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James Landis: The Administrative Process

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JAMES LANDIS: THE ADMINISTRATIVE PROCESS*

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James Landis knew how to make human organizations work.[1] His successes ranged from establishing the Securities and Exchange Commission (SEC) to deaning Harvard Law School to reviving the Office of Civil Defense (OCD) to stabilizing our wartime relations in the Middle East. At Harvard, he was a popular and innovative dean for whom the school made every accommodation in order to keep him.[2] At the OCD, he was credited with cleaning up "the worst of all Washington's administrative messes."[3] Of his work at the SEC, his successor as chair, William Douglas, said "Jim . . . taught us how to get things done."[4]

In 1938, he took great care in the prestigious Yale Storrs Lectures over the working of the administrative process. These lectures justified the resort to that process and demonstrated its potential for solving the problems of modern government. Fittingly, when it was published, it was titled simply *The Administrative Process*.

As we acknowledge the 50-year regime of the extraordinary Federal Administrative Procedure Act (APA), it seems important that we review this work for its practical insights and, unfortunately, for its misplaced optimism. Our rehearsal of the justification for our resort to government ("the administrative" as Landis called it) is made more urgent by the current attack on many of that process' innovations. Practical and cost-effective government is the theme of Landis's work. Even those who seek a more limited government should study

* James M. Landis, *The Administrative Process*, Yale University Press, 1938. 160 pp. $2.00 (the price at the time of publication).

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1. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (Greenwood Press 1974 (1938)); DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS (1980).

2. When Roosevelt asked him to come to Washington in 1942, one of the few "New Deal lawyers" called when things actually needed to get done, Landis was given a leave of absence. RITCHIE, *supra* note 1, at 103. "At the law school other professors were delighted that Landis had only asked for a leave instead of resigning outright, a possibility they considered a 'calamity.' " *Id.* at 106. He was also highly regarded as a teacher and was liked and respected by students.

3. *Id.* at 115.

4. *Id.* at 77.

his insights. Whatever government we are to have, it should be carried out most effectively at the lowest possible cost.

In many ways, of course, we are witnessing the continuation of the long war that was in another particularly heated stage in Landis's time.[5] The 1938 Storrs Lectures themselves were in part a response to a report from Roosevelt's Committee on Administrative Management, under Louis Brownlow. That report denounced the bureaucracy as a "headless fourth branch."[6] Landis's nemesis, former Harvard Dean Roscoe Pound, termed the growing administrative process "marxist."[7] Landis himself was considered quite "pink" in certain quarters.[8]

Far from challenging our basic principles of government, however, Landis saw the administrative process as a necessary modernizing affirmation of those principles.[9] Indeed, his commitment to the market resulted in the only "failure" he suffered as an administrator.[10] His tenure at the Civil Aeronautics Board (CAB) ended in a dismissal caused by an industry afraid of competition. In the middle of the century, American industry had apparently become quite envious of German "industrial socialism," the close partnership of government and industry. That relationship was enhanced here during the war through "dollar-a-year men."[11] The airline industry saw the CAB as its guarantee of government-sponsored monopoly. When Landis attempted to inject the competition that Alfred Kahn ultimately proved so worthy, the industry harassed an embattled president into dismissing him despite enthusiastic support from small

5. The first federal independent regulatory agency, the Interstate Commerce Commission, was created in 1887.

6. RITCHIE, *supra* note 1, at 85.

7. Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 512 (1986) (statement of Paul R. Verkuil).

8. RITCHIE, *supra* note 1, at 108.

9. "I have always considered that my work with the Government was to try to make administrative regulation sufficiently effective so as to enable capitalism to live up to its own pretensions." *Id.* at 176.

10. This is a good place to confront his personal "failures." (These are blamed on a dominating father, who was actually much loved by his community, coworkers, and family including his son. *Id.* at 7-8.) In fact, he seemed to have been a reasonably good husband, father, friend, and human for a busy man in a busy time. Landis's divorce was so difficult because his wife loved him deeply and continued to do so. *Id.* at 135-36. He was good to his children although he did not spend much time with them. *Id.* at 90-91, 193-94. His trouble with the government began a series of events that seemed to confirm a belief (that we harbor about such people) that he was a closet freak. In reality, it turned out to be no more than extreme sloppiness and bad luck. Later psychological analysis showed Landis to be, not surprisingly, a driven personality, seeking affirmation. *Id.* at 196-97. He was not an alcoholic, though he drank too much, and autopsy showed that he died of a heart attack, not a depression-driven suicide. Still, his personal life, which would hardly be considered "colorful" today, so overshadowed our view of his public performance that Peter Irons could sum up the latter with the epithet "during his troubled career as a regulator, corporate lawyer, and law school professor and dean." PETER H. IRONS, THE NEW DEAL LAWYERS 296 (1982). On the contrary, there can be no doubt that his career was extraordinary; it was perhaps sometimes turbulent as a result of its energy and dedication, but it was not "troubled."

11. Corporate America loaned executives to the wartime government and paid their salaries. Truman, who made his national reputation rooting out wartime profiteering and fraud as chair of the Senate Special Committee to Investigate the National Defense Program, distrusted the partnership this practice created. DAVID MCCULLOUGH, TRUMAN 278 (1992).

airlines, pilot and labor organizations, and the public.[12] Here, he was a victim of his own administrative success and policy foresight.[13]

Throughout his career then he made government work. In *The Administrative Process*, he tried to explain how government can be made to work. His success demonstrated two threads that run throughout *The Administrative Process*: its faithfulness to an American approach to social problems and its overarching organizational pragmatism. Landis was an early, if moderate, believer in "legal realism." He continually sought to enhance our foundational principles by making them work. Because we so urgently need to revitalize this approach to procedural theory, this books speaks to us today as much as it did in the formative years of the administrative process.

He described innovations made possible by the administrative process in three major areas. First, his separation of powers discussion may have had the most effect on the APA because he demonstrated that the administrative process strengthened, rather than diminished, the foundational concept of separation of powers. Second, he outlined the advantages of the administrative process over the judicial process. Third, his development of the concept of administrative lawmaking may have had the most impact on the future of administrative law. In all of these, he followed an eclecticism that has been more readily found in administrative law than in the other legal disciplines, just now reluctantly being drawn into "globalization."[14]

I. Separation of Powers and the Bureaucracy

The book's view of separation of powers informed the final APA.[15] Landis challenged the pedigree of this doctrine. He points out that it "has distinctly American flavor" and is not, as is often asserted, derived from fundamental principles of freedom.[16] He recognized that all parliamentary governments, some of which are deemed free, combine the legislative and the executive. In fact,

12. RITCHIE, *supra* note 1, at 154.

13. Here again his organizational success was impressive, and he left a much stronger agency than he found. *Id.* at 155.

14. Dating back to the first American administrative law scholar. FRANK GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY 20 (1893).

15. Allen Moore, *The Proposed Administrative Procedure Act, in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 327, 327-28 (79th Congress ed., 1946).

16. LANDIS, *supra* note 1, at 1. Here, the name of the early eighteenth century observer, Baron Montesquieu, invokes mystical powers and yet in other respects much of his work seems contrary to modern principles. We might note, for example, that he observed that moving into the southern climates "we fancy ourselves entirely removed from the verge of morality; here the strongest passions are productive of all manners of crimes. . . . [T]here is no curiosity, no enterprise, no generosity of sentiment; the inclinations are all passive; indolence constitutes the utmost of happiness. . . ." CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 224 (Thomas Nugent trans., Hafner Publishing Co. 1966) (1748).

it has long been accepted by practical people that wooden adherence to this doctrine cannot work.[17]

Still, he does not challenge the general advisability of separating, as well as coordinating, the three traditional functions of government. He observed:

> If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.[18]

A. Modernizing the Separation of Powers Doctrine

Landis saw the administrative process as both faithful to the doctrine and an instrument for its modernization. "In terms of political theory, the administrative process springs from the inadequacy of a simply tripartite form of government to deal with modern problems."[19] Thus, agencies were created with functions that "embraced the three aspects of government."[20]

Opposing the perpetuation of the archaic tripartite concept that condemned the "administrative" as an unconstitutional fourth branch, he would incorporate this institution into the mechanisms of modern government.[21] This grouping encompasses the entire bureaucracy, executive as well as independent agencies. This bureaucracy deals with all the constitutional branches as if a distinct institution of government. Hence, Landis observed: "It is the relationships of the administrative to the three departments of government that are important."[22]

B. Limits on the Delegation of Powers

The application of the separation of powers doctrine known as the "nondelegation" doctrine is not important in Landis's view, and had by the turn of the century "retired from the field."[23] Delegation, as we know, was then on the rise.[24] Practical pressure then, as now, defeated the doctrine's ability to limit these delegations.

Now, as in Landis's time, we need to recognize that the quality of the delegation is most important. Landis urged that "the grant of the power to regulate

17. "Modern [late nineteenth century] political science has . . . generally discarded this theory both because it is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization." Goodnow, *supra* note 14, at 20.

18. Landis, *supra* note 1, at 46.

19. *Id.* at 1.

20. *Id.* at 2.

21. This debate remains current as the Supreme Court increasingly takes a wooden approach. *E.g.*, Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995).

22. Landis, *supra* note 1, at 88. Indeed, it is the conflicts between executive agencies and the executive office of the president that have been most controversial today. *E.g.*, Allan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1066 (1986).

23. Landis, *supra* note 1, at 50 (quoting a 1916 statement by Elihu Root).

24. *Id.* at 68.

must specify not only the subject matter of regulation but also the end which regulation seeks to attain."[25] If these ends are clear, Landis found immaterial "[t]hat the standards as written into the legislation are broad and vague."[26]

Other factors necessarily limit the authority of the agency. Factual context in which the delegation is to operate will limit discretion.[27] Also, specialization creates responsibility: "Placing responsibility directly upon a specific group means that a finger can be publicly pointed at a particular man or men who are charged with the solution of a particular question."[28] These are the realities of government and hence had much more weight in Landis's analysis than pure constitutional theory.

Landis understood the real problem in a way that we now find easy to accept. The real problem is standards that are too elaborate. Inaction, not action, is the failing of most bureaucrats.[29] Standards offer the incompetent and/or timid bureaucrat a place to hide.[30]

Still, he recognized the other side: practical motivations for standardless delegation arise from legislators looking for cover. Congress passes on tough political questions to the agencies and thus shields itself with the bodies of bureaucrats.[31] For this reason, some urge a modified nondelegation doctrine that requires legislators to legislate as far as practical and, in any event, forces them to resolve all broad policy questions.[32]

Landis seemed to advocate a closer working relationship between the bureaucracy and the legislator. He noted that officials would be more courageous if their actions were formally affirmed by Congress.[33] Congress, on the other hand, would be forced to assume its rightful role on difficult policy questions. He might then support the recent call for more legislative involvement in the rulemaking process.[34]

C. Independent Agencies versus Executive Control

Much of the motivation behind the Storrs Lectures was to counteract the Brownlow Report from Roosevelt's Committee on Administrative Management.[35] That report had compared the independent agencies, the "headless

25. *Id.* at 51.
26. *Id.* at 66.
27. *Id.* at 52.
28. *Id.* at 28.
29. *Id.* at 116.
30. *Id.* at 75.
31. *Id.* at 56.
32. James Freedman, Crisis and Legitimacy: The Administrative Process and American Government 93-94 (1978).
33. Landis, *supra* note 1, at 79.
34. *E.g.*, Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 Admin. L. Rev. 453 (1995); Uniform Law Commissioners' Model State Administrative Procedure Act art. III, ch. II (1991). He would probably not have supported the structural reasoning prohibiting legislative vetoes. INS v. Chadha, 462 U.S. 919 (1983). He might have been convinced by practical arguments, however, such as those presented in, *e.g.*, Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).
35. Ritchie, *supra* note 1, at 85-86.

fourth branch," to the concentration of power by Hitler. The special constitutional status granted agencies had just then been recognized in *Humphrey's Executor*.[36] Landis was enthusiastic about the Supreme Court's "judicial recognition" of independent agencies. Characteristically, he emphasized its practical impact: "The real significance of the Humphrey doctrine lies rather in its endorsement of administrative freedom of movement."[37]

Nonetheless, he found it difficult to articulate the advantages of independence.[38] Clearly, it was not just that such agencies were insulated from political influence in the traditional sense. To a large extent, it was that independence allowed expertise to take hold. Adopting the concept of his day, he advocated devices that furthered objectivity in government.[39] Agency policy under independence "achieved a degree of permanence and consistency that they might not have possessed had their formulation been too closely identified with the varying tempers of changing administrations. . . . On the other hand, professionalism in the nonindependent agencies has suffered on occasion at the hands of political superiors."[40]

D. Separation within the Agencies

The APA sits on the solid foundation of the report of another Roosevelt study committee, "The Final Report of the Attorney General's Committee on Administrative Procedure" (AG Committee Report).[41] Shortly after the report, America found itself in a total and all-consuming war. When the war ended, we returned to the reform of the administrative process. By that time, the "minority" in the AG Committee Report controlled the drafting.[42] They had argued against the combination of functions within the agencies.[43] Here, however, a view much closer to Landis's prevailed, and combination of functions was accommodated in the APA.[44]

Landis argued for the combination of functions within single administrative decisionmaking bodies.[45] He saw the combination of lawmaking and enforcement as one of the advantages of the administrative process.[46] He recognized,

36. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

37. Landis, *supra* note 1, at 115.

38. *Id.* at 113.

39. "[B]y the end of the nineteenth century the administrative process was coming to be understood, in accordance with the scientific ideal of reformers, as one that required trained experts who made decisions and otherwise performed their tasks in accordance with autonomous, abstract standards." William E. Nelson, The Roots of American Bureaucracy, 1830-1900 125 (1982).

40. Landis, *supra* note 1, at 113-14.

41. Final Report of the Attorney General's Committee on Administrative Procedure (1941) [hereinafter AG Committee Report].

42. Davis & Gellhorn, *supra* note 7, at 514 (statement of Kenneth C. Davis).

43. AG Committee Report, *supra* note 41, at 209.

44. The APA accepted "internal separation." 5 U.S.C. § 554(d) (1988).

45. Landis, *supra* note 1, at 106.

46. *Id.* at 3. This view has been confirmed by a study of the Administrative Conference of the United States, 51 Fed. Reg. 46,986 (1986). What we now call "split enforcement," assigning to separate agencies the tasks of administration and enforcement and the task of adjudicating, was found not to increase fairness but did create other problems.

of course, that such combinations offended Anglo-American judicial traditions[47] and created grave dangers.[48] Still, on balance, he urged coordination and asserted that its absence was the cause of judicial inadequacy.[49]

II. Administrative Process versus the Judicial Process

Modern readers must be struck by Landis's low opinion of the courts as vehicles to solve modern social problems. Landis points to the failures of the judicial process as creating the need for the administrative.

> Although it is dangerous to deal in motives, yet the reasons which prompted a resort to the administrative process in the latter area [extended police functions] would seem to be reasonably clear. In large measure these reasons sprang from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods as they related to particular industrial problems.[50]

In challenging a nineteenth century article in the *Harvard Law Review* arguing against the creation of the Interstate Commerce Commission (ICC), he wrote: "These comments . . . indicate a singular unawareness of the fact that the chief drive for the resort to the administrative process in the field of railroad regulation arose from a recognition that the remedies that the courts could provide were insufficient to make effective the policies that were being demanded."[51]

His view of the competence of the courts may fail today on substantive grounds because the movement to dismantle our unique version of the administrative state seems a rejection of the "policies . . . being demanded." Yet, a free market needs some institutions to enforce rights (even negotiated rights). More to the point, the market's necessary conditions, e.g., competition and some information symmetry, need a degree of "extended police functions."[52] Today, as in 1938, policymakers should ask whether the courts can carry the load.

The current movements in the law make important a review of the observations of one who was just coming out of a system we are moving back into. Why did he think the courts inadequate to the task and to what extent do those arguments inform our modern reforms? The judicial defects, for Landis, were both procedural and substantive. His view of the courts' value is moderated in his discussion of judicial review.

A. Superiority of the Administrative Process

Landis observed several advantages the administrative process might possess over the judicial process. Of these advantages, flexibility in design, active participation, and specialization seem dominant.

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47. Landis, *supra* note 1, at 90-93. He recognized that the first tenet of "natural justice" (the nonconstitutional due process concept of British law) is an impartial decisionmaker. William Wade & Christopher Forsyth, Administrative Law 471 (1994).

48. Landis, *supra* note 1, at 95.

49. *Id.* at 109, 110.

50. *Id.* at 30.

51. *Id.* at 89 (referring to 1 Harv. L. Rev. 99 (1887)).

52. In reality, some level of distributional justice has become a necessary condition for a successful market economy. The passive judicial process seems equally ill-equipped to assure that particular type of "justice."

Flexibility in design is one of the great advantages of the administrative process.[53] The administrative process accommodates specially designed decisionmaking bodies. Even in adjudication, administrative process often deviates from the Anglo-American procedural norm. This offends traditional lawyers even today and did so then. For example, shortly before these lectures, the Chief Justice of the Supreme Court compared the SEC process to the Star Chamber. Whereupon, Justice Cardozo observed: "Historians may find hyperbole in the sanguinary simile."[54]

Equally important and equally contrary to our judicial tradition is the active participation of administrative adjudicators. Landis distinguished administrative tribunals, even over legislative courts, which " 'passively' adjudicat[e] the merits of such conflicting claims as may be presented to it."[55] In showing the advantages of the SEC process, he observed: "To have relied, simply, upon such considerations as parties claimant before that agency produced, subjected merely to the cross-fire of nonspecialized counsel, would have afforded scant solution."[56]

More than just the courts, however, he questioned the ability of the entire judicial process system. "[T]he common-law system left too much in the way of the enforcement of claims and interests to private initiative."[57] Today, the increased reliance on "citizen suit" enforcement suggests a finding that private claimants now demonstrate the proper initiative. Confused, ad hoc, and inefficient private enforcement, however, supports Landis's view and calls instead for more techniques that foster administrative vigor.

The third, and perhaps most important, advantage of the administrative process was the resort to specialization and expertise. Lawyers tend to be the consummate generalists and, hence, value that perspective. They see specialization as imposed myopia and expertise as studied bias. Yet, Landis and contemporary administrative lawyers took a different view.

Landis was enthusiastic about the proliferation of single mission agencies. Specialized tribunals perforce create a number of focused decisionmaking institutions. Each tribunal will develop expertise and experience. He was, of course, aware of continental systems that relied on and continue to rely on specialized administrative court systems.[58]

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53. He distinguished agencies from tribunals having all the procedural attributes of courts but judges distinguished as "legislative" or "administrative" rather than "constitutional" because they performed some functions that were not narrowly "judicial." LANDIS, *supra* note 1, at 19-20.

54. Jones v. SEC, 298 U.S. 1, 33 (1936) (Cardozo, J., dissenting). Indeed, the "Star Chamber" was the kings court and apparently functioned both efficiently and fairly (at least as often as any court system.) LAWRENCE BAXTER, ADMINISTRATIVE LAW 17-27 (1984). Our horror at the mention of this tribunal shows one of the advantages of winning: the power to write the history. In fact, a similar institution the royal councils evolved in the continent into the councils of state, which in some systems, notably the French and the European Union, were found superior to the law courts.

55. LANDIS, *supra* note 1, at 20.

56. *Id.* at 45-46.

57. *Id.* at 34.

58. Examples include the famous French Conseil d'Etat. NEVILLE BROWN & JOHN BELL, FRENCH ADMINISTRATIVE LAW (4th ed. 1993). The Germans employ four separate administrative court systems also untouched by generalists review. MAHENDRA SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 3, 103 (1985).

Landis relied on an often overlooked advantage of specialized administrative entities. For Landis, specialization creates, in modern terms, transparency; the person responsible for the decision is easily identified and held accountable.[59]

Concomitant with specialization is expertise. For Landis, the way out of the "paradox" of a free business culture that was nonetheless bent to the public benefit (recognizing the unlikelihood of "breeding supermen") was expert bodies that would know an industry well enough to restrain it without damaging it.[60] Administrative agencies were created "not merely to maintain ethical levels in the economic relations of the members of society, but to provide for the efficient functioning of the economic processes of the state."[61] Thus, he saw expertise as the motivation behind the administrative state.

> With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.[62]

While he focused on regulation, these observations seem no less compelling in reference to today's social programs, where complex medical, psychological, and behavioral questions dominate.[63] Today, we ridicule this enthusiasm for expertise.[64] Yet, only Anglo-American lawyers could accept empowering legally trained generalists (who rely then on a kind of pidgin science) to make such decisions.

As Landis would himself learn, specialization and expertise could lead as well to "capture."[65] Still, at its best, which is how Landis saw it at the time, an agency acting with sensitivity to the realities of its industry is not "captured" but is providing the sophisticated regulation demanded of a mixed economy.[66]

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59. LANDIS, *supra* note 1, at 28.

60. *Id.* at 25-26.

61. *Id.* at 16.

62. *Id.* at 23-24.

63. The famous case of DeShaney v. Winnebago County Department of Social Service, 489 U.S. 189 (1989), provides an illuminating example. That case involved the apparent lack of action by the state social service agency on behalf of a boy, Josh, who was seriously injured by child abuse. The Court found that the agency was not liable for its failure to act even though it had taken on Josh's case. Many have criticized the Supreme Court for rejecting the claim of liability against the administrative authority. Yet, the courts and the failures of the judicial process played a larger role in Josh's circumstances than did any administrative agency. First, a court assigned Josh to the custody of his father, who abused him. Second, the processes of another court failed to uncover the abuse. The case raises more questions about the competence of the judiciary in social program situations than it does about the administrative process. Those who would impose liability on officials in such circumstances should be equally as willing to impose liability on judges.

64. R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 46-47 (1994).

65. GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 305 (1963); THEODORE LOWI, THE END OF LIBERALISM (1969).

66. This view should not be understood to advocate the capture. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1267 (1986). Landis's conduct at the CAB belies this interpretation.

What appears to be capture, then, is in reality a more sophisticated and informed brand of regulation than generalists, courts, or politicians could conceive.

B. Substantive Inadequacies of the Judicial Process

Also, substantive passivity, like procedural passivity, argued in Landis's mind against assigning modern governmental functions to the judicial process.[67] Lodging policymaking powers in the courts would thwart programs and result in "judicial sterilization."[68]

Specialization and expertise were important to policy development and hence the judicial process was further at a disadvantage.[69] "[C]ertain fields where the making of law springs . . . from a 'practical' judgment which is based upon all the available considerations and which has in mind the most desirable and pragmatic method of solving that particular problem."[70] Indeed, generalist judges could not find refuge in "generalizations and principles drawn from the majestic authority of textbooks and cases."[71]

Of course, the courts Landis was writing about were entirely different from today's courts. He observed that the growth of the administrative process resulted from "the demands for positive solutions" and "*laissez faire* . . . came to an end."[72] For him, the courts were the drag on this modernization. Now we might find Congress and the bureaucracy favoring *laissez faire* and the courts interfering in affairs. Still, a certain conservatism is inherent in the judicial system. After all, Landis's judges saw themselves as enforcing fundamental rights just as much as modern judges.[73] What our generation sees as advanced judicial thinking and commitment to fundamental rights may be viewed as insulated and static by the coming generation.

C. Judicial Review

For Landis, judicial review, the melding of the courts into the administrative process, was quite another matter. He conceded a significant role for the courts in monitoring the administrative efforts. The "ultimate check is, of course, the right to judicial review."[74]

He saw the courts as part of the administrative process. He regretted that judicial review was surrounded by an atmosphere of "battle."[75] Rather, he

67. For example, the creation of the FTC grew from the lack of judicial policy development. "Judicial interpretation [of the Sherman Act] suffered not only from inexpertness but more from the slowness of that process to attune itself to the demands of the day." Landis, *supra* note 1, at 96.

68. *Id.* at 97.

69. Today, we are less convinced of the reality and effectiveness of administrative expertise. Nonetheless, to say that the agencies are not as expert as they might be is not to say the courts are.

70. *Id.* at 33.

71. *Id.*

72. *Id.* at 8.

73. And many modern commentators agree. *E.g.*, Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

74. Landis, *supra* note 1, at 100.

75. *Id.* at 136.

urged: "[T]he contest should partake more of that rivalry that attends the academic scene, where a passionate desire for truth makes for recognition and not resentment of achievement."[76]

Timely for these lectures was the controversy over review of facts. He found quite unacceptable redundant judicial determinations of fact.[77] Even in 1938, almost all would have conceded this point. However, de novo review of "jurisdictional" and "constitutional" facts had been adopted by the Supreme Court. Landis objected to anything other than finality for all administrative findings, subject to "review."[78]

He also noted judicial distrust of administrative procedures. "Its bending of judicial doctrine and procedure to realistic curvatures tends sometimes to offend the courts that supervise its activities."[79] Of course, he argued against such judicial narrowing of the options available to the administrative process.

On the other hand, he supported a strong sense of judicial authority over interpretations of law.[80] "The interesting problem as to the future of judicial review over administrative action is the extent to which judges will withdraw, not from reviewing findings of fact, but conclusions upon law."[81] He left no doubt that he thought courts should dominate questions of law.[82]

He, like the drafters of the APA, would not have supported the extreme readings of the *Chevron* opinion that has so captivated current legal scholars.[83] In fact, his contemporaries who drafted the APA made judicial dominance quite clear in the statute itself.[84] And not only is the statutory language clear but also the legislative history says conclusively: "This subsection provides that questions of law are for courts rather than agencies to decide in the last analysis."[85] Any other view would be quite inconsistent with the allocation of authority between the courts and the agencies envisioned by Landis.

III. The Concept of "Administrative Law"

It is from allocation of authority between the courts and the "administrative" that he derives his definition of "administrative law." "The law the courts

76. *Id.* at 153-54. (One must assume he means in the academic dialogue of commentary and not the arena of faculty governance.)

77. *Id.* at 128.

78. *Id.* at 132.

79. *Id.* at 49-50.

80. He supported the distinction between law and facts. *Id.* at 145.

81. *Id.* at 144.

82. *Id.* at 152. For the pragmatic reason, like his other observation, that judges are expert in interpreting law. Indeed, he observed that able administrators never read statutes. *Id.* at 75.

83. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984). A strong reading of that language has suggested that it admonishes courts to accept any plausible agency interpretation of law. This reading seems inconsistent with well-established law, the opinion itself, and subsequent Supreme Court decisions. CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 9.18(1)(a) (Supp. 1996).

84. 5 U.S.C. § 706(A) (1988). (The court shall hold unlawful decisions "not in accordance with law.").

85. ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 214, 278 (79th Congress ed., 1946) (statement of the reports of both houses is the same).

permitted [agencies, tribunals, and rulemaking boards] to make was named 'administrative law,' so that now the process in all its component parts can be appropriately termed the 'administrative process.' "[86] In short, administrative law, as it does throughout the world, describes both the substantive law and the process for generating and implementing that. Because the substantive administrative law has divided into separate legal disciplines, we have come to limit the term "administrative law" to the administrative process.[87] Still, administrative law for Landis was the substantive product of the administrative process as supervised by the courts.

"The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making."[88] Hence, a good deal of his discussion of the internal administrative process relates to agency policymaking, "administrative law" as he would call it.[89]

He recognized that agencies have several techniques for making policy ("exercising interpretative powers") and that each, properly employed, could contribute to the effectiveness and fairness of administrative policymaking.[90] Agencies might use rulemaking, adjudication, or seek "additional powers from the legislature."[91] He preferred that policymaking be accomplished through rulemaking.[92] Nonetheless, he also observed that policymaking was a necessary component of the adjudicative process and the integrity of such policymaking was equally important.[93]

These concepts are self evident in a common law legal culture and well recognized today. Landis, however, identified a failing that remains in our law. He noted that "incidence of judicial review over administrative law-making by way of rules can be contrasted with the scope of judicial review in cases where the law-making of the administrative flows from adjudication."[94] Yet, he observed, "the problem seems essentially to have the same core."[95] He urged that administrative law (agency generated policy) requires the same review whether evolved in adjudication or constructed by rulemaking. Today, courts sometimes confuse their role when they are faced with policy made in adjudication. As Landis recognized, it is essential to the proper allocation of authority between the courts

86. LANDIS, *supra* note 1, at 2.

87. Nathaniel L. Nathanson, *Book Reviews*, 27 TEX. L. REV. 111 (1948) (reviewing WALTER GELLHORN, CASES ON ADMINISTRATIVE LAW (2d ed. 1947); E. BLYTHE STASON, THE LAW OF ADMINISTRATIVE TRIBUNALS (1947); CARL MCFARLAND & ARTHUR T. VANDERBILT, CASES ON ADMINISTRATIVE LAW (1947)).

88. LANDIS, *supra* note 1, at 39.

89. Today, this "law" would be called "policy" in order to distinguish it from interpretations of law. KOCH, *supra* note 83, § 9.15(2)(b).

90. LANDIS, *supra* note 1, at 84 ("All have developed empirically in response to the needs of administration as those needs were viewed by that particular agency." *Id.*).

91. *Id.* at 41.

92. *Id.* at 86.

93. *Id.* at 99 ("[A]rbitrariness and unfairness in adjudication will as easily wreck the regulatory controls of the administrative as those same qualities on the rule-making side." *Id.*).

94. *Id.* at 149.

95. *Id.* at 151.

and the agencies that they stay out of policymaking however it emerges and concentrate on faithfulness to the law.

Nowhere is his sense of procedural flexibility stronger than in structuring rulemaking.[96] Here, he favored action and concluded that rulemaking should be criticized for being too timid rather than too bold.[97] Similarly, he found that "too little imagination has been employed in considering the manner in which the rule-making power is to be exercised by the administrative."[98] Today, we would attribute such "ossification" largely to overreview, but his comments, in an era of a passive judiciary, indicate other causes as well.[99]

Landis had early staked out, and in some sense created, the legal discipline of "legislation."[100] In the course of that study, he determined that "preventive" legislation was neglected.[101] He saw the administrative process adding this element to regulatory programs. In the 1970s, we shifted more toward such legislation, restraints unrelated to finding of harm or violation. It became the dominant administrative process task to evolve and enforce these laws. Great burdens were imposed on many who were not acting against the public. For many, these became substantial "taxes" that were as inhibiting as direct money taxes.

Whether heeding Landis or not, this shift to "preventive" regulation fed the reaction against government interference. Eventually, even the most enthusiastic proponent of the administrate state might accept that this type of administrative action has gone too far.[102] Implementation through the administrative process has created a new level of hatred for active government and support much of today's effort to dismantle it.

IV. Subsequent Modifications

His biographer observed that Landis "revised" his view of the "administrative" in later years.[103] He had two formal opportunities to express his more experienced vision. In 1949, he greatly influenced Eisenhower's "Hoover Commission" study through his old friend Joe Kennedy.[104] In 1960, he produced another study almost single handedly for his pupil, John Kennedy.[105]

96. *Id.* at 69.

97. *Id.* at 85-86.

98. *Id.* at 76.

99. Many commentators have decried ossification in rulemaking. McGarity suggests that judicial review is only one of several reasons. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

100. RITCHIE, *supra* note 1, at 35-36.

101. LANDIS, *supra* note 1, at 90.

102. *E.g.*, CHARLES SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 74 (1977) ("[W]e have ended up extending the sphere of detailed governmental control far beyond what is necessary to accomplish the objectives we seek.").

103. RITCHIE, *supra* note 1, at 162.

104. *Id.* at 175. The Hoover Report ultimately adopted the "core" of Landis's thinking. THE HOOVER COMMISSION REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT (1949).

105. JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960) [hereinafter THE LANDIS REPORT].

In both studies, he identified defects in the administrative process as it had evolved. One must be cautious, however, in interpreting his more recent views as demonstrating a new awareness of the defects in the administrative process. The studies were assigned the task of improving the existing systems and, hence, had a necessarily critical tone. The rudiments of those weaknesses identified in the later studies run throughout *The Administrative Process*. Given those weaknesses, in general terms, Landis remained committed to the administrative process throughout his life.

Most interesting, however, was a growing emphasis on personnel and personnel management. Rather than "radical surgery," he urged Hoover, "[t]he real solution . . . lay in attracting talented personnel and giving them power to carry out their tasks."[106] In his own study, he observed: "The prime key to the improvement of the administrative process is the selection of qualified personnel. Good men can make poor laws workable; poor men will wreak havoc with good laws."[107] While he advocated merit selection and compensation, he urged that the key to improvement lay in independence and challenge.[108]

It is tempting to charge Landis, at the writing of *The Administrative Process*, with failing to see that government would not be populated with people like himself. Landis, even then, harbored no such illusions: "In the business of governing a nation . . . we must take into account the fact that government will be operated by men of average talent and average ability and we must therefore devise our administrative processes with that in mind."[109] Perhaps experience taught him either that the average was lower than he contemplated, or that this constraint was more important than he thought, or both.

Nonetheless, it seems his views matured as did those of many of us who study human organizations. We all initially concentrate on ordering the decisionmaking process. As we gain experience, we note the importance of the people. To some extent, administrative reform has matured in a similar way. The Administrative Procedure Act was born of the concentration on process. The blue ribbon studies since then, including Landis's, more and more emphasize personnel. Carter reformed the government personnel systems and the "Gore Report" becomes nearly hysterical about the importance of the techniques of personnel management.[110]

Surely, to paraphrase Landis, good people can make any organization work and bad people can frustrate the best organization. Selection and recruitment are only part of the answer. Better people serve us in the government than we recognize. While it is always important to attract the best personnel, it is much more important to worry about motivating, trusting, and empowering those we have. That is the challenge for reform.

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106. RITCHIE, *supra* note 1, at 175.

107. THE LANDIS REPORT, *supra* note 105, at 66.

108. *Id.* at 68.

109. LANDIS, *supra* note 1, at 87.

110. Indeed, it devotes one of four chapters to this issue. AL GORE, THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 65-91 (1993).

V. Assessment

Today we challenge two principles that guided *The Administrative Process*: the value of government interference and the superiority of the administrative process as a decisionmaking concept. In doing so, history becomes important because it forces us to consider why we chose the road we took. *The Administrative Process* and James Landis form an important part of that history.

The administrative process contemplated by Landis is not presently in operation. He reflected on a flexible concept that facilitates careful designs focusing on particular decisionmaking tasks. He worked from the foundational principle that government should be run as a business.[111] As in the business culture, he would have it choose mechanisms designed to further its particular mission of serving the public interest, however, the people define that interest.

Today, we have too much law about the administrative process. The business of government, like others, needs serious deregulation. However much government we choose, it should be efficient.[112] Unfortunately, efficiency in government is condemned by both poles on the social policy spectrum, on one end as immoral, and on the other as contributing to an unfortunately active government. Hence, the trend towards ossification and sterilization continues.

This trend, while expansive, is of little account if active government has no place in modern society. Landis observed, however, that the government role evolved as a natural result of the change in the organization of society. The "growing interdependence of individuals in our system" necessarily compelled government sponsored coordination.[113] Unless we become somehow an altruistic species, we cannot exist in such close proximity without some order and enforced cooperation.[114] If that does not come from government, then where?

111. LANDIS, *supra* note 1, at 13.

112. Efficient here means that we get the best government, in terms of services, fairness, sensitivity etc., we can from the resources we expend.

113. LANDIS, *supra* note 1, at 7.

114. JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 15 (1983); *see also* Charles H. Koch, Jr., *Cooperative Surplus: The Efficiency Justification for Active Government*, 31 WM. & MARY L. REV. 431 (1990).