ADDRESS

of

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To what extent can there be formulated rules with respect to what constitutes a fair administrative hearing, which are generally applicable to different administrative tribunals and to different kinds of administrative action?

I must tell you at the outset that I do not propose to, indeed I cannot, answer this question entirely responsively. For me to try to set the limit beyond which fairness cannot go, to try to define the wide variety of administrative tribunals and administrative proceedings to which any given set of rules of fairness must be applicable, would be to assume a breadth of experience and a certainty of knowledge to which I have no claim. To me, administration, and administrative law, are very broad terms, used to cover one general present-day aspect of the continuing socio-legal system which we have inherited and under which we are now living. I cannot follow the popular use of these words to convey condemnation of a supposedly new type of bureaucracy, a New Deal oddity invented in political desperation to gloss over governmental ineptitude by concentrating public attention on the evils of big business. Administrative action is not, as many critics would have it, a servant girl recently hired from the neighboring employment agency, of uncertain antecedents and doubtful utility in the household, to be praised or criticized, educated or restrained to the end that she may be made worth her wages, and finally to be discharged without a character if she does not live up to her references.

It is too little understood that administrative law, even though the development of its techniques may be but another phase of the servant problem, is no newcomer in our midst. Administrative law is an honorable and legitimate product of the permanent relationship between organized society and the individual, with an ancestry in the direct line going back many decades. We are all familiar with the process by which over centuries the demands of an expanding society induced the conscience of the chancellor to implement the rigid forms of the common law by the more flexible and humanistic procedures and doctrines of equity. By a process of development in many ways parallel, our modern administrative law is a product of the conflict between the conventions of judicial procedure and the needs of an ever-increasingly complex industrial society. I have no thought of tracing the history of this conflict - that is for the legal historians; but I do assert that a realistic view of the problems of administrative law today requires an understanding that those problems are not autochthonous nor even of recent birth. The conflict from which they arose has been going on for nearly a century, and almost every issue now discussed was raised long before 1938.

This point may be well illustrated by examining the course of affairs which led, in the heat and frayed emotions of the summer of 1914, to the creation of the Federal Trade Commission. On January 24, 1914, just after President Wilson had proposed his legislative program, there appeared in the columns of the New York Times this dispatch (page 11, column 1):

> "C. Stuart Patterson, banker and director of the Pennsylvania Railroad, and ex-attorney general William Hensel .... united tonight in condemning the Wilson anti-trust legislation in addresses before the Terrapin Club.

> "'A revolution is going on,' said Mr. Patterson, 'and it will go still further ... This vexatious interference with business is dangerous to the whole people. It affrights capital and halts investment; and in turn, it hurts labor. When this interfering legislation is enacted, the man of wealth is able to look after himself, but the man who depends upon his weekly wage is the one who suffers. So this becomes class legislation.
>
> "'You cannot in justice create adversity for one class and prosperity for another. Every class must be treated alike.
>
> "'...Sober sense will call a halt on the interference of little Politics with Big Business, and there will be a demand for legislation that will put all men on a common equality.
>
> "'If it is proper to legislate good wages for the shop girl, it is also iniquitous to impose a starvation income upon railroads. And if it is wrong for business interests to form combinations to regulate prices and protect their business, then it is equally unlawful for labor to combine to dictate to capital.'"

Not unexpectedly the National Association of Clothiers, the Chamber of Commerce, the Merchants' Association of New York, and the editorial columns of the various newspapers joined the chorus of protest.

Criticism of the President's legislative program was finally centered against the proposal to entrust the Federal Trade Commission with functions of investigation and decision. The Commission, it was said, might be satisfactory if it did no more than make recommendations to Congress, if, like the old and useless Bureau of Corporations, its functions were limited to "appeals to reason and publicity". One bitter opponent of the Federal Trade Commission declared that the proposed administrative body's "efficiency is that of a monarchy...and has no place whatever in a democracy" (New York Times, 8-17-14; p. 12). And Representative Montague stated at the hearings before the Committee on Interstate and Foreign Commerce (p. 80):

> "Your bill proceeds on the theory...that the division of this government into three branches...should be practically abolished... and the rights of the individual should not be considered...Does not your bill...go back 400 or 500 years to the old days of tyranny?"

The parallel is obvious. The newspapers told of the bitter fight between Government and "big business". Business demanded a cessation of governmental interference that it might have a "breathing spell". President Wilson accused business of creating a "psychological depression" to defeat his legislative aims. But the Federal Trade Commission was created and there is little suggestion today that it be abolished.

In thus recalling historical parallels I am far from suggesting futility in the discussion of problems of administrative law. For even though no problem be a new one, there can be no doubt that the expansion of administrative functions in recent years has given new importance to the role of the administrator which demands the most careful reexamination even of old problems which appear to have been solved. We have passed many years from the days when the Interstate Commerce Commission, narrow as its powers were, stood

out in solitary prominence as a Federal administrative agency. As Professor Gardner points out in his piquant review of Dean Landis' book on "The Administrative Process", we now have

> "the Interstate Commerce Commission, which more and more governs transportation and travel, the Federal Reserve Board, which more and more governs banking, the Securities and Exchange Commission, which tries to govern all our investments, the Federal Trade Commission, which tries to govern the marketing of our manufactures, the National Labor Relations Board, which interferes in the making of these manufactures, the Reconstruction Finance Corporation, which taxes all of us to lend to whom it thinks fitting, and the Tennessee Valley Authority, which taxes all of us to make over that valley according to the hopes of a few gentlemen's hearts." (52 Harv. L. Rev. 336, 338 (1938)).

This expansion of the administrative process has undoubtedly caused severe anguish of soul to many sincere men besides Professor Gardner; but undoubtedly it has also been bitterly fought by many whose articulate distress marked only self-interest and callous unconcern with public needs.

In spite of the intense conflict which has regularly attended the growth of the administrative process, I suppose there are few informed persons who will not in all honesty admit that the administrative commission is not merely a useful handmaiden, but an indispensable agent of modern democratic government. Even Professor Gardner concludes, although indefinitely, that "they are very good things to work for us -- provided we can afford the expense of them -- but that they are very bad things to rule our lives". Nevertheless, at least those of us whose business is administrative law are fully aware that neither design nor function in administration has been finally perfected; and criticism even from prejudiced sources may be helpful, particularly criticism of administrative methods and procedures. For uncertainties and differences in procedural methods, and in the administrative policies which shape those methods, are irritating and may even be oppressive. Indeed, their effect may be to weaken respect for the whole administrative process.

With the thought of inviting your comment and criticism, I propose, not to respond definitely to the question before me, but to try to give you a picture of the salient outlines of procedure in the one agency of the government with whose work I am closely familiar, the Securities and Exchange Commission. I recognize that conditions in one agency may differ widely from those in another, and that the techniques we have adopted in our effort to assure administrative fair play might be entirely inadequate to the problem of administrative bodies charged with the enforcement of other types of statutes. However, the Securities and Exchange Commission itself is by now far from being a simple organism; with the steady increase of its statutory jurisdiction it has undertaken the conduct of almost every type of proceeding known to administrative law. Our Commission, it seems to me, affords an admirable opportunity for clinical study of the question which has been posed.

As you are very likely aware, the Securities and Exchange Commission administers three statutes: the Securities Act of 1933, the Securities Exchange Act of 1934, and the Public Utility Holding Company Act of 1935. Our advisory functions under Chapter X of the Bankruptcy Act may for present purposes be disregarded. Each of these statutes is regulatory in character, and the subject matter of each is business -- the distribution of securities, mechanics

and practices of securities markets, and the management of gas and electric utility holding companies. Each of these statutes confers power upon the Commission to promulgate rules and regulations of general applicability and legal effect, prescribing in every instance appropriate standards for the guidance of the Commission. This rule making power in itself raises questions for discussion, among the more interesting of which is whether hearings, on notice to interested groups of the community, are necessary or appropriate to the exercise of this essentially legislative function. I propose, however, to limit my inquiry to the order making power. For under each of the statutes the Commission may, after notice and hearing, issue final orders, which adjudicate the rights and liabilities of individuals and companies with the force and effect of law, and which are reviewable by the appellate courts in much the same manner as final judgments of courts of first instance. It is the fairness of hearings in proceedings culminating in such quasi-judicial orders that I assume forms the principal subject matter of this discussion.

As I said, the work of the Securities and Exchange Commission involves a wide variety of types of proceedings culminating in final quasi-judicial orders. From a procedural point of view, however, there has been developed within the Commission a rather clear line of demarcation between two broad classes of proceedings: one, actions of a prosecutory nature instituted by the Commission itself with a view to the suspension of some privilege, either pending compliance with law or as a penalty for its infraction, and the other, actions begun by formal application of private parties to secure from the Commission the grant of some privilege or relief from some statutory prohibition. These classifications are not water-tight, but I propose to accept them for purposes of discussion. For purposes of convenient distinction I will call the former adversary proceedings, and the latter administrative proceedings.

Typical of adversary proceedings are stop order proceedings under the Securities Act to suspend the effectiveness of a registration statement, and proceedings under the Securities Exchange Act to suspend the registration of a security listed on a national securities exchange. Typical of administrative proceedings are applications under the Securities Exchange Act for the extension of unlisted trading privileges on national securities exchanges, and applications under the Public Utility Holding Company Act for exemption from the restrictions imposed by the statute upon the applicant as a holding company or as a subsidiary company, or for authority to issue or acquire securities or utility assets. It may be helpful to consider in detail one example of each class: the stop order proceeding under the Securities Act, and the application for authority to issue securities -- the declaration -- under the Public Utility Holding Company Act.

Briefly stated, the purpose of the Securities Act is to protect the investor against fraudulent or unethical practices in the sale of securities. This protection is in part achieved by means of injunctions and criminal sanctions against fraud in the sale of securities, through the mails or in interstate commerce. These sanctions are enforced only by the courts on application and proper showing by the Commission or, in the case of criminal proceedings, by the Attorney General. But the Act also contains prophylactic provisions -- provisions designed to protect the investing public from misrepresentation or concealment by requiring full disclosure of all fact bearing materially upon the value of securities sold through the mails or any other instrumentalities of interstate commerce. To achieve this end, Section 5(a) of the Act provides, with certain exceptions, that no security may be offered, sold, or delivered

after sale, through the mails or in interstate commerce, unless there is in effect as to such security a "registration statement" describing the security and the issuer in appropriate detail. Under Section 8(a) a registration statement, in the absence of amendment by the issuer or action by the Commission postponing the effective date, becomes effective automatically upon the twentieth day after its filing with the Commission.

Although the Commission has no authority under the Act to approve or disapprove of securities, or in any way to pass upon their merits, the role of the Commission in connection with registration statements is not a passive one. Unless the Commission were empowered to examine into the truth and completeness of a registration statement, and to require the correction of false or inadequate data, the purposes of the Act would fall far short of achievement. Section 8(d) of the Act therefore confers upon the Commission the duty of suspending the effectiveness of any registration statement which, after notice and hearing, is found to contain material misstatements or omissions. Specifically, that section provides as follows:

> If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

It will be seen that to some extent the statute itself prescribes procedural details to be followed in the institution and conduct of stop order proceedings. The statutory requirements, however, are of the broadest, and have necessarily, and I believe appropriately, been implemented by general Rules of Practice, applicable to all proceedings alike. These Rules of Practice embody, at least in part, the Commission's own self-imposed standards of judicial self-limitation.

The proceeding for a stop order is begun after examination of the registration statement by an examining group in the Registration Division of the Commission. If the Registration Division concludes that the statement is materially false or misleading, authorization for a hearing under Section 8(d) is sought from the Commission. Thereupon, if the Commission agrees that the registration statement does not appear to comply with the statutory standards of disclosure, confirmed telegraphic notice of opportunity for hearing within fifteen days is sent to the registrant together with a "Statement of Matters to be Considered" in the nature of a detailed bill of particulars. The Rules of Practice specifically provide that:

> "Such notice shall state the time and place of hearing and shall include a statement of the items in the registration statement by number or name which appear to be incomplete or inaccurate in any material respect, or to include any untrue statement of a material fact, or to omit a statement of any material fact required to be stated therein or necessary to make the statement therein not misleading. Such notice shall be given either by personal service or by confirmed telegraphic notice a reasonable time in advance of the hearing. The personal notice or the

confirmation of telegraphic notice shall be accompanied by a short and simple statement of the matters and items specified to be considered and determined." (Rule III(b)).

In the proceeding the Commission is represented by an attorney from the staff of the Registration Division, which in judicial analogy may be regarded as the plaintiff. The hearing is public in character and held before a trial examiner designated by the Commission; all testimony is stenographically reported and made part of the record; copies of the transcript are made available to all parties to the proceeding. Trial examiners as a matter of internal organization are not subordinated to any official other than the Commission itself, and the Registration Division has no voice in the selection of a trial examiner for any particular case. At the conclusion of the hearing each party (which term, as I am using it, includes the Registration Division) may then file with the trial examiner "a statement in writing in terse outline setting forth such party's request for specific findings, which may be accompanied by a brief in support thereof" (Rule IX(e), Rules of Practice). Both the requested findings and the supporting briefs are also served upon all parties. Ten days after the receipt of the transcript of testimony the trial examiner is required by the Commission's Rules of Practice to file with the Secretary of the Commission an advisory report containing his findings of fact, copies of which are immediately transmitted to each party. Within five days after receipt of the report exceptions may be taken to the findings proposed by the trial examiner, to his failure to make findings, or to the omission or exclusion of evidence. Briefs may be filed in support of such exceptions, and, upon written request of any party, oral argument may be had before the Commission. Thereafter the entire record, including a transcript of the oral argument before the Commission, if such argument was requested, is transmitted to the Commission's General Counsel, whose office is as a matter of internal organization entirely separate and distinct from the Registration Division, for consideration and the preparation of an appropriate opinion containing the necessary findings in support of a stop order, or dismissing the proceeding. The actual drafting is done by attorneys in the Opinion Section of the General Counsel's Office, under the guidance of an Assistant General Counsel and a Supervising Attorney. The draftsmen are under strict instructions not to confer with the trial examiner or with trial counsel in the Registration Division. In the initial stages the draftsmen, as like as not, have only the most general intimation of the Commission's tentative viewpoint or approach to the case. The first draft of the opinion is thus prepared on the basis of the record itself, without conference with any party to the proceeding, and without pressure or suggestion from any source outside of the Commission and the General Counsel's office. Copies of the draft opinion are circulated among the members of the Commission for individual consideration, and later the opinion is called for joint discussion among the draftsmen and the Commissioners in Commission meeting. By that time each Commissioner is familiar with the record, has read the proposed opinion, has reached some decision in his own mind, and is prepared to discuss the issues and offer suggestions as to the form and content of the opinion. I admit frankly that in most cases the opinion is not acceptable in its first draft and must be rewritten in accordance with the matured conclusions of the Commission. Occasionally a completely new opinion, or even alterative opinions, must be prepared. If a Commissioner dissents from the determination of the majority, he will himself ordinarily write a dissenting opinion containing the reasons for his dissent.

I take it that this procedure is "fair", "proper", and "judicial" under any decision heretofore rendered by the Supreme Court, and indeed goes far beyond the current judicial requirements of due process. The position of the trial examiner, however, deserves further consideration. In many agencies, at least, adjudication is now largely centered in the trial examiner. The rules of procedure are formulated chiefly for the hearings before him. In a real sense he is becoming a lower administrative tribunal, and the regulatory authority is itself in fact, if not in theory, becoming a tribunal of second instance. Should this be clearly recognized and written into the law? I suggest the possibility that there may be enough likeness between the judicial functions of the trial examiners in the various regulatory agencies, to justify placing them by law or Executive Order on a unified basis. Many questions must be answered, however, before progress can be made. The following questions have been asked, not with reference to the Securities and Exchange Commission specifically, but with reference to trial examiners generally. "Should trial examiners be under the Civil Service? Should they have specialized training in the field of economics with which they are respectively concerned, as well as in the field of law? Should they make real decisions, such as are made by the individual members of the Board of Tax Appeals? Should their decisions be given to the contesting parties, who shall have a right to take exceptions to them? If exceptions are taken should the case then be heard by the board or commission? In case no exceptions are taken should the case be considered as closed by the Commission? Should the trial examiners continue to be the mere agents of the board or commission, or should they be given a more independent status? Should the principle be further developed that all cases of a regulatory nature be heard de novo before trial examiners, or should certain cases be reserved to the commission itself? Should the commission have the right to call up any case pending before trial examiners for its own consideration?" (See Blachly, Working Papers on Administrative Adjudication, p. 3)

Other questions arise regarding the scope of his activities. At the present time the report of the trial examiner for the Securities and Exchange Commission includes only findings of fact together with a recommendation for action. There is no statement of the principles of law involved. The Rules of Practice provide, moreover, that the "report shall be advisory only, and the findings of fact therein contained shall not be binding upon the Commission. So far as our Commission is concerned, this provision is taken seriously; the record in each case is reexamined meticulously by the impartial Opinion Section of the General Counsel's office, and reconsidered by the Commissioners, and only such weight is given to the trial examiner's report as in the particular case it appears to deserve. This practice, however, adequate as it may be to assure fair and impartial treatment to the respondent, suggests a real necessity for reexamination of the functions of the trial examiner. If the Commission is free wholly to disregard the trial examiner's report, it may be questioned whether the report adequately serves one of its most important supposed functions, that of notifying the parties of the issues involved. The issues discussed in such a report may not be the issues which move the Commission. Exceptions and argument directed to a report which has no binding quality may be futile. One alternative, therefore, might be to eliminate the trial examiner's report altogether, or at least to utilize it merely as a confidential document for the Commission's assistance in analyzing the record.

However, although the Mackay Radio & Telegraph Co. case (58 S. Ct. Rep. 904) shows that the trial examiner's report is not a *sine qua non* of administrative fairness, its value in this regard is clearly suggested by the

opinion of the Supreme Court in the second Morgan case (58 S. Ct. Rep. 773), and it may well be doubted whether further limitation of the trial examiner's functions would fully exploit the advantages in the trial examiner device. Serious consideration might therefore be given to the possibility, as an alternative solution, of giving to trial examiners greater authority in the making of their reports and findings, with power to write their decisions into intermediate orders which, unless excepted to by one side or the other, would become the final orders of the Commission. I do not urge such a solution, but it is at least one that cannot be disregarded. I am aware that existing statutory provisions may not permit such a delegation of authority by administrative agencies, but as one commentator has recently pointed out, "Legislative draftsmen continue to copy slavishly the procedural provisions of old statutes, since they have no means of determining how those provisions can be improved." (Feller, Prospectus for the Further Study of Federal Administrative Law, 47 Yale L.J. 647 (1938)). It is conceivable that our experience may crystallize into concrete suggestions for statutory improvement, at least for future statutes. I also recognize that merely conferring the powers of a judge upon men who have no competence for judging, by no means solves the problem. There is much weight in the current criticism that trial examiners are too frequently yes-men for the commissions they serve, and in Dean Landis's statement that "Today trial examiners' staffs on the whole have too little competence" (Landis, The Administrative Process, p. 104). However, we must at least recognize that if we are to retain the trial examiner, improvement cannot be secured by lessened responsibility and continued impairment of function, but only by greater responsibility and higher standards of personnel.

Now let me describe somewhat more briefly an example of what I have referred to as administrative proceedings. Section 6(a) of the Public Utility Holding Company Act provides that it shall be unlawful to issue or sell any security except in accordance with a declaration effective under Section 7 and with an order under Section 7 permitting such declaration to become effective. Section 7 describes the information which must be included in the declaration and lays down standards to guide the Commission in determining whether or not the declaration shall be permitted to become effective. A declaration upon filing is submitted at once to an examining group in the Public Utilities Division. Amendments may then be called for to clarify or amplify the information originally submitted; conferences are often held between the management and the Commission's staff, and finally the matter is set down for hearing. Since the proceeding is instituted by the declarant, he is of course fully aware of the questions to be considered; the notice of hearing, therefore, merely states the time of the hearing, the place, and the subject matter (Rule XII(a)). The hearing, like a hearing in a stop order proceeding, is held before a trial examiner designated by the Commission, and the Commission is represented by attorneys from the staff of the Public Utilities Division. The trial examiner does not prepare any report, but within five days after the transcript of testimony is filed with the Secretary of the Commission, any party may submit requests for specific findings, together with supporting briefs, copies of which are immediately served upon all parties to the proceeding. Fifteen days after requests are filed for specific findings, plenary briefs may be filed in support of all contentions and exceptions. Upon written request, moreover, oral argument may be had before the Commission. The case is then submitted to the Commission "on the moving papers, the transcript of the testimony and exhibits received at the hearing, requests for specific findings, if any, the briefs of the parties and counsel to the Commission, if any, and oral argument before the Commission, if any" (Rule XII(b)).

Frequently the applicant chooses to submit his case on the declaration without hearing and without further evidence. In such case an attorney for the Public Utilities Division appears before the trial examiner on the date set for hearing, offers the formal papers and the declaration in evidence, and closes the record without trial. Ordinarily these are cases in which the staff of the Public Utilities Division are satisfied that the proposed issue complies with statutory standards, and are prepared to recommend that the declaration be declared effective. The draft opinion, under these circumstances, is prepared by the trial attorney, and thereafter submitted to the Commission for consideration and correction. If the case is contested, however, or if adverse action, or qualified approval, is proposed by the Public Utilities Division, the matter is transmitted to the office of the General Counsel where the findings and opinion are prepared by an independent attorney in the Opinion Section and the case proceeds as if it were a stop order proceeding or some other adversary proceeding.

In my opinion the procedures followed by the Commission in both adversary and administrative proceedings, as I have called them, are more than adequate to meet all sensible demands of due process or of ordinary fair play. Regardless of whether a trial examiner's report is used, the issues in each case are clearly delineated by the statutory requirements, the rules and regulations of the Commission, and the forms provided by the Commission; the position of the Commission's staff on any particular matter is plainly disclosed not merely by conference, hearing, and cross-examination, but by the proposed findings of fact, briefs, and oral argument; the Commission's final decision is based upon its own independent consideration of the case, with the assistance of a qualified and impartial group of attorneys in every case of real or threatened disagreement between the Commission and the respondent or applicant. Morecver, the petition for rehearing is available to offset error or surprise in final adjudication (Rule XII(d)).

In thus outlining to you in specific detail the procedure followed by the Commission in two of its commonest types of proceedings, I should be disingenuous if I left you with the implication that precisely the same devices of procedure are followed in all proceedings before the Commission. As I have said, our Commission deals with a wide variety of quasi-judicial proceedings, each of which, for its most efficient dispatch, may require a different technique. Furthermore, administrative law in its very nature is itself flexible, designed primarily for the purpose of affording relief from the rigidity of judicial forms. And perhaps even more important from the point of our Commission, the Commission itself is young -- young in experience, young in years, even young in the years of its members and its staff. I am proud to say that no practice of the Commission can yet be regarded as immutable, that the Commission itself is constantly reexamining and criticizing its own procedure, and readjusting it to bring it into closer conformity with the high standards of efficiency, fair play and public interest which the Commission has set before it.

Thus far I have confined myself to the administrative practice of the Commission itself, without regard to the protective features afforded by the possibility of judicial review. Under each of our statutes, any person aggrieved by an order of the Commission may obtain judicial review of such order in the Circuit Court of Appeals by filing in the appropriate court, within sixty days after the entry of the order, a written petition praying that the order of the Commission be modified or set aside, in whole or in part. The Commission is required, upon service of such a petition, to file in the court a transcript

of the complete record upon which the order complained of was entered, and upon the filing of such transcript the court is given exclusive jurisdiction to affirm, modify, and enforce or set aside, such order, in whole or in part. Each Act also contains the usual provision that the judgment and decree of the court is subject to review by the United States Supreme Court upon certiorari or certification. Candor compels me to admit, however, that the remedy of judicial review, in most cases, has no practical content. Business transactions cannot wait upon the exigencies of appeal. The overwhelming mass of administrative determinations are never reviewed by the courts. Time is of the essence. Even appellate procedure within the administrative by no means insures that the unfortunate results of action unwise or arbitrary will be cured. The remedy of appeal is not adequate.

The recognition of this fact has undoubtedly given impetus to the attack on the so-called "Judge-Prosecutor" combination. No man, we are told, should be a judge in his own case; one agency should handle prosectuion, another should adjudicate. Lewis Carroll's cunning Old Fury is quoted with abandon, and, viewing him with alarm, serious minded but, I believe, misguided citizens enter on a campaign for separation of functions.

Much has been said and written on this subject -- separation of functions -- which seems to me to disregard the realities of administrative practice and procedure. Certainly it is wise that an administrative agency should conduct its formal proceedings according to the rules of fair play which have been developed over centuries by the conscience of the bench, the bar, and the man in the street. And I cannot reasonably quarrel with the belief that rules and standards of conduct in administrative hearings may appropriately be codified even in statute, if not for the control of the administrator at least for the reassurance of the public. But let us not be deceived as to the importance of rules and standards in the conduct of formal administrative hearings. Whether the Securities and Exchange Commission on final consideration will actually decide to enter a stop order is interesting, but not very important; for only a rare investor would purchase securities from an issuer threatened with the administrative bar. When the Securities and Exchange Commission actually delists a security, the news is important; but the market drops when the order for hearing is announced. When a court actually issues an injunction against a continued violation of the Public Utility Holding Company Act, the news will be found in the back pages of the financial columns; the filing of a bill for injunction, however, is front page news. If nine out of ten Commission orders never reach the courts for review, ninety-nine out of a hundred business problems presented to the Commission for solution never reach the stage of formal proceedings even before the Commission. If the Commission were stripped of every vestige of judicial power, the problem of administrative fair play would remain substantially undiminished.

Furthermore, separation of functions would necessarily mean impairment of functions. Rule-making and enforcement cannot be separated from interpretation and adjudication without sacrifice of efficiency and of the public interest sought to be protected or advanced. Coordination is imperative. I venture to assert dogmatically that the regulatory function of any board or commission would suffer irretrievably if enforcement and policy-making were completely divorced. If a rule is simple in its form, and easily understandable in its application, its enforcement may be left to the courts by prohibition and punishment. But business and industry are no longer simple, and the rules required for their control are exceedingly complicated; they are no

longer rules, indeed, but codes of regulation, as ramified as the business they regulate. Administration, therefore, no longer entails mere prohibition, but the sympathetic understanding of complicated business facts, uniformity of approach, and a constant time-consuming supervisory interest. These are the minimum demands of business itself. And successful administration in the narrow fields of social and economic enterprise entrusted to the administrative agencies requires in addition sensitive awareness of the legislative intent, a keen recognition of the sources of abuse and evasion against which the legislation was aimed, and a constant zeal for justice and the public welfare. To require that the rules and regulations under the Securities Exchange Act regarding the solicitation of proxies should be drafted by one agency and interpreted by another is to deprive those who are subject to regulation of the thought, the experience, and the understanding of those who know the most about the rules -- the draftsmen. If we concede, as I think we must, that the implementation of statutes by rules requires the aid of experts, it seems to me clear beyond question that those same experts are alone qualified to implement the policy expressed in the rules. Conflict, waste, and inefficiency must attend any separation of powers. While the current attack on the blending of functions undoubtedly stems in part from those who are sincerely concerned with the perfection of the administrative process as an instrument of public welfare, care must be taken to discount the fulminations of those whose real motive springs from antagonism to all public regulation. To them it is easy to answer that they come too late; but we must not let them becloud the issue.

And finally what I have said must surely indicate that within the administrative there are already available numerous and adequate protective devices against the possible abuses of combined powers. So far at least as our Commission is concerned, trial examiners are wholly independent of the trial attorneys and are subject directly to the Commission. Trial attorneys have no contact with the Commission in contested cases, and in no way are permitted to shape the final decision otherwise than by evidence included in the record. The Opinion Section in the General Counsel's office is entirely separate from both the staff of trial examiners and the trial attorneys. Trial examiners, it is true, are paid from the Commission's budget; but so are the budgeting and general servicing of the Federal judiciary handled by the Department of Justice. So far as I know, no one has yet intimated that this control has resulted in domination of the courts by the executive. The trial examiner and the trial attorney are both appointed by the same group of men -- the Commissioners; but does this make their independence and integrity more subject to question than those of the District Attorney and judge elected to office simultaneously on the same political party platform? On behalf of the trial examiners I resent the suggestion that they are less honest than other judges.

In the second place, every order of the Commission must be supported by appropriate findings of fact, and reasons for every determination must be formulated in a Commission opinion. Arbitrary action, or even patently erroneous action, is not likely to overcome the power of the balance wheel of enforced publicity.

Thirdly, it should not be forgotten that no governmental agency can long exist if its basic policy, as expressed in both enforcement and adjudication,

operates in a manner contrary to the public interest. Businessmen are by no means an inarticulate group; unfair or unreasonable practice is not likely to continue long.

And lastly, it is of the greatest significance that most of the newer administrative agencies today are independent tribunals, almost completely free from interference by members of the executive and legislative departments. The tradition of independence, we may at least hope, will develop rather than deteriorate with the passage of time. And with the tradition of independence there is developing in the government today what Veblen has called the "instinct of workmanship" -- an attitude that, more than rules or functional safeguards, affords assurance of informed and balanced judgments. The "ultimate protection", as Professor Frankfurter has pointed out, "is to be found in ourselves, our zeal for liberty, our respect for one another and for the common good" (Frankfurter, The Public and its Government, p. 159).

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