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The Reform of Administrative Procedure and the Controversy Over Judicialization

Winston M. Fick

In the last three or four years there has been a notable rise of general interest in the workings of the administrative regulation by government of private business and other activities and in "the administrative process" generally. A very lively sector of this interest has been in procedure, and thus in the profoundly important (and perennial) problem of making the machinery of governmental controls work not only effectively but fairly.

In this sector one of the oldest and most vexed of the many controversies over this problem is again active. This is the controversy over what is often called "judicialization." The controversy has gone on for a very long time, touching many matters and involving many viewpoints. The gist of it is correspondingly difficult to state with assured accuracy, and even a preliminary formulation is not easy. In the main, however, the two principal sides divide over the question of constraints and over the use of judicial analogies.

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1 Current public interest perhaps dates from the investigations of the federal regulatory commissions by the House Subcommittee on Legislative Oversight, beginning in 1958. Professional and scholarly interest has been substantial for many years but has been particularly keen recently, witness for example the many discussions of the December 1960 report of James M. Landis to the then President-elect Kennedy on the regulatory agencies; see, e.g., McFarland, Landis' Report: The Voice of One Crying in the Wilderness, 47 VA. L. REV. 373 (1961).

2 Indeed, the term "judicialization" itself is given diverse meanings. For some users it is simply a pejorative, used against pretty much any constraints on the administrative process of which they disapprove. For others it may mean principally the "trial-type" evidentiary hearing (see DAVIS, ADMINISTRATIVE LAW TREATISE chs. 7 and 8 (1958)), and for others the general picture of formal adjudication in the present federal system (see Nathanson, American Administrative Law, 6 J. SOC'Y PUB. TEACHERS L. 39, 49 (1961).
On the one side there are those who urge that the very nature of the administrative process and of the matters it deals with require that it be reasonably free from any constraints, and that constraints based on judicial analogies are especially likely to be unfortunate. This group is inclined to contend that anything other than such freedom would "place all administrative activity in a judicialized straitjacket" or would make the wrong choice "between a greater emphasis of rigid, courtlike procedures or flexible but expeditious procedures which will permit the prompt dispatch of agency functions with a minimum of delay."

On the other side there are those who urge that the process, and its adjudicatory functions in particular, will be reasonably likely to be fair to all concerned and insure against official arbitrariness and bungling only if some such constraints are put into its machinery at the right places. This faction is less disposed to fear that judicial techniques and influences will be dangerous or obstructive, and is more acceptant of judicial analogies generally. It is inclined to argue that "while the forms of judicial procedure are not to be literally applied in the administrative field, the experience which they reflect can furnish criteria that may be usefully applied in many instances," and that "the teachings of judicial experience . . . may be usefully suggestive in considering the most appropriate procedures for administrative adjudication; they will not be conclusive."

Clearly, much can be said for both sides. The courts and their procedure can be—though they need not always be—rigid, cumbersome and slow, and productive of much inefficiency and injustice. And even aside from this, few people (and very few experienced lawyers) would seriously argue that they are the model upon which all the machinery of government should be constructed. Nonetheless the judicial style and the judicial mode of working, when properly conceived and applied, are among the great resources and prime essentials of the art of civilized government.

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3 This view has been much influenced by Landis' classic, *The Administrative Process* (1938).
4 Blachly & Oatman, *Sabotage of the Administrative Process*, 6 Pub. Admin. Rev. 213, 226 (1946). This is a hostile discussion, written from the administrative point of view, of the federal Administrative Procedure Act of 1946.
7 "In despotic governments the prince himself may be judge. But in monarchies this cannot be; the constitution by such means would be subverted, and the dependent intermediate powers annihilated; all set forms of judgment would cease; fear would take possession of the people's minds, and paleness spread itself over every countenance; the more confidence, honor, affection, and security in the subject, the more extended is the power of the monarch." 1 Montesquieu, *The Spirit of the Laws* 77 (Hafner ed. 1949).
The Setting

The controversy dates at least from the time of the bitter political conflicts of New Deal days; indeed, many present attacks on asserted "judicialization" are transmuted and now-unnecessary defenses of now-unchallenged regulatory policies and techniques that got their start then.8

The division was in some respects much sharper, and some of the views much more drastic, then than now. Thus, supporters of New Deal regulatory policies, and of their effectuation by a vigorous and unfettered administrative process, contended (no doubt often rightly) that efforts to formalize or in any fashion constrain administrative procedure were attacks on the policies themselves, and the exchanges between the supporters and the opponents of the policies drowned out much discussion of procedural improvement.9

The Administrative Procedure Act of 194610 embodied, as to administrative adjudication, pretty much a codification of standing law. It marked a seemingly uneasy truce in the controversy, and there was considerable expectation that it would be merely a preliminary to a thoroughgoing statutory overhaul of this law, which was admittedly not in a completely satisfactory state.11 But in almost sixteen years there has been no such overhaul. Several of the forces that have operated to keep matters thus stabilized can readily be identified: the submergence for some time of the issue of administrative procedure as a lively public question; a rough balance in the political power of contending groups; a general mellowing of extreme views and urges toward change; the natural inclination, perhaps especially strong in government agencies, to cling to what has become familiar.

In recent years, however, scandals in a few federal agencies and the difficulties of delay, cumbersomeness, and ineffectiveness in which parts of the administrative process are now so patently entangled have dissolved much of this stability and have provided both the occasion and the need for further thought.13 It now seems unarguably clear, for example, that

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8 See Blachly & Oatman, supra note 4, and (a far more moderate discussion) Heady, The New Reform Movement in Regulatory Administration, 19 PUB. ADMIN. REV. 89 (1959). It is today increasingly difficult to see in arguments for procedural change any real intent to thwart the administrative process or to cripple the agencies or their programs.

9 The tale is told in many places, including Heady & Linenthal, Congress and Administrative Regulation, 26 LAW & CONTEMP. PROB. 238 (1961), and the authorities there cited.


12 A thorough account of one, with well-considered remedial proposals, is note, Ex Parte Contacts With the Federal Communications Commission, 73 HARV. L. REV. 1178 (1960).

13 Not only is there much discussion and writing of all kinds but also there is much official
formal administrative adjudication, is in such a state that both its practice and its theory could do with some radical reconsideration.

Much discussion, however, is either very general, and hence resistant to analysis and testing, or else tied exclusively to the affairs of one or a few agencies and so of doubtful wider application. Closer study of some aspects of one particular reform proposal that is designed to cover all agencies and the whole administrative process will be helpful, not just because the proposal is an important one in itself but also because discussion can profit from concreteness and because the pros and cons of the proposal can readily be translated so as to apply to other systems of administrative adjudication and to other debates over procedural reform.¹⁴

FORMAL ADJUDICATION IN THE ABA CODE

A general Code of Federal Administrative Procedure is presently proposed by the American Bar Association for enactment into law.¹⁵ This Code has been developed under the sponsorship of an organization regarded by some as the great foe of a vigorous, independent, and effective administrative process,¹⁶ and through much work by many people over several years.¹⁷ It might therefore be expected to be an unbridled polemic in content and a committee-designed monstrosity in form. It is neither. Quite the contrary, it is most moderate in its content and an admirable piece of planning and drafting in its form. Yet it was criticized vehemently on grounds of “judicialization” (among others) by several of the federal departments and agencies which commented on it for the Senate Committee on the Judiciary in 1959-60.¹⁸

activity, e.g., subcommittees of both House and Senate Judiciary Committees, the new Administrative Conference of the United States, and numerous intra-agency committees, of which latter that in the NLRB which accomplished the overhaul of the agency's entire procedure is a successful instance.

¹⁴ Indeed, it is very revealing to make the appropriate applications to the state and local agencies encountered in one's daily law practice. To the present writer, one of the most challenging California examples is regulation of the issuance and sale of corporate securities by the Commission of Corporations under the Corporate Securities Law, CAL. CORP. CODE §§ 25000-26104. See also, Huard, Conflicts of Jurisdiction in California Water Law, 1 S. CL. LAW. 19 (1961).

¹⁵ It is before the present Congress as S. 1887, 87th Cong., 1st Sess. (1961) and H.R. 9926, 87th Cong., 2d Sess. (1962), and was S. 1070, 86th Cong., 1st Sess. (1959).

¹⁶ See, e.g., Blachly & Oatman, supra note 4, and Heady, supra note 8.

¹⁷ Its development is described in Benjamin, supra note 6.

¹⁸ The agency comments (which were on S. 1070, 86th Cong., 1st Sess. (1959), a bill identical with S. 1887 and H.R. 9926 of the present Congress) are stated and discussed in detail in Huard, Collings & Fick, A Study of Agency Comments on the Proposed Code of Federal Administrative Procedure (1961) [hereinafter cited as Huard, et al., Study]. This was an extensive independent study and analysis done for the ABA committee responsible
AN EXTENSION OF COVERAGE OF ADJUDICATION

The Code follows the traditional distinction, followed also in the Administrative Procedure Act, between "rulemaking," which results in rules and is the administrative analogue of legislation, and "adjudication," which results in orders and is the analogue of what courts do.

There is a significant difference, however. The Code would include in adjudication what under the APA are rulemaking operations that produce rules "of particular application," including some kinds of ratemaking and similar activities. This unquestionably brings under adjudication, the judicial analogue, some substantial activities left under rulemaking by the APA. One common agency argument against this was that adjudication is slower, more rigid and, at least from the agency point of view, less efficient and productive than rulemaking.

Several agencies also objected that the change would bring into operation the stricter separation of functions requirements of adjudication for proceedings thus shifted from rulemaking, and argued that these would impede or prevent desirable intra-agency consultations in such proceedings and would be especially harmful in ratemaking.

SOME CHANGES IN ADJUDICATION PROCEDURE

The Code, like the APA, adheres also to the traditional distinction between formal and informal adjudication, and, again like the APA, does not itself require formal adjudication in any case, but simply that if this is required by some other statute or by the Constitution then certain procedural standards are to be observed. But the Code standards include some changes, and some additions, as compared with those of the APA.

One is that in formal adjudication, "pleadings, including the initial notice, shall comply with the practice and requirements of pleading in the United

for the Code by Leo A. Huard, Dean of the School of Law, University of Santa Clara; Rex A. Collings, Jr., Professor of Law, University of California, Berkeley; and the present writer, and contains full citations to the original agency submissions to the Senate committee. Perhaps it should be made clear that in this article the writer is not authorized to speak, and does not purport to be speaking, either for the other authors of the study or for the ABA Code committee, of which he is now a member.

19 The APA defines a rule as "any agency statement of general or particular applicability and future effect designed to . . ." APA § 2(c). The Code drops out the "or particular," S. 1070, 86th Cong., 1st Sess. (1959) [hereinafter cited as Code] § 1001(c). Both APA and Code define an order by exclusion, as "the whole or any part of the final disposition . . . of [in the Code, "by"] any agency in any matter other than rulemaking . . . ." APA § 2(d); Code § 1002(d). Further, the Code drops the APA clause which puts ratemaking and some specified other activities in rulemaking, and makes no statement on them; accordingly, they would or would not be rulemaking under the Code depending on whether or not they were to generate statements "of general applicability and future effect." APA § 2(c). Code § 1002(c).

20 APA § 5 and Code § 1004(a).
States district courts, except to the extent that the agency finds conformity impracticable and otherwise provides by published rule."21 The APA requirements are less explicit and less explicitly based on a judicial analogy,22 and although the APA has no general "except" escape-hatch the Code provision elicited protests from some agencies. These even included heated assertions that it would be "dangerous" and that under it the agencies would no longer be able to simplify and improve their pleading arrangements as they can under the APA.23

Another is that the Code tries to make a modest beginning in developing standards for informal adjudications (i.e., those in which an opportunity for an administrative hearing is not required by Constitution or statute), by means of a permissive provision allowing—and thus, it is presumably hoped, encouraging—agencies to establish by rule intra-agency review procedures for decisions of subordinate officers.24 Yet even this seemingly innocuous step was criticized by one suspicious agency on the ingenious, but one would think improbable, ground that it might have some kind of adverse effect on existing specific statutes providing intra-agency reviews.25

A third is the Code's rules on the evidence receivable in formal proceedings. Under the Code, in formal rulemaking hearings and in adjudications involving the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, or practices bearing upon any of the foregoing, "any reliable and probative evidence shall be received." But in all other formal hearings, "the 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."26 The APA, on the other hand, provides that in all formal hearings "any oral or documentary evidence may be received but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence..."27 These changes from the APA brought agency criticisms both that the formula "any reliable and probative evidence" is too broad and would not permit exclusion of irrelevant evidence

21 Code § 1004(a).
22 APA § 5(a).
23 Huard et al., STUDY 1004-2 and 1004-5. Just how this latter would be so is difficult to see, since the agency has a perfectly free hand, "if it finds conformity impracticable," to "otherwise" provide by published rule.
24 Code § 1004(b).
25 Huard et al., STUDY 1004-3.
26 Code § 1006(d).
27 APA § 7(c).
and also that the civil nonjury case standard is too restrictive (and that there is no one such standard in any event).  

POWERS AND DUTIES OF PRESIDING OFFICER

Some of the most vehement, and most revealing, agency criticisms were directed at the changes the Code would make in the powers and duties of the officer who presides at formal hearings.

Under the APA the hearing examiner in formal adjudications normally (though not always and necessarily) makes an initial decision. However, the agency (1) can bring up the record and make the initial decision itself, and (2), has, on review of examiners' initial decisions, "all the powers which it would have in making the initial decision."  

Under the Code there must be an initial decision by the hearing officer in all formal adjudications, unless the agency itself has presided at the evidentiary hearing, and the agency loses the power to bring up the record and make the initial decision itself. Some agencies objected that the bringing-up procedure is sometimes "expeditious" and that in some cases the hearing examiner lacks, and the agency has, the broad range of experience and skills necessary for an adequate decision.  

Further, under the Code the agency would, on review of the initial decision, in general be limited to a power to remand and a power to "affirm, set aside, or modify the order or any sanction or relief entered thereon, in conformity with the facts and the law." Several agencies objected to this on the general ground that they want to be, and need to be, free to make any changes they wish from the initial decision.

These agency objections were mild, however, compared to those to the Code provision that "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." This elicited some extraordinary outbursts.

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28 Huard, et al., Study 1006-4, 1006-5, 1006-7, 1006-9, 1006-13, and 1006-17.
29 APA § 8(a).
30 Code §§ 1006(b) and 1007. Huard, et al., Study 1007-5, 1007-10, 1007-12, 1007-17 and 1007-18.
31 Code § 1007(c).
32 Code § 1007(c).
33 One agency pointed to this provision and to the broadened availability of judicial review (Code §§ 1005 and 1009) and thereupon concluded, "It appears, therefore, that the administration of the Executive Branch would in large measure be turned over to the hearing commissioners [i.e., examiners], with the courts having the ultimate control. The agency heads would become a sort of intermediate authority for administrative actions." Huard, et al., Study 1007-22.
COMMENTS AND ANALYSIS

First. The agency ideas which generate the complaints of judicialization seem misconceived.

The basic argument that adjudication procedure is necessarily slower, more rigid and less efficient than rulemaking procedure, and that the same is true of anything judicial as compared with anything administrative, is founded on a narrowed perspective and on preoccupation with the deformed kind of adjudication the agencies themselves commonly practice. The judicial can be very fastmoving, flexible, and effective. Compare a good trial court, a most formal and "judicialized" affair, with the ponderous, sometimes nearly interminable, and often unproductive process that even informal agency rulemaking so frequently is. Compare also the crispness and finality of the disposition of legal and procedural issues by a good law and motion calendar with agency handling of analogous problems in a formal adjudication. And compare the rapid and generally satisfactory development of reasoned and coherent bodies of case law by the courts in many fields with what little the typical agencies have achieved. Adjudication, and not least in its most fully judicialized form, can be a pretty good "decision-making process," to use a currently fashionable phrase — and we are often told that the essence of administration is decision-making.

Nor would the Code's widened scope for adjudication, and its consequent wider application of the requirements of separation of functions, really be likely to cripple desirable intra-agency consultation. The legitimate part of such consultation, the internal memoranda and discussions on problems of law, fact, and policy, could go into the record as written or oral testimony and into the agency counsel's briefs. And, of course, agency members in analyzing and appraising the record for decision are free under the Code to consult broadly with agency employees.

The Code's employment of the federal courts' standards of admissibility of evidence seems at first glance to present more substantial issues, but these tend to dissolve if one considers what is likely to happen when the new standard is actually applied in practice. Thus, while it is true that formally there is no single standard "in civil nonjury cases in the United States district courts," in reality there is great uniformity and a seemingly steady

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24 It is commonplace now that many agencies do very little indeed in this direction and that few really do a great deal. Hopes raised by early studies have been generally disappointed by the results of recent ones. For example, compare Hyneman, The Case Law of the New York Public Service Commission, 34 Colum. L. Rev. 67 (1934), with Blum, The Interstate Commerce Commission as Lawmaker: The Development of Standards for Modification of Railroad Securities, 27 U. Chi. L. Rev. 603 (1960).

25 Code § 1005(c).

26 Since under Fed. R. Civ. P. 43(a) there can be variations from state to state.
tendency toward more (witness the progress of the extensive movements for uniform rules), and undoubtedly the vast corpus of administrative adjudication would generate its own.

Agency objections to increases in the examiner's powers are apparently all based on one underlying belief. This is that an agency must have, and can actually make use of, the ability to free itself of any determinations the examiner may make and to deal as it likes with anything he has done or left undone. In a sense the belief is an illusion; the press of agency business is usually such that the ability can be exercised well (if at all) only in a few cases, and even in these little is usually done that could not be done under, for example, the Code. Indeed, drastic further delegation by the agencies seems a clear inevitability. However, the real vice of the belief lies in the almost inevitable outcome of the forces which the claim of the ability lets loose: parties seek more extensive agency review and in more cases; conscientious agency members tend to grant it; supplementary decision-making machineries develop around agency members to cope with the volume of work, and wax undesirably powerful behind the scenes; the impossibility of real mastery by agency members of the flood of materials helps generate *ex parte* approaches and other evils; and so on until we have the whole catalogue of the ills of agency adjudication of today. One might suppose that in fact the typical burdened and troubled agency might find great relief in a state of affairs wherein it could do no more than “affirm, set aside, or modify . . . in conformity with the facts and the law” what its examiner, empowered and obligated to finally determine the facts unless his findings are “contrary to the weight of the evidence,” has done.

*Second.* The administrative process is troubled, not with too much judicialization generally but with too much of false, or seeming, judicialization and too little of the true, or actual.

Thus, formal adjudication in the independent regulatory commissions may have gotten into its well-known difficulties in recent years just because it has *not* been truly judicialized. It has worn the trappings but lacked the essence: vast unorganized proceedings in which there is no clarity on what the issues, whether of fact or law, are, nor on which of the undeveloped and often inconsistent standards and doctrines of agency policy will decide them; hearings undisciplined by a fully-empowered and fully-responsible presiding (and *deciding*) officer; ominously influential supplementary decision-makers clustering semi-visibly around overburdened agency members who are often torn among diverse duties of administration, regulation, promotion and general politicking, and can never personally master their cases; and so on.
Contrast this with, say, the Department of Agriculture's successful and highly regarded programs dealing with buyer-seller controversies over agricultural commodities. The adjudications there do not take place in either a real or pretended courtroom ambiance, but the lawyer would recognize them as the more truly judicial: sharply defined issues; an impartial, single-minded, and responsible tribunal; a known and adequate set of rules of decision; ordered taking of evidence; and the like.

One of the great virtues of the ABA Code is that, within the narrow bounds of change it sets for itself, it seems to have had the distinction well in mind and to have applied it with rigor. The administrative process would benefit greatly from such clarity and realism.

This leads us on to our final point.

Third. One of the classics among modern studies of government, law, and administration is Professor Friedrich's book on the nature and functioning of modern constitutionalism. In it he remarks at one point that "Constitutionalism is the application of judicial methods to basic problems of government. . . ." The suggestion is of course not that the goal of fully constitutional government can be achieved only if courts alone rule. Indeed, the passage refers favorably to the rise of administrative justice as an important modern extension of constitutionalism. The concern is not with judicial forms, and still less with judicial institutions, but rather with the method. Most people probably feel some, and lawyers a great deal of, intuitive sense of what the characteristics and essentials of the method are, and of what kinds of problems of government it is usefully applicable to. And there has been a certain amount of more explicit and methodical exploration of these questions. The results of both the intuitive and the more rationalist inquiries are illuminating and add greatly to the sophistication with which the resources of the judicial experience can be used in other parts of government. Unconsidered polemics against "judicialization" throw this addition away, and obstruct the path to more.

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87 An interesting program partly of this character is described in Endres, Reparations Procedure Under the Perishable Agricultural Commodities Act of 1930, 28 Geo. Wash. L. Rev. 719 (1960).
88 FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (1941).
89 Id. at 116.
90 Although unfortunately little of it so recorded as to be readily accessible.