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ADMINISTRATIVE PROCEDURE LEGISLATION

BY

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Before The

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Section of Judicial Administration
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I propose to discuss before this conference the bills regulating administrative procedure which are now pending before a subcommittee of the Senate Judiciary Committee.

Representing both the Attorney General's Committee on Administrative Procedure and the Department of Justice, I appeared before this subcommittee and testified at some length, giving my views of these proposed statutes. I was a member of the Attorney General's Committee ex officio, and was active in drafting the bill recommended by the majority members.

You will remember that Attorney General Cummings first suggested the plan that a study should be made and that this was carried out by Attorney General Murphy, resulting in the report of the committee. Let me emphasize the fact that this report in substance was unanimous. The extent and method of the control to be exorcised led to differences of opinion which I shall discuss. But the report and the accompanying monographs, which are studies of particular agencies, form the basis of all future legislation. The process of regulation is a continuing and flexible one. As Professor Hart of the Virginia Law School wrote in reviewing the study: "It is the most thorough and comprehensive study of Federal Administrative Procedure that has ever been made."

The subcommittee, chairmaned by Senator Hatch, has given a great deal of time and has had a great number of witnesses with respect to the bills. The American Bar Association has been ably represented, and several of the members of the Attorney General's Committee have testified with respect to all of the solutions suggested.

Three bills are proposed: S. 675 is the bill suggested by the majority. This is the bill that I favor. S. 674 is the bill suggested by three minority members of the committee of eleven. The third bill, S. 918, was introduced by

Senator Hatch at the request of those who had been supporting the old Walter-Logan Bill, which the President had previously vetoed on the ground that it was hasty legislation to which careful and proper consideration had not been given. At the time of the veto, the Attorney General's report had not been completed. Of the 83 witnesses who appeared before the subcommittee, none advocated the enactment of bill S. 918. This bill does not, therefore, have the support of any substantial group of the public or of the bar. I, therefore, propose to confine my remarks to the bills expressing the views of the majority and minority reports.

Let me say at this juncture that my attention has been called to newspaper stories announcing a debate between myself and my very learned friend, Professor Roscoe Pound, former dean of the Harvard Law School. I think it inappropriate for the Attorney General of the United States, having given his views before the Judiciary Committee, to enter into a "debate" on the subject. I am outlining my views here with the hope that closer cooperation between the American Bar Association and the Administration may result concerning these important issues. The differences between the two bills - S. 674 and S. 675 - are not, I believe so fundamental that they cannot be bridged; or, at least, these differences are differences in methods of solving the problem rather than disagreements concerning the existence of the problem.

Before coming to a discussion of the bills themselves, I should like to say a word or two as to the approach to the problem. Two considerations, surely, must govern, not necessarily conflicting but each emphasizing a point of view which may necessitate, in any particular instance, a different approach. The considerations are those of private interests, on the one hand, and of effective governmental action, on the other. It is as important

that private rights be secured under administrative practice as that they be secured in court procedure. But it is equally vital that the effective work of the administrative tribunals be conserved and strengthened. It is not unnatural, therefore, that we find that lawyers whose practice necessarily is based on the representation of individual interests often conflict in this field with members of the government whose main consideration is the efficient operation of administrative and other governmental agencies. This, of course, is an oversimplification of the problem. I do not mean to suggest that the government is not engaged in protecting "private" interests; but I do mean to point out that the procedure, in any case, may depend largely on the emphasis which is placed on the rights of the litigant rather than on the rights of the community. The provisions of any bill must at once protect private rights and make administration effective. Neither consideration should be allowed to be emphasized in a manner disproportionate to the other.

With this in mind, I turn briefly to the bills. First, let me emphasize what I consider the most important proposal of the two bills and on which there is an agreement between all the members of the Attorney General's Committee. I refer to the creation of the Office of Federal Administrative Procedure. Remembering that agencies become quickly alphabetical, I hesitate a little over the name. Perhaps "OAP" would be more convenient for the lawyers than "OFAP". But as to the merits of the Office there can be no disagreement. Studies of administrative procedure in the past have been somewhat spasmodic. But the Office affords a superb vehicle for a continuation of the work done by this Association and by the Attorney General's Committee.

Although the Office has no general mandatory powers over the agencies, and its function is to study and advise, it can counsel, coordinate, and perfect. During our work, the members of the Committee were impressed by the readiness with which agencies accepted our detailed suggestions. Many of the administrative defects have, as a result of these recommendations, now disappeared. The agencies cooperated with us in seeking out and eliminating improper practices. This cooperation would surely continue if such an Office were created. It is more important to narrow the field of general charges of improper bureaucratic methods into specific instances, which analysed and isolated, can readily be terminated. The Office itself, and the members of this Association too -- for under the bill the Office's doors must be open to complaints and suggestions of all who deal with agencies -- can study these inequities, and they can propose remedies. This is not merely a prophecy for in the past three years, we have had an opportunity of seeing the admirable effects of the creation of the Administrative Office of the United States Courts. The Administrator has no power to force judges to try cases expeditiously. Although at first a certain uneasiness existed in the minds of the federal judges that some of their powers might be impinged on, the Office has resulted in the most admirable cooperation. I have recently been presented with a confidential draft of the last report from this Office and I am happy to say that court dockets are, in most instances, being much more promptly cleared and that the creation of the Office has very greatly aided the situation. I think we tend, in approaching these problems, to underestimate the immense value of this continuing cooperative relationship, even where the Administrator is not given specified powers over the agencies involved.

The next major portion of the majority bill deals with administrative rule-making. In respect of actual procedure, both the majority and the minority bills agree in retaining a considerable degree of flexibility. In contrast to the old Walter-Logan bill, and to the present S. 918, neither S. 674 nor S. 675 impose a rigid requirement that hearings precede the issuance of rules. This omission, the entire Committee agreed, is a wise one. Types of rules, the circumstances under which they are issued, the number and organization of the people whom the rules affect, the subject-matter which they concern -- all are too varying to permit of the prescription of any single procedure.

But both majority and minority bills do insist on complete availability of administrative information, so that people will know whom to see and where. Both insist on publication of crystallized policies, on announcement of rules in the Federal Register, on organized units within the agency to devote attention to the perfection of rules and the receipt of suggestion from outsiders. I do have difficulties, however, with several of the provisions of the minority bill which, perhaps inadvertently, at least seem to point in the direction of mandatory rule-making. S. 674, for example, includes in its declaration of policy a statement that agencies "shall, as a fixed policy, prefer and encourage rule making in order to reduce to a minimum the necessity for case-by-case adjudications." It also requires agencies to exhaust their rule-making powers "as rapidly as deemed practicable", and agencies cannot, apparently, act in a particular case unless a specific rule has been issued to cover the case.

While I appreciate the convenience of certainty in the law, I think it unwise and undesirable to make the exercise of the rule-making powers

obligatory. The functions of administrative agencies are as various and as different as the whole gamut of human affairs. The common law was built up by a case-by-case accretion of principles. One of the most luminous insights which has influenced the development of our legal system is a recognition of the wisdom inherent in the construction of legal principles by proceeding slowly and gradually from case to case and not seeking to lay down in advance legislative commands to meet every possible demand upon the legal system. Experience must precede codification and rule-making; it cannot trail after formulation of principles. The common law does not define fraud or negligence or duress. Why, then, should we demand that the Federal Trade Commission define in advance what is unfair trade competition, or the Labor Board define what is discrimination in regard to hire and tenure of employment?

Once cases have been decided by agencies, once principles and policies have become crystallized and formulated, those cases, and those principles and policies should be made public and available. This is what S. 675, the majority bill, provides, and this is as far as it goes. To go further, as S. 674, the minority bill, seems to do, is to place a premium on the issuance of rules for the sake of issuance, to lead to rules which cannot be carefully considered and cannot have the vital groundwork of reality and experience. I cannot believe that such provisions would, in the long run, serve the interests of private citizens.

But let us pass on to the next major subject with which these bills deal - that of adjudication - the decision of particular cases. Now I am sure that the first thing which comes to your minds is - "judge, jury,

prosecutor." That, I think unfortunately, is the slogan which attracts all the discussion, and diverts attention from more concrete and more real difficulties. First, it should be recalled that only in a minority of agencies is there "prosecution" at all - expressed disciplinary action by an agency on its own motion is an important, but numerically minor phase of administrative activity.

But even then, where there is such "prosecution", there is as it is probably unnecessary for me to observe at this late stage, ordinarily combination of functions only in the most formal and abstract sense. For an agency is not one, but many people, and many divisions. We do not say that an indicted criminal is prosecuted by the United States, and that the United States is the judge too -- even though the United States appoints both officers. On a smaller scale, of course, that is the usual organization in an agency, too. One group of employees investigates and prosecutes, another decides. Each is compartmentalized and separated from the other -- often geographically as well as in terms of organization.

Now I do not mean to say that even the theoretical division ought not to be carried further, but I do mean to emphasize that, even though functions are combined in an agency, it does not happen that the same person exercises both functions. So I think that the problems of administrative adjudication can better be solved by a shift in emphasis away from the conceptual approach of combination of functions and, instead, toward the actual method of decision.

This, indeed, has been the approach of both the majority and the minority bills. Neither proposes a rigid, formal and external separation

of the prosecuting and deciding functions of all agencies. Both agree that general supervision over the policies of an agency should be preserved in its heads. Both agree that internal rearrangements provide the immediate solution. For we recognized that there are deficiencies in the adjudicatory process. We recognized that there was a tendency toward a dilution of responsibility in the deciding process. Trial examiners, who hear the testimony and see the witnesses, have often, for one reason or another, not been of the highest calibre and ability. They played too small a part in the decision of the case. As a result there appeared the further difficulty of anonymity -- since the trial examiner's role in the deciding process has been diminished, and since the agency heads themselves obviously cannot assume the sole burden of hearing witnesses, reading the records, and deciding the cases, these tasks have been shifted to others - review attorneys or the like. However able these men may be, they are not in the best position to decide the case. The record is cold; they have not lived with the case as it developed in the field; and though they played an important part in deciding, they have been sheltered from responsibility. Attorneys representing the individual citizens have never seen them, have never had a chance to present their arguments to them face to face, but instead have presented their cases and arguments to examiners who are often mere conduits. Small wonder that they should feel irritated and frustrated.

It was this sort of difficulty, plus, of course, the desirability of further assuring internal sepration of functions, which led us to recommend the hearing commissioner system - upon whose general outlines, once again, the majority and minority bills agree. The hearing commissioner scheme is directed to the end of obtaining men to hear and decide cases in the first instance who will be able, well-paid, and, although an integral part of the agency, still independent. It is probably unnecessary for me to describe in detail the mechanics suggested by the bills for the achievement of this end. Salaries are to be fairly high so that better men can be recruited. The agency may nominate them -- but they are appointed by the Office of Federal Administrative Procedure. Their tenure is fixed; they are removable only for cause and only by the Office. Their independence is real. And their decisions are to be final in the absence of appeal, but even in case of appeal, their findings of fact must be given great weight by the agency heads.

Now it has been suggested - and the proposal is embodied in the minority bill - that the salary range for hearing commissioners be made more flexible. From the standpoint of administrative efficiency, this might be advisable, particularly in the light of the wide variety of adjudications in the several agencies, and even in a particular agency. But if the agencies can control the salary of the hearing commissioner, even within the limits of a sliding scale, there is at least a potential threat to their independence.

As for the next major area of administrative procedure - judicial review - it is to be noted that except for a section dealing with venue, and one dealing with the record on appeal to the courts, S. 675, the majority bill, is silent on the subject. The minority bill, on the other hand, includes comprehensive sections dealing with judicial review. But I find it difficult to discuss these sections of the minority bill since I am uncertain what they mean. If the minority bill is simply a restatement of existing law, there really is not a great difference between the two bills. If the minority bill does more than restate, I am unable with certainty to ascertain the precise extent to which and the precise manner in which its provisions go beyond existing law.

I wish to make clear that I am not opposed to judicial review. Judicial protection against administrative action which is beyond legal authority is, I believe, in general, basic to our systems of government. But I do not believe that effective blanket legislation is feasible. My difficulty with the provisions of S. 674 concerning judicial review is that their effect is uncertain and unpredictable. Congress has in the past made purposive selection of alternative methods for, and scope of, review. I think that the only real solution to the problem of judicial review is to continue individual scrutiny and to amend those particular statutes which may be found to be inadequate, for there are very few statutes which omit a specific review procedure. In instances where there has been such omission, the courts have always found methods of reviewing the administrative decision where advisable. The Bar and the courts generally understand

the provisions of the statute and have applied them, speaking in a general sense, to confine review to correct errors of law but not to permit the substitution of the court's inferences of fact for those of the administrative body. I believe that it would very seriously impair the effectiveness of administrative tribunal to broaden the scope of review in such a manner as to change this well-understood distribution of functions. One of the main reasons against such a change is that it would burden the court with endless administrative matters properly belonging to the agencies.

You will see that, thus far, the majority and the minority bills are not in very great disagreement. Aside from differing details, the real difference between them, however, is the "code" form which the minority bill takes. And it is with that that I have the most serious difficulties. The authors of the minority bill - and originally, in fairness to them, several members of the majority too - felt that the idea of a code was an excellent one. It would be utilized as a guide to the agencies, and its effect would be salutary. But those of us who approved the majority bill ultimately came to the conviction, through trial and error, that a legislative code was, after all, not feasible in fact, however attractive in theory. Either excessive rigidity would result, imposing requirements applicable to some agencies, wholly inapplicable to others; or the bill would be inflated with exhortations and generalities. I think that both results appear in the minority bill.

The statute proposed by the minority report is full of general and unenforceable exhortations. Take, for instance, Section 110 of the bill which reads: "Any member, officer, or employee of any agency who violates the mandatory provisions of this act, shall, other laws to the contrary

notwithstanding, be subject to disciplinary action, demotion, suspension, or discharge from the public service." But what provisions of the act are mandatory?

For instance, Section 206 of S. 674 provides: "Prior to the making of rules or the utilization of any of the procedures provided by this title, each agency shall conduct such preliminary non-public investigations as will enable it to formulate issues or proposed, tentative, or final rules." The section spoke in mandatory language, and yet should the officer be disciplined for not conducting preliminary investigation? Again, Section 309 (m)(4) says: "In the consideration and decision of any cases, hearing or deciding officers shall personally master such portions of the record as are cited by the parties." I shall not comment on this provision except to say that I am glad that it does not apply to the Solicitor General in his arguments before the Supreme Court. When I made a similar remark before the subcommittee, Senator O'Mahoney said "I wish there was some power which would compel me to master this record."

I think that we have two superior media for the kinds of proposals which appear in the code. One is the Final Report itself, with its general recommendations and its specific recommendations. The second is the Office of Federal Administrative Procedure, which can find the evils when they arise, and make recommendations as they are warranted. These two vehicles together can provide the necessary guide for administrators without the dangers of the over-rigid prescription or the over-general exhortation of which the minority bill falls afoul.

For, after all, I think we are just beginning. Administrative procedure is maturing, but what is still more important, the study of the

field is just now maturing too. Before, we had to talk - and to reform - in the dark, basing our ideas on more or less haphazard information and isolated personal experiences with particular agencies. But now, for the first time, we have gathered together conprehensive materials - the 27 monographs of the Attorney General's Committee. And through the Office of Federal Administrative Procedure, we have the machinery for continued study and development.

I think it urgent that we not permit our attention to the field of administrative procedure to die at this stage. We have come this far; we have made a start. It would be a terrible waste of energy to let our efforts stop here because we cannot agree precisely on what to do. Nor do I think that the urgency is less because of the present international crisis and its domestic reverberations. On the contrary, it seems to me that these very factors make it more imperative than ever that we - you of the Association, we in the Government - cooperate and continue in our efforts toward improvement in the field.

For it must not be forgotten, as has been pointed out by one of my colleagues on the Committee, Professor Fuchs, that after all administrative justice is an alternative not only to judicial or "court" justice but also to a far more fluid and swift-moving executive justice. The present emergency has, more and more, brought with it an emphasis on executive action, just as it did in the last war. And this executive action is not, and probably cannot be, accompanied by the procedural safeguards for which we have been striving.

But we cannot be certain that, when the emergency is over, there will be an abandonment of executive justice. The same problems, the same

maladjustments, which gave rise to the increase of administrative agencies in 1929, are likely to remain, and indeed, will probably be present in even more acute form with the end of the emergency. Old social problems will be accentuated; new and urgent problems of reconstruction and adjustment will appear.

To meet these problems, the house of administrative justice must be set in order now, not when the problems have run beyond us. Administrative justice must be improved and perfected to make it ready to deal with what is on the horizon. It must be so fitted that it can deal with the future adequately and quickly; safeguards, indeed, there must be, but still administrative procedure cannot be so loaded with technicalities, be so encumbered with litigious details, that it will be a vehicle unable to cope with the swift moving demand. For the new problems will demand swift and effective action; the public will not long be patient with inadequate machineries. The alternative will be a continuation of executive action.

The responsibility is ours. We must all meet it. We cannot allow our attention and our energies to be divested by disagreements over degrees and details. As a flexible and effective beginning on our course, averting that rigidity and that impingement upon the substance of the laws which are administered which are fatal to wise procedural legislation, I suggest that S. 675 in its general outlines at least, is our greatest hope.