A FEDERAL ADMINISTRATIVE COURT*

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During the past year the decisions of the United States Supreme Court in the "hot oil" ¹ and the "sick chicken" ² cases have been cited so frequently and for so many different propositions, that both the possibilities of the cases and the patience of the listening public might justly be regarded as exhausted. The proposal of the Special Committee on Administrative Law of the American Bar Association for the establishment of a federal administrative court affords, however, an opportunity for reference to them from a point of view which has received very little attention.

The cases are important to the proposal, not in furnishing any direct authority one way or the other, but in suggesting an interesting contrast. In one field of administrative law, having to do with delegations of legislative power to executive or administrative agencies, the Supreme Court has, with these decisions, at last made progress toward some sort of a boundary line between two of the three great departments of government under our Constitution. At least, the Court has recognized that there *is* a boundary line. In the equally important sister field, having to do with reposing judicial power in such agencies, we are still not only without any semblance of a boundary line but are actually faced with a disheartening maze of conflicting notions as to where that line should be drawn and at times even with doubts as to whether any line exists.

In its opinions in these two cases last year, the Supreme Court of the United States declared for the first time in positive terms that there are bounds which Congress may not transgress in delegating *legislative* power to the Executive. Superficially, it seems strange that we have waited so long for judicial repair of this essential but somewhat damaged pillar in our national structure. The doctrine of separation of governmental powers into legislative, executive and judicial is *one* feature of our Constitution that cannot rightly be blamed on the *laissez-faire* philosophy of poor old Adam Smith. The doctrine was written into our fundamental law plainly enough,

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1. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935).

2. *A. L. A. Schechter v. United States*, 295 U. S. 723 (1935).

and, as we know from authoritative sources, this was done deliberately and for reasons which seemed good and sufficient to the master builders of the Republic. It has been given unqualified recognition by the Supreme Court of the United States in a number of decisions.³ The claim that Montesquieu erred in his appreciation of this feature of the English constitution would seem to be as fully outlawed as the claim that the Supreme Court has no power to invalidate legislation.

If the doctrine of separation of governmental powers is erroneous it still constitutes one of the essential lines of our governmental structure and, if it is to be done away with, it should be by amendment in such fashion that the electorate will understand the issue on which it is voting. The issue will not be whether we desire to substitute a new social and economic philosophy for an old; it will be whether we are prepared to dispense with our principal safeguard against autocracy in government. Let me digress here to say that I do not think we should go back to the days of the Tudors and the Stuarts for precedents on the powers of the Executive or even to the period of one hundred years ago when you can still find vestiges of the autocratic theory of government. It is not difficult to find vestiges even in later years. One purpose of our Constitution, I take it, was to prevent a repetition of institutions such as the Star Chamber.

A certain amount of delegation of legislative power to executive officials took place as far back as in the first administration of George Washington, on a small scale, however, and for the most part not of such character as to cause public concern. One writer has counted nineteen such delegations (some of them a little dubious) in the first volume of our federal statutes covering a period of about ten years.⁴ As we know, the process did not assume substantial proportions until almost a century later and it was only recently that the floodgates broke loose. Now, instead of nineteen, we find on the statute books (at the last count) about thirteen hundred separate instances where Congress has turned over the power to enact laws to executive and administrative agencies. Many of these delegations are narrow in scope; many are disturbingly broad; some are without intelligible limit.

Until February, 1933, in the few cases that came before it on the subject,⁵ the Supreme Court seemed a little reluctant to call a spade a spade;

3. *E. g.*, see *Evans v. Gore*, 253 U. S. 245 (1920); *Springer v. Philippine Islands*, 277 U. S. 189 (1928); *O'Donoghue v. United States*, 289 U. S. 516, 530 (1933); in addition, of course, see the *Panama Refining Co.* and *Schechter* cases. See also *Humphrey v. United States*, 295 U. S. 602 (1935).

4. GOMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* (1927) 50.

5. See, for example, *The Aurora*, 7 Cranch 382 (U. S. 1813); *Field v. Clark*, 143 U. S. 649 (1892); *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *Hampton, Jr., & Co. v. United States*, 276 U. S. 394 (1928). See, however, the dissenting opinion of Mr. Justice Holmes in *Springer v. Philippine Islands*, 277 U. S. 189, 210 (1928), in which he stated: "It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi."

the same was true of courts generally, federal and state. Instead, a variety of euphemisms appeared in judicial opinions. When the courts encountered delegated legislative functions, they baptized them "administrative" or "quasi-legislative" or even "quasi-judicial", terms that gave the impression of representing something new in governmental processes and, in fact, led many lawyers, judges and writers on legal subjects to believe that the impression was well founded.^{5a} In truth, they represent something almost as old as government itself. I venture to say that one of the chief obstacles to clear thinking in the field of administrative law has been this tendency to blink at the facts.

In February, 1933, when our government under the Constitution was 144 years old, the Supreme Court first discarded the euphemisms and called a delegation of legislative power by its right name.⁶ In the case in which this happened, it upheld the particular statute before it, saying, in realistic fashion, that a certain amount of delegation is all right; the process is perfectly constitutional if you do not go too far. We all recognize that this must be so. The necessities of government business require it, particularly for the making of detailed regulations in highly specialized fields such as the technical operation of radio stations or the importation of honey bees or the shipment of insects—fields which require the continuous participation of experts in the making of the law.⁷ The euphemisms having been discarded and the process having been recognized for what it is, the way was cleared for placing limitations on how far it might be carried without doing violence to the essential purpose of the constitutional prescription. In a sense, the decision in 1933 opened the way for the decisions in 1935.

Unfortunately, however, even at this late date, no decisions of the Supreme Court have established corresponding metes and bounds for an approach to the equally important sister problem: how far may Congress go in commingling *judicial* power with executive and legislative powers? Of course, Congress really does not "delegate" judicial power at all (it has none to delegate), but the term is occasionally more convenient than certain clumsy, though more accurate, circumlocutions. The fact is that in most discussions of the doctrine of separation of governmental powers there has been altogether too much emphasis on the word "delegate" and too little on the "basic and vital" object of the doctrine, which is "to preclude a commingling of these essentially different powers of government in the same hands."^{7a} Daily the executive officials of the federal government delegate

5a. See SHORT, NATIONAL ADMINISTRATIVE ORGANIZATION (1923) 22, 23.

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

7. This point of view has been consistently subscribed to by the Special Committee on Administrative Law. See, for example, its 1934 report, 59 A. B. A. REP. 543, 563.

7a. O'Donoghue v. United States, 289 U. S. 516, 530 (1933). In Jones v. Securities & Exchange Comm., 56 Sup. Ct. 654, 657 (1936), the majority opinion, in discussing arbitrary power, said the following: "To escape assumptions of such power on the part of the three primary departments of the government is not enough. Our institution must be kept free

the performance of functions assigned to them by act of Congress to subordinates in their employ, without encountering any constitutional obstacle. Similarly, Congress might conceivably delegate its power to legislate on a particular subject-matter to a board responsible directly to Congress and, if it did not also endow such board with executive or judicial power over the same subject-matter, it would not run afoul of the doctrine of separation of governmental powers, however badly it might bruise the maxim *delegatus non potest delegare*. The latter is an entirely different doctrine which has on occasions been read into the Constitution as if it were one and the same thing as the former.^{7b}

The point cannot be made too frequently that what has come to be known as "administrative law" in the United States results primarily from departures, large or small, from the strict interpretation of the doctrine of the separation of governmental powers. As stated in the first report of the Special Committee on Administrative Law in its 1933 report,

" . . . the conclusion is difficult to avoid that administrative tribunals represent departures, varying in degree and kind, from a rigid application of this doctrine, in fact if not in constitutional theory. The committee makes this statement, not in any spirit of criticism or disapproval, but in order to facilitate a simple analysis of the subject matter with which it expects to deal. . . .

"In general, it may be said that administrative law results from the reposing of what are essentially legislative or judicial functions (or both) in an official or board belonging to the executive branch of the government or in an independent official or board."^{7c}

By way of contrast to the comparatively modern state of affairs that now obtains on the legislative side of administrative law, we are still in the

from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but not less violative of constitutional guaranties."

The rapid growth in the exercise of inquisitorial functions by administrative agencies suggests an interesting study, from the point of view of the doctrine of separation of governmental powers. What has actually been occurring has been largely obscured by the tendency to commingle executive, legislative and judicial functions in a single agency. In a judicial proceeding, the issues are usually fixed, and any inquisition to compel disclosures is limited accordingly. When the inquisitorial process was extended so as to serve as an aid in performing legislative functions, the issues became vague indeed, and all too often the process was really employed as a fishing expedition in order to find the basis for a criminal prosecution. More recently, it seems, the tendency has been to seek to use the inquisitorial process openly in aid of purely executive functions, and, in particular, to secure information on which to base prosecutions. The wholesale seizure of private telegrams by the Federal Communications Commission in cooperation with the Black Committee seems to be an instance where the process has been carried at least this far.

7b. See FRANKFURTER AND DAVISON, CASES ON ADMINISTRATIVE LAW (1935), Part II, entitled "Delegation of Powers," for a collection of authorities on the maxim.

7c. (1933) 58 A. B. A. Rep., 409-410.

euphemism stage on the judicial side. No decision to date⁸ has frankly faced the fact that, under a bewildering medley of federal statutes, judicial functions galore have been lodged in the President, in agencies directly responsible to the President, in the heads of government departments, in subordinate officials and bureaus in those departments, and in the so-called independent boards and commissions (the word "independent" is also somewhat of an euphemism). Many persons have amused themselves by attempting to count the instances of such delegations. No two reach exactly the same result and, unless Congress has a slump in its recent large annual output, no count will remain accurate for the time necessary to get it published. Much depends on definitions. It must be conceded that there are boundary-line cases difficult to classify; some shade over from judicial into executive and some from judicial into legislative. The fact that there are twilight zones between the three great departments of government is, of course, nothing new and offers no excuse for attempting to obliterate their essential differences. It would be just as reasonable to say that there should be no law at all. My most recent count (which, frankly, may be open to criticism for including some doubtful cases) indicates that there are about seventy-three administrative tribunals in the federal government performing judicial functions in about 267 classes of cases. Some of these tribunals, needless to say, operate in very narrow fields but are none the less important to those persons subject to their jurisdiction.

At times the Supreme Court has called these functions "administrative", at others, "quasi-judicial", at others, "quasi-legislative".⁹ It has called some of the tribunals "*legislative courts*."¹⁰ As a result of this policy of non-recognition, there is no decision placing intelligible limits on the extent to which the process of commingling judicial power with executive power and

8. For an interesting decision of a lower federal court, see *Western Union Tel. Co. v. Myatt*, 98 Fed. 335, 354 (C. C. D. Kan. 1899).

See also the majority decision in the Guffey Coal Act cases (*Carter v. Carter Coal Co.*, U. S. Sup. Ct. May 18, 1936), with respect to the attempt by Congress to delegate the power to fix hours and wages to a majority of the producers and miners. The majority said: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The delegation is so clearly arbitrary and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp. v. United States*, 295 U. S. at p. 537; *Eubank v. Richmond*, 226 U. S. 137, 143; *Seattle Trust Company v. Roberge*, 278 U. S. 116, 121-122." See also *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N. W. 420 (1936); *In re Petition of State of Wisconsin and the Tavern Code Authority*, Wis. Sup. Ct., Jan. 7, 1936.

9. Among the many decisions of this character, see *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464 (1930); *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716 (1929); *Ex Parte Bakelite Corporation*, 279 U. S. 438 (1929); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274 (1928); *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70 (1927); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 700 (1927); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 444 (1923); *Butterworth v. United States*, 112 U. S. 50 (1884).

10. See *Williams v. United States*, 289 U. S. 553, 560 (1933); *Ex parte Bakelite Corporation*, 279 U. S. 438, 440 (1929).

legislative power may be carried. Our citizens are daily doing business with *de facto* political entities which have not been formally recognized, at least by their right names. But it seems clear that another essential pillar of our national structure is somewhat damaged and is in need of repair.

It is on this subject of commingling judicial power with other powers that, in all humility, the Special Committee on Administrative Law of the American Bar Association has proposed a method of repair—the establishment of a federal administrative court. To appreciate the problem that must be met, and to understand the limitations into which any attempted solution must be made to fit, more must be said about the existing agencies and the situation created by past decisions of the Supreme Court.

I need not dwell at length on the evils created by the mere multiplicity of these agencies—the innumerable varieties of rules of practice and procedure, the countless different ways of taking depositions and of compelling the attendance of witnesses and the production of documents, the bedlam of conditions on admission to practice and disbarment, the bewildering dissimilarities in the method and scope of judicial review, the lack of accessibility to decisions, the overlapping jurisdiction, the ever-increasing centralization in Washington, and the tendency of each agency to make decisions in its own field without adequate appreciation of the effect of those decisions on persons and businesses not directly subject to its regulation. Commissions are always actuated by the philosophy of rugged individualism *vis-a-vis* each other. The eradication of these and related evils seems difficult, indeed, as long as we maintain our present federal circus with some seventy-three side-shows housed in separate tents. We must find a way by which at least some of the side-shows may gradually be brought into one large tent.

On the other hand, the moment we talk about doing so we encounter a serious obstacle of a practical order. The opinion is widely held that, on the judicial side as well as on the legislative side, there is need for the continuous supervision of a body of experts dealing exclusively with a given class of cases which, it is said, the courts have neither the time, the ability nor the experience to handle. Personally, I think the notion rests on a misapprehension and proceeds primarily from a confusion of legislative functions with judicial functions. I have already conceded that the making of regulations in a technical field may well require delegated legislative power to a bureau of experts, but I have yet to see the case in which an alleged violation of one of those regulations involved issues any more difficult than are faced daily by every court in the land. Like the climate of Los Angeles, theoretically this conception of expert commissions is perfect. Sometimes, it is true, experts are appointed, but no more than you would expect under the law of averages. Most of the appointees naturally achieve familiarity with the subject-matter after they have served a substantial time. So do judges

assigned to hear a particular class of litigation, *e. g.*, divorce cases. However this may be, the committee has recognized the possibility of merit in this opinion and the practical necessity of compromise with those who entertain it, if it is to achieve any measure of success toward its main objective. The practical problem, therefore, becomes two-fold and somewhat paradoxical—to achieve uniformity without sacrificing the alleged advantages of multiplicity.

So far I have spoken as if there were no decisions of the Supreme Court to be reckoned with. The task would be somewhat simplified if there were not. As I understand the Court's decisions in the *Panama Refining Company* and the *Schechter* cases, a delegation of legislative power, to be valid under the Constitution, (1) must be limited by a sufficiently definite legislative standard expressed in the statute, and (2) may not be exercised except on the basis of appropriate findings required to be made by the administrative agency. In the past, including the very recent past, the Court has made exactly the same requirements of delegations of judicial power, although it has not called them by name. Instances of this are its decisions under the Federal Trade Commission Act and under the Radio Act of 1927.¹¹

Heartily as I concur in the results of the recent decisions, I cannot believe that these requirements mean very much. If, to make an otherwise invalid delegation of legislative power valid, all you have to do is to insert some word or phrase such as "fair" or "reasonable", or "public interest, convenience, or necessity," and a requirement that there be findings of fact showing that the standard has been complied with,¹² then, it seems to me, the essential meaning of the doctrine of separation of governmental powers has been missed and its evasion becomes simple indeed, while at the same time the legitimate field for delegations of legislative power, and the good purposes served by delegations within that field, are given little or no recognition.

11. *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933); *Federal Trade Comm. v. Raladam Co.*, 283 U. S. 643 (1931), and cases therein cited.

12. A counterpart of this process of reasoning is to be found in the tendency of Congress to attempt to give itself power to legislate on a given subject matter by extensive recitals in a preamble to, or the first section of, a statute. Among the many recent examples are the National Industrial Recovery Act, the Agricultural Adjustment Act and the Guffey Coal Act. Some color of authority for this procedure seems to be given by *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923), when taken in conjunction with *Hill v. Wallace*, 259 U. S. 44 (1922). Such recitals of fact, it seems to me, should be made in the reports of legislative committees, who have held hearings and heard evidence on the need for the legislation, and not in the legislation itself. Recently the Supreme Court, in *St. Joseph Stock Yards Co. v. United States*, 56 Sup. Ct. 720, 730 (1936), has, in its majority opinion, spoken as follows on this subject: "When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation."

Certainly Congress cannot delegate *all* its legislative power to a commission and then go home, no matter how elaborate a standard is set up as a torch to guide the commission in the meantime. Is not the real point to be found in a requirement that delegation of legislative power be in relatively narrow and specialized fields which, as a practical matter, could not successfully be handled by Congress? Can any one say that these so-called standards really mean anything that would not be read into the statutes in any event? ^{12a}

On the judicial side, these requirements appear more appropriate and to serve a legitimate purpose. They fall far short, however, of achieving the essential purpose served by keeping the judicial separate from the executive and the legislative departments of government. If there is anything of which we can be relatively sure after some hundreds, even thousands, of years of experience with judicial machinery, it is that no man can be trusted to be judge in his own case.^{12b} And he *is* a judge in his own case if he is also the prosecutor or if he is also the legislator who made the rule he is asked to interpret and apply. Agency after agency in our federal government is authorized to wield all three powers of government at once. Wearing its legislative toga, a commission makes a regulation, on compliance with which John Doe's right to continue in business may depend. Having reason to

12a. Whatever may be thought as to the conclusions reached by Mr. Justice Cardozo in his dissenting opinion in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433 (1935), and in his concurring opinion in *A. L. A. Schechter v. United States*, 295 U. S. 495, 551 (1935), I am inclined to think his opinion goes farther in the direction of suggesting a workable rule than does the majority opinion. In the *Panama Refining Co.* case, at 443, he said, in support of his conclusion that there was sufficient definition of a standard: "Discretion is not unconfined and vagrant. It is *canalized* within banks that keep it from overflowing. . . . What can be done under cover of that permission is closely and clearly circumscribed both as to *subject matter* and occasion." In the *Schechter* case at 551, applying the same test, he found that here "is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard."

I regret that space does not permit a discussion of the suggestions made in the *Report of the Committee on Ministers' Powers* (the Sankey Committee) (1932). Contrary to an impression rather generally promulgated, this Committee did not give wholesale approval of the modern tendency toward broad delegation of legislative power but, on the contrary, observed "dangerous tendencies" and "risks of abuse," against which "safeguards are required." It recommended that Parliament should confine itself to the delegation of "normal" powers and should not, as a rule, delegate "exceptional" powers. As examples of "exceptional" powers it enumerated powers to legislate on matters of principle or to impose taxation, power to amend existing legislation, powers conferring so wide a discretion that it is almost impossible to know the limit intended, and powers over the exercise of which judicial control is forbidden. The report contained a number of other recommendations designed to remedy evils due to the fact that "the methods by which those powers have been delegated are open to serious criticism." To say that the report constitutes a refutation of HEWART'S *THE NEW DESPOTISM* (1929), is an enormous exaggeration.

12b. See note 17a *infra*. In his dissenting opinion in *St. Joseph Stock Yards Co. v. United States*, 56 Sup. Ct. 720, 726 (1936), Mr. Justice Brandeis said: "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, *but that the trier of the facts shall be an impartial tribunal*; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearings shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed." (Italics added.) See, however, *Brinkley v. Hassig*, C. C. A. 10th, April 7, 1936, quoted *infra* note 17.

believe that John Doe is guilty of violating the regulation, the commission doffs the toga and, taking up the executive sceptre, investigates and prosecutes him. With the sceptre still in its hand, the commission hurriedly dons the judicial ermine and proceeds to present to itself at least two scintillas of evidence to prove that it was right in the first place. While care is sometimes taken to preserve the *form* of placing the burden of proof on the prosecutor, all the form in the world cannot disguise the *fact* that the burden is usually on John Doe to prove himself innocent before a commission that at least strongly suspects he is guilty. If John or his lawyer construes the regulation differently than does the commission, that is just unfortunate for John. The commission made the regulation and is confident that it knows just what it meant to say.¹³ And it is always free to change its mind. John is in the position of a man whose wife changes her system of bidding in the middle of a bridge game without notice. He is sure to lose and is equally sure to get blamed for it.

Important as is the matter of imposing proper limits on the delegation of legislative power, the matter of imposing limits on the reposing of judicial power in agencies that have executive or legislative power (or both) seems to me more important—at least if the individual is to be left with any protection at all against arbitrary, capricious or corrupt public officials. After all, in a democracy legislation is bound to be a partisan process, sometimes pursuant to a party platform and sometimes not, but usually under the leadership of a group that has, or claims to have, an objective. It is so in Congress, and we have no reason to be shocked if it is so of officials in the executive departments and the independent agencies to which legislative power has been delegated.^{13a} If regulations made in the exercise of such a power are enforced *uniformly* against all persons, regardless of party, we need not fear too much from the results. A bad regulation, like a bad statute, will be repealed soon enough *if* it is enforced. But if power is given to

13. One encouraging limitation on the power of administrative tribunals to act *simultaneously* in a dual capacity has been pointed out by the Supreme Court in *Arizona Grocery Co. v. Atchison, Topeka & S. F. R. Co.*, 284 U. S. 370, 389 (1932): "Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated, in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." "The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

See also the recent decision of the Supreme Court in the Guffey Coal Act cases (*Carter v. Carter Coal Co.*, U. S. Sup. Ct., May 18, 1936), in which the effect of legislative recitals by way of inducement is considered in the majority opinion.

13a. "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient." Majority opinion in *St. Joseph Stock Yards v. United States*, 56 Sup. Ct. 720, 728 (1936).

the same agency to discriminate without too much danger of detection—to enforce the regulation against *A* and to overlook *B*'s transgressions, whether for friendship or because of some form of political pressure or on account of any of the countless frailties of human nature, there you will find tyranny of the bureaucrat over the individual, a return to the jurisprudence of the Arabian sheik. And that is exactly what you have when judicial power is combined with legislative and executive power in an administrative agency, and that agency, in turn, is composed of men who must periodically look to the Executive and to the Senate for reappointment and a continuation of their source of livelihood. As stated by Alexander Hamilton in the Federalist Papers (and quoted by the Supreme Court in *Evans v. Gore*,¹⁴ and *O'Donoghue v. United States*¹⁵):

“In the general course of human nature, a power over man's subsistence amounts to a power over his will.”

So far as I know, not a single federal decision declares or even hints that it is unconstitutional to combine judge with prosecutor or legislator,¹⁶ and there are many decisions which can be cited as giving tacit approval to that combination.¹⁷ If there is any one purpose more than another which a majority of the Special Committee on Administrative Law have had in mind in proposing an administrative court, it is to segregate the clearly judicial functions of these agencies from their executive and legislative functions and, so far as possible, to restore the exercise of those functions to an independent judiciary.^{17a}

14. 253 U. S. 245, 252 (1920).

15. 289 U. S. 516, 531 (1933).

16. A possible exception to this is found in *Western Union Tel. Co. v. Wyatt*, 98 Fed. 335, 354 (C. C. D. Kan. 1899).

17. See, for example, *Federal Trade Commission v. Klesner*, 280 U. S. 19, 27 (1929). See, also, the very recent case of *Brinkley v. Hassig*, C. C. A. 10th, April 7, 1936, involving a revocation of license to practice medicine by the Kansas State Medical Board. The opinion contains the following:

“The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years. The Board of Tax Appeals is an outstanding example of one such successful effort. But it has never been held that such procedure denies constitutional right. On the contrary, many agencies have functioned for years, with the approval of the courts, which combine these roles. The Federal Trade Commission investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred. The Interstate Commerce Commission and state public service commissions may prefer complaints to be tried before themselves. If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so preferred, due process is not denied here because one or more members of the board aided in the investigation.”

17a. Again it is a matter of regret that space does not permit a detailed discussion of the findings and recommendations contained in the *Report of the Committee on Ministers' Powers* (1932), 74, already referred to *supra* note 12a. The report finds “it is beyond doubt that there are certain canons of judicial conduct to which all tribunals and persons who have to give judicial or quasi-judicial decisions ought to conform.”

Among these canons is the following: “The first and most fundamental principle of natural justice is that a man may not be a judge in his own case.” *Id.* at 76.

Curiously enough, the chief obstacle to a complete restoration is found in decisions of the Supreme Court itself. It has taken some of its own euphemisms too seriously. Having found that certain functions were "quasi-judicial" or "quasi-legislative" or "administrative," it has later reasoned that ergo those functions cannot be judicial and cannot be exercised by constitutional courts or, on review, by the Supreme Court.¹⁸ The line is usually drawn between issues of fact and issues of law (find it if you can).¹⁹ The court has held that decisions on issues of fact by federal administrative agencies, or at least certain kinds of such agencies, cannot be reviewed by a constitutional court when they are supported by more than a scintilla of evidence. Yet in nearly every administrative controversy, as in most lawsuits, the principal issues are of fact, and most instances of arbitrariness and caprice in administrative decisions consist in disregarding the great weight of the evidence in order to favor the less deserving of the two parties to the dispute.

Disqualifying interest, said the Committee, is not confined to pecuniary interest. "Indeed we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest"

"We are of opinion that, in considering the assignment of judicial functions to Ministers, Parliament should keep clearly in view the maxim that no man is to be judge in a cause in which he has an interest"

"It is unfair to impose on a practical administrator the duty of adjudicating in any matter in which it could fairly be argued that his impartiality would be in inverse ratio to his strength and ability as a Minister" *Id.* at 78.

There follows a detailed series of recommendations which, in substance, recommend the establishment of a number of independent tribunals analogous to the Board of Tax Appeals and recommend against the establishment of a system of administrative law and administrative judges analogous to the French system (a system in which, unlike the proposal of the Special Committee on Administrative Law, no appeal would lie to the ordinary courts).

18. See, for example, *Federal Radio Comm. v. General Electric Co.*, 281 U. S. 464 (1930).

19. The Supreme Court has, of course, recognized that, in certain classes of cases at least, there is a line which may not be transgressed, even on issues of fact. The line has been established with respect to so-called "jurisdictional" fact, and to matters of constitutional right. In *Crowell v. Benson*, 285 U. S. 22, 56 (1932), for example, the Court said: "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." More recently, in *St. Joseph Stock Yards Case*, the Court (majority opinion) said at 729: "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

"That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Where the prosecutor is also the judge, the individual needs the protection of the courts far more on issues of fact than he does on issues of law.

Perhaps we have all been unconsciously affected by a habit of thinking due to an institution more or less peculiar to Anglo-Saxon jurisprudence—the jury.^{19a} Under this jurisprudence the exercise of judicial functions on the law side has been apportioned between two bodies, the court and the jury. It is fair to state, I think, that the institution of jury trial is due, not to any notion on the part of our English forefathers that issues of fact are not judicial, but rather to their deep-rooted belief in the doctrine of separation of governmental powers. The Englishman distrusted the judges because they were appointed and, he believed, controlled by the King. He wanted issues of fact (and also some issues of law) adjudicated by independent umpires free from control by the Executive. We, in turn, imbedded the right of jury trial in our federal and state constitutions not altogether appreciating, I am afraid, that the essential thing was to have *independent* judges on issues of fact and not that issues of fact are not for the judiciary.

19a. This appears in the dissenting opinion of Mr. Justice Brandeis in the *St. Joseph Stock Yards Case*, at 737, in which he said, speaking of earlier decisions of the Court: “. . . and, they draw distinctions, which give clear indication when due process requires judicial process and when it does not.

“The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the Government, *United States v. Babcock*, 250 U. S. 328, 331) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights. Compare *Phillips v. Commissioner*, 283 U. S. 589, 596-597. A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. . . . But a multitude of decisions tells us that when dealing with property a much more liberal rule applies. They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court, . . .” Further on, at 739, he said that the Court “has recognized that there is a limit to the capacity of judges; and that the magnitude of the task imposed upon them, if there be granted judicial review of the correctness of findings of such facts as value and income, may prevent prompt and faithful performance. It has borne in mind that even in judicial proceedings the findings of fact is left, by the Constitution, in large part to laymen. It has enquired into the character of the administrative tribunal provided and the incidents of its procedure. Compare *Humphrey's Executor v. United States*, 295 U. S. 602, 628.”

It is interesting to note how, in this dissenting opinion as in so many opinions of the Court, no distinction is made between the exercise of a *legislative* function (*e. g.*, rate-making as involved in that case) and the exercise of a *judicial* function (*e. g.*, an award of reparations, or the revocation of a license for violation of a regulation, or the entry of a cease-and-desist order after finding a person guilty of a specified unfair method of competition). It is also interesting to contrast Mr. Justice Brandeis' conception of the supremacy of the law, with that of Mr. Justice Sutherland speaking for the majority of the Court in *Jones v. Securities and Exchange Commission*, 56 Sup. Ct. 654, 660 (1936). The former's conception is expressed as follows: “The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly.” The latter's conception is as follows: “The action of the commission finds no support in right, principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy.”

The paradox is that the decision of issues of fact, originally removed as far as possible from the Executive, is now thrown bodily into the lap of executive officials and the court-house doors are closed to them. Something has been rendered unto Caesar that never belonged to Caesar.²⁰

Take the Federal Trade Commission as an example of the curious paradoxes into which we have been led. Prior to 1914 there had been a hue and cry against what were vaguely termed unfair methods of competition. Congress wanted to prohibit something but was not quite sure what it was expected to prohibit. So it fired a sawed-off shotgun at the side of a barn, forbade all unfair methods of competition, and set up a Federal Trade Commission as a body of experts to ascertain just how much of the barn had been hit. Its decisions were made subject to review in the several circuit courts of appeals, on questions of law only. What has been the result? On issues of fact (on which the individual had most need of protection, and which the Commission was least qualified to decide) the Commission reigned supreme. On the important issue of law as to what constitutes an unfair method of competition, we must today, after over twenty years of the Commission, look chiefly to court decisions and not to the decisions of this body of experts on the subject.²¹ Would it not have been better to have endowed this commission with power to define "unfair methods of competition" by rules and regulations, promulgated after notice and hearing if you will—and then to have provided that violation of a regulation would constitute a penal offense, to be tried and determined in our courts?^{21a}

20. Dean Roscoe Pound, with his usual keen penetration, recognized the tendency as early as 1907. In his article *Executive Justice* (1907) 55 U. OF PA. L. REV. 137, 139, he said: "A brief review of the course of judicial decision for the past fifty years will show that the judiciary has begun to fall into line, and that powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions."

21. "It belongs to that class of phrases which does not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion'. Davidson v. New Orleans, 96 U. S. 97, 104. The question is one for the final determinations of the courts and not the Commission. Federal Trade Comm. v. Gratz, 253 U. S. 421, 427; Federal Trade Comm. v. Beech-Nut Packing Co., *supra*, p. 453." Federal Trade Comm. v. Raladam Co., 283 U. S. 643, 648 (1931).

21a. See the able article, Handler, *Unfair Competition* (1936), 21 IOWA L. REV. 175. The author, a valued former member of the committee, in the concluding portion of his article, at 185, writes: "The definition of unfair competition by administrative legislation is incomparably superior to definition by administrative decision. The method of judicial exclusion and inclusion does not permit of a sustained, consistent, comprehensive and speedy attack upon the trade practice problem. The case by case determination takes years to cover even a narrow field; it leaves wide lacunae; false starts are difficult to correct and the erroneous decision is just as prolific as a sound ruling in begetting a progeny of subordinate rules. In a controversy between two litigants or between a Commission and a private party, the law making function is distracted by factors which are important to the contestants but irrelevant to the formulation of future policy. The fusion of law and economics, the detailed investigations and hearings, and the precise formulation of rules, all of which are so essential to a proper regulation of competition, are not feasible when law making is but a by-product of the adjustment of controversies. The combination of the two functions may have been justified when knowledge of the workings of competition

Over five years ago, Mr. Chief Justice Hughes said :

"The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country, and I care little who lays down the general principles.' " ²²

This brings me to state another requirement that must be met by the proposed administrative court. It must have full power to determine issues of fact, either in the first instance or on review. Consequently, it cannot be a constitutional court ²³ and we must be very careful as to the method we provide for ultimate review of its decisions by our constitutional courts.

It will be of assistance in appreciating the committee's proposal if I outline the major classes of cases in which judicial functions are exercised by administrative agencies, so as to make plain both how modest is its initial program and how far-reaching is its ultimate purpose. It will also help to make clear that the committee's proposal has only to do with *clearly* judicial functions and that there is no ground for apprehension that it would invade the traditional prerogatives of the Executive or that it would usurp any legislative activities, including rate-making.

The first class of cases consists broadly of those involving money claims or penalties. In this group would fall the cases now heard by the Board of Tax Appeals, the Court of Claims, the Customs Court, and, on the customs side, the Court of Customs and Patent Appeals. All these are already really courts in a genuine sense. The cases they hear are, to some extent, exactly the same as certain classes of cases over which our federal district courts have jurisdiction. None of them presents a combination of prosecutor or legislator with judge. The individual gets his day in court before an independent judiciary, and, except for the members of the Board of Tax Appeals, the judges have life tenure.

was sparse and objectives ill-defined. It can no longer be justified today. It would be little short of criminal to rely upon so inefficient a method of law making when more scientific and expeditious devices are unavailable.

"It is futile to expect the legislature to revise the statute to meet changing conditions and needs. Hence we should resort to administrative legislation, at least so far as federal control of practices in interstate commerce is concerned. The administrative tribunal would have several functions. On the legislative or law making side, it would be charged with the duty of maintaining an unremitting study of the trade practice problem. It would, by rules and regulations, under a proper delegation of power and a clear definition of the standards by which it is to be guided, make additions to the general code of unfair competition. These additions would be preceded by investigation and public hearing and proposed drafts would be subject to extended criticism and study before enactment.

"On the enforcement side, I should favor the conversion of the Federal Trade Commission into an administrative court with the authority, in the first instance, to issue binding injunctive orders. Prosecution should be completely divorced from the process of adjudication."

²² U. S. Daily, Nov. 1, 1930, at 1.

²³ Federal Radio Comm. v. General Electric Co., 281 U. S. 464 (1930).

There is, however, an amazing number of other cases involving money claims or penalties where these safeguards are partly or completely lacking. Time will not permit anything like a full description of them. There are instances in which executive officials have power to find the individual guilty of this-or-that violation of a statute or regulation and to impose a fine. The Secretary of Labor may, for example, impose a heavy fine on a steamship company for bringing a diseased, defective or otherwise inadmissible alien into the United States if the condition of the alien might have been ascertained with reasonable diligence.²⁴ There are the reparations cases confided to the Interstate Commerce Commission and the Federal Communications Commission.

A second class of cases consists broadly of those which, if handled in court, would be called injunction or mandamus cases. An illustration of this is the jurisdiction of the Federal Trade Commission to find an individual guilty of an unfair method of competition and to enter a cease-and-desist order against him (but not the jurisdiction of such bodies as the Interstate Commerce Commission, the Federal Communications Commission, or the Secretary of Agriculture under the Packers and Stockyards Act to fix rates).

A third class of cases which, I think, may prove to be the most important of all, includes those which I shall describe generally as revocation-of-license cases. There are, as nearly as I can ascertain, about 100 instances of federal statutes which require a license, permit or some other instrument of authority as a prerequisite to engaging in a particular kind of business undertaking or activity. In a large proportion of these instances the licensing authority has broad legislative power to make regulations with which the licensee must comply, and broad judicial power to revoke the licenses and to put the licensee out of business after trying him for violation of one of its own regulations. It is unnecessary to recall that the recent unfortunate N. I. R. A. had a one-year provision under which, if valid, the President might have imposed the license system on practically every business in the country, and that the similarly ill-fated Agricultural Adjustment Act had a provision almost as broad. In both instances, judicial review of revocations was almost completely eliminated.

The tendency to impose the license system on individuals and on businesses is visible everywhere. A number of bills now pending in Congress would, if passed, extend the system or its equivalent into new fields. Such a system is the dream of every bureaucrat. It throws the machinery of government into reverse gear so that the servant becomes the master.²⁵

24. *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U. S. 329 (1932).

25. At this point I have borrowed, with slight rephrasing, the language which I have used in another article, *Freedom of Speech and Radio Broadcasting* (1935) 177 ANNALS 179.

What has heretofore been a constitutional right to engage in an honorable calling becomes a mere privilege held subject to the caprice of an administrative agency which combines legislative, executive and judicial powers with no substantial recourse to the courts for protection. There is not a constitutional guaranty which cannot be evaded with impunity and laughed to scorn by such a combination. Can any lawyer reasonably contend that to try a man for violation of a regulation, to find him guilty, and to punish him by taking away his right to earn his livelihood in his chosen calling, does not constitute the exercise of a judicial function? To me, there is no field in which there is greater need or occasion for the intervention of an independent judiciary with full sway over issues of both law and fact.

Now let us consider the machinery of the court which would be established to exercise some or all of the judicial functions which I have described.

The court envisioned by the Special Committee on Administrative Law would consist of a chief justice and a number of associate justices (probably forty at the outset) to be determined by the scope and nature of the functions assigned to it. All members of the court would hold office for life or during good behavior. They would be appointed by the President, by and with the advice and consent of the Senate, except that, so far as possible, at the outset its members would consist of the present personnel of the tribunals whose functions are taken over by the court.²⁶ The salaries would be reasonably commensurate with the salaries paid to judges of the United States District Courts and the United States Circuit Court of Appeals, with a somewhat higher salary for the chief justice. The provisions for retirement that apply to federal judges would apply to the administrative court judges. They would not be removable from office by the Executive or by any process other than impeachment. While, under decisions of the Supreme Court, this new tribunal could not achieve the dignity of a constitutional court, as much dignity and as much security and as much independence as is possible to provide by Act of Congress would be conferred upon it and its members.

Up to this point there is not much leeway, I believe, for difference of opinion or occasion for compromise. At any event, the committee would probably be adamant, even obstinate, in insisting that judicial independence is the bed-rock on which this court must be constructed and that without a large measure of such independence we may question whether the labor and the pain of the necessary adjustments are worthwhile. If this court's every decision is to be blurted out under the shotgun of an executive power to

26. An exception may have to be made in the case of the Board of Tax Appeals. The point has been made that Congress would have no power to convert their definite terms of office into life tenure, and, if the point is well-taken, it would be necessary to take over members of the Board only for their unexpired terms.

appoint or remove, or of a legislative power to refuse to confirm, then it will fall far short of getting us back on the main road. So far as clothes can make the court, the committee desires to outfit this court with judicial vestments as it starts on its career.

The committee is thinking in terms of an extremely flexible organization, under a chief justice with broad powers, but subject to appropriate checks. The court would have two divisions—a trial division and an appellate division—and the statute would fix a minimum number of justices to be assigned to either division. Subject to this, the chief justice would determine these numbers and would assign the justices back and forth, all in such manner as most expeditiously to dispose of the court's work. No justice would, of course, be allowed to review a case in an appellate capacity if he had had to do with it in a trial capacity. Each division might well have a presiding officer called a chairman.

The trial division would be subdivided into not less than four sections, each composed of one or more justices. The chief justice would determine the number of justices composing each section, the particular justices to be assigned thereto, and the scope of the section's work, with power to make any necessary changes from time to time. Each section would be assigned a particular class of cases, or two or more related classes of cases and, until changed, would have continuous supervision of the class or classes of cases assigned to it. This would all be done in such a manner as to provide not only for the expeditious disposal of the court's work, but also for the development of expert knowledge and experience in the handling of specialized fields. Thus, we might eventually expect a tax section, a customs section, a claims section, a patents section, a section dealing with unfair methods of competition, a section dealing with revocations of license, and so on. At the outset, temporary provision should be made for specific sections corresponding to the tribunals to be absorbed, so that there will be a minimum of disturbance. The flexibility of the section idea would make it possible to obviate overlapping functions, to bring related functions together whenever necessary, and to meet peak loads of work in one section by drawing upon the personnel of another section which is not so busy.

While the advantage of expert knowledge and experience in the handling of specialized subject-matter would be retained, the advantage of reasonably uniform rules of practice, procedure and evidence would be secured. The matter of admission to the administrative bar and of disciplining wayward members could be placed on an orderly and logical basis. These and other advantages, which seem beyond hope of achievement with our present circus of seventy-three side-shows, become within reach with a court so organized.

To what extent the appellate division would or should be subdivided into sections, each limited to particular classes of cases, depends, of course, on

how large a court is created and on what functions are assigned to it. In the modest form proposed by the committee a multiplicity of sections of this sort might not be desirable. There would be sections in the sense that not more than three justices of the appellate division would participate in the determination of any case reviewed by it, with provision, however, for a procedure by which conflicts between two or more of these sections could be resolved on motion for rehearing. The same sort of procedure could also be employed in order to reduce the issues in any case to matters of law, where any questions of law are involved, so as to put the case in such shape that it may constitutionally be reviewed by the Supreme Court on petition for certiorari. In other words, a motion for rehearing would serve as a sifting process to protect the Supreme Court from being burdened with unimportant cases and at the same time to bring into bold relief the cases that do involve important questions and deserve review by our highest court. The majority of the committee are inclined to think that provision for review by the Supreme Court on petition for certiorari is all that is necessary, but there may be a difference of opinion on that. They believe that it is not desirable that there be an appeal as a matter of right to the several circuit courts of appeal (except, perhaps, in classes of cases where such an appeal as already provided by statute) with the resulting conflict in decisions, the unavoidable delay and expense, and the intervening uncertainty. If it were not for the ambulatory features of the court, which I shall mention presently, the committee might feel otherwise, but it seems that it will not be difficult to avoid the evil of having this court sit too regularly in Washington.

Incidentally, the appeal from the trial division to the appellate division could be, and I think, ought to be, on as informal and as inexpensive a basis as possible. Printing of the record could be dispensed with, and such matters as the time within which appeal should be taken, and the formalities attending, would be governed by the court's rules.

While both the trial division and the appellate division would have headquarters in Washington, both divisions, and each section thereof, would be ambulatory to the greatest extent practicable, with power to hold hearings anywhere in the United States and, wherever the work of the court justifies it, to establish either permanent or part-time branches in the larger cities. To assist in this, the trial division would be empowered to employ examiners or commissioners both regularly and, to meet unusually heavy demands, for limited periods or for particular classes of cases.

Needless to say, a great deal depends on how large a court is established. The smaller the court and the more restricted its functions, the greater the extent to which it will have to operate at its headquarters in Washington. The larger the court the more ambulatory it may become. Large or small, however, it will, in this respect, offer opportunity for a vast improvement

over the present situation. Seventy-three separate administrative agencies, each with anywhere from one to sixteen members, and each with a narrow field to work in, must all stay fairly close to their headquarters in the District of Columbia. Such a system, or lack of system, inevitably leads to the maximum of concentration at the capital and a maximum of expense and a minimum of convenience for the persons regulated. Any combination of the judicial functions of even two of them is in this respect a step forward.

Now I come to the subject which is by all odds the most troublesome, and, I am afraid, the most controversial: What jurisdiction should be conferred upon this court at the outset? What federal administrative agencies should be shorn of their judicial functions so that they may be conferred upon this court? The members of the committee have, in the main, been troubled only on the practical side; for the most part its members have been in complete agreement that theoretically the new court should eventually have all the several classes of cases I enumerated as judicial a moment ago. In order that there may be no misapprehension, I want to mention two classes of cases over which the committee would *not* confer original jurisdiction in the proposed court.

One class is the jurisdiction now exercised by those agencies that have to do with the regulation and fixing of rates. The committee has never proposed, in fact it took pains in its 1934 report²⁷ to negative any intention of proposing, that functions of this character, such as now exercised by the Interstate Commerce Commission, the Federal Communications Commission, the Shipping Board, and the Secretary of Agriculture under the Packers and Stockyards Act, should be absorbed by the proposed court. These functions either are, or come so close to being, legislative in character, that the committee agrees it would not be practicable or desirable to dislodge their exercise in the first instance from the tribunals to which they are now delegated.^{27a} This is not to say, however, that federal administrative rate-making machinery cannot be improved. The existing situation, in which a number of rate-making agencies are operating on as many different theories as there are agencies and with little or no reference to each other, certainly could be bet-

27. (1934) 59 A. B. A. REP. 539, 550.

27a. "The fixing of rates is a legislative act." *St. Joseph Stock Yards Co. v. United States*, 56 Sup. Ct. 720, 728 (1936). If the implications of this statement had been more fully recognized and discussed in the majority and minority opinions, I have the feeling that much of the clash between the two would have disappeared. Both opinions, however, treat the *legislative* act of the Secretary of Agriculture in fixing a rate as exactly the same thing juridically as the *judicial* act of the Secretary of Labor in excluding a person seeking to enter the United States, after a finding that he has certain physical defects or that he has been guilty of moral delinquency.

An interesting field for speculation is raised by the *Township of Franklin v. Tugwell*, App. D. C. May 18, 1936. The majority of the Court held that there had been an unconstitutional delegation of legislative power to the President, the only criterion or standard provided by the Act being that the money be spent for "housing projects". If the function thus delegated be considered legislative in character, it still is not of the sort which is primarily discussed in this article. The issue rather seems to be the extent to which congress can divest itself of the control over the purse-strings vested in it by the Constitution.

tered. Something might be gained by eventually having them all subject to review by a single tribunal such as the proposed administrative court, but that is a question that does not have to be solved now.

Another class of cases with which the committee does not propose to interfere is the jurisdiction now exercised by the galaxy of licensing agencies in the federal government in the original *issuance* of licenses and renewals of license. I have already stated that the committee regards the *revocation* of a license as the exercise of a judicial function. Proceedings on applications for license or on applications for renewal of license (except, perhaps, where used as a substitute for revocation proceedings) seem, however, to belong to a somewhat different category. In a large proportion of cases the issuance of licenses and of renewals of licenses is a formal matter not involving any controversy, and seems to be the performance of an executive function. In the comparatively small proportion of cases where controversy arises, and a hearing must be held and a decision made, there is, of course, a distinctly judicial flavor to the proceedings, but, on the whole, it seems best that the original determination should be made by the licensing authority. The same is true, in a general way, of analogous matters, such as applications for loans, applications for patents, and the admission or exclusion (but not the expulsion) of aliens. In some (but not all) of these classes of cases, the committee would want eventually to provide an appeal to the proposed court so as to obtain independent review of the issues of fact as well as of law, but only where the function exercised is judicial and not predominantly executive in character. Where the latter is true, the remedy of the injured individual would seem to be in the field of mandamus or injunction or other extraordinary writ against the offending public official than by way of formal appeal from his decision.

In passing I wish to call attention to the fact that both in the issuance or renewal of licenses and in the revocation of licenses, the power exercised by the administrative agency is complete in itself and self-executing and is just as final as any court decision. And I am tempted to challenge anyone to cite an instance where it is necessary, or even helpful, that the agency which issued the license and prescribed the regulations under which the license is held should also act as both prosecutor and judge in proceedings which may later be instituted to revoke the license.²⁸

All the other functions which I have described as judicial the majority of the committee would eventually want to see reposed in a federal administrative court.²⁹ It happens, however, that the majority also believe that, with

28. There are, of course, a few cases where exceedingly speedy action in revocation cases is necessary or highly desirable in the public interest. I, for one, am willing to except such cases for the present. It is not the common experience, however, that commissions as a rule act speedily.

29. A valued member of the committee as constituted in 1934-1935, Prof. Milton Handler of Columbia University School of Law, felt that further study should be made of certain of these classes of cases and was not prepared to express a conclusion with regard to them.

respect to those same classes, other than the revocation-of-license cases, there are obstacles of a practical character which furnish adequate reasons for not attempting a more ambitious program than the one I shall presently outline. The committee is under no illusions, for example, as to the difficulty of getting a bill through Congress at the present time which would strip the Secretary of Agriculture, or the Secretary of the Interior, or the Secretary of Commerce, or the Federal Trade Commission, of any sweeping description of prerogatives. It must necessarily embark on a modest program.

The program on which a majority of the committee have reached agreement this year is that, as a basis for discussion, a bill should be introduced in Congress under which the proposed court would start its career outfitted with the trial or original jurisdiction now exercised by

- (a) the Court of Claims;
- (b) the Board of Tax Appeals;
- (c) the Customs Court;
- (d) the District Courts of the United States and the Supreme Court of the District of Columbia over claims against the United States and claims against the Collectors of Internal Revenue;³⁰ and
- (e) the Supreme Court of the District of Columbia over actions for writ of mandamus or of injunction or other extraordinary remedy against officers and employees of the United States;

and with the appellate jurisdiction now exercised by the United States Court of Customs and Patent Appeals together, of course, with jurisdiction to review all decisions and judgment of the trial division. The jurisdiction of a large number of (but not all) federal bureaus, boards, commissions and officials over revocation-of-license cases would also be included. The proposal would contemplate that all the present members of the Court of Claims, the Board of Tax Appeals, the Customs Court and the Court of Customs and Patent Appeals would become judges in the new administrative court with life terms. This would make a total of thirty-five to which possibly five judges should be added to take care of the increased work due to the jurisdiction which would be had by the court in matters over which none of these four tribunals now has jurisdiction.

The committee's proposal is not really for the establishment of a full-fledged administrative court but for the *nucleus* of such a court. In this form, it is believed, it can hardly fail to work satisfactorily and, if it does work, one by one the judicial functions of various federal administrative agencies can be transferred over to it and the membership of the court would be corre-

30. Several members of the committee, including the writer, have been impressed with the criticisms which have been made of the inclusion of this jurisdiction, and it is not at all certain that the committee will advocate it.

spondingly increased. As new agencies are created, the nucleus will be at hand as an attractive place in which to house new judicial functions. Nothing need be done all at once. The experimentation will be slow and cautious.

I need hardly point out that the make-up of the original nucleus is not due to any fault found with the agencies that would be absorbed. It is precisely because they have proved the least subject to criticism, because they have so thoroughly demonstrated judicial ability, temperament and integrity and because they have the necessary experience and the general confidence of the public, that they seem to furnish the logical foundation on which to build. There would, indeed, be certain advantages which they and persons subject to their jurisdiction, would derive from the merger. Frankly, however, none of these advantages would, in itself, have moved the majority of the committee to make the proposal. Its members are looking to the future when such a court can be made the instrument for gradually wiping out the evils in *other* administrative agencies, which have faults that these tribunals do not have.

What progress has been made by the Special Committee on Administrative Law toward realization of this program? An answer to this question will be assisted by a brief review of its work to date.

The committee was originally created by action of the Executive Committee of the American Bar Association early in May, 1933.³¹ At the Annual Meeting of the Association held in Grand Rapids in August, 1933, the committee presented a report consisting of a tentative outline of its proposed activities, a review of the administrative law features of legislation enacted during the first session of the Seventy-third Congress, and a brief comment on proposed legislation.³² Among the fields of inquiry and of activity enumerated by the committee was the following:

"The practicality and desirability of divorcing quasi-judicial functions from quasi-legislative and executive functions in some or all of those administrative tribunals in which such a combination of functions now exists; of concentrating the quasi-judicial functions in an independent body having the character of an administrative court with appropriate branches and divisions and assisted by examiners or commissioners, its decisions to be subject to judicial review; and of concentrating the quasi-legislative and executive functions under executive officers responsible to the President."³³

Reference was made to a bill which had been introduced by Senator Logan of Kentucky in the Seventy-third Congress, to establish an administrative court, and the provisions of the bill were briefly summarized. Members of

31. (1933) 58 A. B. A. REP. 318.

32. *Id.* at 407.

33. *Id.* at 415.

the Association were urged to study the bill and to communicate their views to the committee.³⁴

The following year, at the annual meeting held in Milwaukee, the committee presented an extended report in which were set forth certain far-reaching conclusions³⁵ including the following:

"1. *Segregation of Judicial Functions.*—In principle and with certain exceptions, the judicial functions of federal administrative tribunals should be divorced from their legislative and executive functions, and should be placed

(a) preferably in a federal administrative court with appropriate branches and divisions including an appellate division or, failing that,

(b) in an appropriate number of independent tribunals (or a combination of such tribunals and an administrative court) analogous to the Court of Claims, the Court of Customs and Patent Appeals and the Board of Tax Appeals,

in either case the tribunal to be limited to judicial functions, its members to hold office during good behavior or at least for long terms of years, the tribunal to have power to make use of commissioners or examiners and to establish branches and hold hearings anywhere in the United States, and its decisions to be subject to judicial review to the full extent permitted by the Constitution. In the future, no judicial power should be delegated by Congress to any non-judicial tribunal other than in accordance with the foregoing."³⁶

Among the exceptions expressly noted by the committee were certain commissions (and specifically the Interstate Commerce Commission) and the General Accounting Office.³⁷ The conclusion above quoted was discussed at some length in the report, as were the difficulties lying in the way of its full or immediate realization. The report stated:

"Consequently, the committee believes that a start should be made somewhat along the lines followed in the bill introduced by Senator Logan of Kentucky at the first session of the 73rd Congress, referred to in last year's report, but with certain modifications designed to make the court capable of receiving added jurisdiction from time to time over new fields of administrative controversy."³⁸

After debate, the Association adopted a resolution recommended by the committee in which, subject to the approval of the Executive Committee,

34. *Id.* at 426-427. The Logan bill had been preceded by a similar but more restricted bill introduced in an earlier Congress by Senator Norris. Col. O. R. McGuire, now chairman of the committee, played an important role in the drafting of these bills.

35. (1934) 59 A. B. A. REP. 539.

36. *Id.* at 539-540.

37. *Id.* at 540, 550.

38. *Id.* at 550. See also the analysis of the bill, Beelar, *United States Administrative Court* (1936) 24 GEO. L. J. 944.

the Association authorized the committee (*inter alia*) to draft and urge the enactment of legislation in furtherance of its conclusions.

At a meeting of the Executive Committee held in Jacksonville, Fla., on January 29-31, 1935, the committee presented an interim report in which was presented a plan for a proposed federal administrative court in some detail but not in the form of a draft bill. Since the plan did not differ materially from the plan incorporated in the bill hereinafter discussed, it need not be described in detail. The Executive Committee authorized the committee to draft, or assist in the drafting of, a bill in accordance with the plan, to appear before the appropriate committees of Congress in behalf of such a bill, and by that and other proper steps to urge its enactment,³⁹ it being understood, of course, that when the draft was completed it would be submitted to the Executive Committee.

Shortly after the general character of the proposal was made public, the committee was advised that several groups in the profession were not in agreement with certain features of the plan. Consequently, at a meeting of the Executive Committee held in Washington, D. C., in May, 1935, the committee appeared, explained the state of affairs, and asked to be excused from having the bill introduced at the then-pending session of Congress. Due to this situation, and the rapidly changing picture resulting during that period from decisions of the Supreme Court and legislation then threatened in Congress, the committee made no formal report to the Association at its Annual Meeting in Los Angeles in July, 1935.⁴⁰ Instead, it participated in an open meeting with the Judicial Section and the National Conference of Judicial Councils, the sessions of which were principally devoted to a discussion of the proposal.⁴¹

A bill incorporating the plan had been drafted by the committee in the winter and spring of 1935. After two meetings of the committee held in the fall of 1935, agreement on the part of four of the five members of the committee was reached on a draft that might suitably be introduced in Congress to serve as a basis for discussion, the committee freely recognizing that it contained flaws and imperfections. The committee appeared before the Executive Committee at its meeting held in Chicago in January, 1936, and explained that it desired to have the bill introduced, unaccompanied at this time by the approval of either the Association, the Executive Committee, or even of the committee itself, in order to bring about the necessary discussion and to make the start which must always be made in imperfect fashion in a matter of this magnitude. The Executive Committee approved

39. (1935) 21 A. B. A. J. 133. The major features of the plan were summarized in this article.

40. (1935) 60 A. B. A. REP. 136.

41. *Id.* at 615-621.

this course of action. As a result, the chairman of the committee delivered the bill to Senator Logan who introduced it.⁴² It was referred to the Senate Committee on the Judiciary. This is the bill's present status, there having been no hearings and it being unlikely that hearings will be held during this Congress. The bill has been ably summarized and explained in a recently published article by the chairman of the committee, accompanied by a reprint of its important provisions.⁴³ It is unnecessary here to repeat that summary and explanation. The bill will constitute one of the important topics for discussion at the next annual meeting of the Association, to be held at Boston in August, 1936, at which time the Association will be asked to adopt a resolution approving the proposal of a federal administrative court in principle, with certain essential features. It will not be asked to approve or disapprove any particular bill on this subject, or to determine what jurisdiction should be taken at the outset.

The suggestion has been made that while there is merit to the committee's thought that the judicial functions of federal administrative agencies should be segregated (or subject to adequate review), this should be accomplished not by one administrative court with branches, but by a multiplicity of appellate bodies similar to the Board of Tax Appeals.⁴⁴ The Committee has given careful consideration to this suggestion and, in fact, in its report of last year this is listed as an alternative proposal.

Such a course would be infinitely preferable to continuation of the present chaos, and perhaps, as a practical matter, it is all that will ultimately be achieved. The committee is, however, more optimistic than that, not for tomorrow or for next year but for the years to come. Its members cannot persuade themselves that they should profess to be satisfied with setting up seventy-three varieties of midget courts in Washington, with all the attendant evils which inevitably follow in the train of such a multiplicity.

The committee is under no illusions or delusions as to the practical obstacles in the way. The picture frequently painted of them involves no exaggeration. The committee realizes that, as Lord Beaconsfield said: "England is not governed by logic; she is governed by Parliament." At any rate, and in spite of the obvious difficulties, it has chosen to hitch its wagon to a star.

42. SEN. REP. NO. 3787, 74th Cong., 2d Sess., introduced Jan. 22, 1936, entitled "A Bill to establish a United States Administrative Court to expedite the hearing and determination of controversies with the United States, and for other purposes." Since then, on April 15, 1936, the bill has been introduced in the House by Congressman Celler of New York as H. R. No. 12,297.

43. McGuire, *The Proposed United States Administrative Court* (1936) 22 A. B. A. J. 197.

44. See summary of address delivered by Hon. John Dickinson on July 16, 1935, before joint meeting of the Judicial Section and the National Conference of Judicial Councils (1935) 60 A. B. A. REP. 616.