

1945

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Repository Citation

Beutel, Frederick K., "The Problem of Reform of Administrative Procedure" (1945). *Faculty Publications*. 1238.
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THE PROBLEM OF REFORM OF ADMINISTRATIVE PROCEDURE

FREDERICK K. BEUTEL*

THE constantly expanding government activities are producing hosts of new administrative agencies, many of which we may expect to remain with us either in permanent form or long after the cessation of hostilities. It is commonplace that these activities are reaching into wider and wider spheres of influence, touching more and more the life of the common citizen. Their continued growth and expansion, which seems to be the product of our modern complex society, is raising two great problems of procedure. The first is, how can the Government effectively and efficiently accomplish its purpose; the second, how can fairness and due process of law be preserved for individuals affected. It has generally been assumed that any means which affirmatively answers the one question necessarily negates the other. But it is submitted that the true province of reform of administrative procedure is to work out a solution which will get both results.

In actual practice there has been plenty of cause for complaint of lack both of efficiency in government operation and fairness to the individuals affected. Attempts, pushed constantly by the organized bar, to remedy these defects, real and fancied, in administrative procedure, have been numerous and vocal, but mostly on the side of protecting individual rights against government encroachments.

The purpose of this article is to examine the probable effectiveness of these efforts at administrative reform and to suggest a permanent means to solve the difficulties involved.

Clamor for Administrative Reform

Anyone causally acquainted with the history of the American Bar Association will realize that for at least forty years there has been a growing demand among the practitioners represented in that body for reform of administrative agencies. Reports of the proceedings of their conventions during this period will yield speeches decrying the growth of administrative activity and the demand for

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the return of the good old days with court supervision.¹ Seldom, if ever, does the discussion go any further than to demand administrative reform without mentioning which of the numerous possible types of administration the speaker has in mind, but a careful examination of these proceedings will indicate that the orator is usually generalizing from a particular quasi-judicial or regulatory agency. The result of this agitation has been the introduction into Congress of bills that are too numerous to discuss here, usually having the support of prominent members of the bar or of organizations which they represent. As part of this movement, the American Bar Association also has organized national state and local committees to push for "Administrative Reform."²

These protagonists of more careful limitation of governmental activity complain on one hand of endless delays and inability to get results from government agencies; on the other, of arbitrary action resulting in interference with individual freedom, curtailment of business activity, and the nuisance of licensing. There has also been a wide and justified complaint, especially in recent years, on the grounds that it is difficult for the average citizen or his attorney to discover the nature of the government bureaus impinging upon his activities, and the proper approach to the officials who are responsible for the interference. It should also be borne in mind, however, that much of the clamor against government administrative action arises from squeals of certain persons and organizations who have been successfully regulated in the public interest. All of it is couched in ambiguous terminology, and charged with emotionalism.

But regardless of the motive or nature of the complaint, there has been an increasing pressure upon Congress to do something about the situation which in past sessions resulted in the Walter-Logan Bill and the Attorney General's Committee on Administrative Procedures in Government Agencies. The report of the latter³ contains much valuable information on the subject. The Walter-Logan Bill,⁴ which was a comprehensive attempt to limit the power of administrative agencies, passed the Congress but was prevented from being put into effect by Presidential veto.⁵ It is significant

¹ For one of the better and more learned addresses of this sort, see Pound, *Proposed Legislation on Federal Administrative Procedure*, 20 *Ind. L. Jour.* 29 (1944); and for an excellent critique of this whole process see, Jaffe, *Invective and Investigation in Administrative Law*, 52 *Har. L. Rev.* 1201 (1939).

² See the long list of committees, *American Bar Association Directory* (1944-45), p. 34.

³ S. Doc. 8, 77th Cong., 1st sess. (1941).

⁴ H. R. 6324, 76th Cong., 3d sess. (1939).

⁵ See *Congressional Record*, House, December 18, 1940, p. 21501, for the text of the Presidential veto.

that neither of these measures succeeded in stopping the clamor for further limitation or codification of the law affecting administrative agencies.

There have already been introduced into the present Congress at least five measures attempting in whole or in part to accomplish this result. Two of these, H. R. 184 and H. R. 1206, are outgrowths of the bill recommended by the majority of the Attorney General's Committee on Administrative Law⁶ and which were fully discussed there, need not be analyzed at this time. It is sufficient to say that in the last three years they have not met with enough support either in the Congress or from the public to indicate that they will become law. The other three measures are, in substance, an almost direct outgrowth of the legislative proposal by the American Bar Association's special committee on administrative law.⁷

The bill, as recommended and drafted by that committee, was introduced into both the House and Senate of the 78th Congress.⁸ This measure has been copied, with some changes,⁹ in the so-called Smith Bill,¹⁰ recommended by a select committee of the House to investigate executive agencies pursuant to House Resolution 102 and is discussed at length and recommended in their report.¹¹

The remaining and most important bill in the present session of Congress is the successor to the American Bar Association Bill which appeared in the 78th Congress. It has been introduced in both the House and the Senate and appears as H. R. 1203 and S. 7. Because the American Bar Association Bill in the last Congress met with such a storm of criticism in the various agencies, its sponsors, under the authority given them by the American Bar Association, have hastily redrafted it in an attempt at improvement and forestalling criticism.

While this redraft has removed many of the obvious objections to the bill, it still contains in substance the feeling of the American Bar Association that all administrative agencies of the Government can be placed in one category and be governed in their procedure by one set of rules and standards. Most of the discussion which follows will be directed to this bill and the purpose which it purports to achieve.

⁶ S. Doc. 8, 77th Cong., 1st sess. (1941), p. 192 ff.

⁷ See 30 A. B. A. J. 226 (April 1944); *id.* 479 (August 1944).

⁸ H. R. 5081 and S. 2031, 78th Cong., 2d sess.

⁹ For a summary of these changes, see 30 A. B. A. J. 526 (September 1944), and there are additional minor changes in the present bill not discussed there.

¹⁰ H. R. 339 and its identical twin H. R. 1117.

¹¹ H. Rept. 1797, 78th Cong., 2d sess.

Nature of Administrative Law

At the threshold of any discussion of a bill to regulate administrative activities, we are met with the problem of the patent ambiguities in the terms "administrative law" and "administrative agencies." Far from being a term of art, the term "administrative law" has a number of varying meanings depending upon the person using the term. There are at least four major and distinct activities of government to which the term "administrative agency" is commonly applied, and these in turn are subject to further subdivisions.

The widest use of the term and the best established, both in the field of government and scholarship, is that used by Wyman in his book on *Administrative Law*.¹² As he uses the term it covers executive activities of all branches of the Government and includes consideration of the power of officers, their authority to appoint agents, the laws which govern their activities in particular offices. The term "administrative agencies" used in this sense would embrace such offices as the Executive Office of the President, the Cabinet, the activities of the Army and Navy Departments, all independent agencies such as the Interstate Commerce Commission, Federal Trade Commission, and the like. It would also include even the Administrative Office of the United States Courts. In other words, administrative law in this sense is the law which governs the activities of all officials carrying out the business of the Government, excluding the judicial processes of the courts and the legislative procedures of the Congress. Even the latter might, in some instances, be included.

In their second and narrowest sense, the terms "administrative law" and "administrative agencies" are often used to cover activities of commissions and other bodies which take the place of courts in settling disputes of various kinds or doing work which could be done by courts themselves; activities such as the workmen's compensation commissions, the settlement of international claims by bodies such as the Mixed Claims Commission, the Tax Court, and many others which may be said to fall in this category. Closely related in this narrower sense in this group are other dispute-settling agencies such as the National Labor Relations Board, National War Labor Board, the Railroad Retirement Board, and similar bodies acting in their quasi-judicial capacity. Practicing lawyers with their attention focused mainly on court activity, often think of administrative law as covering only these dispute-settling agencies.

¹² Wyman, *Administrative Law* (1903).

A third and broader sense in which the terms are used includes the activities of the so-called regulatory agencies such as the Interstate Commerce Commission, Federal Trade Commission, Federal Communications Commission, Office of Price Administration, and the like. Closely associated with these are licensing agencies and others which interfere with business activities such as the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System and the like. These are often thought of by the layman as being the extent of the field in which administrative law functions. Most of these agencies have legislative as well as quasi-judicial powers and the term "administrative law" is taken to cover all of their activities. This is probably the sense in which the terms are used by the Attorney General's Committee in their study of administrative procedure in Government agencies.

In this category one also may find the activities of preventive agencies, such as the United States Public Health Service quarantine activities, Bureau of Entomology and Plant Quarantine, and others of this nature. Although these organizations have probably greater power to interfere with human liberty and property than perhaps any others, they are often not considered as operating within the field of administrative law. Closely akin to these are other regulatory agencies which indirectly affect the activities of business and every-day life and carry on their regulation in the form of competing or cooperating business activities, are such as the Federal Reserve Banks, Tennessee Valley Authority, and the numerous banking and financing organizations found in the Federal Loan Agency.

A fourth category which is sometimes spoken of as administrative agencies is the great body of scientific organizations which are conducted by the Government, such as the Bureau of Standards, Bureau of Mines, Geological Survey, Bureau of Plant Industry, Soils, and Agricultural Engineering, and many others of this nature. The laws governing their activities might well be classed as administrative law but are seldom thought of as being the entire field.

It should be noted that the term in its first and broadest definition covers all of the government bureaus of the type named in the other three. There are literally hundreds of these so-called administrative agencies carrying on all types of activities. Examination of the index to the U. S. Government Manual will yield at least four hundred separate such organizations. All of these can and properly may be included within the term "administrative agencies" and it is no stretching of the expression to say that it is administrative law which governs their activity.

With this ambiguity in terminology involved at the outset, one must carefully examine any bill or discussion of administrative agencies to see just what is the nature of its subject matter.

The Salient Features of the Administrative Law Bills

There are a number of characteristics which are found in a majority of these acts attempting administrative reform. The four main features which will be discussed in their order are as follows: (1) All-inclusive coverage of government agencies in the term "administrative agencies"; (2) the demand for complete publicity of the actions of these agencies; (3) the attempt to force the judicial pattern of procedure on all agencies; and (4) the demand for full judicial review or the "day in court" for everybody affected in any way by administrative activities.

(1) The All-inclusive Coverage of the Bills.

One of the most prominent and common features of these bills is that they use the term "administrative agencies" in its broadest possible meaning. This was the case with the Walter-Logan Bill¹³ which passed the 76th Congress and was prevented from becoming law only by Presidential veto. In like manner it is found in all the variations of the American Bar Association Bill which defines an agency as "each office, board, commission, independent establishment, authority, corporation, department, bureau, division, institution, service, administration or other unit of the Federal Government other than Congress, the courts, or the governments of the possessions, territories or the District of Columbia."¹⁴ Although the bills necessarily contain some exceptions, the constant effort of their protagonists has been to include all Government agencies within their ken, and S. 7, the current bill, surpasses all others by the following definition, "'Agency' means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."¹⁵ It then proceeds to exempt agencies lasting for the duration, and agencies composed of representatives of the parties. But by and large it attempts to cover the entire field of Administrative activity in its broadest sense.

¹³ See Sec. 1(1)-(4) of H. R. 6324, 76th Cong., 1st sess. (1939).

¹⁴ H. R. 5081, Sec. 1, The Smith Bill, H. R. 5237, contains the same definition with less exceptions; and H. R. 4314, Sec. 2; H. R. 673, Sec. 102; and H. R. 816, Sec. 102, contain similar language; all these were bills in the 78th Congress.

¹⁵ Sec. 2(a).