terms of their public relations. For example, rarely will a party formally challenge a Securities and Exchange Commission request to alter a registration statement, for the resulting publicity may destroy the possibility of successfully marketing the issue. In this type of case the formal hearing process of the Commission is generally not used, and the courts are virtually precluded as an effective recourse from adverse administrative action. More generally, private parties know that they must establish cordial relationships with regulatory agencies, and this too may make them hesitate to take a case to court from fear of future reprisals. Even if such a fear may be unjustified, a corporation with a great deal at stake in the long run may not want to take a short term chance on a relatively inconsequential issue. It may, therefore, sacrifice its interests in one case to further them in another. Private parties will always weigh various alternatives of a practical nature before they seek judicial review; and more often than not they will forgo such review on the basis of these considerations. These factors, in addition to judicial self-restraint, and congressional preclusion of review in many types of cases, increase the likelihood of administrative finality in the exercise of the judicial function. One of the most pressing current problems is how to deal with the necessarily vast administrative discretion in the adjudicative process. This problem stems not only from these limitations upon judicial review, but also from the essentially informal nature of administrative procedure today.

A. THE NATURE AND SCOPE OF FORMAL AND INFORMAL ADMINISTRATIVE ADJUDICATION

Generally, each administrative agency involved in adjudication may be considered to have an informal and a formal process to settle disputes. Although the term "formal" is somewhat elusive, it is usually defined in terms of procedures traditionally characteristic of common-law courts. The word "traditionally" is chosen carefully here, for it is a well known fact that much of what is done today in the judiciary involves informal procedure. In accordance with common-law theory and practice (to the extent it is not altered by informal procedure) formal adjudication involves adequate notice to the participating parties, and a hearing with a decision based upon the record, from which an appeal may be taken within proscribed limits. Ideally, the hearing should provide the opportunity for oral argument, although this has never been set-

tled in administrative law. In *WJR, the Goodwill Station v. FCC*¹¹ the District of Columbia Court of Appeals stated categorically that due process requires oral argument "on every question of law raised before a judicial or quasi-judicial tribunal."¹² On appeal the United States Supreme Court reversed, stating that "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations."¹³ The view of the Supreme Court has prevailed. Specific standards of due process have never been developed by the judiciary or Congress for application to formal administrative proceedings. Cases involving agency procedure that have been reviewed by the courts have always been settled on what is actually an *ad hoc* basis. In addition, the Administrative Procedure Act of 1946 is extremely ambiguous, and exempts many categories of administrative cases from the provisions of the act.¹⁴

In contrast to formal administrative adjudication, agencies utilize various methods of informal settlement, not the least important of which are directed at *settling informal cases that have reached the formal hearing stage*. This is a frequently overlooked area of administrative procedure. It is analogous in one respect to pre-trial procedure in the courts, in that attempts are made informally to sharpen issues and settle by deposition, stipulation, or other means, matters that are amenable to compromise or not in dispute. Agencies use such procedure wherever possible to avoid prolonged and costly hearings. To illustrate the importance of this type of informal disposition, the Internal Revenue Service, through its appellate division machinery, manages to settle through stipulation approximately ninety per cent of the tax cases petitioned to the Tax Court (docketed cases). Numerous other instances of various forms of shortened procedure could be cited, both with respect to regulatory and non-regulatory agencies.¹⁵ Even where there are sweeping statutory requirements for hearings, agencies will utilize every possible device to shorten the proceedings. The Civil Aeronautics Board illustrates this, where prehearing conferences are employed extensively along with other techniques to reduce the

¹¹ 174 F.2d 226 (D.C. Cir. 1948).

¹² *Id.* at 233.

¹³ *FCC v. WJR, the Goodwill Station*, 337 U.S. 265, 276 (1949).

¹⁴ See APA §§ 4(b), 5, which require certain standards of procedure only where a previous statutory requirement for hearing exists; and §§ 3, 4, 5, 10, which exempt large portions of administration from the act.

¹⁵ See Woll, *The Development of Shortened Procedure in American Administrative Law*, 45 CORNELL L.Q. 56 (1959).

burden of statutory hearing provisions.¹⁶ Even though these informal techniques are employed extensively, a great deal of the criticism of the administrative process today centers upon the thesis that there is too much formality at the hearing stage, thus impeding expeditious disposition of cases. This will be discussed below.

Apart from informal procedure at the formal hearing stage, various techniques are used extensively and effectively by administrative agencies to dispose initially of cases before the formal adjudicative level. Such case settlement involves informal contact between the agency and the private party concerned, from which agreement emerges disposing of the issues involved to the satisfaction of both parties. Informal conferences and correspondence are widely used. In areas involving the application of technical administrative standards, such as that encompassed by FTC requirements for the labeling of wool, fur, and flammable fabrics, agency inspections may serve as a channel for securing compliance in individual cases. This is essentially informal administrative adjudication. The informal process is often institutional, involving the participation of several units of the agency in decision-making. This contrasts with personal decision-making, where "the person who hears, decides." The latter is possible at both formal and informal levels of adjudication; the former tends to be more effectively employed in informal adjudication, which is not burdened by standards of quasi-judicial conduct (emanating from statutes, the courts, or administrative regulations) that limit the extent to which the institutional process may be used.¹⁷

The scope of informal administrative adjudication is impressive by any standard. In terms of the total picture, over ninety per cent of the cases arising within administrative jurisdiction are settled informally. Although this is an average, rarely, in particular

¹⁶ *Id. passim.*

¹⁷ See APA §§ 5, 7, 8, 11. See also, *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), *reversing*, *Allentown Broadcasting Corp. v. FCC*, 222 F.2d 781 (D.C. Cir. 1954); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). The institutional process essentially involves a combination of functions, to varying degrees, in accordance with the type of case under consideration. It is a process in which various groups contribute their *expertise*, where appropriate, to the determination of selected aspects of a case. The APA provisions and the cases noted above pertain to requirements for the separation of functions within the administrative process. Insofar as separation is required, and to the extent that the hearing examiners have final power of disposition on certain issues, the institutional process of decision-making is necessarily limited.

categories of cases, is the formal hearing process of equal significance to informal disposition, and virtually never is it of greater importance. Nor is it possible to dismiss the subject of informal adjudication by saying that qualitatively the most important cases are handled through a formal hearing process, although quantitatively the informal process is clearly dominant. The fact is that by qualitative standards the interests at stake in cases settled informally are of great importance, and are at least equal to those adjudicated formally.¹⁸

In summary, administrative procedure in adjudication possesses many similarities to court procedure. It is certainly less formal as a whole; but both the courts and administrative agencies have the power to dispose of specific cases, with finality, within proscribed limits of judicial review. From the standpoint of procedure it is accurate to state that the judicial power exercised by administrative agencies reflects similar problems, and has parallel implications to that employed by the judiciary, with respect to the determination of individual obligations and rights.

B. THE SUBSTANTIVE ELEMENT IN ADMINISTRATIVE LAW

One of the most important distinctions that must be made between adjudication by administrative agencies on the one hand, and by the courts on the other, is that substantive policy considerations are more consciously involved in administrative adjudication. Some consider this to be a major difference.¹⁹ To say that the entry of policy into administrative decisions of a judicial nature distinguishes administrative from judicial application and interpretation of the law is not to deny the importance of public policy to judges, nor is it to deny that judges often *make* public policy. The difference is one of degree, not of kind. One scholar, concluding that judges have a creative function when they interpret the law within the framework of what they consider to be public policy, notes that "it seems to be only the *openly* avowed use of the idea of public policy, as a basis for judicial legislation, from which the judges are apt to shrink, perhaps because such law-making may readily be interpreted as a usurpation. For can it be doubted that in all those other branches of the law where the idea is but rarely adverted to expressly, it is nevertheless implicit, in each new brick that is added to the edifice, that the judge's notion of what the

¹⁸ See Woll, *Informal Administrative Adjudication: Summary of Findings*, 7 U.C.L.A.L. REV. 436 (1960).

¹⁹ See Wade, "Quasi-Judicial" and Its Background, 10 CAMB. L.J. 216 (1949).

public interest demands is at least an operative consideration, if not a decisive one?"²⁰ Although many lawyers might quarrel with this statement, it can not be denied that in many instances conceptions of proper public policy and decisions in specific cases go hand in hand in the courts.

In contrast to the judiciary, one of the *principal purposes* of the administrative process is to *implement public policy* in particular areas established by Congress. Administrative adjudication aids the function of regulation, which has been delegated to administrative agencies by Congress as a result of various forms of political pressure favoring government intervention into different spheres. In other words, there is a conscious political motive which may or may not enter the process of agency case disposition, but which is always on the sidelines as a factor to be taken into account. This fact has profound implications upon the nature of administrative functions and the structure of agencies. It affects the adjudicative process not only with respect to the final decision that is made, but also with regard to the type of case that is handled. The fact that agencies have a *positive* policy function causes them to initiate cases where such action is necessitated by policy considerations. Here there is a clear distinction between agency and court adjudication, for the latter cannot and will not hear anything other than a "case or controversy." The courts have, of course, the power to select what issues they will decide, and the Supreme Court, in addition, may often refuse to hear a case at all. In this sense the courts can be selective. However, their selection must come from concrete cases that have developed from initiative over which they have no control. The judge cannot consciously seek out cases to implement policy; thus, his function is more passive than that of the administrative agency.

The extent to which substantive issues should be injected into administrative adjudication is a major point of contention at the present time. Before analyzing the more important proposals which deal with this area, it is important to note at this point that the arguments both for and against the combination of substantive policy and the adjudication of specific cases are equivocal. There is no clear-cut answer. Further, the lines of groups supporting one side or the other are not clearly drawn; thus, although the American Bar Association has taken a stand in favor of greater formalization and separation of functions in the administrative process, there are many lawyers within and without government who disagree with this position completely. On the other hand the administra-

²⁰ LLOYD, PUBLIC POLICY—A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW 121-22 (1953).

tive agencies have opposed with a high degree of consistency the stand of the American Bar Association; however, this does not prevent many government lawyers and in some instances top agency officials from speaking out in favor of a strict separation of policy making and adjudication.²¹

From a historical point of view it is evident that Congress, in establishing government regulation in various areas, purposely created agencies that could function with a high degree of flexibility, both in interpreting and applying the law. In some instances Congress consciously removed jurisdiction from the courts and transferred it to an administrative agency, *e.g.*, in the area of workmen's compensation legislation. In other situations it withheld jurisdiction from the courts upon the creation of a new regulatory agency. For example, when Congress established the Federal Trade Commission in 1914, it provided for independent powers of enforcement so that the FTC would not have to rely upon judicial action to carry out policy in the field of monopoly control and in the regulation of business practices. This distinguishes it from the Justice Department, which must seek enforcement in the courts. By 1914 Congress realized that previous legislation, *viz.* the Sherman Act of 1890 which vested the power of enforcement jointly with the Attorney General and circuit courts (changed to district courts in 1911), had failed to provide vigorous implementation of anti-trust policy.²² The courts were unsympathetic to legislative goals; hence, they were not applying the law in accordance with congressional standards. Congress wanted substantive issues injected into anti-trust adjudication, but they wanted the "right" standards to be employed. Apart from present and past attacks upon the combination of legislative and judicial functions in the hands of one agency, it may be objectively stated that this was the design of Congress in establishing such regulatory agencies in the first place. This in no way implies that Congress today should not change its own creation;

²¹ Hector, *Memorandum to the President—Problems of the CAB and the Independent Regulatory Commissions* (Sept. 10, 1959), reprinted in *Hearings on H.R. 4800 and H.R. 6774 Before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 336 (1960). The CAB reply, prepared by its General Counsel, can be found *id.* at 412.

²² Sherman Act § 4, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958) provides: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." The original Act vested jurisdiction in circuit courts.

in fact that has already been accomplished to a limited extent through the APA.

The above considerations raise the extremely complex question concerning the extent to which policy-making and adjudication can realistically be separated in the administrative process; and at the same time the issue is raised as to whether or not they *should* be separated. If it is decided that there should be a combination of functions, it is not necessary to deal with the first question. On the other hand, if a separation of functions is desired, it is necessary to determine realistically the extent to which this can be accomplished. This issue will be discussed below in relation to proposals for the separation of functions.

C. SUMMARY

In summary, the necessity of discussing the policy making and adjudicative aspects of administrative law as interrelated functions has been illustrated. Further, it is important to note that this fact does not indicate a unique characteristic of administrative law, for public policy considerations enter the process of judicial decision-making at numerous points. On the other hand, the administrative process performs a more positive act in this respect than the judiciary. Its primary purpose is effective regulation in the public interest, in accordance with congressional standards. Regulation involves policy as much as adjudication, and there is little doubt that Congress intended that these agencies should adjudicate in light of substantive policy criteria. This type of regulatory activity, although it may fulfill broad legislative goals, poses problems to what the lawyer generally describes as "traditional concepts of fair play" which are embodied in the idea of procedural due process of law. It is now necessary to turn to this aspect of administrative law, which leads directly into a consideration of proposals that have been made for reform of administrative procedure.

II. ADMINISTRATIVE LAW REFORM, 1933-1946

It is of importance to review briefly early attempts to control administrative procedure made by the American Bar Association and the judiciary, for therein is contained the theoretical basis of current proposals made by these same groups. It is interesting to note that at this early stage these groups (lawyers and judges) more or less monopolized the scene involving the development of the administrative process. Historically lawyers dominated the administrative branch of the government much in the same way that they controlled Congress. The government of the United States

is supposed to be a government of law, and this reason, among others, gives to lawyers a certain status and *expertise* that at times is unchallenged. It would be a mistake of great magnitude to assume conformity of attitude among the legal profession. Relative to other groups there is generally a greater awareness of the legal aspects of particular problems among lawyers, and perhaps a greater respect for procedural protection in adjudication. Beyond this there are sharp contrasts within the group. Nevertheless, during the early part of the New Deal, as administrative agencies were created with a degree of rapidity that astounded many, the American Bar Association took an official stand in relation to the control of administrative law, and it was later instrumental in securing the passage of legislation for this purpose. The judiciary also attempted to deal with administrative law on a relatively consistent basis. Many lawyers, of course, who worked for both new and old administrative agencies, took a stand in sharp opposition to the American Bar Association. This tendency increased as the agencies became more highly developed, and today much of the opposition from within government to American Bar Association proposals comes from agency lawyers. In the area of administrative law reform, however, agency lawyers were not initially very vocal in their representation of views that differed from the American Bar Association and they had virtually no influence upon legislation in this field. This situation changed as administrative agencies gained power and prestige, as well as political support from clientele groups. By 1946, the date of the passage of the APA, the voice of regulatory agencies of various types was being felt in Congress.

The initial question that must be asked when dealing with the subject of reform of administrative procedure is: what is all the fuss about? With respect to proposals coming from the American Bar Association, *why* was this group so concerned with the development of administrative law? The answer is both very simple and very complex. It concerns, to some degree, human motivation, a very difficult area in which to arrive at accurate conclusions. Put in simple terms, the American Bar Association was concerned with administrative law because it involved the exercise of judicial functions; thus it involved an area of *expertise* possessed solely by a group for which the American Bar Association was spokesman. This function had been traditionally handled by the courts, a *milieu* in which the lawyer functions with knowledge and ease. With the development of judicial functions outside of this medium, the lawyer becomes uncomfortable until it is structured in a manner familiar to him. Thus it was natural for the American Bar Associa-

tion to attempt to shape the administrative process in the image of the courts, at least insofar as judicial functions were involved. Judicial power had been traditionally exercised within the framework of court procedure, and the administrative process had to conform if it was not to violate the Anglo-American legal tradition. Of course, there had been some exceptions in history to this rule, as illustrated by the powers possessed by the office of justice of the peace in Great Britain. However, even though this was part of the legal tradition, it was the exception rather than the rule insofar as the exercise of judicial power was concerned. Star chamber proceedings also had been employed, but contrary to the common-law heritage.

If one views the writings of legal scholars, and American Bar Association committee reports and proposals from the beginning of the century to the passage of the APA in 1946, a certain fear of the administrative process becomes evident, as well as a tendency to desire a measure of conformity between agency procedure and traditional common-law court practice. Roscoe Pound, who spoke throughout this period both as an independent scholar and as a representative of American Bar Association committees dealing with administrative law reform, stated as early as 1914 that there was a conflict between what he termed "executive justice" and "justice according to law."²³ He recognized that administrative law did not and probably could not fit comfortably into the common-law pattern, in terms of the personnel, issues, and procedures involved. He favored as a minimum a strict code of administrative procedure and extensive judicial review.²⁴ He did not feel that the APA was adequate to meet the threat of administrative arbitrariness.

The first report of the American Bar Association Committee on Administrative Law, established in 1933, echoed the concerns of men like Pound in the statement that:

When . . . the administrative official exercises a quasi-judicial function, he may be expected to conform to the sort of procedure which has been found best adapted to the determination of the rights and obligations of the individual in his controversies with other individuals and with the Government. Certain fundamental safeguards of notice, opportunity for hearing, and determination or review of issues of fact and of law by an independent tribunal (and eventually, on questions of law at least, by a court) are in-

²³ Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 18 (1914). This article is in three parts; the other parts are in 13 COLUM. L. REV. 696 (1913); 14 COLUM. L. REV. 103 (1914).

²⁴ See Pound, *For the "Minority Report,"* 27 A.B.A.J. 664 (1941).

volved, and, indeed, are necessary if justice is to be done to the individual.²⁵

The emphasis during this early period of legal concern with the administrative process was upon the procedural rather than the substantive aspects of administrative law. Although there was not necessarily a quarrel with the nature of substantive policy formulated by administrative agencies, there was a concern with the way in which general rules were made as well as with their application in specific cases of adjudication.²⁶ After much maneuvering the American Bar Association secured the passage of the Walter-Logan Bill in 1940, only to have it vetoed by President Roosevelt. This act was an extreme attempt to control administrative procedure, and it is difficult to visualize how it could have worked. For example, it provided that "administrative rules and all amendments or modifications or supplements of existing rules implementing or filling in the details of any statute affecting the rights of persons or property shall be issued . . . only after publication of notice and public hearings."²⁷ This would have introduced a novel feature in the law by providing for hearings with respect to the formulation of legislation—a concept rejected by the courts then and now. With respect to administrative adjudication, the act established strict requirements for formal hearings and provided that "any person aggrieved by an agency decision" had a right to such a hearing. Finally, judicial review of administrative decisions

²⁵ *Report of the Special Committee on Administrative Law*, 58 A.B.A. REP. 407, 410 (1933).

²⁶ Of course there are some members of the American Bar Association who essentially opposed the New Deal and the increased scope of governmental activity through an expanded administrative branch. Their concern with administrative procedure was based not only upon the need to protect the rights of the individual, but also upon the necessity of curbing administrative expansion. One way of shaping the substantive nature of policy formed by administrative agencies is to give to those directly or indirectly affected the ability to participate in the process of policy formulation. If this could be done effectively it would result in a limitation upon the scope of governmental activity. As a minimum it would delay administrative action, which would be in the interests of those opposed to particular political programs that can only be implemented through such action. Thus, to some extent the more extreme proposals for control of administrative procedure resulted from an essential opposition to the administrative process and the New Deal itself.

²⁷ Section 2(a). The texts of both the Walter-Logan Bill, H.R. 6324, 76th Cong., 1st Sess. (1939) and the American Bar Association Administrative Law Bill, H.R. 4236, 76th Cong., 1st Sess. (1939), which was essentially the same, may be found in *Hearings on H.R. 6324 and H.R. 4236 Before the House Subcommittee No. 4 of the Committee on the Judiciary*, 76th Cong., 1st Sess. 1-5, 10-14 (1939).

was established both with respect to points of law and fact, a concept that overruled the carefully formulated plans of the judiciary to limit the scope of review to legal issues.²⁸

During the same year that the Walter-Logan Bill was passed by Congress, Justice Frankfurter, speaking for the Supreme Court, stated in *Railroad Comm'n v. Rowan & Nichols Oil Co.*,²⁹ with respect to the validity of an oil proration order promulgated by the Texas Railroad Commission which had been challenged as a violation of the Fourteenth Amendment: "A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."³⁰ Further, he noted that "it is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."³¹ This case is representative of the trend in the judiciary, which began during the thirties, to defer to the expert judgment of administrative agencies. In this respect the legislative proposals of the American Bar Association to expand judicial review were in conflict with case law developed by the courts. The latter had a greater realization of what it would mean to remove the barriers to judicial review that they had so carefully constructed. In this sense the judiciary was more practical because of its greater day to day involvement in the reviewing process.

President Roosevelt summed up the point of view of many scholars and practitioners of administrative law concerning the Walter-Logan Bill in his veto message. He noted:

I am convinced . . . that in reality the effect of this bill would be to reverse and, to a large extent, cancel one of the most significant and useful trends of the twentieth century in legal administration.

That movement has its origin in the recognition even by the courts themselves that the conventional processes of the courts are not adapted to handling controversies in the mass. Court procedure is adapted to the intensive investigation of individual con-

²⁸ In the face of the growing volume of administrative decisions it was necessary for the courts to develop doctrines of self-restraint to avoid a deluge of appeals from agency determinations; hence they formulated what one scholar has termed "the doctrine of judicial *inexpertise*." See Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 762, 769 (1955).

²⁹ 310 U.S. 573 (1940). These parties came before the Court again in 1941. See *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941) in which Mr. Justice Frankfurter affirmed his earlier conclusions.

³⁰ 310 U.S. at 580.

³¹ *Id.* at 584.

troversies. But it is impossible to subject the daily routine of fact-finding in many of our agencies to court procedure. Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often traps for the unwary and technical rules of evidence often prevent common-sense determinations on information which would be regarded as adequate for any business decision. . . .

The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials, and informal proceedings supersede rigid and formal pleadings and processes.³²

Because of the intense interest in and importance of administrative law during the latter part of the thirties, Roosevelt directed the Attorney General to select a committee to investigate the nature of the administrative process and make recommendations for necessary improvements. The committee submitted its report in 1941, with the majority recommending rather flexible and lenient controls of administrative rule-making and adjudication.³³ The minority recommended very strict control of these areas of administration, in a manner similar to the Walter-Logan Bill. After the interruption of World War II the American Bar Association again came strongly to the fore and secured the passage of the APA which in terms of content fell between the more liberal bill that had been recommended by the majority of the Attorney General's Committee in 1941, and the strict bill of the minority. It was closer in terms of spirit and content to the latter than the former.³⁴

A. THE ADMINISTRATIVE PROCEDURE ACT OF 1946

Because the APA is the only general statute that governs administrative procedure today it is important to review briefly its salient features. First, the act recognizes the exigencies of the administrative process and does not attempt, as did its predecessor, the Walter-Logan Bill, to force agency procedure into a single judicial mold. It takes into account the fact that each agency has some unique characteristics and problems which are governed by statute; hence, the APA does not require specified procedure in rule-making and adjudication unless a previous statutory requirement for hearing exists. Further, large portions of the adminis-

³² 86 CONG. REC. 13942 (1940).

³³ REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE APPOINTED BY THE ATTORNEY GENERAL, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

³⁴ For an excellent discussion of the background and content of the APA see Sherwood, *The Federal Administrative Procedure Act*, 41 AM. POL. SCI. REV. 271 (1947).

trative process are exempt from the provisions of the APA.³⁵ There are general requirements pertaining to the right to counsel, administrative subpoenas, denial of applications (prompt notice must be given and the grounds for denial stated by the agency), and license cases. Although these provisions also contain various limitations upon their applicability, they apply regardless of previous statutory provisions to the contrary.³⁶

With respect to judicial review, the APA establishes two important limitations. First, if there is a statutory preclusion of review, the APA's provisions for review cannot be invoked. Second, agency action committed by law to agency discretion cannot be reviewed.³⁷ Although these limitations may seem relatively clear at first glance, the fact is that they result in extremely difficult questions of interpretation. For example, in order to preclude judicial review must a statute have an express provision to this effect? The courts do not support this view, and, in fact, in some instances they find congressional intent to preclude judicial review because of the absence of an *affirmative* provision for review. Similarly, the question of whether or not a matter is committed to agency discretion by law requires as a general rule judicial interpretation of legislative intent. If it is determined that the provisions of the APA with regard to judicial review apply, then the effect of the act is to expand the scope of review by providing that in making their determinations concerning the legality of administrative action the courts must review the *whole record*. In other words it is not enough for the courts simply to uphold the agency's decision because they find adequate evidence to support it; both pros and cons must be considered, and judicial decision must rest upon a comparison of the validity of the contentions of each side. Theoretically this should limit the presumption of validity that the courts have in the past accorded to administrative decisions; in fact, although a number of cases reviewed since the passage of the APA undoubtedly have been decided against the agencies concerned as a result of this expanded scope of review, there still exists a strong judicial deference to administrative *expertise*.

Aside from expanding the scope of judicial review, the APA's more positive features include: (1) requirements for public information about agency policies and practices;³⁸ and (2) the establishment of an independent class of hearing examiners, in con-

³⁵ APA §§ 2, 3, 4, 5.

³⁶ APA §§ 6, 9.

³⁷ APA § 10.

³⁸ APA § 3.

junction with a separation of the prosecutory and adjudicative functions within each agency.³⁹ With respect to the former, agencies have given greater publicity, both in the Federal Register (and hence the Code of Federal Regulations) and separately, to their procedural and substantive rules. Insofar as the latter is concerned, one of the most important changes in the administrative process as a result of the APA is the greater independence of hearing examiners. The agencies are unable to influence examiners on the basis of particular policy points of view as easily as they did before the APA, and those who deal with regulatory agencies today feel to a greater degree that trial examiners can give them a genuinely independent decision.

However, problems have developed concerning the independence of hearing examiners. First, the very fact that trial examiners are more independent than in the past means there is a greater disparity between their decisions and the *policy* viewpoints of the top agency officials. Of course there are many cases in which the examiner's decision becomes final because of lack of agency review. This depends upon the agency and the type of case involved.⁴⁰ Louis J. Hector, a former member of the Civil Aeronautics Board, recently remarked that:

The hearing examiner who heard the *Seven States* case did not know what the Board had in mind in terms of extent of service.

The Board had in its own thinking come around to the conclusion that any town which had any reasonable chance of producing 5 passengers a day should have a chance to see if it could do so, and if it could then it should have an airline.

The hearing examiner did not know this, because he is independent, and the Board could not talk to him.

So he spent 2 years hearing evidence and turning out a 500-odd page opinion.

It came up to the Board, and the Board's first reaction was, "This wasn't what we had in mind at all. We were thinking of a much more extensive route pattern."⁴¹

This illustrates that the separation of those engaged in the formulation of agency policy from those initially adjudicating cases may directly cause nullification of the initial decision; hence, the in-

³⁹ APA §§ 5, 11.

⁴⁰ Statistics with respect to the finality of examiners' decisions in accordance with the type of case handled in various agencies may be found in 1959 ANNUAL REPORT OF THE OFFICE OF ADMINISTRATIVE PROCEDURE 38-46.

⁴¹ *Hearings pursuant to S. Res. 234 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. 232 (1960).

dependence of the trial examiner will be to no avail. Aside from this problem, a second point that should be noted concerning the limitation of trial examiner independence is, once again, that large portions of the administrative process are excluded from these APA provisions.

B. SUMMARY

The accelerated expansion of administrative agencies during the New Deal and the recognition that the administrative process was deeply involved in the exercise of judicial functions resulted in American Bar Association proposals for judicialization of administrative procedure. The Walter-Logan Bill, which passed both houses of Congress in 1940 only to be vetoed by President Roosevelt, was an attempt to mold all administrative agencies in the image of the judicial process. In 1946, with the passage of the APA, the American Bar Association was finally successful; however, the APA recognizes the exigencies of administrative procedure as well as diversity within the administrative branch. As a result, its provisions for standardization of administrative procedure in rule-making and adjudication do not apply across the board to all administrative agencies; statutory provisions as a general rule are superior to the APA, and Congress may either exclude an agency completely from the provisions of the act, or it may provide for elimination of hearings in certain categories of cases or a limitation upon judicial review—which will result in only partial application of the APA to the agency's operation. Congress may also exempt agencies from particular APA provisions.

The rather equivocal nature of the APA, and the resulting exemption of large portions of the administrative process from its provisions, has resulted in dissatisfaction on the part of the American Bar Association relative to present administrative practices. At the same time there are a number of agency officials, administrators, and scholars of administration generally who are dissatisfied with the nature of administrative law today. All of these groups have recommended changes in recent years, and it is now necessary to examine the nature and the validity of current proposals for reform of administrative procedure in light of the nature of administrative law discussed previously.

III. CURRENT PROPOSALS FOR ADMINISTRATIVE LAW

A. REFORM

One may roughly divide current proposals for reform of administrative procedure into those representing the formal stand

of the American Bar Association, and those emanating from Congress. The latter represent a synthesis of the views of many groups. There is no unified reform movement, although there is widespread dissatisfaction representing divergent points of view. Each group that puts forth reform proposals views the administrative process from a different perspective, and, because of diverse premises, different requirements for administrative procedure are emphasized. In order to understand the administrative reform movement it is necessary to indicate briefly the positions that have been taken by the major groups involved.

B. THE STAND OF THE AMERICAN BAR ASSOCIATION

The American Bar Association's position in 1962 with respect to the administrative process is virtually identical to its posture of the thirties. Because of its dissatisfaction with the results of the APA of 1946, the American Bar Association is recommending reforms that would lead to greater judicialization of administrative procedure than presently exists. In brief form the American Bar Association is recommending: (1) stricter separation of judicial functions from legislative and executive functions within the administrative process; and (2) the establishment, within the judicial area of administration, of well-defined procedures which conform to traditional judicial procedures insofar as possible. The *assumptions* underlying these recommendations are: (1) judicial functions can be clearly distinguished when exercised by administrative agencies; (2) the rights of the individual *directly* involved in adjudication must be protected; and (3) the best way to do this is through formal judicial procedure.

In order to accomplish its objectives the American Bar Association is proposing both a stricter Code of Federal Administrative Procedure, and the establishment of specialized administrative courts in the trade practice and labor relations fields. In line with the latter proposals the American Bar Association has recommended that the Tax Court be transferred to the judicial branch.⁴² Although these proposals are relatively stringent in terms of the effect they would have upon administrative procedure, they are not as strict as the recommendations of the Hoover Commission Task Force upon which they were based. The American Bar Association, however, seems to agree with the basic assumptions of the Task Force, which were stated in the following way: (1) "The more closely that administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be

⁴² For all of these proposals, see *Report of Special Committee on Legal Services and Procedure*, 81 A.B.A. REP. 491 (1956).

attained in the administrative process;" and (2) "formalization of administrative procedures along judicial lines is consistent with efficiency and simplification of the administrative process."⁴³ The Task Force recommended legislation similar to that being sponsored by the American Bar Association at the present time, *viz.*, a strict code of administrative procedure, administrative courts, and the transference of certain judicial functions "such as the imposition of money penalties, the remission or compromise of money penalties, the award of reparations or damages, and the issuance of injunctive orders,"⁴⁴ to the common-law courts. Although legislation has been introduced to effect proposals for the limited establishment of administrative courts, recently this idea has been given less serious attention, and concentration has been placed upon proposals for stricter legislative control of internal agency procedure and an expansion of judicial review.

C. THE CODE OF FEDERAL ADMINISTRATIVE PROCEDURE

In what way does the proposed new Code of Federal Administrative Procedure change the APA and current administrative practice? No precise answer can be given to this question, for administrative procedure is dependent upon a number of variables. One can make any number of technical changes in legislation; however, there must be either voluntary acceptance of proposed changes on the part of those affected, or an adequate enforcement agency. At the time the APA was passed many felt that the administrative process would be forced into a judicial mold, and that administrative procedure would be very significantly altered. Time, however, produced a different result. As indicated previously, the trend in judicial review during the latter part of the thirties and the forties was not in line with proposals for stricter control of administrative rule-making and adjudication. Hence, when the APA finally became law, it was only natural that the courts would adopt, in many instances, a liberal interpretation of its provisions that would leave untouched large areas of administrative discretion. The APA, of course, had a definite impact upon the administrative process that has been discussed above, even though it did not fulfill the expectations of its framers. However, experience with the APA indicates that one must be extremely careful in attempting to ascertain the possible effects of statutes governing administrative procedure.

⁴³ U.S. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT (1953-55), TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 138 (1955).

⁴⁴ *Id.* at 85.

D. ELIMINATION OF STATUTORY EXEMPTIONS

The Code of Federal Administrative Procedure contains a number of important changes from the provisions of the APA. First, it eliminates the large number of specific statutory exemptions from the APA. Section 1012 of the Code lists no less than seventeen laws with APA exemptions, and repeals the sections of those laws providing for such exemption. Further, the Code provides in section 1012 that, in addition to these seventeen laws specifically mentioned: "[A]ll laws or parts of law . . . which, either expressly or impliedly, grant exemption from the provisions of the Administrative Procedure Act of 1946 are hereby repealed. . . ." Such important laws as the Immigration and Nationality Act of 1952, the Universal Military Training and Service Act, and the Atomic Energy Act of 1954 would be changed to provide for procedures in accord with the Code. This elimination of exemptions from the Code applies, of course, to the entire Code, and would include rule-making and adjudicative procedures, as well as all other areas governed by the Code.

E. THE CODE AND ADMINISTRATIVE RULE-MAKING

The American Bar Association's Code of Federal Administrative Procedure stiffens procedural requirements for rule-making, and is aimed at securing greater judicialization in the area of administrative adjudication.⁴⁵ A careful reading of section 1003 of the proposed Code, which governs rule-making, reveals that it is less permissive in allowing administrative agencies exemption from its provisions than is section 4 of the APA. The Code eliminates notice and public participation requirements in rule-making:

(1) required to be kept secret in the protection of the national security, (2) relating to public property, loans, grants, benefits, or contracts to the extent that the agency finds and publishes, with a statement of supporting reasons, that such public participation would occasion delay or expense disproportionate to the public interest; or (3) relating solely to internal management or personnel of the agency.⁴⁶

⁴⁵ The original resolution proposing the Code of Federal Administrative Procedure may be found in *Report of the Special Committee on Legal Services and Procedure*, 81 A.B.A. REP. 491 (1956). It became S. 1070, 86th Cong., 1st Sess. (1960), and S. 1887, 87th Cong., 1st Sess. (1961). See also Fuchs, *The Proposed New Code of Administrative Procedure*, 19 OHIO ST. L.J. 423 (1958); Fuchs, *The American Bar Association and The Hoover Task Force Administrative Code Proposals*, 23 I.C.C. PRAC. J. 870 (1956).

⁴⁶ The text of this and subsequently cited sections of the Code of Federal Administrative Procedure is taken from S. 1887, 87th Cong., 1st Sess. (1961).

The APA provides for similar exemptions in section 4 and adds that, except where notice or hearing is required by statute in rule-making, its notice and public participation provisions "shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or *in any situation* in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." (Emphasis added.) This is clearly more permissive than the proposed Code, and gives virtually complete discretion to the agencies in rule-making proceedings to determine appropriate procedure. Further, the Code provides in section 1003 (b), as does the APA in section 4 (b), that agencies shall afford interested persons an opportunity to participate in rule-making through the submission of written data, etc., and oral presentation unless the agency considers it unnecessary. However, the Code adds that "the agency shall fully consider all submissions," and "except with regard to rules of procedure, the agency shall, when requested by an interested person, issue a concise statement of the matters considered in adopting or rejecting the rule and the reasons therefor." These latter provisions are not in the APA.

F. THE CODE AND ADMINISTRATIVE ADJUDICATION

The greatest changes proposed in the Code of Federal Administrative Procedure pertain to administrative adjudication and judicial review. In these areas the APA was relatively lenient, providing generally for a separation of functions, an independent class of hearing examiners whose opinions could readily be overruled by the agency, the right to counsel, proper notice before a hearing, as well as notice of adverse agency action in certain types of cases. Finally, judicial review was expanded, as indicated above, to include the *whole* record. Undoubtedly one of the major limitations upon the effectiveness of these APA provisions is the large number of exemptions to the act, established by its own terms and by the provision that previous or future statutory requirements supersede APA mandates. This fact, combined with permissive judicial interpretation of the act, renders it relatively ineffective in the control of administrative procedure. This has been discussed above.

The Code contains an important section controlling *informal adjudication*. In this area the APA is only incidentally relevant. Section 1004 (b) of the Code provides that in all cases of informal adjudication that affect private rights, claims, or privileges:

[D]ecisions of subordinate officers may by rule be made

subject to review within the agency by the agency or designated boards or superior officers. If requested, the reviewing authority shall furnish to a party a statement of the reasons for its decision. The decision of the reviewing authority or, if the agency fails to establish an intra-agency review procedure, *the decision of the subordinate officer shall . . . constitute agency action subject to judicial review*, in which case the record on review shall be made by trial in the reviewing court.⁴⁷

In some respects this is a revolutionary change, substantially altering judicial doctrine as well as statutory prescription. The courts have generally required exhaustion of administrative remedy which usually involves case disposition at the formal stage of adjudication. It is difficult to see how such an expansion of judicial review could work, given the volume of cases settled informally.⁴⁸ The courts are already overburdened and scarcely capable of providing meaningful review of formal administrative cases, let alone informal cases.

In the area of formal adjudication the requirements of the Code, like those of the APA, would not apply except where hearings are required by statute or by the constitution. Once a hearing is required, the Code is far stricter than the APA in its procedural restrictions. It is safe to say that the framers of the Code had as their primary consideration the protection of the rights of the individual in the administrative process. In the formal hearing stage the Code spells out in greater detail than the APA the separation of the prosecutory and adjudicative functions within agencies. In this respect the Code attempts, on the one hand, to isolate hearing examiners *vis-à-vis* the parties in particular cases, and on the other to give examiners more authority in relation to agency review of their decisions. In this area it is with regard to agency review of an examiner's decision that the Code differs most from the APA. The APA provides, as does the Code, that the officer who presides at the initial hearing shall render a decision which becomes the decision of the agency in the absence of an appeal. If an appeal from the examiner's decision is taken to the agency, the APA provides that "the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision."⁴⁹ For this reason it has been common practice for agencies to overrule their own examiners, and there are few risks taken when this is done, although the courts have in some instances insisted that agencies substantiate in evi-

⁴⁷ Emphasis added.

⁴⁸ See Woll, *Informal Administrative Adjudication: Summary of Findings*, 7 U.C.L.A.L. Rev. 436 (1960).

⁴⁹ APA § 8(a).

dence the reversal of an examiner's decision.⁵⁰ On the other hand, under the provisions of the Code⁵¹ the agencies would be given far less discretion to overrule trial examiners. The Code requires that upon review the agency must confine itself to the record established by the presiding officer, and adds the mandate that "no other material shall be considered by the agency upon review." Further, the Code provides that "the grounds of the decision shall be within the scope of the issues presented on the record. The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the presiding officer shall not be set aside by the agency on review of the presiding officer's initial decisions unless such findings of evidentiary fact are contrary to the weight of the evidence."⁵² It is not possible to say precisely how this provision would work because of the difficulty of defining "evidentiary fact." However, there is little doubt that the role of the agencies as opposed to that of the presiding officers in formal hearings would be more limited than is presently the case. Further, this section of the Code would give additional ammunition to the courts that could be used to justify reversal of an agency decision which did not follow that of the examiner.

The essential problem raised by the Code's stricter separation of the presiding officers from the agency heads, as has been noted above with respect to present APA provisions,⁵³ is that it would increase the isolation of the trial examiner *vis-à-vis* the agency. This would lead to greater disparity between the policy viewpoints of the agency and the examiner; at the same time it would give the agency less power to overrule the examiner and thus implement its policy position. In other words, the Code emphasizes the importance of adjudication at the expense of policy, and tends to reinforce agency-examiner conflict. The very fact that agencies today feel compelled to reverse the findings of their examiners so frequently reflects this problem. Of course, the answer that proponents of the Code would give to this statement is that the rights of individuals are more important than the policy considerations of administrative agencies. However, as has been noted previously, the substantive element of administrative law cannot be overlooked when attempting to construct a system of administrative justice.

⁵⁰ See *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), *reversing*, *Allentown Broadcasting Corp. v. FCC*, 222 F.2d 781 (D.C. Cir. 1954); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Note also discussion in text at notes 40-41 *supra*.

⁵¹ Proposed Code of Federal Administrative Procedure § 1007(c).

⁵² *Ibid.*

⁵³ See text discussion at notes 40-41 *supra*.

The needs of the agencies must be balanced with the rights of the individual. Although supporters of the Code would say they have done this, it is suggested here that they have concentrated primarily upon securing individual rights and have given less attention to requirements of public policy formulation in the public interest.

G. THE CODE AND JUDICIAL REVIEW

In the area of judicial review the proposed Code of Federal Administrative Procedure has vastly expanded the ability of individuals to secure a redress of grievances in the courts. The APA, although it expanded the scope of judicial review by providing for review of the whole record of agency proceedings, nevertheless made its judicial review provisions applicable "except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion."⁵⁴ As noted above, the courts have seized upon this statement to preclude review in many instances, even though statutory intent to provide or withdraw judicial review is unclear.⁵⁵

The Code contains no such exemption from its requirements for judicial review. In fact it states affirmatively that unless there is an express statutory preclusion of review it will be available to anyone aggrieved by agency action.⁵⁶ The Code also contains more individual-oriented provisions for standing to secure review than does the APA. The latter states that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."⁵⁷ The Code provides that "any person adversely affected or aggrieved by any such reviewable agency action shall have standing to seek judicial review thereof, except where expressly precluded by Act of Congress hereafter enacted."⁵⁸ In conjunction with this standing provision the Code makes *every* final agency action subject to judicial review unless expressly precluded therefrom by an act of Congress.⁵⁹ In technical terms the Code gives standing to a broader range of parties than the APA. Further, instead of stating merely that the whole record of the agency proceeding shall be reviewed by the court

⁵⁴ APA § 10.

⁵⁵ See, e.g., *Schilling v. Rogers*, 363 U.S. 666 (1960).

⁵⁶ Proposed Code of Federal Administrative Procedure § 1009(a).

⁵⁷ APA § 10(a).

⁵⁸ Proposed Code of Federal Administrative Procedure § 1009(b).

⁵⁹ Proposed Code of Federal Administrative Procedure § 1009(a).

upon judicial review, the Code spells out in detail that the record on review of formal administrative cases shall include:

(1) all matters constituting the record for action or review by the agency, including the original or certified copies of all papers presented to or considered by the agency, (2) rulings upon exceptions, (3) the decision, findings, and action of the agency, and (4) as to alleged procedural errors and irregularities not appearing in the agency record, evidence taken independently by the court.⁶⁰

Apart from review of formal cases, the Code provides that "in all other cases, the record on review shall be made by trial in the reviewing court."⁶¹ This latter provision leads to a final consideration, noted above, namely that informal adjudicative determinations are subject to judicial review, whereupon the record is to be made in the reviewing court.⁶²

Aside from expanding judicial review through elimination of exemptions, broadening scope, and facilitating standing, the Code contains several novel features giving the courts greater power over the agencies. In particular, the courts may intervene in agency proceedings under defined circumstances before the agency has rendered a final decision. This substantially modifies the long-standing criterion of exhaustion of administrative remedies which, until now, has applied in most cases before judicial review may be obtained. In this regard, the Code provides that "upon a showing of irreparable injury, any Federal court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency."⁶³ Further, the Code requires that "every agency shall proceed with reasonable dispatch to conclude any matter presented to it with due regard for the convenience of the parties or their representatives, giving precedence to rehearing proceedings after remand by court order."⁶⁴ A party may, on the basis of undue delay in the proceedings, appeal to the federal court for relief, and the court "may direct the agency to decide the matter promptly" if it finds such delay present.⁶⁵ It is evident here as elsewhere in the Code that the American Bar Association intends to expand the role of the courts in administrative proceedings.

⁶⁰ Proposed Code of Federal Administrative Procedure § 1009(e).

⁶¹ *Ibid.*

⁶² Proposed Code of Federal Administrative Procedure § 1004(b).

⁶³ Proposed Code of Federal Administrative Procedure § 1009(g).

⁶⁴ Proposed Code of Federal Administrative Procedure § 1005(d).

⁶⁵ *Ibid.*

H. SUMMARY OF THE CODE

The proposed Code of Federal Administrative Procedure is the most comprehensive and important proposal of the American Bar Association governing administrative procedure at the present time. It would completely replace the APA, and would provide greater procedural restrictions upon administrative agencies. Most importantly, the Code attempts to eliminate most of the statutory exemptions to the APA, and vastly expands the role of the judiciary in the review of administrative decisions. The Code requires internal agency procedure to conform more closely to accepted judicial norms. Proper notice, hearings, and a record are to comprise as many agency proceedings as possible. Rules of evidence and requirements of proof "shall conform, to the extent practicable, with those in civil nonjury cases in the United States district courts."⁶⁶ Personal decision-making is emphasized over institutional decision processes through giving trial examiners greater authority and reducing the discretion of agencies in the review of the decisions of presiding officers. The judicial decision-making model was employed by the framers of the Code, and they are less willing to leave procedural matters within the discretion of the agencies than was the case with those who formulated the APA. The Code, which has been discussed extensively in Senate hearings, is now being seriously considered for the first time in hearings before the House Judiciary Committee. In January 1962, Congressman Francis E. Walter of Pennsylvania introduced in the House legislation based on the Code.⁶⁷

I. CURRENT CONGRESSIONAL ATTITUDES AND PROPOSALS FOR PROCEDURAL REFORM

Apart from considerations concerning the Code, Congress has been deeply involved in recent years in a general attempt to assess requirements for administrative procedure. The 1955 Hoover Commission *Task Force Report on Legal Services and Procedure* and the subsequent American Bar Association proposals stirred Congress to renew its investigation of the administrative process. In addition to this, the revelations of the Harris Special Subcommittee on Legislative Oversight caused congressional concern in various areas, but particularly with respect to *ex parte* influence on administrative decisions of a judicial nature. Much of the current legislation seriously proposed by House and Senate committees dealing with administrative procedures contains provisions to increase and

⁶⁶ Proposed Code of Federal Administrative Procedure § 1006(d).

⁶⁷ H.R. 9926, 87th Cong., 2d Sess. (1962).

ensure the independence of administrators involved directly in making judicial decisions. The scope of pending legislation in Congress that has committee support is not nearly as broad as the Code of Federal Administrative Procedure. It is possible that the House Judiciary Committee will recommend passage of the Code in 1962. However, at the present time, the Code does not have significant congressional backing.

The Harris Special Subcommittee on Legislative Oversight held numerous hearings from 1958 to 1960 concerning the conduct of proceedings before the regulatory agencies.⁶⁸ As a result of these hearings new legislation to control *ex parte* representations in judicial proceedings was recommended, directed specifically at the six agencies (CAB, FCC, FPC, FTC, ICC, and SEC) which the committee had investigated. An example of the approach of the Harris committee (now the Interstate and Foreign Commerce Committee) may be seen in the proposed Independent Regulatory Agencies Act of 1961⁶⁹ which attempted to define and control improper influence upon and by agency members and employees.

Separate sections of this act deal with the problem of *ex parte* communications, prohibiting such communication from outside parties, and providing for a record of *ex parte* contacts made by agency members, hearing officers, or employees. The act generally is an attempt to protect "on-the-record," i.e., formal, proceedings. This fact, in addition to the limitation of the applicability of the act to the six agencies noted above, makes it extremely narrow in scope. The 1961 Independent Regulatory Agencies Act represents a watered-down version of the bill originally introduced and considered by the Interstate and Foreign Commerce Committee of the House in 1959 and 1960.⁷⁰ Both the original and current versions of the act have caused strong agency opposition, and it is doubtful that effective legislation of this nature will be passed in the near future.

The counterpart in the Senate to the Harris committee is the Subcommittee on Administrative Practice and Procedure of the Judiciary Committee. John A. Carroll of Colorado is the present

⁶⁸ *Hearings on Investigation of Regulatory Commissions and Agencies Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958); 86th Cong., 1st Sess. (1959). *Hearings on Major Administrative Process Problems Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1959).

⁶⁹ H.R. 14, 87th Cong., 1st Sess. (1961).

⁷⁰ H.R. 4800, 86th Cong., 1st Sess. (1959). See also *Hearings on Independent Regulatory Agencies Legislation Before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960).

chairman. After holding extensive hearings in 1959 and 1960 on procedural problems in administrative agencies⁷¹ the committee issued a report in 1961 which recommended that various changes be made in legislation governing administrative procedure.⁷² The Committee recommended against enactment of the Code of Federal Administrative Procedure, stating that it would add undue formality to administrative proceedings. The committee noted that:

[T]here is little in the way of concrete evidence pointing to any need for increased formalities, or for more active participation by the courts in the administrative process. On the other hand, the subcommittee has received comments from thirty-three agencies which almost unanimously expressed the fear that the proposed code would increase their difficulties in disposing of the business before them, with little or no increase in fairness of procedure or quality of decision. The study and thoughtfulness by the 32 agencies that came to the conclusion shared by this subcommittee reinforces that conclusion, namely, that drastic tinkering with the Administrative Procedure Act is undesirable at this time.⁷³

Having rejected "drastic" changes in the APA, the Carroll committee proposed certain amendments which would have the effect of increasing the power of hearing examiners relative to agency members in cases where the former preside at the initial proceeding.⁷⁴ In a rather interesting twist, Robert Benjamin, who was instrumental in formulating the American Bar Association's Code, rejected this provision in testimony before the committee on the ground that it was too strict! The provision at issue states that the agency may grant or take review of a case decided initially by an examiner:

... but only upon one or more of the following grounds: (1) a finding of material fact is clearly erroneous, (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law, agency rules or precedents, (3) a substantial and important question of administrative policy or discretion has been raised, or (4) the conduct of the proceedings involved a prejudicial procedural error.⁷⁵

⁷¹ *Hearings on Administrative Procedure Legislation Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. (1959); *Hearings on Federal Administrative Procedure Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. (1960).

⁷² Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, *Administrative Practice and Procedure*, S. REP. NO. 168, 87th Cong., 1st Sess. (1961).

⁷³ *Id.* at 10-11.

⁷⁴ S. 1734, 87th Cong., 1st Sess. (1961).

⁷⁵ S. 1734, § 8(a), 87th Cong., 1st Sess. (1961).

This provision grants agencies less discretion in the review of examiners' decisions than the corresponding Code requirements, which are, as noted previously, very strict in this respect also.⁷⁶ The recommendation for the enactment of S. 1734, and the committee proposal calling for legislation to facilitate judicial review of agency decisions, are somewhat inconsistent with the general committee stand noted above against increased formality in the administrative process.⁷⁷

J. THE LANDIS REPORT ON REGULATORY AGENCIES

James Landis, whom President Kennedy requested to investigate the regulatory agencies immediately after his election in the fall of 1960, joined the Carroll committee to question witnesses during part of its hearings on administrative procedure. The Landis Report on Regulatory Agencies to the President-elect was reprinted at the committee's request.⁷⁸ In several respects there is general agreement between the 1961 recommendations of the Carroll committee and the Landis proposals.⁷⁹ The Landis report dealt with the problems of regulatory agencies in terms of top management and major cases, and it was primarily concerned with policy-making. No particular attempt was made to separate and emphasize the distinctions between legislative and adjudicative functions in administrative law. At the beginning of the report the major problems of regulatory agencies are related in terms of: (1) delays in the disposition of adjudicative proceedings; (2) excessive costs of administrative proceedings generally; (3) lack of high caliber personnel; (4) prevalence of unethical conduct, particularly in terms of *ex parte* representation; (5) inefficient procedure, particularly as a result of excessive "judicialization;" (6) inadequate organizational structures, causing a lack of unified policy direction within and between agencies; and (7) lack of effective presidential control over major regulatory policies.

Various remedies were proposed by Landis to cope with these problems. Generally, he recommended presidential appointment of chairmen, where this power does not exist, to provide greater over-all coordination of regulatory policy. The President would be aided in this task by the establishment of a special office to deal

⁷⁶ See text discussion at notes 48-52 *supra*.

⁷⁷ For the proposal regarding judicial review, see Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, *Administrative Practice and Procedure*, S. REP. No. 168, at 12, 87th Cong., 1st Sess. (1961).

⁷⁸ See note 4 *supra*.

⁷⁹ The Carroll committee report is cited at note 72 *supra*.

with such agencies within the Executive Office of the President. Internal efficiency of the agencies would be strengthened through an increase in the power of the chairmen, and through greater delegation of formal adjudicative functions to hearing examiners to eliminate the necessity of agency review. In this way more unified direction would be given to the agencies, and the top echelon would have greater time to devote to policy formulation. Landis recommended greater emphasis upon informal techniques within the formal stage of adjudication, *i.e.*, by hearing examiners. Further, he admired the success of informal adjudication in such agencies as the NLRB; however, he did not note in particular the vast use of this method of case disposition throughout the administrative process. He hinted that perhaps administrative procedure was too judicialized. Finally, he proposed measures to obtain high-caliber personnel, *e.g.*, longer terms of office, more prestige to the chairmen of agencies, etc. The Carroll committee agreed with the Landis report in recommending: (1) an office in the White House to coordinate various activities relating to the regulatory agencies, *e.g.*, reorganization plans, statistical compilation, investigation of trouble spots; (2) legislation to increase the term of agency members to ten years, increase their salary and other benefits; and (3) legislation to increase the prestige and power of hearing examiners. Both Landis and the Carroll committee also agreed that a permanent Administrative Procedure Conference and secretariat should be established to continue the present Administrative Conference.

Many of Landis' proposals were incorporated into legislative bills in 1961 with the support of President Kennedy. However, the bulk were turned down by Congress because of agency and outside interest opposition. In some respects the chairmen of certain agencies, such as the CAB and FTC, have greater power today than previously because of a 1961 reorganization approval by Congress; and the President may reorganize the structure of agencies providing Congress does not veto. However, the agencies generally remain the same today, both with respect to procedure and structure, as they were before the current reform proposals were made.

K. SUMMARY

The major seriously considered proposals for reform of administrative procedure in 1962 emanate from the American Bar Association and from committees in the House and Senate that have held extensive investigations of the administrative process during the past few years. Because the views of various outside groups, in addition to those of the American Bar Association, have been felt by Congress, the proposals coming from congressional committees are

less extensive in attempting to control administrative procedure, and not as strictly in accord with the judicial model as those stemming from the American Bar Association. Of course, the most important opposition to change in administrative procedure comes from the agencies themselves. This has been revealed in testimony before committees of Congress. Congressman Francis E. Walter of Pennsylvania has recently introduced a bill in the House that would affect the provisions of the Code of Federal Administrative Procedure proposed by the American Bar Association. The House Judiciary Committee plans to hold extensive hearings on the Code and other proposals for procedural reform. In other words, in addition to the fact that the Code and other proposals were considered in extensive hearings held since 1958, the Code is of particular current interest and concern and is still under intensive investigation. The Code has been examined in detail above in relation to the APA, and the more important changes that would be effected through its enactment, as well as their implications, have been covered. It is now necessary, in conclusion, to note some of the more important considerations involved in administrative law in relation to current proposals for procedural change.

IV. CONCLUSION: THE PROBLEM OF ADMINISTRATIVE JUSTICE

In view of the nature and source of the reform movement directed toward improvement of administrative procedure today, the fundamental question that arises is: To what extent is the judicial model of decision-making appropriate and feasible in the administrative process? Is it both theoretically and practically valid? The question is put in these terms because, to a greater or lesser degree, the judicial model is the basis of the major reform proposals. The Landis report represents the only significant exception, and his proposals have been largely rejected as a basis for procedural reform.

In essence, what is the nature of the judicial model? First, it is oriented to the protection of the individual where his rights have been challenged, impaired, or affected in any way. The fundamental premise of the judicial model is that it affords the best protection to individuals because it is the most efficient and accurate fact-finding mechanism available in adjudication. Further, the facts that are determined will develop directly from the circumstances and position of the individuals involved in the case and controversy. Extraneous factors will not be considered, and may not form part of the record. In other words the record will be made by the parties to the dispute. The fact-finding procedures, then, that have

been so carefully nurtured in the judicial process are designed more to affect individual interest than an external "public interest" defined as something apart from the specific interests of individuals directly involved in the proceedings. The mechanisms of the judicial model, *viz.*, notice, a hearing in which strict rules of evidence prevail and cross-examination is permitted; a decision on the record; and limited right of appeal, are well designed to implement the individual-oriented goals of the system. The individual is protected insofar as he can be in adjudication when this procedure is used.

Most of the proposals of current interest are based upon an acceptance of the premises of the judicial model. Aspects of these proposals which illustrate this are those which extend hearing requirements in administrative adjudication and emphasize the importance of the presiding officer. Further, proposals to extend judicial review fit this pattern. All of these, as embodied, for example, in the Code of Federal Administrative Procedure, are oriented toward the protection of the individual.

It is not within the scope of this article to suggest a definitive system of administrative justice, even if that were possible. A few tentative considerations, however, should be noted regarding the appropriateness of the judicial model in administrative law. First, there is little doubt that this model affords in many instances greater protection to particular interests involved in administrative adjudication, by giving them greater opportunity to participate in the formulation of the record upon which the decision is based, and by affording them better access to the courts of appeal. In addition, the strict regulation of *ex parte* communication prevents any undue consideration to a particular party. Thus, all parties to adjudicative proceedings are protected by this type of control. On the other hand, it should be reemphasized that the bulk of administrative adjudication is handled informally, and in this area the judicial model cannot be introduced. Adjudication of this type is generally voluntarily accepted by parties subject to administrative jurisdiction. Any formalization of the administrative process will necessarily exclude its most significant portion. The need for speed, limited expense, and lack of publicity, which prevail to a far greater degree in the informal than in the formal adjudicative realm, precludes most parties from appealing an informal decision either to the formal administrative process or to the courts. In this respect it is also important to note the limited applicability of proposals to extend judicial review to informal administrative adjudication. From the standpoint of private parties the factors noted above would generally preclude appeal, and

if this were not the case the courts would be deluged with a volume of requests they could not handle.

A second important consideration involving the compatibility of the judicial model to administrative law concerns the proper relationship that should exist between substantive policy and adjudication in the administrative process. This has been discussed at length previously.⁸⁰ It is relevant at this point to note that a strict application of the judicial model renders the decision-makers—judges or administrators less flexible in applying policy to adjudication. A strong argument can be made that administrative agencies, charged with broad policy-making responsibilities, should have a high degree of flexibility in this area. At the present time the APA provides this, whereas the proposed Code of Federal Administrative Procedure and several other current proposals would severely restrict the freedom of agencies through the elimination of exemptions and the enhancement of the position of the presiding officer in adjudication.

In the third place, a question can be raised concerning the effectiveness of the judicial model to the determination of the facts upon which administrative decisions frequently must be based. The types of cases and characteristics of personnel involved in many court cases differ markedly from their administrative counterparts. The formal testimonial process of proof, for example, is designed to keep irrelevancies and prejudicial matter away from juries and to gain the advantage of demeanor evidence. Juries are characterized by a lack of continuity and *expertise*, and in this sense are quite different from administrators involved in adjudication. The fact-gathering machinery of the judicial model may be quite inappropriate to administrative decision-making. For example, demeanor evidence is of little importance in administrative proceedings, and such procedural devices as cross-examination are cumbersome in making expert determinations. Further, in many cases it is doubtful that a record, supplied almost entirely by the parties directly involved in adjudication, will provide an adequate factual basis for an administrative agency to render a proper decision.

All of these considerations lead to the conclusion that what is needed in administrative law is not stricter control through legislation that requires the judicial model as a basis for administrative decision-making in adjudication, but rather flexibility within a very broad framework of control. No one should object to tightening the requirements of the APA in certain respects, *e.g.*, making it applicable to deportation proceedings; however, a whole-

⁸⁰ See text discussion at note 12 *supra* and following.

sale transformation of judicial procedure to administrative law is undesirable. Although the Code of Federal Administrative Procedure does not indiscriminately apply the judicial model to administrative procedure, it is stricter in this regard than the APA. Perhaps the most notable feature of the Code is its vast expansion of judicial review of administrative decisions. Because of the difficulties of using the judicial model in administrative law, and because of the increasing importance of informal administrative adjudication, it is doubtful that the Code would accomplish the objectives sought by its framers. While recognizing the importance of the contributions made by present and past American Bar Association committees in administrative law, it is suggested that a more flexible set of controls will achieve administrative justice, in terms of balancing the rights of the individual, public policy requirements, and accurate fact-finding, more readily than will the present emphasis upon the primacy of the judicial model.