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THE FALSE STANDARD IN ADMINISTRATIVE ORGANIZATION AND PROCEDURE†

CARL MCFARLAND

If we are to think clearly in the field of administrative law and procedure, we must select and disclose our standards, tests, and weapons of criticism. The necessity of such a course is so obvious that, to say so, seems trite; but to follow such a course is novel. The situation is not the less amazing in view of the vast flow of literature and speech in this field. This literary and oratorical output has actually done very little more than fill out the programs of bar associations and supply the periodical needs of law journals. Indeed, so much fuss has been made that general legislation has actually passed the Congress in response to a vague feeling that something must be done, and that anything is better than nothing.¹

I

The general literature of the subject is concocted of a few standard ingredients. Distilled of elegant verbiage, most "liberal" writings come to one or both of two standard propositions:

(1) Conceding (at least for the sake of argument) that the Constitution and laws should, in the last analysis and in most types of cases, be applied and enforced by the courts, nevertheless the necessary freedom of administrative agencies is endangered by judicial control—so that the courts must exercise their jurisdiction very sparingly.²

(2) Administrative justice is both necessary and good because it is (a) inexpensive, (b) efficient, and (c) can encompass those things which are beyond the practical or constitutional realm of legislative and judicial competence.³

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¹H. R. 6324, 76th Cong., 3d Sess. For the veto message and accompanying document, see H. R. Doc. No. 986, 76th Cong., 3d Sess. (1941).

²The recent federal Committee on Administrative Procedure took the position that, while judicial review should be, and is, "fairly limited," nevertheless the courts make the rules of review in any event so that the present system guarantees against any potential administrative abuses. *Administrative Procedure in Government Agencies—Report of the Committee on Administrative Procedure Appointed by the Attorney General at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein*, SEN. DOC. NO. 8, 77th Cong., 1st Sess. (1941), 75 *et seq.*

³*Id.* at 11 *et seq.*

Although some writings examine details or particular aspects of these general themes, articles (and even whole books) add to these propositions little more than a luxuriant foliage of citations, quotations, footnotes, and deft phrases.

It is true that a more limited group of writers and speakers (who, however, express the feelings of large segments of business and professional people) do not accede to these statements of general theory and, instead, write and speak in terms of two propositions similar in subject matter but quite different in viewpoint and emphasis, as follows:

(1) The Constitution is in danger unless rigorously applied in all cases and in detail by the courts;⁴ and, as a corollary, all statutory powers must be similarly applied;⁵

(2) Administrative agencies are, or tend to be, arbitrary, capricious, and unjust in their operations—at least unless held within rigidly narrow limits by judicial restraint.⁶

⁴That "the constitution must be looked into *by the judges*," in the words of Chief Justice Marshall, "is of the very essence of judicial duty" for to permit otherwise "would subvert the very foundation of all written constitutions." *Marbury v. Madison*, 1 Cranch 137, 178, 179 (1803).

⁵So far as interpretation of administrative authority in the United States is concerned, "the custom of the constitution has lodged it in the judges." CARDOZO, *NATURE OF THE JUDICIAL PROCESS* (1921) 135. "And without having recourse to any of the elementary writers, or to the popular conventions of Europe, we have a most commanding authority in the sense of the American people, that the right to interpret laws does, and ought to belong exclusively to the courts of Justice," Kent, C., in *Dash v. Van Kleeck*, 7 Johns. 477, 509 (N. Y. 1811). "Obviously, if the executive could determine its own competence, it would, in fact, be the master of the legal imperatives by which it lives. By entrusting the decision of such disputes to a body outside the executive, an independent assessment of validity can be obtained." LASKI, *INTRODUCTION TO POLITICS* (1931) 62. In the forum of the courts, it has been said, "the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide." WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1911) 142.

Attempts to do away with judicial interpretation of the statutory authority of administrative officers caused great outcry in England fairly recently. See: ALLEN, *BUREAUCRACY TRIUMPHANT* (1931) 62 *et seq.*; HEWART, *THE NEW DESPOTISM* (1929); MARIOTT, *THE CRISIS OF ENGLISH LIBERTY* (1930), 1-18; WILLIS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS* (1933). This resulted in the appointment of a special commission of inquiry. REPORT, COMMITTEE ON MINISTER'S POWERS (1932) London.

⁶But compare a more recent view of the majority of the federal Committee on Administrative Procedure to the effect that "this is not to say that the courts must always substitute their own interpretations for those of the administrative agencies. Their review may, in some instances at least, be limited to the inquiry whether the administrative construction is a reasonable one." *Op. cit. supra* note 2, p. 78, and see also pp. 90-91. See also the recent statement of the Supreme Court to the effect that "the function of review . . . is fully performed when they determine that there has been . . . an application of the statute in a just and reasoned manner." *Gray v. Powell et al.*, — U. S. —, 62 Sup. Ct. 326 (1941).

⁶What we cannot say of administrative power in general [that it is permissible with proper personnel] we can say of discretionary administrative power over individual

There are, of course, a good many variations in emphasis as between different speakers and writers on these latter themes.

A third and more limited group of writings explores some particular phase of administrative justice—such as the application of the rules of evidence, or the administration of some particular statute. But even these—though it is not always apparent to the casual reader—almost always, if they are to any extent critical, pursue their discussion upon a background, or upon assumed standards of judgment, in accord with one or the other of the foregoing points of view.

Amid this welter of words—this vast bibliography—it is necessary to pick a way very carefully in order to discover a more tangible and useful course of thought and action in this field. Neither of the viewpoints set forth above has ever been wholly accepted in practice, even by its proponents. They are not really standards, but represent merely general convictions or fashions in thinking.

II

Out of the general attitudes on the subject, however, there has developed a series of approaches which have become somewhat more specific. They illustrate not merely the interesting search for a standard of criticism but also a gratifying attempt to get to the roots of the problem—or at least to so much of the problem as may seem to be subject to profitable study and action.

(1) The first awareness of administrative justice naturally gave rise to consideration whether there was a place for such an institution in the American system.⁷ Here, too, there were two general propositions for debate:

rights, namely that it is undesirable *per se* and should be avoided so far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law.'" FREUND, HISTORICAL SURVEY OF ADMINISTRATIVE LAW IN GROWTH OF AMERICAN ADMINISTRATIVE LAW (1923) 22-23. "The function of an administrative body is to get something done, not to adjudicate controversies nor to mark out and delimit rights. . . . It must seek a practical solution of one case rather than a rule for all cases; and this requires that its determinations. . . must be subject ultimately to the check of an adjudicating body primarily interested in general rules of delimitation between opposing rights." DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 235.

In England where the rights of Englishmen were long ago put forward by the courts against the royal power, it is now urged that this function is no less important as a protection against the popular executive. HEWART, THE NEW DESPOTISM (1919) Ch. VII. "Let us not think of the bureaucrat as an octopus ever reaching his tentacles for more and more absolute powers. He is both efficient and disinterested; we are proud of our Judges in England, and we have as good reason to be proud of our Civil Service. But it is exactly from the executive officer's efficiency and zeal that we must save ourselves—and him. His business is to get things done. He knows best what is to be done and the most convenient means of doing it; he is the expert, with special means of knowledge at his command; and when principles of law are put in his way, he is apt to be impatient of them as mere pedantic obstructions." ALLEN, BUREAUCRACY TRIUMPHANT (1931) 59, 60.

⁷Even today, "when the term 'administrative law' is used, the real subject is not ordi-

(a) Whether administrative justice could exist validly within the constitutional and legal system of the United States, and (b) whether, irrespective of its legality, it was a desirable development. The former was answered by history—since there had always been some degree of administrative justice in the federal and state governments⁸—and by the necessities created by the expanded scope of governmental functions which came after the Civil War.⁹ The latter proposition—the question whether administrative justice, if legal, was a good thing—resulted in much declamation during the last decade of the nineteenth century and the first of the twentieth, of which we still hear echoes from time to time. But since the institution was apparently valid under the Constitution,¹⁰ and regarded as a necessary instrument of expanded government, those who argued its abstract desirability found themselves almost literally crying in the wilderness.¹¹

(2) Thereupon, particularly after the first World War, a new and somewhat more specific ground of debate developed in the problem of the relation of

narily the *law* of administration but the *institution* or system of having the forms of law applied by administrative agencies." McFarland, *Administrative Law—Its Symptoms and Diagnosis*, 1939 GA. BAR ASS'N REP. 263.

⁸"The practice of public officers exercising powers over persons and property is older than our form of government and has been with us always—the governor, the tax gatherer, the public prosecutor, the customs agent, the land commissioner, the local constable, and a host of others. Old and new precedents on their powers are accumulated in our standard law books under the heading of "Public Officers" or are scattered among diverse subjects. The public prosecutor—the district attorney, county attorney, state's attorney, or municipal solicitor—exercises, for example, unparalleled power to prosecute or to withhold the penalties of the law, to persecute the innocent or protect the guilty; but his powers are so ancient and accepted that they pass almost unnoticed." *Op. cit. supra*, note 7. See also *op. cit. supra*, note 2, at 7 *et seq.*

⁹The courts very early recognized the necessities: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it." Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). In the words of Chief Justice Taft, "the inevitable progress and exigencies of government and utter inability [of the legislative branch] to give time and attention indispensable to the exercise of these powers in detail forced the modification of the rule." *Proceedings on the Death of Chief Justice White*, 257 U. S. v, xxxv-xxxvi (1922).

¹⁰The literature on the subject deals with the incidence of the constitutional system upon administration rather than the validity of administrative justice *per se*. One of the few articles which attempts a survey of constitutional limitations upon administrative agencies is Judge Cuthbert Pound's *Constitutional Aspects of Administrative Law*, which is one of the chapters in *GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923), reprinted in 9 A. B. A. J. 409. Another is Judge Rosenberry's *Administrative Law and the Constitution* (1929), 23 AM. POL. SCI. REV. 32. See also McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, 59 A. B. A. REP. 326 (1934).

¹¹"The symptoms of administrative justice which critics mention may be grouped in three classes: (1) the number and character of the public officers involved, (2) the powers they wield, and (3) the methods by which they proceed with their tasks." *Op. cit. supra* note 7.

administrative agencies to the regular courts.¹² For, while administrative justice had become recognized as a valid institution, it was not autonomous. Its judgments were subject, in most instances, to judicial scrutiny to some degree. Although the problem had been sketched long before, the decade of the 1920's was given over almost entirely to a debate upon the proper scope of judicial review of administrative action.¹³ Then, for a short while, a special court of review was advocated¹⁴ as a compromise between the competing ideas

¹²*Compare*: "One of the most persuasive arguments against a too generous employment of the right to a judicial review is the fact that courts are not equipped to review findings of fact in many technical fields. . . . On the other hand, an unintelligent, improperly equipped administrative body, ignorant of fundamental legal principles may by its findings and orders do such great injustice that one who suffers therefrom ought, according to the conceptions of justice which obtain among Anglo-American peoples, to be entitled to have them reviewed. Here we come to an impasse in the development of administrative law under our constitutional system. . . ." Rosenberry, *Administrative Law and the Constitution*, 23 AM. POL. SCI. REV. 32, 44 (1929). "The need for a coherent system of administrative law, for uniformity and despatch in adjudication, for the subtle skill required in judges called upon to synthesize the public and private claims peculiarly involved in administrative litigation, these and kindred considerations will have to be balanced against the traditional hold of a single system of courts, giving a generalized professional aptitude to its judges and bringing to the review of administrative conduct a technique and a temperament trained in litigations between private individuals." FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927) 184-186.

It is important to keep in mind that here "judicial review" involves several things: (1) the popular demand for a right of appeal of *some* sort, (2) the professional demand for a right of appeal to *judicial* tribunals, (3) *statutory* judicial powers over administration, and (4) judicial powers under the Constitution of the United States and the constitutions of the several states. Of the popular demand for some appeal, it has been said that "in the estimation of English-speaking people generally a right of review is no less sacred than the right to be heard in the first instance." Rosenberry (Chief Justice, Supreme Court of Wisconsin), *Administrative Law and the Constitution*, 23 AM. POL. SCI. REV. 32, 41 (1929).

¹³For the literature of this period, see for example: Albertsworth, *Judicial Review of Administrative Action by the Supreme Court*, 35 HARV. L. REV. 127 (1921); DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927); FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928) 285-299; Freund, *Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666 (1915); Grimm, *Administrative Determinations*, 3 ST. LOUIS L. REV. 140 (1919); Hankin, *Conclusiveness of the Federal Trade Commission Findings as to Facts*, 23 MICH. L. REV. 233, 233-237 (1925); Mc. FARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTER-STATE COMMERCE COMMISSION* (1933); Powell, *Conclusiveness of Administrative Determinations in the Federal Government*, 1 AM. POL. SCI. REV. 583 (1907); Tennant, *Administrative Finality*, 6 CAN. BAR REV. 497 (1928); Tollefson, *Administrative Finality*, 29 MICH. L. REV. 839 (1931); Isaacs, *Judicial Review of Administrative Findings*, 30 YALE L. J. 781 (1921); Powell, *Administrative Exercise of Legislative and Judicial Power*, 27 POL. SCI. Q. 215 (1912), 28 *Id.* 34, 34-35 (1913); Berle, *Expansion of American Administrative Law*, 39 HARV. L. REV. 430 (1917); Pillsbury, *Administrative Tribunals*, 36 HARV. L. REV. 405 (1923). For recent views on the same subject, see *op. cit. supra*, note 2, at 75 *et seq.*, 209 *et seq.*, and Stason, "Substantial Evidence" in *Administrative Law*, 89 PA. L. REV. 1026 (1941).

¹⁴A measure "to establish a United States Court of Administrative Justice and to expedite the hearing and determination of controversies with the United States" was introduced in the Senate, May 29, 1933. S. 1835, 73d Cong., 1st Sess. See also S. 3676 introduced in the 75th Congress (1937-1938).

of specialization and a more complete judicial control. Soon, however, the former debate regarding judicial-administrative relations was resumed and reached its climax in the recent passage of a measure by the Congress which was principally designed to specify the scope and subject matter of judicial review.¹⁵

But even while these matters were being agitated, the conviction began to grow that judicial review, of itself, could not solve the problem. While some clarification of judicial review has come to be agreed upon as *one* of the desirable items in any general administrative legislation,¹⁶ nevertheless, as a practical matter it is available and can operate only in a limited class of cases. In the first place, comparatively few people, though adversely affected by administrative action, reach the point where they may even consider seeking judicial review. After they have unsuccessfully applied to an agency, or been the subject of affirmative administrative action, they must decide whether to submit to the first judgment of the agency or ask a reconsideration. They, or their counsel, must find and study the substantive and procedural law—in statutes, rules, and rulings. They must decide whether they can afford a hearing. They may have to decide whether they can afford a rehearing. Only after they have passed through these and other stages of the administrative process are they accorded an opportunity for judicial review. Even then, many factors foreclose judicial review, no matter how specific the Congress has been in granting it or how generous the courts may be in exercising it. In some fields, judicial power, even where review exists, does not afford full relief,¹⁷ and in many fields judicial review comes too late.¹⁸ In others, factors of cost,

¹⁵*Op. cit. supra* note 1; *op. cit. supra* note 2, at 214.

¹⁶See, for example, *op. cit. supra* note 2, at 92, 209-212; and *Hearings, Sub-committee of the Senate Judiciary Committee, on S. 674, 675, and 918, Pt. III, 77th Cong., 1st Sess., pp. 1437-1438, 1452.*

¹⁷"In none of the situations in which an action of the Interstate Commerce Commission or of a similar federal regulatory body comes for scrutiny before a federal court can judicial action supplant the discretionary authority of a commission. A federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices." *Federal Power Comm'n v. Pacific Co.*, 307 U. S. 156, 160, 59 Sup. Ct. 766, 768 (1939).

¹⁸In many cases "business transactions cannot wait upon the exigencies of appeal * * * Time is of the essence." When the Securities and Exchange Commission issues a stop order or delists a security, later reversal by a court may show the Commission to have been in error, but it cannot recapture the transactions which the Commission's action prevented. Again, "whether the Securities and Exchange Commission on final consideration will actually decide to enter a stop order is interesting, but not very important; for only a rare investor would purchase securities from an issuer threatened with the administrative bar. When the Securities and Exchange Commission actually delists a security, the news is important; but the market drops when the order for hearing is announced." Lane, *Address*, Association of American Law Schools, Handbook of Proceedings, Thirty-sixth Annual Meeting (1938) 199.

time, the wear and tear of litigation, and fear of imagined regulatory reprisals effectively dissuade the disappointed citizen.

Moreover, neither the availability of judicial review, nor its formal scope, touches a more vital matter—that is, the subject matter of judicial review. The courts hear no witnesses, but merely examine a paper record. By what process was that record made? For example, neither the Constitution nor the statutes from which the courts derive their powers of review prescribe what constitutes adequate notice. Neither specify the many phases of a fair hearing. What shall the administrative record, to which the review is confined, contain? Since the rules of evidence have been abolished generally in administrative trials, what has taken their place? Neither the Constitution, nor the statutes, nor the administrative agencies, nor the courts have specified. Manifestly, without recognizable and available rules and principles for administrative procedure, the courts must operate in a decidedly artificial manner when they review an administrative trial. The point is that the availability and scope of review, of which so much has been said and written, are, after all, empty subjects so long as basic administrative procedure is without character.¹⁹

(3) We come, then, to the third and most recent stage of study and activity—administrative procedure. Partly out of recognition of the real substance of the problem, partly to avoid undue expansion of judicial review through legislative action, and partly because of recently and rapid expansion in the realm of federal administration which has driven home bluntly the methods and operation of administrative agencies, attention has been turned to the principles and details, the needs and inefficiencies, the virtues and injustices of the actual operation of the administrative system in the federal government.²⁰ In the states the same problem is being felt.²¹

¹⁹See the final report of the Committee on Administrative Procedure: "Dissatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies." *Op. cit. supra* note 2, at 92. To the same effect: "The need for review of questions of fact is less if the machinery for the determination of facts inspires confidence; it is greater if it does not." Bell, *Let Me Find the Facts*, 26 A. B. A. J. 552, 553 (1940).

²⁰The chief effort in this line was the work of the recent federal Committee on Administrative Procedure which was created at the suggestion of Attorney General Homer Cummings who, in 1938, suggested to the President "a most thorough survey of existing practices and procedure" to pave the way for the elimination of deficiencies "and point the way to improvements in the [administrative] process which will make it so serviceable and just that it will command the respect, and enjoy the support, of all other branches of the Government and of the public at large." *Op. cit. supra* note 2, at 251. Out of this suggestion grew the appointment of a committee, the publication of a series of studies, a final report, and proposals for general legislation. Chiefly significant was the act of this committee in concentrating attention upon the whole of the actual operations of administrative justice rather than confining its work to the examination of generalities or discussion of a spectacular link or two in the long chain which constitutes the administrative procedural process.

²¹North Dakota has a new statute. One was recently agitated in New York. A fact-

This phase of the history of the subject is two-fold: *First*, it is recognized that procedure must be treated apart from substance, since the latter is too elusive and volatile to attempt to do more than set in order the methods by which it is made (through rules and regulations) and administered.²² *Second*, current thought and study involve a consideration of the adequacy and fairness of the steps, stages, and details of the administrative process itself. Thus, for the first time in half a century of almost constant discussion, attention has been turned to the actual methods of operation of a going system of administrative justice—just as, periodically, attention heretofore has been turned to the procedural methods of courts.²³

III

At least for the moment, then, the problem of administrative law is a problem of procedure. But, in so limiting the subject, we are still faced with the necessity of building that procedure upon some theory or basis, with some standard for thought and criticism. As to the actual and operative

finding study is being conducted in North Carolina and Ohio, and one has just been completed in New York (see ADMINISTRATION ADJUDICATION IN THE STATE OF NEW YORK, Report to Governor, 1942).

²²The law of contracts, property, injuries, and crimes has been written into statutes and codes; and perhaps, in some unforeseeably distant day, the various subjects of administrative law may be similarly treated—just as equity, the administrative justice of some centuries ago, has come to rest in the general body of the law. But today, when Congress creates an administrative agency, it specifies the law only by laying down prohibitions or stating the objectives which the agency is to attempt to attain, in very general phrases. These statutory provisions, together with such rules, policies, and precedents as the agency itself may devise from time to time, constitute the body of the law relating to railroads or pensions or securities, as the case may be. For the most part, moreover, this "law" is changing, sometimes from day to day, since the very purpose of administrative regulation is to give meaning and life to subjects so new and devious as to defy the traditional methods of legislation and administration. If it were otherwise, Congress would state the law in statutes; the courts would administer it in cases, with explanatory statements in the form of opinions; and, in such form, it would be collected and compiled, as other law. See McFarland, *A Code of Administrative Procedure*, 221 ANN. AM. ACAD. POL. SCI. 160.

²³As a matter of fact, the original recommendation for the creation of the recent federal Committee on Administrative Procedure was expressly made as a part of the movement which included "the reform of the civil procedure for the District Courts of the United States An exhaustive study was made by a representative group of the bar, appointed by the Supreme Court as an advisory committee, which was assisted in its work by representatives of the Department of Justice. The result has greatly simplified procedure in the handling of civil cases in the federal district courts and the appeals therefrom, substituting for the diverse, cumbersome, and obsolescent practice, theretofore obtaining, a uniform system that apparently has met with nation-wide acclaim. Efforts are now under way to bring into harmony with the spirit of this simplified judicial procedure the review, in the several Circuit Courts of Appeals, of orders and decisions rendered by administrative boards, agencies, and commissions. Thus, it is particularly timely that attention be turned to the procedure employed by the administrative process." *Op. cit. supra*, note 2, at 250-251. See also the SELECTED PAPERS OF HOMER CUMMINGS (Swisher ed. 1939) p. 200 and p. 181 *et seq.*

organization and methods of administrative agencies, such thought and criticism have been almost wholly comparative. While there has been some tendency, particularly in connection with administrative rule making, to compare the administrative process with the legislative process,²⁴ for the most part the whole field is instinctively held up to the familiar pattern of the common law and its courts.²⁵ Accordingly, implicit in most thinking on the subject is the pervading judicial pattern of all our institutions.²⁶

²⁴For an indication of the inappropriateness of such a comparison, see *op. cit. supra* note 2, at 101-102.

²⁵At least one critic has pointed out that the report of the recent federal Committee on Administrative Procedure (*op. cit. supra* note 2) reflects a preoccupation with "a judicialized type of proceeding" and "a general concept of a judicialized administrative procedure." Davidson, *Administrative Technique—the Report on Administrative Procedure*, 41 COL. L. REV. 628, 637 (1941).

An even more basic fallacy in this approach, not treated above in the text, is the pitfalls of attempting to discuss the *institution* or desirability *per se* of administrative justice in terms of common law history. Undoubtedly this approach served a very useful purpose thirty years ago when the subject was first broached (see the classic articles by Dean Pound entitled *Justice According to Law*, 13 COL. L. REV. 696 [1913], 14 *id.* 1, 103 [1914]) since people then could hardly be expected to understand any other kind of language. Naturally, the first discussions required a comparison with the traditional system in broad terms. Indeed, Dean Pound was quick to recognize the inapplicability of judicial processes to many fields of government. "In the nineteenth century the United States developed a system of judicial interference with administration. Law paralyzing administration was an everyday spectacle. . . . A reaction from the extreme limitations of administration in our traditional polity, accelerated by the demands of an expanding law of public utilities . . . resulted in a rapid development of administrative bodies of all kinds. . . ." "A better adjustment between law and administration is needed. . . . We have tried . . . to extend law to matters not suitable for judicial justice, and thus have tied down administration too rigidly." *Id.*, 14 COL. L. REV. 1, 12, 22, 23. Nevertheless, the notion has persisted that the sole standard is whether the administrative system is completely imitative of the judicial system, and when this idea is used to discuss the desirability of one over the other, the resulting debate is well illustrated in Judge Frank's recent article amusingly entitled *When 'Omer Smote 'Is Bloomin' Lyre*, 51 YALE L. J. 367 (1942).

²⁶"For example, some presidents have been prone to give the executive arm a completely deliberative character. The cabinet itself is a holdover from the day when governor and council were both an upper house of legislation and a court of final appeal. An interesting example of the tendency to make administration judicial was President Taft's order setting up a presidential court to determine the much-mooted question under the pure food laws, "What is whiskey?" * * * Hearings, *The Meaning of the Term 'Whiskey'* (1909) 1243, 1266; Food and Drug Acts Decisions (1914) 818, 831. A purely executive task was thus simply and easily transformed into solemn judicial procedure.

"Even our legislatures have turned more and more to formal hearings of interested parties, with specific legislation as the *res in judicio*. In the new House Office Building at Washington this tendency is typified, for example, in the magnificent chamber of the Committee on Ways and Means, where its members sit at a semicircular bench, indistinguishable from a courtroom." *Op. cit. supra* note 7.

The borrowing of judicial personnel and forms for service even in military situations is illustrated in the appointment of a commission, headed by a justice of the Supreme Court, "to investigate and report the facts relating to the attack made by Japanese armed forces upon Pearl Harbor." *Attack upon Pearl Harbor by Japanese Armed Forces*, SEN. DOC. 159, 77th Cong., 2d Sess. (1942).

Administrators and executives, instinctively it seems, turn to the formal methods of the courts of justice. Secretaries, administrators, examiners, commissioners, or board members sit in the judgment seats. Following the example of appellate court structure, there is an assumption that administrative authorities should have a plural form, rather than be guided by a single administrator. Notices, summonses, charges, and complaints are issued. Lawyers present documents, examine witnesses, and make arguments. Findings are made and opinions are rendered. On review in the regularly constituted courts, this whole process is searched again and arguments of substance and procedure are canvassed. It is small wonder, therefore, that the details of administrative justice are either modeled after, or compared with, the more familiar habits of the judiciary. Indeed, this imitation of judicial manners has served to call attention even to customary and traditional administrative functions, and has subtly raised the question whether powers exercised in form so judicial ought not, in fact, either be intrusted to regularly constituted courts or at least patterned more completely in the image of the judiciary.

This imitation, conscious or unconscious, is undoubtedly the response to several types of impulse: *First*, the Congress itself, when specifying procedure as to particular agencies, is led naturally to use the familiar language of the judicial code and the procedural precepts of constitutional law. *Second*, some administrators may fear that unless they adopt judicial forms, those forms will be forced upon them through judicial decisions delivered in the course of judicial review. *Third*, administrators may, independently of statute, adopt such forms either out of conviction as to their essential merit or from the very reasonable belief that traditional forms will be more readily accepted by those who are subject to the administrative process.

By and large, of course, the judicial system reflects fundamentals which are not merely accepted but which are necessary in any civilized system. These must be preserved, not because they are judicial but because they are fundamental. But the point is that any thoughtless aping of judicial forms has drawbacks as well as virtues. The drawbacks are of two kinds: *First*, not all of the general plan of judicial organization or procedure is applicable to the administrative process. *Second*, some phases of the judicial process are as arbitrary and unjust, in a civilized world, as any arbitrary or capricious action which was ever imagined to be characteristic of the administrative process.

It is, therefore, the blind acceptance of the judicial standard that is a false standard when applied to administrative justice. In any last

analysis the problem of administrative justice is to be just. If administrative justice is merely designed to imitate judicial forms, then there is no need for administrative justice.²⁷ It is indeed a cruel type of intelligence which would justify administrative injustice upon the ground that courts and judges do likewise. Aside from the frailties of men, even though they are judges, our judicial system is in good part the result of historical happenstance which may, because of habit if nothing more, suffice in its own field. Transplanted into the administrative system, however, many judicial methods become aggravated anachronisms.

While space does not permit any attempt at an exhaustive list of judicial methods which are inapplicable to the administrative field, it is easily illustrated that some of the general characteristics of court organization and method have no place in the executive branch of the government. Four examples will suffice:

²⁷There is no doubt of authority to establish "legislative" courts pursuant to the exercise of legislative powers other than the power "to constitute tribunals inferior to the Supreme Court." See: *Ex Parte Bakelite Corporation*, 279 U. S. 438, 49 Sup. Ct. 411 (1929); Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930). There is no reason why many functions now exercised by administrative agencies may not be vested in specialized courts similar to the Court of Claims, the former Court of Private Land Claims, or the Court of Customs and Patent Appeals. Historically, the common law in the course of time has taken over whole fields of administrative or executive justice. "Equity, both at Rome and in England, began as executive justice. . . . The equity made in the Court of Chancery and the law as to misdemeanors made in the Star Chamber became parts of our legal system. The common law survived and the sole permanent result of the reversion to justice without law was a liberalizing and modernizing of the law." Pound, *Justice According to Law*, 14 COL. L. REV. 1, 19, 21 (1914). The development of an administrative law is "no more radical than that which took place when the Court of Chancery developed the principles of equity to mitigate the harshness and severity of medieval common law." Cuthbert Pound, *Constitutional Aspects of Administrative Law*, GROWTH OF AMERICAN ADMINISTRATIVE LAW (1923) 130-131. "There is really nothing in the . . . division of jurisdiction more repugnant to English notions than in the division of our own jurisdiction into Common Law and Equity. Both, in the course of time, have become merely a matter of machinery." ALLEN, BUREAUCRACY TRIUMPHANT (1931) 54. "There is no reason why the administrative law of the future should not be regularized and developed as part of the ordinary legal system of the land." *Id.* at 98-99.

Courts, too, have long performed tasks which are essentially administrative. They manage estates of deceased persons, raise children, naturalize citizens, oversee industrial concerns which are financially embarrassed, measure the precious waters in the arid West, participate in local inquiries as to the peace of the community, and make rules of procedure. These customary duties, if they presented themselves as new today, might be handed over to a department or board. It is sometimes said that administrative agencies specialize and that they also take care of a tremendous load which courts could not add to their present burdens; but there may be and are specialized courts, and enough courts could be created to handle the job of administrative adjudication.

"Why then, do we have administrative as distinguished from judicially administered justice, and how do they differ? The distinctions hang on slender threads. In essence, the question is a war between the advocates of two supposedly different types of personnel. Courts are almost always manned by lawyers; administrative agencies often are not." *Op. cit. supra* note 7.

First, and foremost, there is a necessity for the administrative arm *itself* to set out, publish, and keep accurate currently a public statement of its own organization and procedure. There is no comparable need for courts to do so because their organization, jurisdiction, and procedures²⁸ are almost entirely set forth in statutes. Yet administrative agencies, whose organization and procedure are hardly mentioned in the statutes, almost universally fail to compile (at least for public use) their organizational set-ups, and often fail to specify their procedures.²⁹ This lack, while simple, is fundamental because, without knowledge of where to turn, the citizen in many cases is denied any recourse whatever. No single factor in the administrative system causes so much pain and anguish to the untutored citizen whether he be lawyer or layman.³⁰

Second, while in name each agency is a single board or commission or administrator, an agency is actually hundreds or thousands of people. There is, therefore, a necessity for subdelegation of authority by board members or chief administrators. That delegation—which is not a general characteristic of judicial procedure—takes place whether authorized or not. It must be permitted, for otherwise board members or chief administrators would have to pass upon all the vast volume of matters within their jurisdiction—which, of course, is simply impossible and leads to harmful subterfuge.³¹ At the same time, subdelegation must be published,

²⁸This does not include the recent departure from custom in connection with the new Federal Rules of Civil Procedure, although even there the rules are but a fraction of the law as embodied in the Judicial Code. Most court rules are merely a few pages or even a few paragraphs, and obviously administrative rules of practice have been drafted by individuals who, originally at least, thought of nothing except to parallel in scope and form the familiar rules of some county or state court. The Federal Trade Commission Rules are an excellent example. The new rules of the United States Maritime Commission were drafted with a copy of the Federal Rules as a model, regardless of the vast differences in problem and purpose. The original rules of the Bituminous Coal Commission were copied for the most part from those of the Interstate Commerce Commission regardless of meaning or applicability and doubtless the Interstate Commerce Commission rules originated in some lawyer's attempt fifty years or so ago to reproduce, in form at least, the rules of a state or federal court.

²⁹*Op. cit. supra* note 2 at 25 *et seq.* See also, for example, Davison, *Administrative Technique—the Report on Administrative Procedure*, 41 *Col. L. Rev.* 628, 630-631 (1941).

³⁰"Such a state of affairs will at least partially explain a number of types of criticisms of the administrative process. Where necessary information must be secured through oral discussion or inquiry, it is natural that parties should complain of 'a government of men.' Where public regulation is not adequately expressed in rules, complaints regarding 'unrestrained delegation of legislative authority' are aggravated. Where the process of decision is not clearly outlined, charges of 'star-chamber proceedings' may be anticipated. Where the basic outlines of a fair hearing are not affirmatively set forth in procedural rules, parties are less likely to feel assured that opportunity for such a hearing is afforded." *Op. cit. supra* note 2, at 25.

³¹"Four of the characteristics of administrative agencies, then, are their size, their specialization, their responsibility for results, and their variety of duties. Each of these characteristics to a greater or less degree, in turn, contributes to, and necessitates,

so that citizens having business with an agency will know of it; and it must be limited to permit recourse to higher officers in proper cases.³² This problem is peculiarly administrative; the judicial pattern yields no sufficient guide. Yet little, if anything, has been done to ease the difficulties. It seems to be assumed that, since the courts have no such problem, the administrative arm, perforce, is also without it.

Third, unlike courts except in the recent judicial development of pre-trial procedure, administrative agencies should develop informal methods of disposing of cases where parties consent and where, therefore, elaborate procedures are both unnecessary and time-consuming. Routine matters may often be dealt with informally, with the ready and even eager consent of the parties. But too often administrators, assuming the awe-inspiring aloofness of courts, are reluctant to bend to informal methods.³³ Here, in a most vital sector of administration, judicial forms furnish no guides and the administrative method has developed only slightly, except for the halting attempts of a few agencies in recent years.

Fourth, because of the need to subdelegate at least part of the functions of administrative agencies in practically all cases, the actual process of decision must be revised to recognize and regularize the participation of subordinate officers. The anonymity of those subordinates who participate in the decision process, the lack of knowledge on the part of those affected as to who makes the recommendations or writes the decisions, is productive not only of distrust of the system but of a procedural hiatus in which the parties have no recourse.³⁴ The judicial process offers only

a highly important characteristic of administrative procedure: delegation. The large staff of an agency, the many duties which the agency is called upon to perform, the necessity of harmonizing its affirmative responsibility for results with its equally important duty of deciding correctly as between the parties in each particular case, and the practical need for the fullest possible utilization of its special skills and expertness—each of these calls for internal organization which involves an allocation of functions among the members and staff of the agency.

"For it becomes obvious at once that the major work of the heads of an agency is normally supervision and direction. They cannot themselves be specialists in all phases of the work, but specialists must be immediately available to them. They cannot themselves receive material which must be filed and analyse it. They cannot, and they should not, conduct investigations, determine in every instance whether or not action is required, hear controversies, and at the same time make all the decisions. Administrative procedures must be founded upon the reality that many persons in the agency other than the heads must do the bulk of this work." *Op. cit. supra* note 2, at 20 *et seq.*

³²*Op. cit. supra* note 2, at 219 n.; and *op. cit. supra* note 16, at 1378.

³³*Op. cit. supra* note 2, at 35 *et seq.* As a matter of fact, the simpler course for administrators is either to insist upon formal procedures at every step or to do away with all procedure. The latter is usually the practice in purely executive functions. The former makes it possible for agencies to proceed in stately fashion, whatever the views of the parties or the exigencies of cost or time. The citation given above sets forth the somewhat general practice of agencies to insist upon a hearing of facts even where the parties who are solely concerned are only too willing to admit the facts.

³⁴"Because the agencies have required the person who heard the evidence to play a

an incomplete guide in this situation in the form of the ill-defined roles of law clerks and masters in chancery or referees.

But, beyond these rather general differences in the administrative system as compared with the judicial, another phase of the application of the false standard is the tendency to search the judicial system for loose forms which allow a maximum freedom of action to the administrative branch, no matter how unjust such transplanted forms may be. Ordinarily these are found in the judicial chamber of horrors, more commonly known as the criminal law.³⁵ Thus, not merely have we come to imitate judicial forms, but we select the worst we can find because they suit a particular purpose. Here, again, a few of the more general examples will suffice:

First and foremost is the problem of notice to private parties. The Congress, out of an understandable desire to leave administrative agencies free to develop their own rules and principles, has conferred jurisdiction in broad statutory language. At the same time, it has long been recognized in the judicial field that complaints or indictments may be phrased "in the language of the statute."³⁶ Agencies, therefore, have

more or less subordinate role in deciding, they have had to use other instrumentalities for shaping a decision. Intermediate reports, exceptions thereto, and oral arguments on the exceptions are the mechanical devices which are usually employed; staffs of review attorneys or review examiners and the like have been created as aids. Some agencies, such as the National Labor Relations Board, have established large sections of attorneys isolated from other staff members to analyze the record and prepare decisions in accordance with the Board's directions. Others, such as the Federal Communications Commission, have relied for analysis and assistance upon members of their legal staffs, who collate the recommendations and suggestions of other staff members in the technical divisions. Whatever form of organization may be employed, almost invariably the agency heads rely heavily upon subordinates other than the hearing officer to digest the record and to draft findings and opinions in accordance with the directions of the agency. * * *

"The agency heads cannot read the voluminous records and winnow out the essence of them. Consequently, this task must be delegated to subordinates. Competent as these anonymous reviewers or memorandum writers may be, their entrance makes for loss of confidence. Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who must in the first instance decide or recommend the decision. In many agencies attorneys rarely exercise the privilege of arguing to the hearing officer. They have no opportunity to argue to the record analysts and reviewers who have not heard the evidence but whose summaries may strongly affect the final result." *Op. cit. supra* note 2, at 45, 46.

³⁵Well aware of the political and oppressive nature of the English criminal law, early America, once independence was achieved, rejected it. See, for example, CUMMINGS AND MCFARLAND, *FEDERAL JUSTICE—CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* (1937) 463 *et seq.* But the pitfalls and injustices of modern American criminal law, which of all fields of the law remains most completely judicial in form, are now occasionally noted even by courts. Such a reference is to be found in the proceedings of the Judicial Conference in 1922 wherein the arbitrary, harsh, and prejudicial nature of the law of criminal conspiracy is discussed [see *United States v. Eisenminger*, 16 F. (2d) 816, 821 (D. Del. 1926)].

³⁶Sometimes administrative agencies have attempted to justify this practice of vague notice upon the basis of the barbarous and oppressive rule of the law of criminal conspiracy. See, for example, the discussion in *Securities and Exchange Commission*,

taken the broad language of statutes delegating authority as the language of their orders to show cause, their complaints, and their notices. The result has been that statutes devised to confer powers have been utilized, in accordance with the judicial rule, to give vague and often meaningless notice of charges.³⁷ How can a citizen know what is charged if he is summoned to "show cause why" his license or permit should not be revoked "in the public interest"? To be sure, he knows the details of his business and may study the scanty substantive law, but the whole proceeding may continue even to its termination without his knowing just what phase of his activities some administrator suspects is unlawful.

Second, the application of rules of evidence offers a curious twist to the administrative theme. There is much talk of doing away with "technicalities" in the administrative process; and to this extent, at least, the judicial form generally is supposed to be superseded.³⁸ As a matter of fact, however, the reading of almost any administrative record in a contested case will disclose that counsel not infrequently indulge successfully in every technicality to prevent the proof of facts. But, more important, where administrative functions include the grant of privileges, exceedingly detailed, rigid, and legalistic requirements are laid down

Monograph of Committee on Administrative Procedure, Sen. Doc. 10, Pt. 13, 77th Cong., 1st Sess., 46. But, whatever the basis for justification, in either case the result is insufficient notice in a field which ought to be just and fair.

³⁷"There are certain criteria of fairness in the hearing process which, in the absence of clear evidence of inapplicability in particular circumstances, should regularly be observed. Before adverse action is to be taken by an agency, whether it be denying privileges to an applicant or bounties to a claimant, before a cease-and-desist order is issued or privileges or bounties are permanently withdrawn, before an individual is ordered directly to alter his method of business, or before discipline is imposed upon him, the individual immediately concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them. * * *

"A . . . prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject-matter and issues involved. Notice, in short must be given; and it must fairly indicate what the respondent is to meet. * * *

"Room remains for considerable improvement in the notice practices of many agencies. * * * Too frequently, this notice is inadequate. * * * The applicant is put to his proof on such broad issues as public interest, convenience, and necessity. * * * Agencies not infrequently set out their allegations in general form, perhaps in statutory terms, thus failing fully to apprise the respondents and to permit them adequately to prepare their defenses." *Op. cit. supra* note 2, at 62-63; and see pp. 234-235 n. Also *op. cit. supra* note 16, at 1392-1393.

³⁸For example: "Although administrative agencies may be freed from observance of strict common law rules of evidence for jury trials, it is erroneous to suppose that agencies do not, as a result, observe some 'rules of evidence.' Even in the disbursing agencies such as the Veterans' Administration and the Railroad Retirement Board, where the greatest degree of liberality is necessitated in order to permit the claimant to present his case, the regulations embody extensive rules governing the modes of proving such crucial issues as birth, death, service, and the like." *Op. cit. supra* note 2, at 70.

by agencies themselves, and all applicants must conform. Here, only too often, technicalities are compounded rather than reduced, all upon a firm foundation of legalisms drawn from the common law. While it is true that the large corporation or the well-to-do citizen may shoulder this burden through counsel, many people must turn away because of the sheer burden of technicalities.³⁹

Third, the methods of presentation of evidence ape judicial forms to the extent of precluding, even where no one objects, the presentation of written evidence. If notice were specific and if the presentation of authenticated statements were authorized, many expensive trials would be obviated. The traditional question and answer method obviously is ill-suited where matters are uncontested or where mere technical compilations and data are required. Here, however, administrative agencies have hesitated to devise procedures⁴⁰ merely because, it would seem, the judicial arm offers no familiar parallel.

Fourth, drawing heavily from judicial practice, administrative agencies either write no opinions to accompany their judgments, or they write long and rambling discourses which fill volume after volume of reports to the extent that sometimes it is a labor of many hours to read and understand a single decision. Here agencies blindly draw upon the judicial parallel both to give reasons for their decisions⁴¹ and to obfuscate their reasons. Obviously, the no-opinion certiorari practice of the Supreme Court is not applicable to the work of many agencies; and the endless restatement of prior decisions which pads so many court reports only increases the public and private cost of administrative justice.

IV

It ought to be clear that—despite the writing and speech-making and despite the wise limitation of current inquiry to matters of procedure—we are still very far from an objective and fair standard. So long as we assume that the administrative system is the same as the judicial in its general form, and so long as we use the judicial scrap bag from which to draw methods or practices, regardless of their essential merit, we are applying a false standard to administrative law. Imitation is not fairness, and certainly appropriation of the exceptional barbarities of the courts is not justice.

³⁹The burden is quite as much one of piling up document after document, to say nothing of the technical details as to each document.

⁴⁰*Op. cit. supra* note 2, at 40-41, 64-68, 69-70.

⁴¹*Op. cit. supra* note 2, at 29-30. See also: Pound, *Justice According to Law*, 14 *COL. L. REV.* 103, 108, 109 (1914); DAVIES, *THE FEDERAL TRADE COMMISSION* (1924), Ch. III and pp. 334-337; *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 86, 51 *Sup. Ct. 1*, 5 (1930).