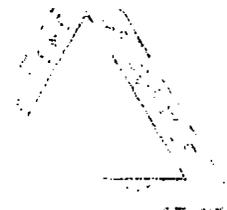


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ADDRESS

BY

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Prepared for Delivery

Before

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On behalf of the President and of the Department of Justice I welcome each of you to this Conference on Administrative Procedure. This is a good occasion to express the deep interest of the Administration and my own concern, in improving Federal administrative procedures. I am convinced that we can do much to reduce delay and expense in such proceedings. Also, I believe that we cannot develop and maintain the administrative procedures which we need unless we give to them the continuous attention which the courts and the bar have given to the improvement of judicial procedures. For these reasons, I strongly recommended to the President that he call a conference to devise ways for improving Federal administrative procedure.

Fair and efficient administrative procedures are a major element in the administration of justice. They are also the means by which large areas of public policy are carried out. Today, Federal administrative agencies implement public policies and determine private rights in such important and diverse fields as transportation, communications, labor relations, atomic energy, subversive activities, industrial accidents, Indian claims, and milk marketing.

The continuing importance of fair and efficient procedures in such hearings is shown not only by the importance of the matters entrusted to administrative agencies, but also by the volume of formal hearings. While the bulk of Federal administrative decisions are made without hearings, nevertheless, during the year ending June 30, 1951, five administrative agencies, Interstate

Commerce Commission, National Labor Relations Board, Coast Guard, Federal Communications Commission, and Civil Aeronautics Board, held 5325 administrative hearings for the receipt of evidence, as compared with 9878 civil and criminal trials commenced in all of the Federal district courts.<sup>1/</sup> Again, there are about 215 Federal District Judges, while Federal administrative agencies employ about 273 hearing examiners. And it is fair to assume that the matters involved in those administrative hearings were at least as important to the persons involved and to the general welfare as those which were tried in the courts.

While Congress was assigning new and broader functions to administrative agencies, little attention was given to administrative procedures. As recently as 1916, Elihu Root could tell the American Bar Association that "a system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect."<sup>2/</sup> Until recently, regulatory statutes usually dealt with procedure only to the extent of requiring that certain administrative actions be preceded by notice and a hearing. Things have changed since 1916. Administrative law is taught in our law schools. In the 1930's, Congress and the bar became concerned with improving administrative procedures, and this concern, together with the report of the Attorney General's Committee

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<sup>1/</sup> Annual Report of the Director of the Administrative Office of the United States Courts, 1951, p. 148.

<sup>2/</sup> 41 A. B. A. Rep. 355, 369.

on Administrative Procedure in 1941, resulted in the Administrative Procedure Act. Also, in recent regulatory statutes, such as the Labor Management Relations Act, the Communications Act Amendments of 1952, and the new Immigration and Nationality Act, Congress has concerned itself with procedural matters to a much greater extent than in earlier years.

I am convinced that we must give to the improvement of administrative procedure the kind of continuous effort that has produced the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. My work in the New York legislature, and particularly my experience during the last two years as a member of the Judicial Council of the State of New York, taught me that constant and thorough study of particular problems is the most effective way to improve legal procedures.

Neither the Administrative Procedure Act nor any other set of rules can prescribe fair and efficient procedure for all time. New regulatory activities, increasing agency work loads, and changing standards of procedural fairness are among the factors that will compel continuing change and improvement. By way of analogy, I would remind you that the Rules of Civil Procedure have been amended three times since their adoption in 1932.

I also believe that such continuous effort to improve administrative procedure must come both from within and without the agencies. The agency staffs collectively possess an immense and detailed knowledge of problems and procedures which must be drawn upon. Of course, this is not enough. It is said that the guests are a better judge of a feast than the cook. And so we have with us 12 practicing lawyers and three

distinguished Federal judges who can contribute the experience and insight of those who appear before the agencies and those who perform the function of judicial review of administrative action.

You have before you the Report of the Judicial Conference Advisory Committee on Administrative Procedure which was appointed by the Chief Justice to inquire into the causes of unnecessary delay, expense, and voluminous records in administrative proceedings.

It is significant that this Advisory Committee, with Judge Prettyman as chairman, concluded that most of the causes of excessive administrative records with the attendant delay and expense are to be found in the procedures of administrative agencies. These problems are not peculiar to the administrative process. During my service on the New York Judicial Council, we made studies seeking to reduce calendar delays and to reduce the size of appellate records. Similarly, the Judicial Conference properly has been concerned with the length of trials and records in some antitrust cases. We are going to do our share in solving those problems. For example, we are vigorously searching for procedures by which we can obtain sufficient factual information in advance of trial to make possible more precise pleadings and greater use of pre-trial procedures.

In the administrative field, the criticisms and suggestions of the Advisory Committee cannot be dismissed as the complaints of disappointed litigants, because 11 of the 12 members of the Advisory Committee held or had held important posts in Federal administrative

agencies. That is, the criticisms of the Advisory Committee are self-criticisms of Federal administrators. That they are so frank in regard to their own conduct encourages me to believe that this conference can find ways to improve our Federal administrative procedures.

On June 15, 1215, 738 years ago this month, the Magna Carta proclaimed that "To none will we sell, deny, or delay right or justice." We all know that justice is denied to the extent that its administration is unnecessarily expensive or delayed. The administration of justice in the courts has been criticized sharply whenever judicial procedure has been inadequate to provide speedy justice at a reasonable cost. Dicken's attack on English Chancery procedure in Bleak House finds a counterpart today in the unending efforts of legislatures, courts, and the bar to improve the administration of justice in such practical respects as the elimination of calendar delays and the simplification of procedure.

Unnecessary delay and expense in the administration of justice and public business by administrative agencies is equally objectionable. Perhaps it is more so, because a major reason for entrusting important functions of government to specialized administrative agencies is the expectation that experts can do these jobs better than anyone else. I am sure that you will agree with me that those who administer Federal regulatory programs have a clear duty to develop and maintain procedures which will eliminate unnecessary delay and expense. For my part, I also believe that Federal administrators, by combining

their experience, with the aid of the practicing bar and the courts who have occasion to review their work, can do more than any other single group to improve Federal administrative procedures. Moreover, if we don't, someone else surely will.

The Advisory Committee of the Judicial Conference concluded that in some cases administrative hearings are unnecessarily prolonged and hearing records made voluminous for the following reasons, among others: deficient pleadings, failure to utilize fully pre-trial or pre-hearing procedures, the failure of agency hearing officers to exclude irrelevant and immaterial evidence, and cumbersome methods of presenting scientific and economic evidence. I shall not attempt to discuss all of the Advisory Committee's suggestions, because some of the members of the Committee will go over their report with you in some detail.

However, I should like to point up two of the Committee's suggestions as illustrating how its report goes to the heart of the administrative process in seeking to minimize delay and expense in agency hearings.

The Advisory Committee concluded that:

"Lack of provision, or inadequate or ineffectual provision, for prehearing conferences, and lack of clarity of understanding by the hearing officer and counsel as to the purposes and possibilities of such conferences, contribute largely to the difficulties here under consideration."<sup>3/</sup>

Since Rule 16 of the Federal Rules of Civil Procedure became effective in 1938, pre-trial procedure has played a growing role in the judicial process in civil cases. In the Federal courts, "between one-third and one-half of all districts now use it regularly in most civil cases."<sup>4/</sup> In the Southern District of New York and in the District of Columbia, pre-trial conferences are mandatory in most types of civil cases.

As long ago as 1941, the Attorney General's Committee on Administrative Procedure concluded that "perhaps the most fruitful possibilities for expediting and simplifying formal administrative proceedings lie in the field of pre-hearing techniques."<sup>5/</sup> Section 7(b) of the Administrative Procedure Act expressly requires Federal agencies to empower their hearing officers to "hold conferences for the settlement or simplification of the issues by consent of the parties." Thus,

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3/ Report of the Judicial Conference Advisory Committee on Administrative Procedure (1951) p. 4.

4/ Report of the Judicial Conference of the United States, 1952, p. 20.

5/ Final Report of the Attorney General's Committee on Administrative Procedure (1941) pp. 64, et seq.

it is distressing to learn from the Advisory Committee that Federal administrative agencies have failed to utilize fully pre-hearing procedures as a means of shortening hearings and records.

Yet, the experience of the courts with pre-trial procedures teaches us that it is not enough to pass a law providing for such procedures. Some judges and some lawyers have had less than enthusiasm for pre-trial procedures. For several years, a committee of the Judicial Conference of the United States has encouraged the use of such procedures by furnishing judges with explanatory materials and even by arranging demonstrations. This suggests to me that this Conference can do much to encourage the general and regular use of pre-hearing procedures in Federal administrative proceedings.

I realize that the full use of pre-hearing procedures by administrative agencies will sometimes involve problems which the courts do not have. For example, where a Federal agency sends an examiner from Washington to conduct a hearing in another part of the country, it may be difficult to schedule pre-hearing conferences without putting either the hearing officer or the litigants to the expense and inconvenience of additional travel. Also, the large number of parties in some of the most important administrative cases may require the development of special pre-hearing procedures. I hope that the Conference will give particular attention to the solution of such problems. I believe much can be accomplished.

The Advisory Committee concluded that:

"The reception of substantial quantities of irrelevant and immaterial evidence, both oral and documentary, through inadequate restriction of the testimony of witnesses and undue relaxation of the rules of evidence contributes largely both to the bulk of the record and length of time required to adjudicate a proceeding.

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"Failure on the part of hearing officers to exercise their authority to control the conduct of hearings and to confine testimony and other evidence, and arguments of counsel before them, to that which is relevant and material to the issues, is recognized as a substantial factor in the problems here under consideration."<sup>6/</sup>

The correction of this condition lies in part in the fuller use of pre-hearing conferences and in better pleadings. But when everything has been done to simplify the issues in a case, the agencies and their hearing officers must apply a firm policy of excluding irrelevant, immaterial and cumulative evidence, whether offered on behalf of private parties or by government counsel.

It is obvious that effective control over the introduction of evidence presupposes competent hearing officers - fully versed in the

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6/ Report of the Judicial Conference Advisory Committee on Administrative Procedure, pp. 5, 6.

applicable substantive law and the agency's policies, and aware of what evidence is relevant and probative to the issues of the particular case. It presupposes that agencies will adopt appropriate rules and policies with respect to the admission of evidence and that hearing officers will have sufficient authority and backing to carry out those policies.

I am sure that the members of this Conference will have other ideas for expediting the administrative process. For example, you may wish to consider whether agencies have not clogged their dockets and reduced efficiency by the excessive granting of continuances and postponements.

This brings me to two other matters which are closely related to the suggestions of the Advisory Committee of the Judicial Conference.

First, as you know, there has been considerable discussion of the desirability and feasibility of establishing uniform rules of procedure for Federal administrative agencies. Indeed, a bill (S. 17, 82d Cong.) which would have established a commission to formulate such rules was passed by the Senate on June 21, 1951.<sup>7/</sup> This year, a subcommittee of the Senate Committee on the Judiciary has held hearings upon an identical bill (S. 17, 83d Cong.).

Those who favor uniform rules point to the fact that the Federal courts have no difficulty in handling a wide variety of cases

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<sup>7/</sup> 97 Cong. Rec. 6855. And see Sen. Rep. 413, 82d Cong., 1st Sess. (1951)

under the Federal Rules of Civil Procedure. It is clear that such rules would be of great assistance to the average lawyer in general practice who occasionally has cases before various Federal agencies.

Some people have opposed the idea of uniform rules of procedure on the ground that the diverse functions of Federal regulatory agencies can be performed effectively only through procedures tailored to fit particular problems. However, I am particularly impressed by the view of those bar groups which have considered the question of uniform rules, that no one has ever done the necessary spadework to determine whether or to what extent it is feasible to have uniform rules of procedure.

Thus, in 1949, the Committee on Administrative Law of the Association of the Bar of the City of New York, in a report approved by the Association, stated that "no study has yet been made demonstrating the advisability and practicality of adopting uniform rules of practice and procedure for Federal administrative agencies."<sup>8/</sup> In 1952, a committee of the Administrative Law Section of the American Bar Association urged "the assembling of data to establish the extent of the need for uniformity and the feasibility of meeting that need." Both the latter committee and a representative of the New York State Bar Association have recommended that such a thorough study of the feasibility of uniform rules of procedure be made by this Conference.

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8/ 4 Record of the Association of the Bar of the City of N.Y. 244.

I recommend that this conference undertake the job. It's time to stop saying that we don't know whether uniformity is possible. I think that the bar and those subject to administrative regulation are entitled to an authoritative answer as to whether it is practical to have uniform rules of procedure. Our basic attitude should be that uniformity is possible in the absence of cogent reasons to the contrary. I am sure that you will find that many variations in procedure are due to differences in agency rules and statutes which exist only because no one was thinking in terms of uniformity. Starting with the elements of due process and the requirements of the Administrative Procedure Act, and leaving flexibility to meet the needs of particular cases, may be a more likely approach than trying to preserve every existing difference in procedure.

A worthwhile answer will involve a careful analysis and comparison of the various agency functions and procedures. If the Conference is willing to undertake this task, I shall be glad to cooperate with the officers of the Conference in making arrangements for the detailed and thorough studies which should be the basis for your recommendations.

Also, I recommend that this Conference give consideration to the desirability of establishing an Office of Federal Administrative Procedure which would make continuous studies of the administrative process such as the Judicial Conference and the Administrative Office of the United States Courts carry on with respect to judicial procedure.

You will recall that the creation of such an office was recommended by the Attorney General's Committee on Administrative Procedure in 1941. I suggest that the same reasons which led to the calling of this Conference may indicate that such an office could perform an essential function. Busy administrators, like busy judges, tend to be poorly informed as to what procedures others have devised for expediting public business. I am convinced that studies prepared by the Judicial Conference, such as the one before you entitled, "Procedure in Anti-trust and Other Protracted Cases", are of great value to individual judges. I urge you to consider whether an Office of Administrative Procedure might not be able, by continuous and comprehensive studies of administrative procedures, to perform similar services for the Federal administrative agencies. Specific studies, such as those of the Attorney General's Committee on Administrative Procedure, become obsolete. Such an office, however, could continuously collect and disseminate information and suggestions on problems common to various agencies. Also, such an office could collect statistics on such matters as agency caseloads and backlogs which would be of great value in appraising the efficiency of agency procedures and in the preparation of budget requests.

I would visualize such an office as doing much of its work through advisory committees composed of representatives of the agencies and of the bar. In other words, the office would be a continuing nucleus of cooperative effort such as this conference is undertaking.

In this connection, I think the Conference should consider whether it would be desirable to transfer to such an Office of Administrative Procedure the functions now performed by the Civil Service Commission with respect to the recruitment, compensation and tenure of hearing examiners. Those functions are now vested in the Commission by Section 11 of the Administrative Procedure Act. While some of the legal questions under Section 11 recently were resolved by the Supreme Court in Ramspeck v. Federal Trial Examiners' Conference, 345 U.S. 128, the Civil Service Commission's administration of Section 11 has been widely criticized.<sup>9/</sup> I don't wish to enter into that controversy other than to point out that the Commission's functions under Section 11 of the Administrative Procedure Act are entirely different than its other functions in administering the Civil Service laws. It may be that an Office of Administrative Procedure, which engaged in continuous study of the entire administrative process, would be better equipped than anyone else to perform these important functions with respect to trial examiners.

Moreover, I don't think that this Conference should consider itself limited to the problems suggested by the Advisory Committee and by me. Rather, each of you should call attention to any problems of administrative procedure which you have encountered, and the Conference should consider itself free to take up any subject which it considers worthwhile.

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<sup>9/</sup> See Fuchs, The Hearing Examiner Fiasco Under the Administrative Procedure Act, 63 Harv. L. R. 737 (1950); Senator McCarran's letter of September 6, 1951, printed in Sen. Doc. No. 82, 82d Cong., 1st Sess., Ramspeck v. Federal Trial Examiners' Conference, supra.

This conference can do much to improve Federal administrative procedures. Collectively, you represent and can draw upon the entire skill and experience of the administrative agencies, the courts and the legal profession. You can produce, not vague generalities, but concrete recommendations which will furnish practical assistance to the agencies and to lawyers in their every day work, and to Congress when it deals with the problems of the agencies. In this work you can be assured of the complete cooperation of the Department of Justice.