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The Proposed Administrative Procedure Act

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The Proposed Administrative Procedure Act†

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The proposed Federal Administrative Procedure Act, sponsored by the American Bar Association and drafted by its Special Committee on Administrative Law, has been said to provide the most fertile ground for statesmanship in the field of the administration of justice since the Judiciary Act of 1789. This view seems not only to be a bit of overemphasis but it is quite in line with the approach of the American Bar Association toward the growth of administrative law in the past ten or twelve years, during which repeated efforts have been made to obtain legislation, such as the Walter-Logan bill, which, if enacted, might easily have thwarted a necessary and inevitable development of the administrative process.

The bill under consideration here is entitled "A Bill to Improve the Administration of Justice by Prescribing Fair Administrative Procedure," and was recently introduced in the Senate by Senator McCarran of Nevada and in the House by Congressman Sumners of Texas.[1]

The bill marks the culmination of more than five years of continuous study and drafting by the Special Committee on Administrative Law and by the association itself following the veto by the President of the Walter-Logan bill, the association's first effort to secure such legislation.

The bill is also said to mark the commencement of a new responsibility upon association members and lawyers generally to promote the enactment of the measure.

This paper is an attempt to evaluate the merits of the proposed act for the members of the Colorado Bar Association at this, its annual meeting, in order that they may be more fully advised and in a better position to make an intelligent determination when the association considers a resolution to approve the bill and urge its enactment, and thereby, as individual members, responding to President Henderson's appeal to "constitute yourself a committee of one to do what you can to aid in securing favorable consideration of the association's immediate

†An address before the Colorado Bar Association, October 14, 1944.

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[1]S. 2030 and H. R. 5081, 78th Cong., 2d Sess.

objective—the improvement of the administration of justice through the adoption of a statutory framework of fair administrative procedure."

It is indeed a grave responsibility which confronts the bar associations and the lawyers of this country. We should make certain that the proposed act would actually improve the administration of justice and that it truly prescribes fair administrative procedure. We should be certain that the public interest and welfare will properly be protected; that the act will not impede the normal development of administrative law, and that it is not an effort to emasculate the growth of new instrumentalities designed to meet the will of the people in a rapidly expanding society in periods of stress and strain.

These points are raised because frequently in recent years advocates of this type of legislation have used, somewhat carelessly, cliches such as "administrative absolutism," "bureaucracy," "dictatorship," "the issue here is constitutional government vs. bureaucratic dictatorship," "the New Despotism," this "Wonderland of Bureacracy," this "pattern for tyranny."

Now, what is this thing which has so frightened members of the Congress, bar associations, lawyers, the press and some of the general public? What is this thing which brings about such violent attacks? Are the very foundations of our government being undermined? Are such fears well-founded? I think not. "Administrative law," "the administrative process," "administrative tribunals" do not appear so sinister if one understands something of the origins, developments, and characteristics of the administrative process and its proper evaluation in our scheme of government.

It therefore seems appropriate before giving a synopsis of the proposed (Administrative Procedure) act to give something of the background of administrative law in this country, as well as to trace the steps leading to the introduction of the McCarran-Sumners bill.

James M. Landis in the Storrs Lectures given at Yale University in 1936, later published in book form as "The Administrative Process," says in the introduction:

> "The last century has witnessed the rise of a new instrument of government, the administrative tribunal. In its mature form it is difficult to find its parallels in our earlier political history; its development seems indigenous. The rapidity of its growth, the significance of its powers, and the implications of its being are such as to require notice of the extent to which this new 'administrative law' is weaving itself more and more into our governmental fabric.
>
> "In terms of political theory, the administrative process springs from the inadequacy of a simple tri-partite form of government to deal with modern problems. It represents a striving to

adapt governmental technique that still divides under three rubrics to modern needs and, at the same time, to preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American government."

Landis here refers to the doctrine of separation of powers, an old political maxim, based upon the division of governmental powers in the federal and state constitutions into the legislative, executive and judicial. This tripartite ideal of government, and the checks and balances to be found in our constitutions have resulted in fineness of logic-chopping by our courts, to uphold the separation of powers, and for a tendency on their part to establish new categories of quasi-legislative and quasi-judicial powers when they find an executive agency infringing on the powers of either of the other branches of government.

Dean Landis then states:

"The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the situation, agencies were created whose functions embraced the three aspects of government. Rulemaking, enforcement, and the disposition of competing claims made by contending parties were all intrusted to them. As the years passed, the process grew. These agencies, tribunals, and rule-making boards were for the sake of convenience distinguished from the existing governmental bureaucracies by terming them 'administrative.' The law the courts permitted them to make was named 'administraitve law,' so that now the process in all its component parts can be appropriately termed the 'administrative process'."

The term "administrative law" thus came into general use and the administrative process has resulted in a voluminous literature and the inclusion of courses in "Administrative Law" in most of the law schools.

Since the administrative process deals with the relationships of governmental agencies to persons it has necessarily been associated with the term "bureaucracy." From bureaucracy to autocracy to dictatorship is a simple transition in some people's thinking. The literature of the subject abounds with fulminations. It treats the administrative process as if it were an antonym of that supposedly immemorial and sacred right of every English man, and every American, the legal palladium of "the rule of law." The process is denounced by worthy lawyers, legislators, bar associations and politicians as heralding the death knell of ancient liberties and privileges. The independent administrative agencies of the federal government have been said to constitute "a headless fourth branch" of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers whose institution did "violence to the

basic theory of the American Constitution that there should be three major branches of the government, and only three."

Such glorification of the doctrine of the separation of powers obscures rather than clarifies thought. In spite of this chorus of abuse and tirade, the growth of the administrative process shows or will show little signs of being halted.

The administrative process in the federal government is not new. On the contrary it is as old as the government itself; and its growth has been virtually as steady as that of the Statutes at Large. The growth has been pragmatic. Congress has passed laws, and has resorted to the administrative device in the framing of the laws and in the practical effort to meet particular needs.

The nine executive departments and the eighteen or more independent agencies are examples of administrative agencies, but so also are the many subdivisions of departments termed "bureaus," "offices," "administrations," "services" and the like, which have a substantial measure of independence in the department's internal organization and in the conduct of their adjudicative or rule-making activities. At the time of the Attorney General's Committee Report, there were 51 administrative agencies of the type which were deemed to be parts of the administrative process. The war has added to that number about 25 more, making a total of about 75 strictly administrative agencies. There are, of course, other agencies which do not have rule-making or adjudicatory powers.

Since the administrative process has developed in this fashion and without a definite plan, it invites comprehensive study with a view to coordination and improvement and not blind repeal or emasculating and unthinking legislation. It should be understood that the administrative process has deep roots in American history and it should be recognized that it embodies the practical judgments of successive congresses and presidents, and of the people. It is no socialistic, foreign ideology, plotted by the so-called palace guard for the purpose of substituting a government of men for a government by law. It should be and can be improved and developed into an ever-increasing instrumentality for efficient government in an increasingly complex society where government is certain to be charged with more and more functions, which in a simple, ecnomic society of earlier days were either non-existent or could easily enough be left to the ordinary legislative, executive or judicial processes.

The American Bar Association has for many years been preparing itself for leadership in undertaking to effectuate more adequate legislative and judicial guidance or control of the development of administrative law. Through its Special Committee on Administrative Law, first established in 1933 and continued annually to this time, it had made many studies and reports to the association.

In recent years the first substantial recommendation of the Special Committee on Administrative Law was the establishment of a Federal Administrative Court.[2] That effort proved abortive. It was succeeded by the legislative proposal known generally as the Walter-Logan bill, which was sponsored by Congress and vetoed by the President.[3] Shortly thereafter the Attorney General's Committee on Administrative Procedure made its final report, including legislative recommendations by both a majority and a minority of that committee.[4]

The American Bar Association did not adopt either of those measures as its choice, nor did it continue its backing of the Walter-Logan bill; instead, it adopted a declaration of principles which it felt should be included in any adequate federal legislation and declared that, of the existing proposals, that of the minority of the Attorney General's committee more nearly met the principles so declared.[5]

Thereafter a subcommittee of the Senate Judiciary Committee held extensive hearings on the proposals growing out of the Attorney General's committee hearings,[6] but suspended consideration in the summer of 1941 because of the imminence of war and the then declared national emergency. Accordingly, for the next year and a half the Special Committee on Administrative Law devoted its energies to the development of the Conference on Administrative Law and other matter covered in its annual reports.[7]

The House of Delegates of the association, on August 26, 1943, adopted recommendations authorizing the Special Committee on Administrative Law (1) to draft a bill respecting the basic problems and requisites of fair administrative procedure, and (2) upon the approval of such a bill (a) to publicize it and take all necessary steps to secure its consideration and adoption, and (b) to make special recommendations to congressional committees with reference to legislative action in connection with specific administrative agencies or powers as may arise.[8]

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[2]S. 1835, 73d Cong., 1st Sess.; S. 3676, 75th Cong., 3d Sess.; 58 A. B. A. Rep. 203, 426 (1933); 59 A. B. A. Rep. 539 (1934); 60 A. B. A. Rep. 136 (1935); 61 A. B. A. Rep. 220, 237, 721 (1936).

[3]62 A. B. A. Rep. 262, 790 (1937); 62 A. B. A. Rep. 156, 333 (1937); 63 A. B. A. Rep. 281 (1938); 65 A. B. . Rep. 215 (1940); H. R. 6324, 76th Cong., 3d Sess.; House Doc. No. 986, 76th Cong., 3d Sess.; 66 A. B. A. Rep. 143-144 (1942).

[4]Administrative Procedure in Government Agencies, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941).

[5]66 A. B. A. Rep. 439 (1941); 67 A. B. A. Rep. 226 (1942); 68 A. B. A. Rep. 252 (1943).

[6]Administrative Procedure, on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess., three parts plus appendix.

[7]67 A. B. A. Rep. 226 (1942); 68 A. B. A. Rep. 249 (1943).

[8]68 A. B. A. Reports 147, 254 (1943).

A first draft of such general federal legislation accompanied the 1943 report of the committee. A second tentative draft was printed in 30 A. B. A. Journal 7, January, 1944. A further amendment of this draft was presented to and approved by the House of Delegates, February 28, 1944, and was printed in 30 A. B. A. Journal 226, April, 1944, and as stated earlier was introduced in the Senate by Senator McCarran as S. 2030 and in the House by Mr. Sumners as H. B. 5081, 78th Cong., 2d Sess.[9]

With this perhaps over-long introduction and background material in mind, I shall now proceed to discuss the purposes, scope and affect of the bill if enacted and to give an analysis or synopsis of its principal features with comments interspersed as to what I consider to be its good and bad points.

The McCarran-Sumners bill is designed primarily to secure publicity of administrative law and procedure, to require that administrative hearings and decisions shall be conducted in such manner as to preclude the secret reception of evidence or argument, to restate but not expand the right of and procedures for judicial review, and to foster the foregoing by requiring an intra-agency segregation of deciding and prosecuting functions and personnel. No attempt is made to require formal administrative hearings where the law under which the agency operates has not so required. No attempt is made to limit existing administrative authority. Agencies are simply confined to the scope of their authority.

The proposed act is said by its drafters to be designed to achieve four essential and simple purposes:

> "(1) It requires administrative agencies to publish their organizations and procedures, and to make available to public inspection their orders and releases.
>
> "(2) As to rule making, it requires that agencies publish notice and at least permit interested parties to submit views or data for consideration.
>
> "(3) As to adjudication, it provides that, in the absence of agreement through informal methods, agencies must accord the parties notice, hearing, and decision before responsible officers, with provision for the segregation of deciding and prosecuting functions.
>
> "(4) As to judicial review, it provides forms of review actions for the determination of all questions of law in all matters not expressly committed to executive discretion."

The short title of the act is given as the "Administrative Procedure Act."

[9]See Analysis of said bills, 30 A. B. A. Journal 479, August (1944).

Section 1 defines the terms "Agency," "Rule," "Rule Making," "Adjudication" and "Order." The bill is concerned primarily with administrative agencies, that is, the Congress, the courts the governments of the possessions, the territories and the District of Columbia are excluded, and to judicial review of their regulatory actions. It applies to functions rather than enumerated agencies and deals comprehensively with:

(1) The issuance of "rules," by which is meant the written statement of any regulation, standard, policy, interpretation, procedure, requirement, or other writing issued or utilized by any agency, of general applicability and designed to implement, interpret, or state the law or policy administered by, or the organization and procedure of any agency; and "rule making" is the administrative procedure for the formulating of a rule, and

(2) the "adjudication" of particular cases, meaning the administrative procedure of any agency, and

(3) the issuance of "orders" by which is meant its disposition or judgment, whether or not affirmative, negative, or declaratory in form, in a particular issuance other than rule making and without distinction between licensing and other forms of administrative action or authority.

These terms include the three typical administrative functions which bear upon private rights and parties.

The bill is further limited in scope since war agencies and functions are excluded *in toto*, except as to the requirements in Section 2 that they publish their procedures and make their orders available for public inspection (Section 1), which in turn is not mandatory as to military, naval or diplomatic functions (Section 2).

No fault is found with respect to the definition section, since the terms "agency," "rule," "rule making" and "order" are essentially those included in the Federal Reports Act of 1942,[10] the Federal Register Act[11] and the Federal Register Regulations,[12] in which the essential language is "general applicability and legal effect." It is predicted, however, that many, if not most, old line agencies such as the Interstate Commerce Commission and the Federal Trade Commission will be excluded from the scope of the act before final passage, and that its terms will be limited to the newer agencies as was done in the Walter-Logan bill.

Section 2 of the act is headed "Public Information" and requires, except as to military, naval or diplomatic functions of the United States requiring secrecy in the public interest, the publication concurrently of

[10] (Public No. 831, 77th Cong., 2d Sess., Dec. 24, 1942).
[11] Sec. 4, 5, and 11 (a), 49 Stat. 500, 44 U. S. C. 304, 305 (a) and 311 (a).
[12] 1 C. F. R. 2.1 (b), as revised by 6 F. R. 4397.

all rules concerning the organization of the agency, substantive regulations, statements of general policy and all procedures; the preservation and publication, or the making available to public inspection of all rulings on questions of law, and all opinions rendered or orders issued in the course of adjudications, and the filing of releases with the Division of the Federal Register. To these provisions are added certain substantive prohibitions regarding the issuance of publicity reflecting adversely upon any person, product, commodity, security, private activity, or enterprise otherwise than by issuance of the full texts of authorized public documents, impartial summaries of the positions of all parties to any controversy, or the issuance of legal notice of public proceedings within its jurisdiction. These obscure substantive provisions appear to have no proper place in a procedural act. In many instances pitiless publicity is a useful device. These last-mentioned provisions would be most difficult to administer. There is, of course, no objection to giving the public all possible information through publication, inspection and filing.

Section 3 is an important section on rule making, one of the major functions of administrative agencies. The first subsection (a) on notice requires every agency to publish general notice of proposed rule making including (1) a statement of the time, place and nature of any public rule-making procedures, (2) reference to the authority under which the rule is proposed, and (3) a description of the subject and issues involved. This requirement does not apply to cases in which the agency is authorized by law to issue rules without a hearing and notice is impracticable because of unavoidable lack of time or other emergency. The subsection applies only to substantive rules, and is not mandatory as to interpretive rules, general statements of policy, or rules of agency organization or administrative procedure.

The second subsection (b) provides procedures affording interested parties an adequate opportunity to participate in rule making through (1) submission of written data or views, (2) attendance at conferences or consultations, or (3) presentation of facts or argument at informal hearings. This subsection applies only to the type of rules for which notice is required by the first subsection. Where a law specifically requires that rules be issued only upon a formal hearing, separate procedures are set forth in Sections 6 and 7. Public participation in the rule-making process does not appear to be necessary or desirable to the extent provided in this subsection. It would prove costly, time consuming and would impede the efficiency and effectiveness of the agency.

The third subsection (c) provides that every agency authorized to issue rules shall afford any interested person the right to petition for the issuance, amendment, or recision of any rule. Few agencies have regular procedures whereby private parties may petition with respect to rules.

Both the majority and the minority of the Attorney General's Committee proposed that such a provision be included in legislation.[13]

Section 4 of the proposed act covers the subject of "adjudication" and provides that in every case of administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required to be determined only after opportunity for an administrative hearing (except to the extent that there is directly involved any matter subject to a subsequent trial of the law and facts *de novo* in any court notice shall be given [subsection (a)]).

The introductory double exception to the section removes from the operations of Sections 4, 6, and 7 all administrative procedures in which the law concerned does not require rules or orders to be made upon a hearing and all matters subject to a subsequent trial *de novo* in any court.

Of the two introductory exceptions, that limiting the adjudication procedure to those cases in which statutes require a hearing is the more significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has intentionally or traditionally refrained from requiring an administrative hearing.

The second exception rules out such matters as the tax function of the Bureau of Internal Revenue (which are triable *de novo* in the Tax Court), the administration of the custom laws (triable *de novo* in the customs courts), the work of the Patent Office (since judicial proceedings may be brought to try out the right to a patent), and subjects which might lead to claims determinable subsequently in the Court of Claims. The second exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement.

Subsection (a) of Section 4 provides that the agency shall give due and adequate notice in writing specifying (1) the time, place, and nature of the proceedings, (2) the precise legal authority and jurisdiction, and (3) the matters of fact and law in issue. Adequate notice is certainly a prerequisite to a fair hearing. "Room remains for considerable improvement in the notice practice of many agencies.[14] A provision is included which provides that the statement of issues of fact in the words of the statutes shall not be compliance with the notice requirement.

Subsection (b) provides that in every case after the notice required by subsection (a) is given, the agency shall afford all interested parties the right and benefit of fair procedure for the settlement or adjudication

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[13]Final Report, pp. 195, 230.

[14]Final Report, Attorney General's Committee, p. 63.

of all relevant issues through (1) opportunity for informal submission and full consideration of facts, claims, arguments, offers of settlement, or proposals of adjustment, and (2) thereafter, to the extent that the parties are unable to determine any controversy by consent, formal hearing and decision in conformity with Sections 6 and 7. Two lengthy provisions concerning cases resting upon physical inspection or test, permitting reinspection and retest and providing for summary action in certain cases, all included. Some agencies either neglect or preclude informal procedures, although now even courts through pretrial proceedings dispose of much of their business in that way. There is even more reason to do so in the administrative process, for "informal procedures constitute the great bulk of administrative adjudication and are truly the lifeblood of the administrative process."[15] In so far as possible, cases should be disposed of through conferences, agreements, or stipulations, hence the inclusion of such informal methods in the act, and their application to inspections and summary proceedings, will strengthen the administrative arm and serve well the interests of private parties.

Subsection (c) provides for declaratory rulings upon petition of any proper party in order to terminate a controversy or to remove uncertainty as to the validity or application of any administrative authority, rule or order with the same effect and subject to the same judicial review as in the case of other rules, or orders of the agency. The administrative process has been slow to adopt declaratory judgment procedures, although courts, particularly state courts, have long recognized the validity of such procedures. The Attorney General's committee strongly recommended that declaratory rulings be made a part of the administrative process and subject to judicial review.[16]

Section 5 of the bill concerns certain ancillary matters in connection with any administrative rule making, adjudication, investigation, or other proceeding or authority, such as appearance, the conduct of investigations, subpoenas and denials.

Subsection (a) of the section recognizes the right of parties to appear before administrative agencies, in person or by counsel and be accorded opportunities and facilities for the negotiation, information, adjustment, or formal or informal settlement of any case. A provision recognizes that, in the administrative process, the right to counsel shall be accorded as of right just as recognized by the Bill of Rights in connection with judicial process, and as proposed by both majority and minority of the Attorney General's committee.[17] A second provision is designed to do what is possible to remedy delays in the administrative

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[15]Final Report, Attorney General's Committee, p. 35.

[16]Final Report, pp. 6, 30-33.

[17]Final Report, pp. 193, 219.

process, since "expedition in the disposition of cases is commonly a major objective of the administrative process."[18] It relieves the private parties from consequences of unwarranted or avoidable administrative delay, provides that cases shall be promptly set and determined, and makes essential provisions for cases in which licenses are required by law but administrative agencies fail to act. In such cases the licenses are deemed granted after 60 days.

Subsection (b) relates to the conduct of investigations, stating that they shall be confined to the jurisdiction and purposes of the agency to which the authority is delegated.

Subsection (c) relating to subpoenas is designed (1) to assure that private parties as well as agencies shall have a right to such subpoenas, (2) limit the showing required of private parties so that they may not be required to disclose their entire case for the benefit of agency personnel, and (3) recognize that a private party may contest the validity of an administrative subpoena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The haphazard and often unfair methods of issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's committee.[19]

Subsection (d) provides that every agency shall give prompt notice of denials accompanied by the grounds for such denial and any further administrative procedures available.

No exception is taken to any of the ancillary matters included in Section 5.

Section 6 and 7 of the bill are of the greatest importance, since they provide the essential procedures thought to constitute a full and fair hearing and proper decisions or findings thereafter.

Section 6 on "Hearings" states that no administrative procedure shall satisfy the requirement of a full hearing unless [subsection (a)] the case shall be heard (1) by the ultimate authority of the agency or (2) by one or more subordinate hearing officers designated by the agency from members of the board or body which comprises the highest authority therein, state representatives authorized by law to preside at the taking of evidence or examiners appointed subject to the civil service or other laws, at salaries ranging from $3,000 to $9,000. Numerous provisions are inserted respecting the functions of such presiding officers.

In subsection (b) presiding officers are given power to (1) administer oaths and affirmations, (2) issue subpoenas, (3) rule upon offers of proof and receive evidence, (4) take or cause depositions to be taken,

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[18]Final Report, pp. 327, et. seq.

[19]Pp. 124-125, 414-415.

(5) regulate the course of hearings and the conduct of the parties, (6) hold informal conferences, (7) dispose of motions, etc., and (8) make or participate in decisions in conformity with Section 7.

Subsection (c) relates to evidence. The principles of relevancy, materiality, probative force, and substantiality as recognized in judicial proceedings of an equitable nature shall govern the proof, decision, and administrative or judicial review of all questions of fact. Thus it appears that no attempt is made to require the application of the so-called "common law" or "jury trial" rules of evidence in administrative hearings. This is proper.[20] It is in line with basic principles of evidence followed among administrative agencies.[21] This subsection contains other pertinent provisions regarding burden of proof, the rights of cross-examination and rebuttal, admission of written evidence, official notice, and a declaration that no sanction, permission or benefit shall be imposed or granted, or permission or benefit withheld except upon evidence which on the whole record is competent, credible, and substantial.

Subsection (d) enumerates the materials which shall constitute the record and provides that it shall be available to all parties.

Section 7 contains provisions relating to decisions for the initial submission of briefs, proposed findings and conclusions, and oral argument for consideration in preparing an initial decision, or where subordinate officers preside, an intermediate report, the details of such report or decision, provisions for administrative review, the consideration of cases, the findings and opinions and the service thereof upon all the parties.

The provisions of these two sections on fair hearings and findings or decisions should serve to meet most of the heated criticisms heretofore directed against administrative agencies in the conduct of hearings. Most well-run agencies have already provided for such procedures.

Section 8 relates to penalties and benefits. The first subsection (a) prohibits the imposition of extra-legal sanctions. Rules may not enlarge such authority [Subsection (b)], nor may orders do so [Subsection (c)]. Subsection (d) prohibits the imposition of burdens in issuing licenses except as provided by law, or the withdrawal of licenses except in cases of wilfulness or stated cases of urgency, without warning notices giving an opportunity for the correction of conduct questioned by the agency.

Subsection (e) is designed to place limitations upon the retroactive operation of rules or orders whether such operation is designed as a penalty or for cause. These provisions seem proper and wise.

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[20]Final Report, p. 70.

[21]Final Report, p. 70.

Section 9 treats of judicial review and constitutes the longest, most involved and most controversial features of the proposed act. Chapter VI of the Final Report of the Attorney General's committee[22] gives an extensive analysis of this important but technical subject from the viewpoint of the majority of the committee. It concludes that dissatisfaction with the existing standards as to the scope of judicial review derives largely from dissaisfaction with the fact-finding procedures employed by the administrative bodies, that is, whether or not such action inspires confidence, and assumes that if the notice, hearings and finding procedures are adopted as recommended they will obviate the reasons for change in the area and scope of judicial review.

However, the minority of the committee, Messrs. McFarland, Stason and Vanderbilt, was of the contrary opinion and thought that Congress should provide by general legislation for both the availability and scope of judicial review.[23] It therefore included in its proposed bill a quite elaborate section on judicial review.[24] In successive drafts, and in the proposed act here under discussion, the judicial review section became increasingly elaborate and involved until it either means nothing at all or else its adoption would result in seriously crippling the administrative process and impose upon the courts a hopeless burden and thus substitute the judicial for the administrative process.

With this background, I shall attempt as briefly as possible to describe the contents of Section 9 on judicial review.

There is an introductory limitation by which there is excluded any matter subject to a subsequent trial *de novo* or judicial review in any legislative court such as the Customs Court, the Court of Customs and Patent Appeals, the Tax Court, or the Court of Claims.

Subsection (a) provides that any party adversely affected by any administrative action, rule or order within the purview of the act or otherwise presenting any issue of law shall be entitled to judicial review thereof in accordance with this section, and reviewing courts are given plenary power with respect thereto. I shall not attempt here to make crystal clear what "an issue of law" is as distinguished from "an issue of fact" or a mixed issue of law and fact. I suspect the courts will wrestle with that problem for a long, long time.

Subsection (b) states the types of available review proceedings that are statutory and non-statutory and enumerates declaratory judgments as one such type. A further provision authorizes an action for review against the agency by its official title as well as the head officer or officers, or any of them.

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[22]Pp. 75-95.

[23]Final Report, pp. 209-212.

[24]Section 311, Final Report, pp. 245-247.

Subsection (c) relates to courts and venue, and contains provisions as to the transfer of review proceedings, amendment thereof, and general provisions to assure that the rights of parties will not be defeated by complicated court and venue provisions of law defects pointed out by the Attorney General's committee.[25]

Subsection (d) on reviewable acts, states that any rule shall be reviewable upon its judicial or administrative application or threatened application, and, whether or not declaratory or negative in form or substance, except those matters expressly committed by law to absolute executive discretion. Only final actions, rules or orders, or those for which there is no other adequate judicial remedy are reviewable; in other words, a recognition of the principle of the exhaustion of administrative remedies.

Subsection (e) deals with interim relief, such as stay orders, in elaborate fashion.

Subsection (f), on scope of review, is the heart of Section 9. The drafting committee states this subsection does not attempt to expand the scope of judicial review, nor reduce it directly by implication. "Nor is it possible to specify all instances in which judicial review may operate. Subsection (f), therefore, seeks merely to restate the several categories of questions of law subject to judicial review."

The essential words are directly quoted:

"* * * Upon such review, the court shall hold unlawful such act or set aside such application, rule, order, or any administrative finding or conclusion made, sanction or requirement imposed, or permission or benefit withheld to the extent that it finds them (1) arbitrary or capricious; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory authority, jurisdiction, or limitations or short of statutory right, grant, privilege, or benefit; (4) made or issued without due observance of procedures required by law; (5) unsupported by competent, material, and substantial evidence, upon the whole record as reviewed by the court, in any case in which the action, rule, or order is required by statute to be taken, made or issued after administrative hearing, or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial *de novo* by the reviewing court."

Every clause, phrase and word of this quotation deserves extensive ad intensive study to determine its true significance. What its effect would be in actual operation no one can say. As a whole I am of the opinion that this subsection goes entirely too far, is dangerous and would result in an impossible substitution of the judicial for the administrative process and thus deprive our jurisprudence of that process or else delay

[25]Final Report, pp. 92-95, 201-202.

its proper and normal development. This subsection constitutes a bold and ambitious effort on the part of the critics of administrative law to kill it or nullify it before it has had an opportunity to prove its true worth. Similarly, conservative common law judges and lawyers have fought the development of equity and most every other judicial reform.

Subsection (g) provides that judgments of original courts of review shall be appealable in accordance with equity law and in the absence thereof, by the Supreme Court upon writs of certiorari.

Subsection (b) recognizes that all other provisions of law relating to judicial review shall remain in effect unless inconsistent with Section 9, except where Congress has forbidden it or broadened it.

Section 10 relates to separations of functions so as to achieve an internal segregation of deciding and prosecuting personnel. The minority of the Attorney General's committee thought that there should be a complete separation of functions—that is that hearings should be held and decisions made by an administrative tribunal separate from the agency engaged in investigations and prosecutions or by a court.[26] The majority of the committee thought this unnecessary and undesirable, holding that the problem is simply one of isolating those who engage in the adjudicative activity.[27] This section follows quite closely the view of the majority rather than of the minority.

Section 11, the concluding section of the proposed act, includes the usual provisions respecting the construction and effect of the act and certain other technical matters.

The proposed Administrative Act represents one of three conflicting doctrines of public administration now struggling for domination of the federal government. Blachley and Oatman in "Federal Regulatory Action and Control" have called these three doctrines (1) the doctrine of executive management; (2) the doctrine of the judicial formula; (3) the revisionist doctrine.

The essential feature of the doctrine of executive management is the assertion that all administrative activities of the federal government (except those of a quasi-judicial nature) should be under the control of the Chief Executive.

Those who advocate the doctrine of the judicial formula would require the administrative process to act in so far as possible, according to the judicial formula of notice and hearing followed by a decision, and would subject to judicial review practically every act which would even remotely affect personal and property rights.

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[26]Final Report, pp. 203-209.

[27]Final Report, pp. 55-57.

The revisionist doctrine sees in the present federal administrative system a fairly satisfactory adaptation of structure and relationship to function. At the same time it advocates improvement.

There are many objections to the first doctrine which need not be developed here.

The doctrine of the judicial formula of public administration is largely the product of the Special Committee of the American Bar Association, the activities of which have been mentioned herein. The chief criticism of the present system offered by it and the association may be expressed in two words, "administrative absolutism." The proposals of the committee at various stages have been embodied in bills which have been mentioned and in the proposed Administrative Act just described and commented upon. In my opinion the doctrine of the judicial formula as embodied in the act is wrong in its fundamental objectives. Although some of the doubtful features from a constitutional standpoint and some of the most rash departures of earlier bills have been eliminated in the proposed act, yet its animating purpose, the desire to subject every possible disagreement between the individual and the administrative agency to complete control by the courts, is opposed to the inevitable, necessary and useful evolution of administrative procedures and administrative and judicial controls that have been a notable feature of the federal government during more than a half century. The theory is based on the moribund concept that law cannot prevail or justice be done except through the courts. It fails to accord to the administrative process the degree of power and finality which the courts themselves, applying the laws under the Constitution of the United States, have recognized as belonging to that process. It looks backward and tries to revive the very system of judicial regulation of business and industry which proved so impossible as to lead to the establishment of regulatory agencies. It destroys and is not constructive. It offers no real protection to the citizen but does menace effective administration. It rests upon dead theory instead of evolving reality. The doctrine of the judicial formula should be discarded and rejected. It appears that the "tendencies toward administrative absolutism," so feared by certain advocates of the proposed act and its predecessors, are largely non-existent.

The revisionist doctrine, on the other hand, sees in the present system of federal administration a vast complex of organizations performing a multitude of functions, employing a wide variety of methods and procedures, and subjected to numerous types of control, carried on within a constitutional framework, based on individual rights, adequately protected. The administrative process has developed step by step to meet everyday needs. Changes which are necessary should be made to improve it and should not be designed to destroy it. It was with this idea in mind that the Attorney General's committee was appointed in 1939 and car-

ried on its painstaking research for two years or more. Its Final Report is an imperative for one who would be fully informed of the issues involved here. The majority of the committee recommended (1) the establishment of an Office of Administrative Procedure under a director with an advisory committee; (2) the publication of rules and other information, and certain safeguards with respect to rule making; (3) administrative adjudication through a system of independent intra-agency hearing commissioners such as is now in use in the OPA, and (4) the power to issue declaratory rulings. Specific recommendations were made concerning individual agencies, many of which recommendations have been adopted. It made no suggestions for judicial review. It summarily rejected the idea of the minority of the committee that it was feasible to draft a "Code of Standards of Fair Administrative Procedure," although such a code was included in the Final Report, and as I have indicated the proposed act is its present form.

Progress in the administrative process can be made (1) by maintaining the independence of regulatory agencies; (2) by further developing administrative rule making and adjudication; (3) by more exact differentiation of the various forms of administrative action, and (4) by simplifying administrative judicial procedure, and, where possible, by making it more uniform.

These things will leave the administrative system intact, will add to its strength and stability, and will broaden and develop it to meet the expanding needs of a living democratic society. The adoption of the proposed act would have quite the opposite effect.

Help!

The Selective Service Advisory Board is seriously up against it because of a scarcity of attorneys willing to devote one hour a week to assist in processing selectees. A couple of years ago, it was different as there were plenty of volunteers and lots of work. The work dropped off and at times the attorney would sit over at headquarters for his hour with nothing to do. He thus gained the impression that he really wasn't needed and got out of the habit of going. It is necessary for someone to be on the job every hour, even though he might not be particularly busy, as otherwise some selectees might not receive help. A few of the faithful are still on the job, and are being worked overtime.

It will be greatly appreciated if lawyers will volunteer for this patriotic duty. It shouldn't be too great a hardship to devote one hour a week to helping the eighteen-year-olds and those discharged from the armed forces.

Please write or telephone W. D. Wright, Jr., 722 Symes Building, Keystone 7941, and say "Yes."

Joint Invitation and Summons

TO ALL MEMBERS OF THE COLORADO BAR ASSOCIATION AND THE DENVER BAR ASSOCIATION, GREETING:

The honor of the presence of yourselves and your wives, husbands, ladies and escorts is requested at a joint Dinner Meeting of The Colorado Bar Association and The Denver Bar Association on Saturday evening, February 24, 1945, at 7 o'clock P. M. in the Lincoln Room of the Shirley-Savoy Hotel, Denver, Colorado.

The Speaker: HONORABLE DAVID A. SIMMONS
President of
The American Bar Association and
Immediate Past President of
The American Judicature Society

The Toastmaster: HONORABLE HENRY MCALLISTER
Of the Denver Bar

ADDITIONAL ENTERTAINMENT BY THE "MEN OF THE WEST" QUARTET AND BY MILTON SHREDNIK'S KOA STRING TRIO

The Dinner will be informal and the price $2.00, which will include tax and tip. Please purchase tickets from, or make reservations with, either of the undersigned Secretaries promptly because food rationing requires us to make an accurate attendance guarantee.

BENJAMIN E. SWEET
President of The
Colorado Bar Association

WM. HEDGES ROBINSON, JR.
Secretary of The
Colorado Bar Association
Equitable Building
Denver, Colorado

MILTON J. KEEGAN
President of The
Denver Bar Association

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