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Administrative Absolutism

Cover Page Footnote

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ADMINISTRATIVE ABSOLUTISM

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AT ITS annual meeting in Cleveland in July, 1938, the American Bar Association received from its Special Committee on Administrative Law the sixth in a series of yearly reports which are coming to assume a most important place in the current literature on the subject. Apart from their intrinsic worth (the invariably high professional standing of the members of the Committee from the time of its creation in 1933 entitles their utterances to respectful consideration) the reports are significant documents because of the influence they exert in directing thought in and about Administrative Law. Not only does the Committee have the direct audience of some thirty thousand members of the American Bar Association (plus countless others who learn its views, more or less accurately, through newspaper articles), but it is the only body in America directly concerned with, and regularly publishing studies on Administrative Law.¹

In its current report² (hereinafter referred to as "the Report"), after making a number of specific recommendations, including those of the enactment of legislation to forbid the appearance of certain elected officials as advocates before administrative tribunals in certain cases, and of the enactment of legislation to provide for declaratory judicial pronouncements of the validity of administrative rules and regulations, and of the encouragement of the teaching of Administrative Law in law schools and elsewhere, the Committee devotes more than three-fourths of its space to a "General Report",³ which consists of the most comprehensive appraisal and the most searching critique of administrative tribunals and their processes yet made by this body. A lengthy enumeration is made of what the Committee denominates "Defects of administrative justice against which safeguards are required,"⁴ followed by, not specific suggestions for remedies against these defects (for the Committee wisely recognizes that experience with this form of governmental action has not yet developed sufficiently to enable us to know the answers in detail), but a statement of general principles in accordance with which, it is suggested, remedies may be found.

It is not with the Report's catalog of evils, or with its formal con-

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1. This is not to depreciate the activities of the Commonwealth Fund and the seminars and courses in Administrative Law in many of the law schools. Without pausing now to evaluate such works as the Harvard Studies in Administrative Law, or those sponsored by the Commonwealth Fund, I simply make the point that their sphere of influence over the direction of professional thought is quantitatively much narrower than that of the Reports of the American Bar Association Committee.

2. AMERICAN BAR ASSOCIATION, 1938 ADVANCE PROGRAM, 134-171.

3. *Id.* at p. 141 *et seq.*

4. *Id.* 149-154.

clusions, by and large, that the present writer is in disagreement. But it contains undercurrents of thought, questionable postulates and inadequately considered premises of reasoning which, unless care is taken, will sweep attention away from the larger phases of the problem and concentrate it upon a series of relatively petty issues. An examination of the basis of reasoning exhibited in the Report may lead to a change of emphasis in the criticisms leveled at administration and perhaps to amendment of the Committee's conclusions. It is with this thought in mind that the present paper is written.

I. *Administrative Absolutism*

The general tone of the Report, as of its predecessors,⁵ is not indicative of an excess of sympathy, on the part of the Committee, with administrative tribunals and their processes, or of approval of the place they hold at present in American jurisprudence. In fact, there is more than a suggestion, throughout the Report, that the activities of administrative agencies have either brought us, or are bringing us, to a stage of social control beyond the pale of "jurisprudence" as that term is ordinarily understood. The complaint is, not the outmoded one that administrative jurisdiction should not, in the nature of things, and cannot, under the constitution, exist (the Report admits the fact and the necessity, if not the desirability, of administration), but that there is a basic fault with numerous attendant consequences subsumed under the phrase, repeatedly occurring in the Report: "Administrative Absolutism."

It would be idle, as well as unscholarly, to find fault with the Committee over a difference of opinion as to the aptitude of a rhetorical expression. While the phrase, "Administrative Absolutism,"⁶ at once conjures up visions of Tudor and Stuart excesses and calls into play prejudices born of emotion and tradition rather than calm, scientific appraisal of legal and political problems, its use in the Report is not *per se* objectionable. What is objectionable are the facts, (1) that the phrase, as used in the Report, is made to denote a number of different things, some of them quite irrelevant to the conclusions reached, and, (2) that the phrase, in its contexts, gives rise to a good many implications of doubtful validity.

The nature of the first objection may be made apparent from a quotation from the Report. In the first place, after rejecting the realistic definition of "law" as being "whatever is done officially," the Report

5. The earlier reports of the Committee appear in the ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION as follows: (1933) 58 A. B. A. REP. 407; (1934) 59 *id.* 539; (1935) 60 *id.* 136 (an oral report only); (1936) 61 *id.* 720; (1937) 62 *id.* 789.

6. The phrase appears to be one coined by Professor Pound, the Chairman of the Committee, in a paper, *The Individualization of Justice* (1938) 7 *FORDHAM L. REV.* 154. The basic thought goes back to his papers on *Justice According to Law* (1913) 13 *COL. L. REV.* 696; (1914) 14 *id.* 1, 103; and *Executive Justice* 55 *AM. L. REV.* 137.

adopts the analytic-sociological definition of "law" as being the "body of authoritative grounds of and guides to decision."⁷ This definition, as it has been more fully expounded by the Chairman of the Committee, on other occasions, may be taken to include authoritative and authoritatively received precepts, a term which includes standards, principles, rules, and conceptions.⁸ Thus, these severally enumerated guides to decision, as applied by legally constituted tribunals, may be said to constitute "law" in the sense in which that term is used in the Report.

Next, the Report proceeds to a definition of "administrative law." In this definition it includes: "Whatever [administrative] officials, tribunals and agencies do, whether by way of law making or judging or administering legal precepts or standards in the course of exercising their functions."⁹ This, in its context, we may take to be a specific definition of "administrative law" in the terms of the preceding paragraph substantially as follows: "The body of authoritative standards, principles, rules, and conceptions, used and usable by administrative tribunals as guides to decision, plus the technique of courts in supervising such tribunals."

After a definition of terms, the Report introduces its discussion of "administrative absolutism" by stating: "There may be administration or administrative determination according to law, or contrary to law or without law."¹⁰ The inference clearly is that the epithet is applicable to either or both of the two latter alternatives.

Continuing, the Report proceeds to insist on "safeguarding individual interests and preserving the checks and balances involved in the common law doctrine of the supremacy of law and the constitutional separation or distribution of powers which is fundamental in our American polity. What the profession must insist upon is such an adjustment of administrative jurisdiction and practices and determinations to the general law, and of the doctrines of the general law to the exigencies of effective administration as will preserve the guaranteed rights of individuals and yet permit of effective securing of public and social interests."

This series of quotations seems to indicate a confusion of several different things. When the Report defines "law" in a generic sense, and then speaks of "administration without law," or "contrary to law," the immediate inference is that it is referring to what the Chairman of the Committee once aptly described as "Oriental justice," a process of determining and adjudicating according to whim and caprice, the system of "subjective" justice administered by Haroun al Raschid.¹¹ But, when

7. A. B. A. 1938 ADV. PROGRAM, 143.

8. POUND, OUTLINES OF LECTURES ON JURISPRUDENCE (4th ed.) 48; Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 641, 643-653.

9. A. B. A. 1938 ADV. PROGRAM, 145.

10. *Ibid.*

11. Pound, *Justice According to Law* (1913) 13 COL. L. REV. 696, 697.

detailed discussion of "administrative absolutism" is entered into, we find that the need is not so much of the conformity of administration to "law," as of its adjustment to the "general law." This is something else again. The latter term is nowhere defined in the Report. It is not likely that it is the ghost of *Swift v. Tyson*,¹² so recently annihilated.¹³ Yet it is hard to read "general law" as meaning anything other than "common law" in one of the many senses in which that much-abused expression is used.¹⁴ With such an understanding, administration without, or contrary to, "law" may be, and probably is, an entirely different thing from administration without, or contrary to the "general," or "common" law.

To put the matter concretely, no court of competent jurisdiction would hesitate, in a proper case, to "administer" the Alien Contract Labor Act.¹⁵ Nor in administering it would it be accused of administering "justice without law." Yet it would be applying a precept wholly foreign to all the substantive rules and received ideals of the common law system.¹⁶ Everything in common law history, from the Statute of Laborers down, shrieks that there is no limitation upon the right of the employer to hire his hands, save that he must not steal another employer's contract servant. Consider, too, the application of the Mann Act¹⁷ in *Caminetti v. United States*.¹⁸ There was justice contrary to the common law,¹⁹ but certainly not justice without law. Going over to the procedural side, it is unquestionable that the State of California tried *Hurtado*²⁰ not according to the common law when it dispensed with a grand jury indictment for murder, but when he was hanged (as presumably he was) the official action was not "justice without law."

What has been said has been offered, not as a quibble or as a play upon words, but in order to emphasize the need of clarity in defining the issues to be discussed. It is one thing to apply the epithet "administrative absolutism" to the ideas of those who envision social control through the unsupervised decrees of a body of wizards, but quite another thing to speak in the same terms of a system of regulation by executive officials according to more or less definitely expressed legislative standards and subject to a greater or less degree of judicial control. Theoretically, there is a point at which the latter shades off into the former, but, assuming the

12. 16 Pet. 1 (1842).

13. *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938).

14. Riddell, *Correction of Erroneous Verdicts* (1929) 17 GEO. L. J. 323 (1929).

15. 23 STAT. 332 (1885); 39 STAT. 875 (1917), 8 U. S. C. 136 (h) (1927); 39 *id.* 879, 8 U. S. C. 139 (1927); 23 *id.* 566 (1885), 8 U. S. C. 141 (1927).

16. Compare the understatement of Brown, J., in *United States v. Craig*, 28 Fed. 795, 798 (1886).

17. 36 STAT. 825 (1910), 18 U. S. C. 397-404.

18. 242 U. S. 470 (1917).

19. MILLER, *CRIMINAL LAW* (1934) 432 and authorities there collected.

20. *Hurtado v. California*, 110 U. S. 516 (1884).

incompatibility of the "wizard" theory of jurisprudence with democratic ideals, it would seem more profitable to recognize a distinction between the two than to tar the entire administrative process with the brush of an opprobrious name. This done, discussion could proceed temperately to determine the need and the availability of ways and means of improving the process. The problem could be reduced to one of degree rather than kind. Once recognize that administration according to standards is administration according to "law" (at least of a sort), we can formulate and discuss the juristic issue as to the qualitative and quantitative content of the "law" which should govern administrative action.

Before further development of this theme, it will be well to return to the second objection to the use of the expression "administrative absolutism." This, it will be remembered, is the questionable implications of the term. The first of these is involved in the definition of "law" already set forth as the authoritative body of guides to decision. As has also been seen, the analysis of the leading exponent of this definition makes a four-fold classification of these guides into standards, principles, rules, and conceptions. The thought is continually suggested, although nowhere expressly stated, that unless all of these elements, notably the third, are present, the guide to decision, whatever else it may be, is not "law."²¹ The invalidity of such a generalization can be made to appear from a single example. Courts, in administering the due process clauses of constitutions, have, in the last analysis, only a standard as a guide to decision. It is well known that they have definitely and constantly refused to define due process by anything in the nature of a rule. Yet it is traditional to speak of constitutions and constitutional decisions as "law."

The questionable implications referred to may be reduced to two, one of doctrine and the other of fact. The Man from Mars, upon reading the Report, would be led to infer, (1) that the natures of our system of law and of our public problems are such that a rule or precept, as distinct from a mere standard, can be framed to govern every situation selected for regulation, but (2) that in fact all, or a great majority of our administrative tribunals exercise all their functions under the guidance of no rule at all, but in accordance with a nearly absolute discretion.

The first of these propositions springs from the natural instinct for security which is thought to flow from certainty and predictability, and reflects the juristic concepts of the great majority of the legal profession who idealize "law" in terms of the Blackstonian pronouncement that it is a "rule of action."²² The facts of civilization, however, keep such an

21. A. B. A. 1938 ADV. PROGRAM, 159-160: "The type of the administrative process is a dealing with a unique situation on its own special circumstances without attempt to refer the situation to a general principle or formulate in the course of disposing of it a precept for like cases in the future."

22. 1 BL. COMM. *38.

ideal from complete realization. Once we accept the fact that there is, and will continue to be extensive governmental regulation of private activities, we are forced to recognize that, in certain of its phases, such regulation can be accomplished only by the application of standards. This matter was well put in an address to his professional brethren by the general counsel of one of the great railroads.²³ The speaker told of a conversation with a former Interstate Commerce Commissioner in which the ex-official was asked to describe his mental processes in making rates. The answer was, simply, "I just made them." This is the sort of thing which Mr. Justice Holmes once described as, "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."²⁴ Whether a rate is just and reasonable, or whether a trade practice is consistent with the public interest, are questions which cannot be answered by formulae.

Moreover, it must be remembered that this process of what Mr. Justice Holmes on another occasion described as, "decision [dependent] on a judgment or intuition more subtle than any articulate major premise,"²⁵ is not the whole of any administrative process. The Statutes-at-Large and the Federal Register are full of rules and regulations imposing limitations, substantive and procedural, upon administrative action. It is a commonplace that the terms of a pertinent statute control administrative action,²⁶ even where technical competence is involved.²⁷ Again, although the Interstate Commerce Commission has a certain amount of discretionary power in prescribing rates, once the power is exercised, the rate prescribed is binding upon the Commission as well as upon the carriers affected.²⁸ And, even where courts refer to administrative exercise of discretionary power as "conclusive," it may be noted that such exercise of power is ordinarily preceded by a hearing of some sort and may be followed by some amount of judicial review.²⁹

From these considerations, it appears that the topic for discussion should be, not whether administration should be allowed to run at large, but whether the proper restraints exist to prevent it from running at large; not whether administrative discretion should be tolerated as such, but whether discretion is wisely given or withheld in particular cases; not whether standards alone are proper guides to decision, but whether in particular cases it is possible or desirable to supplement standards by principles and rules.

23. Bikle, *Administrative Discretion* (1933) 2 *Geo. Wash. L. Rev.* 1.

24. See *Chicago, B. & O. Ry. Co. v. Babcock*, 204 U. S. 585, 598 (1907).

25. See *Lochner v. New York*, 198 U. S. 45, 76 (1905).

26. *Universal Battery Co. v. United States*, 281 U. S. 520 (1930).

27. *Waite v. Macy*, 246 U. S. 606 (1918).

28. *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370 (1932). And see Note (1936) 34 *MICH. L. REV.* 672.

29. See *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297 (1937).

II. Separation of Powers

More than once in the Report³⁰ the implication is made that the growth of administrative jurisdiction is repugnant to a constitutional precept relating to separation or distribution of the powers of government. This thought introduces a wholly extraneous issue, and, were it not for the fact that it reflects a widely prevalent state of mind in the profession, it might well be dismissed with the observation that the courts have generally been competent to deal with excesses of constitutional power.

Lawyers and political scientists have been slow to appreciate the distinction between what may be called the *political* doctrine of separation of powers and the *constitutional* or *legal* doctrine.³¹ The former is an ideal indicative generally of the form of good government. The latter is a precept, giving definite content to the ideal for purposes of its specific application. As an ideal, the doctrine of separation of powers has no efficacy in the machinery of social control except insofar as the accepted political and social standards of the time and place are influential in determining the construction of statutes or the exposition of constitutional provisions.³² To the extent that it has been made a constitutional precept, the doctrine has the force of law and of course controls the decision of appropriate cases.

In American public law there is an important relation between these two doctrines of separation of powers. There is more than jest in the trite saying, "The Constitution means what the judges say it means." It is a corollary of the accepted doctrine of judicial supremacy that provisions of the Constitution, especially those found there by implication only, have no finally authoritative meaning until defined by the courts. We can, then, learn to what extent there is a constitutional precept of separation of powers only by inquiring to what extent the courts have decided that there is. And when we inquire, we find that the judicial evolution of the doctrine is not a process of application of analytical concepts or of postulating a pre-existing scheme into which all governmental phenomena must fit, but rather a course of sanctioning contemporary ideals either as evidenced by established executive and legislative practices,³³ or as intuitively sensed.³⁴

30. A. B. A., 1938 ADV. PROGRAM, 145, 155.

31. See O'Reilly, *The Proposed Federal Administrative Court* (1937) 6 FORDHAM L. REV. 365, 370.

32. This influence is frequently not inconsiderable. See Finkleman, *Separation of Powers*, 1 UNIV. OF TORONTO L. J. 313.

33. *Field v. Clark*, 143 U. S. 649 (1892); *Myers v. United States*, 272 U. S. 52 (1926); *McGrain v. Daugherty*, 273 U. S. 135 (1927).

34. *E.g.*, the ideal of the limitation of the jurisdiction of the federal courts. *Hayburn's Case*, 2 Dall. 408 (1792); *Gordon v. United States*, 117 U. S. 697 (1864); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428 (1923).

The constitutional doctrine of separation of powers, as evolved to date, has imposed relatively few limitations upon the power of the federal legislature to provide for the conduct of the government.³⁵ It may well be that the framers of the Constitution, influenced as they no doubt were by the writings of Montesquieu, had some thought of prescribing the trichotomy of governmental functions envisaged by the great Frenchman as a part of the basic law they were making. But, in the eyes of James Madison, one of the first constitutional commentators,³⁶ they did not accept the details of Montesquieu's doctrine as such, but stopped at translating into a legal standard the political ideal (which stood behind Montesquieu) of preventing undue concentration of governmental power in the hands of a single individual or group. It may be that in the eighteenth and early nineteenth centuries, when government was still in a state of relative simplicity, the strict separation of powers which Montesquieu advocated would have been a convenient rule to implement this ideal. But the fact is that, although most of the thinking about separation of powers has been along the lines of Montesquieu's thesis, that thesis as a whole has never been crystallized into legal precept. It has been legalized in certain technical connections, such as the limitations upon the jurisdiction of the federal courts,³⁷ and latterly, the matter of excessive delegation of legislative power.³⁸ But on the other hand, even in the days of governmental simplicity, there were lacunae in, and overlappings of executive, legislative, and judicial powers and functions. Of these the courts were sometimes conscious,³⁹ sometimes unaware.⁴⁰ But in all cases where a strict separation of powers was found inadequate for the real or apparent necessities of governmental functioning, there was tacit acquiescence in departure from it,⁴¹ although to be sure there were ingenious protestations that in each case there was in reality no departure. In recent years, however, after the way was opened by Chief Justice Taft,⁴² who had been an executive and an administrator as well as a lawyer and judge, there was open admission that strict separation of powers was being departed from, and validly so.⁴³ This view was ex-

35. See cases in note 34, *supra*; also *Panama Refining Co. v. Ryan*, 293 U. S. 399 (1935); *Schechter Poultry Co. v. United States*, 295 U. S. 495 (1935); *cf. Springer v. Philippine Islands*, 277 U. S. 189 (1928).

36. *THE FEDERALIST*, xlvii. The pertinent language is quoted in O'Reilly, note 31, *supra* at 369.

37. See cases note 34, *supra*.

38. *Panama Refining Co. v. Ryan*, 293 U. S. 389 (1935); *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

39. *Wayman v. Southard*, 10 Wheat. 1 (1825).

40. *Cargo of the Brig Aurora*, 7 Cranch 382 (1813).

41. *Field v. Clark*, 143 U. S. 649 (1892); *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *United States v. Grimaud*, 220 U. S. 506 (1911).

42. *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394 (1928).

43. See *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 305 (1933).

pounded even in an era which saw separation of powers as a legal institution given its widest application.⁴⁴

In the past thirty years the functions and activities of government have become more numerous and more complex than formerly. The result is that lacunae, overlappings, and other phenomena leading to departure from a strict separation of powers have become more numerous. It is questionable reasoning which is based upon the assumption that Montesquieu's political ideal is any longer (if it ever was) a trustworthy guide in determining whether governmental power is being *legally* exercised. And when the Report speaks of "the constitutional separation or distribution of powers which is fundamental in our American polity,"⁴⁵ it makes just such an assumption. It were more profitable, if the Committee desires to talk about separation of powers, to speak in the language of Madison; to discuss whether or not administration is too centralized; to ascertain whether there are too many or too few departments, bureaus, boards, and commissions; but above all, to recognize that when they talk about this matter, the issue is one of policy, not of law, and the problem is one of expediency, not of constitutional limitations.

III. *Judicial Review*

Of a kind with its treatment of separation of powers is the Report's advocacy of judicial review as a means of restraint upon administrative action. Its function, one gathers, is the preservation of "the checks and balances involved in the common law doctrine of the supremacy of law."⁴⁶ This statement, which colors the tone of the whole Report, is a glittering generality which adds nothing to the store of human knowledge. Unless the Committee is setting up a man of straw to be pushed over by ponderous argument, it will find little dispute as to the need of checks upon administrative action generally. On the other hand, that the checks should be those involved in the common law doctrine referred to is a statement of doubtful meaning as well as of questionable validity.

The common law doctrine of the supremacy of law may be taken to be identical⁴⁷ with the "Rule of Law" popularized by the late Professor Dicey in his treatise on the English Constitution.⁴⁸ Both the existence and the legitimacy of this offspring of the Anglo-American tradition of judicial supremacy are dubious. Neither the "law of the land" of Magna Carta nor the "due process of law" of the Constitution perpetuated the common law or any or all of its processes.⁴⁹ The picture of the corner policeman

44. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

45. A. B. A. 1938 ADV. PROGRAM 145.

46. *Ibid.*

47. Pound, *Rule of Law*, 13 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 463.

48. DICEY, *LAW OF THE CONSTITUTION* (8th ed.) 183.

49. *Cary v. Curtis*, 3 How. 235 (1845); *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272 (1855).

and the plumbing inspector being subject to the same action for excesses of official power as is the private citizen who commits similar torts is a strikingly dramatic one, but seldom is its prototype found in real life. In Great Britain misconduct of an officer is traditionally followed by an inquiry in the House of Commons and an explanation or an apology by the appropriate minister. In this country, if the wrong is serious enough, there are editorials about it in the newspapers. But in either country, those close to the courts know that damages are rarely sought against public officers for wrongs committed by them in the course of duty save where the public authority has adopted the practice of satisfying judgments rendered against its servants.

What the expositors of the "Rule of Law" have observed but failed adequately to analyze is the breakdown of the doctrine of the immunity of the sovereign from suit. There is no doubt that the courts have been the prime movers in this breakdown. Influenced in part by distrust of administrative action, and in part by jealous zeal for the preservation of their own jurisdiction, they invented and applied common law curbs, usually in the form of the so-called extraordinary writs, to administration.⁵⁰ The net result of such procedure was to invite legislation which, while it formally surrendered the position of immunity of the government from suit, placed (or attempted to place) drastic limitations upon the power of the courts to control administration. Provisions for conclusiveness of administrative action, for postponement of judicial action until after the completion of the administrative process, for the substitution of statutory for common law procedures, and a host of others were designed to cut down what was felt to be judicial "interference" in administration.

What is needed now is the development of an enlightened technique of review of administrative action. It is a shortsighted view which sees the issue as a contest between the advocates of review and those of non-review. The real need is of a survey to restate the nature and function of review (whether judicial, or administrative, or both) of administrative action, to determine the appropriateness and the scope of review in particular classes of cases, and to consolidate existing procedures (or invent new ones) for the conduct of such review. Administrative agencies have become definitely established institutions in the framework of modern government and it is hopeless to attempt to spell out their relation to the ordinary courts on the same basis as if they were strange and temporary phenomena. On the other hand, each administrative agency has its own individuality and it would be futile to attempt to work out the relation between the courts and all such agencies in terms of the same formula. The need of simplification of the modes of review is adverted to in the Report.⁵¹

50. The history of this has been well summarized in the Report. A. B. A. 1938 Adv. PROGRAM 155-157.

51. *Id.* 162.

There is no unity of opinion as to what is, at the present day, the proper function of courts in reviewing administrative action. One school of thought, patently influenced by the distrust of administration already mentioned, conceives that, so far as possible, the courts should see to it that the administrative tribunal reaches the "right" result.⁵² One State has gone so far as to write this principle into the proposed revision of its constitution.⁵³ Another school of thought would limit judicial supervision to determining not whether the administrative properly disposed of the matter upon its merits, but rather whether the process used was one calculated to lead to the right result.⁵⁴ Another view that has been expressed envisions the courts as the supervisors of an evolution of administration into an effective and orderly instrumentality of justice.⁵⁵ Thus, we find an experienced administrator using this language:⁵⁶

"These temporary defeats really strengthened the administrative bodies, for at early stages in their history they were shown pitfalls to be avoided and were guided along sounder lines than they, in their pioneering efforts, were following. There is no doubt of the profound effect of these early decisions in shaping the course of administrative justice, both State and Federal, and in determining the form and scope of subsequent legislation."

Again, there is no uniformity of view as to what standards should be held up to administrative bodies by the reviewing courts. It is admitted on all sides that when a hearing is called for by either the statute or the constitution, administrative action without a hearing is void. But what constitutes a "hearing"? Sometimes an administrative proceeding complies with the requirement when it approximates the form of a hearing before a legislative committee.⁵⁷ At other times, a hearing is inadequate because it does not approximate traditional judicial procedure.⁵⁸ Or, take the matter of findings. It is sometimes held that administrative action must be accompanied by findings whether the statute so provides or not.⁵⁹ At other times, there need be no finding unless the statute demands one.⁶⁰ And where the statute prescribes findings, how definite need the "findings"

52. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920); *Crowell v. Benson*, 285 U. S. 22 (1932); *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38 (1936).

53. Proposed N. Y. Constitution, Judiciary Article, No. 25 (1938).

54. Dickinson, *Administrative Law and the Fear of Bureaucracy* (1928) 14 A. B. A. J. 513, 597.

55. Oppenheimer, *The Supreme Court and Administrative Law* (1937) 37 COL. L. REV. 1.

56. Atchison, *Justice Holmes and the Development of Administrative Law* (1933) 1 GEO. WASH. L. REV. 165, 170.

57. *Norwegian Nitrogen Products v. United States*, 288 U. S. 294 (1933).

58. *Morgan v. United States*, 298 U. S. 468 (1936), rehearing denied 304 U. S. 1 (1938).

59. *Panama Refining Co. v. Ryan*, 293 U. S. 389 (1935).

60. *Pacific States Box Co. v. White*, 296 U. S. 176 (1935).

be? In the cases of a deportation order⁶¹ or an executive embargo on the shipment of military supplies,⁶² a finding in the terms of the statute will suffice; but in the cases of federal regulation of intrastate railroad rates⁶³ or the granting and denying of radio licenses,⁶⁴ the findings must be more elaborate. It is true that some part of the discord in these and other decisions is attributable (and properly so) to differences in the subject-matters of regulation and in the traditional procedures of the tribunals involved. But there is no evidence that the courts are conscious of this sort of thing as they decide the cases, or that the process is carried on according to any design. The inference that immediately occurs to one who has read and compared these cases is that the courts, still unconvinced that administration in its present stage of development is capable of doing its job properly, are groping about almost blindly, seeking some device to keep control of a process all of whose implications they cannot see; a process which is for that reason alone, they think, pregnant with danger to the future commonweal.

This largely subconscious technique is a factor of prime importance in any evaluation of judicial review. Most discussions of the topic assume that review consists of applying an objective test, the "pure fact of law," to administrative action in order to test its legality. The fact is almost invariably overlooked that judges, in many of their public law decisions, are policymakers and statesmen, not mere mouthers of rules. It was not a difference of opinion over a petty legalism in the *Charles River Bridge* case⁶⁵ that made Story differ with Taney and led the former to a most unjudicial exchange of letters with Chancellor Kent in which both parties freely predicted the end of the Constitution.⁶⁶ The issue decided there was whether the ideal of Marshall's generation, sanctity of contract, should yield to an upstart, the police power of the state. Not all the cases assume the proportions of this one but in a good many of them the judges do the same sort of thing that Taney and Story did there. The difference is one of degree: the results of the other cases may not be so important but the substance and method are the same. But unless account is taken of this factor in judicial review and steps taken to regulate it, the cumulative results of a number of cases may become very important. Complaints are being heard that judges are carrying the technique of judicial statesmanship to excess. It is alleged that under the forms of interpretation of statutes and inquiry into the administrative application of legal standards,

61. *Mahler v. Eby*, 264 U. S. 32 (1924).

62. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1937).

63. *Florida v. United States*, 282 U. S. 194 (1932).

64. *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. (2d) 554 (App. D. C. 1938).

65. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (1837).

66. WARREN, SUPREME COURT IN UNITED STATES HISTORY, II, 28-32.

often highly technical in their nature and with objectives and methods with which the courts are not at all familiar, the judges are frustrating many pieces of social legislation.⁶⁷ The result is a cry for the establishment of a system of administrative courts.

It is not necessary to be in agreement on the solution in order to agree that there is a problem and enough has been said to indicate that a problem exists. Already the precedents are in such confusion that the process of judicial review is perhaps more chaos than law. We have watched the systems of common law and of equity grow up in a haphazard, unregulated sort of way, so that they now stand in need of Restatement and we have seen crystallized in them, beyond even the control of a Restatement, doctrines and rules which we could wish were not there. It is time to take profit from experience and to make an attempt to save Administrative Law from the fate which overtook the private law. This is not a suggestion that techniques can be developed in a day or a year or that there is an adequate substitute for experience and the passage of time. But it is a suggestion that enlightened study and a sympathetic approach may enable us to develop long range objectives and to guide the evolution of this growing process along lines best calculated to gain the ever-present goal of a proper adjustment of the competing claims of individual rights and of social interests. Here is a reform, or rather, insurance against the need of reform which a committee of the American Bar Association could well undertake, and, by reason of its widespread influence bring well along the road to realization.

IV. *Specific Problems*

It would be a mistake to think that revision of the process of judicial review could be effected by direct methods. It is conceivable that a procedural statute could be enacted either abolishing or cutting down to a minimum the jurisdiction of courts to review administrative action. But that, like the opposite extreme, giving courts plenary jurisdiction to review, is not what seems to be needed. And it goes without saying that no code of procedure can create a judicial technique. The first need is of a recasting of the general background against which judicial review operates, so that the way may be paved for whatever reform then appears necessary.

The beginning of such a recasting should be made within the ranks of the legal profession. It is customary for critics of judicial review as it is now practiced to put most of the blame for the shortcomings of the system on the judges who preside over the courts. The inference is made, or sometimes the proposition is baldly stated, that judges are innately reactionary, that they are so influenced by their conservative personal and professional associations that they deliberately set their faces against

67. Gordon, *Administrative Tribunals and the Courts* (1936) 49 HARV. L. REV. 429.

anything smacking of liberalism. This is a most distorted picture. While it is undoubtedly true that the personal equation does not disappear upon elevation to the bench, history gives us innumerable judges who refused to let the viewpoints of clients whom they formerly served control their judicial decisions. A recent biography⁶⁸ calls to mind Waite the one-time railroad attorney who decided *Munn v. Illinois*.⁶⁹ And there are scores, if not hundreds like him who might also be listed. Yet there is a ray of accuracy in the picture just described. Judges do, very frequently, incline against accepting or giving a liberal interpretation to new social legislation.

The articles of Messrs. Gordon and Jennings⁷⁰ document the thesis that a good deal of legislation has suffered needless emasculation through strict statutory interpretation. The English instances cited by them could easily be duplicated in America. The explanation offered is that the English judges did not fully understand the objectives and the social implications of the legislation with which they were dealing and therefore refused to give the administrators of the statutes *carte blanche* to do things the consequences of which the judges could not foresee. The validity of this concept may be argued from observation of a case where the result was the reverse. In the Wagner Act cases⁷¹ the court, in order to sustain the legislation, made an interpretation of the commerce clause which is generally believed⁷² to be the direct contrary of one of its own recent and rather vehement decisions.⁷³ There is a school of thought which finds the explanation of this sudden reversal of opinion in the excellent arguments of government counsel in the cases.⁷⁴

If the major premise is acceptable, there is abundance of proof at least *a priori* of the minor, that counsel do not, in fact, perform adequately their function of informing the courts of the issues in and beneath the cases.⁷⁵ One who spends considerable time as a detached observer listening to arguments in a state supreme court and reading briefs filed in cases in that court cannot help but get a definite impression of the mediocrity of the bar as a whole in most matters and of the utter incompetency of the rank and file in public law litigation. The cause of this deficiency is twofold. It is to be found in the education and the experience (or rather, in the

68. TRIMBLE, CHIEF JUSTICE WAITE.

69. 94 U. S. 113 (1877).

70. See note 67, *supra*.

71. N. L. R. B. v. Jones and Laughlin Steel Corp., 301 U. S. 1 (1937); N. L. R. B. v. Freuhauf Trailer Co., 301 U. S. 49 (1937); N. L. R. B. v. Friedman-Harry Marks Clothing Co., 301 U. S. 48 (1937); Associated Press v. N. L. R. B., 301 U. S. 103 (1937).

72. See Butler, J., dissenting, in Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 469 (1938).

73. Carter v. Carter Coal Co., 298 U. S. 237 (1936).

74. The oral arguments are printed in 301 U. S., appendix, 719.

75. See Davison, *Administrative and Judicial Self-Limitation* (1936) 4 GEO. WASH. L. REV. 291 for some specific instances.

lack of these factors) of the average member of the bar. Until late years, most law schools saw no necessity of giving their students more than a suggestion of training in the public law field, and even today, many of them devote the smallest possible part of the curriculum to these subjects. Again, it is still true that, even in the present era of broadening of the scope of governmental activity, the great bulk of the average lawyer's practice is in private law. The result is that when a case for litigation against the government comes into the office, the attorney, never well grounded in public law, attempts to learn the pertinent doctrine overnight and proceeds to trial and argument utterly deficient in and ignorant of the subtle background of technique by which the doctrines were evolved and in accordance with which decisions are made. Nor are these deficiencies found alone in the ranks of private practitioners. They are present, only to a more limited extent, among those who serve the government. Political appointments, frequent turnover, low salaries, inadequately-manned staffs are factors which make for poorly-presented cases on this side.

The remedy, it is clear, is education. The Committee has made a step in the right direction in recommending that the law schools and the bar associations do something about training men to appear before administrative tribunals and to become administrative officials. The thought advanced here is that the recommendation be given wider scope and be made to provide that all lawyers be encouraged to familiarize themselves with administrative law and its processes.

Another part of the general background which stands in need of correction is what may be called the problem of administrative personnel. Incompetence, indifference, and venality are all to prevalent in the administrative departments of all our governments. Dickinson has traced out the relation between this fact and the distrust in which courts hold most administrative processes.⁷⁶ He argues that the problem is a political one and suggests that if the courts in their review of administrative action would refuse to correct errors actually or presumably attributable to incompetence and dishonesty, there would soon enough be sufficient pressure brought for the creation of new and effective political controls of the problem of personnel. This line of argument depicts fairly enough the courts' self-portrait of a divinely-appointed mission to save the world from the wrongs of poor executives and contrasts strangely with judicial unwillingness to question the wisdom of legislatures but the conclusion reached is too far contrary to accepted tradition to have much hope of realization.

Any project of restatement of the technique of judicial review must seriously consider this problem. The task is largely one of the development of a convincing tradition of efficiency and accomplishment. The

76. See note 54, *supra*.

nearest approach, if not the realization of this, has been in the Interstate Commerce Commission. A fitting subject for research and experiment would be to see how that Commission's plan of separation of function and co-ordination of activities could be translated so as to serve the needs of other agencies.⁷⁷ Not to be ignored, yet not to be cavalierly seized upon as an answer, is the question as to how far extension of a "career system" of classified civil service will go to meet the difficulty.⁷⁸ The problem is one to which almost no systematic thought has been given by lawyers but the solution, if one is found, will go as far as anything towards earning for Administrative Law full recognition as a branch of "law." It is no answer to say⁷⁹ that the ideal of a body of experts is seldom realized in the actual practice of government and to conclude⁸⁰ that our only recourse is more judicial supervision. At least there should be inquiry to ascertain whether there are means available of accomplishing the ideal.

A third line of potentially fruitful inquiry is one which has been almost completely lost sight of in current thinking about Administrative Law. This has to do with the need of developing a critique of legislation.

As has been suggested above, the traditional habit of professional thought is to impute to the courts an infinite amount of wisdom and to indulge the trust that they can and will, by virtue of this wisdom, provide protection against executive abuses. Apart from the fact that this line of thought places undue emphasis upon the securing of individual interests to the exclusion of consideration of social interests and assuming that the thought has a substantial basis in fact, there are two objections to making it a guide in the conduct of public affairs. First, with the increase in the number and scope of administrative activities and the constant tendency to limit the jurisdiction of courts to review these activities, it is doubtful whether judicial review can much longer remain an adequate check upon the administrative.⁸¹ Second, to look solely to the courts for relief, overlooking the possibilities of developing effective responsibility in the co-ordinate departments of government is a shameful disregard of sound principles of division of labor.

A great deal can be accomplished in these directions by means of legislation. Matters of inner administrative organization and procedure and of "apportionment of authority between the judicial and the administrative processes"⁸² as well as matters of broad general policy are properly the care of the statute-making body.

77. Cf. LANDIS, *THE ADMINISTRATIVE PROCESS*, 103-105, as to the Securities and Exchange Commission.

78. See Morford, *Administrative Boards and Agencies* (1937) 23 A. B. A. J. 95.

79. A. B. A. 1938 ADV. PROGRAM, 148.

80. *Id.* at 163.

81. The implications of *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) and *Re National Labor Relations Board*, 304 U. S. 333 (1938) on this point are tremendous.

82. A. B. A. 1938 ADV. PROGRAM 157.

The need of legislative attention to these matters of detail is strikingly illustrated by the decisions of the Supreme Court in the Kansas City Stockyards case.⁸³ That was a proceeding under the Packers and Stockyards Act in which the Secretary of Agriculture sought to exercise his statutory power to prescribe rates. There was an elaborate hearing before a trial examiner at which some 10,000 typewritten pages of testimony were taken and some 1000 pages of exhibits and statistics received. The proceeding was then moved to the office of the Secretary, where oral arguments were made before an Assistant Secretary of the Department and written briefs were filed. A rate order was then issued over the signature of the Secretary. The market operators filed a bill in equity in the district court to restrain the enforcement of the rate order. This suit has twice been brought up to the Supreme Court of the United States and at the present writing (over six years after the institution of the proceedings) a final decision on the merits is yet to be reached.⁸⁴

The original bill was dismissed after the district court struck out an allegation, upon information and belief, that the Secretary of Agriculture had not accorded the petitioners the "full hearing" required by the Act, in that he had not personally, before signing the rate order, read the testimony or the arguments of counsel. The supreme court reversed, holding that the allegation was properly in the bill, and that the statute requiring a "full hearing" was not satisfied where the officer making the decision was not familiar with the record upon which the decision was presumably based. After the remand to the district court, the Secretary responded to interrogatories. He testified that he had read the written briefs and the transcript of the oral argument (which had been held before his assistant) and had "dipped into the record from time to time to get its drift." Employees of the Bureau of Animal Industry had digested the record and prepared findings which were submitted to the Secretary but were not shown to the market operators. The rate order, the Secretary concluded, was his independent conclusion "as based on the findings of the men in the Bureau of Animal Industry." The district court again dismissed the bill, but again the supreme court reversed, holding that the procedure revealed in the responses to the interrogatories did not amount to the "full hearing" required by the statute. The keynote of the decision is found in the following language of the opinion of Chief Justice Hughes:

"Congress, in requiring a 'full hearing' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. . . . The requirements of fairness are not exhausted in the taking or con-

83. *Morgan v. United States*, 298 U. S. 468 (1936), 304 U. S. 1 (1938).

84. The *New York Times*, September 1, 1938, carried a dispatch stating that new administrative hearings were planned in the case.

sideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

" . . . In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceedings against the owners of the market agencies. . . .

" . . . What would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect."

Despite the appearance in the opinion of the phrase "due process," it seems clear enough that the decision is based not upon any constitutional limitations on the power of Congress to prescribe a form of procedure, but upon the view that there was not administrative compliance with the statutory requirements. The court applied the fair presumption that when Congress directed that a hearing be held, it intended that there should be a proceeding characterized by the elements of "fair play." In applying the presumption the court relied upon the generally correct proposition that fair play is probably wanting when the adjudicating officer consults *ex parte* with one of the interested parties. An essential factor in the court's application of this proposition in the *Morgan* case was the "interest" of the employes in the Bureau of Animal Industry. On this point, it is interesting to compare a statement by the Secretary of Agriculture on the decision:⁸⁵

"The men of the Bureau of Animal Industry were of very real assistance to me in digesting the 10,000 pages of oral transcript and studying carefully the 1,000 pages of statistical exhibits. It was right that I should rely on them, because these men were employed among other things for just such a purpose. They were not the active prosecutors in the case, as has been assumed."

It is not the purpose here to discuss the question whether the Secretary or the Chief Justice was right on the question of fact. It is quite possible that each was right. It may well be that the court believed that secret consultation with any employe of the Department after argument was a departure by the Secretary from his statutory duty of conducting a "full hearing." The point to be made here is that a careful phrasing of the statute could have eliminated any need for the court speculating as to the exact degree of "interested" *ex parte* advice Congress "intended" to exclude from the concept of fair play.

We have become accustomed, in the conduct of our affairs, to seize upon

85. Letter of Henry A. Wallace to the editor of the *New York Times*, May 8, 1938. See also letter of Frederick H. Wood (counsel for the market operators), *id.* May 15, 1938.

various shibboleths⁸⁶ for guidance. Thus, "consideration" is still the shibboleth of the commercial lawyer, although the doctrine of promissory estoppel has all but robbed that term of significance. In the political world, "Republican" and "Democrat" are still the words which induce the marking of ballots. Likewise, in the field of public law, "hearing" is the shibboleth of the legislator and the judge. Statutes are thought to provide due process of law when they direct that a "hearing" shall be held before adjudication. Sometimes, indeed, the legislature fails to order a hearing as an adjunct to an important phase of administrative action, but apparently leaves it to the administrative officers to set up for themselves the proper safeguards.⁸⁷ Usually, the legislature considers its work done when it enacts that there shall be a hearing, not pausing to consider what should be done about the fact that a hearing may be so perfunctory, or conducted under such circumstances, or by such officers as not to amount to any restriction upon administrative action.

The task of a legislature in this connection is not to set up a rigid code of administrative procedure such as will hamstring administrative officers and deprive them of all discretion, or will cast all administrative procedures in the same mold. The task is to set up minimum standards of conduct for administrative officers (not necessarily the same standards for all officers) by way of elaboration of the general directions contained in the statutes for the conduct of the public business. For instance, to pursue the theme suggested by the *Morgan* case, Congress might well consider whether in the administration of the Packers and Stockyards Act there should be a "proposed report" procedure, modelled after that of the Interstate Commerce Commission⁸⁸ by which a trial examiner, after hearing, submits tentative findings and order, upon which argument is had and which serve as the basis of decision in the particular case. Whether the conclusion reached is in the affirmative or the negative, similar but separate consideration should be given to the question of the desirability and the practicability of applying like procedure in different functions of this and the other departments of the government.

A technique of approach to the problem of developing a critique of legislation is being worked out by a number of distinguished scholars. The late Gerard Henderson, for example, pointed out the dangers inherent in

86. "Shibboleth: 1. Bib. The word by which Gileadite (Galaadites) distinguished the fugitive Ephraimites, who pronounced it sibboleth." Webster's Dictionary.

87. PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES*, ch. 5, enumerates a long list of legislative failures to provide proper procedural safeguards against administrative abuses.

88. I. C. C. Rules of Practice, XIV; SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION*, ch. 4, p. 227 *et seq.* Such a procedure is in fact in operation under the Packers and Stockyards Act by rule of the Department of Agriculture. The rule was adopted after the Kansas City Stockyards proceeding was begun. See Mr. Wallace's letter, note 85, *supra*.

the Federal Trade Commission's institution of "revolving" panels of trial examiners and prosecutors. The tendency, he pointed out, was for the prosecutors to dictate findings which the trial examiners signed and submitted to the Commission.⁸⁹ Van Vleck makes pointed criticism of the statutes which allocate the function of trying deportation cases to administrative tribunals rather than to courts.⁹⁰ Landis points out the desirability of requiring some administrative tribunals to write opinions articulating the reasons for their decisions.⁹¹ Dodd has called attention to the usefulness of provision for administrative review of certain kinds of administrative action.⁹² Thus, the trail has been blazed. What remains, is first a process of expansion and consolidation. Research into the nature and function of the various institutions of state and national governments, along the lines indicated by Patterson and Sharfman, should be encouraged, and from these researches efforts should be made to extract general principles of either universal or particular application.

The method of administrative law need not be essentially different from that of the physical sciences. It is ideally the inductive one of translating the facts of experience into general principles governing future action, rather than deducing rules of action from generalities postulated *a priori*. To cite a rough analogy: the automobile industry of today is the product of an evolution covering many years. But the evolution was a controlled one. The producers placed the first crude "gasoline buggies" on the roads and then, partly through laboratory research, but chiefly through critical observation of the machines in actual operation, they have been able to preserve merits and eliminate defects, and finally to manufacture the streamlined approaches to mechanical perfection which transport the population of today. Administrative law, older than many of the physical industries, is still in a stage of underdeveloped adolescence. It has gathered a wealth of experience, but too little effort has been made to elucidate and coordinate this experience for purposes of improving the process. The scientific method of improving administration need not be limited to details of procedure but is adapted as well to matters of substance. Although it is true that, "modern legislators, if they are to carry on the functions of democracy, cannot become tea tasters,"⁹³ it is quite possible that vague and elusive standards governing administrative action, unavoidable at the outset of an experiment in public regulation, may in many cases be capable of clarification and definition as a result of experience in the particular type of regulation.

89. HENDERSON, *THE FEDERAL TRADE COMMISSION*, 85.

90. VAN VLECK, *ADMINISTRATIVE CONTROL OF ALIENS*, 248.

91. LANDIS, *THE ADMINISTRATIVE PROCESS*, 105, 106.

92. DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION*, 811.

93. Oppenheimer, *The Supreme Court and Administrative Law* (1937) 37 *COL. L. REV.* 191.

Finally, there remains the question of a means to turn this method to practical utility. Governmental reforms are not brought about merely by encouraging the writing of books. They are generally achieved only as the result of well planned and long sustained pressure brought to bear upon those in control of affairs. Legislative reform of administration to date has been the result largely of pressure brought to bear by the administrative itself, an efficient and continuous pressure, but not one necessarily calculated to be in the best interests of the administrative process as a whole. Each administrator, in seeking amendatory legislation, has in mind chiefly the improvement of his own efficiency, and only secondarily, if at all, the object of facilitating the attainment of the ends of the whole body of law. What must be devised is some instrumentality, impartial yet practical, of pressure to secure the enactment into law of principles and rules designed to reach the end already mentioned: maximum security of individual interests consistently with highest promotion of social interests.

To summarize briefly: The Committee on Administrative Law of the American Bar Association is in a position, and is therefore subject to a certain obligation, to enter upon a definite, systematic program looking to the development of Administrative Law in this country along lines which will best insure its being an effective and satisfactory instrument of justice. To that end, its program must be broad and far-seeing enough to enable its members to look beyond subconscious prejudices and inculcated notions of an ideal simplicity of governmental structure. Facing realities, they must recognize the existence of the administrative as a permanent institution. They must recognize the fact of an accepted doctrine of judicial supremacy, and the further fact that at present, and not without cause, the judiciary is distrustful of the administrative, with the result that much administration is obstructed by an excess of judicial supervision. They should cast about for some means of breaking down this distrust by destroying its causes. The suggested fields of activity are: 1. Education of the bar to an understanding of public law objectives and processes; 2. Improvement of administrative personnel; 3. Development of a technique of legislative control of the evolution of the administrative.