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RESEARCH IN ADMINISTRATIVE LAW

By EDWIN BLYTHE STASON *

I have selected the subject "Research in Administrative Law." First, I shall carry you through the principal research and development activities that have distinguished the last thirty years, especially to bring into focus one of the very few really significant achievements in the history of the law—namely, a high-powered collaboration of many persons attacking a most important contemporary problem—in this instance administrative procedure. Then, second, I shall comment on the research needs of the future.

THE PAST

It is difficult for me to realize that when I started teaching administrative law at the University of Michigan Law School in 1928, there was no law casebook available as a teaching tool excepting only Ernest Freund's excellent volume predicated largely on a bygone era. There were but few courses offered in American law schools and the teachers of administrative law could be counted on one hand. Ernest Freund and Felix Frankfurter were outstanding, but the fraternity was small indeed! There was no West Publishing Company "key number" subdivision on administrative law. Yet, we were on the threshold of a striking development in American jurisprudence—namely, twentieth century administrative procedure.

In 1906, the Hepburn Act was passed; in 1914 the Federal Trade Commission Act. Then came the economic catastrophe of the 1930's. The history is well known. Congress gave birth to the Securities & Exchange Commission, the Federal Power Commission, the Federal Communications Commission, the National Labor Relations Board, and later the Civil Aeronautics Board and the Atomic Energy Commission. In addition, a vast array of administrative powers was conferred upon the Departments of Interior and Agriculture, and the other executive offices in the federal government. Equivalent developments took place in the state governmental systems. All of these acts and others of similar

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character conferred upon administrative officials broad discretionary powers to regulate private business, both by rule making and by adjudication. By 1950, every man, woman and child in the country was affected to a greater or less extent by administrative action. A very large proportion of the practicing lawyers of the country became engaged in proceedings before administrative agencies. A new era in American jurisprudence had come into existence. Administrative law had come into its own.

To say the least all of this was a chaotic growth, with infinite confusion and not a little hardship for many of those directly affected. In due course, lawyers and legal scholars become conscious of the need of bringing order out of chaos and the profession responded to the new challenge. Intensive research and deliberation began about 1933 and thereafter, down to the present day, we have witnessed a grand period of development of administrative law and procedure.

Let me sketch the panorama to bring the achievement into sharp focus. We are so close to it that we can scarcely realize that we have witnessed one of the very few great events in legal history. Also, I want to name some of the people to whom great credit is due for constructive statesmanship. It will not be possible to name all of them, for during the years, at least one hundred able and dedicated members of the bar have played significant roles in what is one of the very few truly great collaborative research programs witnessed in the entire course of the Anglo-American legal system.

To recall the history, beginning in 1933, the American Bar Association first took serious cognizance of administrative law when it created its Special Committee on Administrative Law under the chairmanship of Lewis Caldwell. Subsequently, Dean Roscoe Pound and later Carl McFarland, among others, succeeded to chairmanship. Monumental reports were prepared, a beginning of collaborative scholarly consideration of administrative law problems.

In 1937, under the leadership of Judge John J. Parker, the Section of Judicial Administration of the American Bar Association created a Committee on Administrative Agencies and Tribunals. A year later this Committee, with Ralph Hoyt as Chairman, presented a splendid report on the subject of "Judicial Review of State Administrative Action in State Courts." Again, in 1939, the same Committee prepared and proposed for state adop-

tion a draft act dealing with certain phases of state administrative procedure. This was one of the earliest, if not the earliest, of the codes of administrative procedure.

In 1939, on Executive Order of the President of the United States, the Attorney General appointed a committee of eleven persons known as the Attorney General's Committee on Administrative Procedure. This Committee, between 1939 and 1941 under the chairmanship of Dean Acheson, prepared its notable final report, which contained in a minority statement the draft of the Code of Federal Administrative Procedure that, later in 1946, became the Federal Administrative Procedure Act. Those of us who were active in the field at that time will readily remember the tremendous contributions of Arthur Vanderbilt and Carl McFarland to the drafting and ultimate acceptance of the APA, but there were others to whom credit is due, both on the Committee and on its research staff. Ralph Fuchs was a vigorous contributor on the Committee, and in the research group were three young men who deserve especial mention, for they have subsequently attained great distinction in the field: Walter Gellhorn, Research Staff Director, Kenneth Culp Davis and Robert Ginnane. These were all collaborative efforts on a grand scale.

Thereafter, in 1942, the so-called Benjamin Report was submitted to the Governor of New York. This report was another significant milestone, prepared by Robert Benjamin, who was appointed Commissioner for the purpose of studying quasi-judicial functions and procedures in New York state. The report is a valuable contribution to state administrative procedure, paralleling in a way, the Attorney General's Committee Report in the federal scene.

World War II compelled a brief moratorium, but in 1953, the President of the United States, at the instance of the Chief Justice of the Supreme Court, in his capacity as Chairman of the Judicial Conference, called a Conference on Administrative Procedure, with representatives of some fifty-six federal agencies, together with members of the federal judiciary, federal trial examiners, and members of the bar. This Conference, under the able chairmanship of Judge Barrett Prettyman, reported with twenty-two recommendations in March, 1955. It was a massive collaborative effort, pulling together the knowledge, skill, experience, and ability of a host of experts in federal administrative law. A second such Conference under the same chairmanship was called by

President Kennedy in 1960, and it reported its thirty recommendations in 1962.

Also, in 1953 Congress established the second Hoover Commission. One of the Task Forces of this Commission dealt with Legal Services and Procedure. Under the chairmanship of James M. Douglas, former Chief Justice of the Supreme Court of Missouri, and the directorship of Whitney Harris this Task Force prepared a complete revision of the federal Administrative Procedure Act. Again, there was a significant collaborative effort of many skilled and experienced persons.

In 1955, the Board of Governors of the American Bar Association established a Special Committee on Legal Services and Procedures, under the chairmanship of Ashley Sellers. This Committee, in collaboration with the Council of the Section on Administrative Law, and using the Hoover Task Force draft as a starting point, prepared a completely revised "Code of Federal Administrative Procedure" and caused it to be introduced into Congress. Bills are now pending in Congress to effectuate various aspects of this revised code. Ashley Sellers, Charles Horsky, Don Beelar, Smith Brookhardt, Harold Russell, Robert Benjamin, among others who could be named, have contributed mightily to the preparation and advocacy of these measures. Some, or perhaps all of them, will eventually emerge as a part of federal law.

Finally, mention should be made of the recent revision of the Model State Administrative Procedure Act adopted in 1961 by the National Conference of Commissioners on Uniform State Laws. Frank Cooper made a very great contribution to the development of this revision. The National Conference is one of the great collaborative instrumentalities in legal research and development in the United States.

The events thus sketched beginning in 1933 and continuing for a period of thirty years, can properly be looked upon as one vast, interrelated, unitary cooperative research activity of lawyers, law teachers, and government employees interested in improving the administrative process. Simultaneously, it was accompanied all during the years by a wealth of periodical literature, books, monographs, seminar proceedings and symposia in which specific phases of the subject were examined microscopically by learned and articulate individual legal scholars. Taken in its entirety, this is research and development on the grand scale, seldom encountered in our profession, where lawyers all too frequently confine them-

selves to the immediate necessities of taking care of the problems of their clients.

Let's get it all into proper focus. There are, perhaps, only three other instances in the whole history of the common law in which lawyers, judges, and law scholars have by collaborative effort made equivalent contributions to the development of the legal system. These have all taken place since World War I, since the legal profession has really commenced to assume its public responsibilities. The three are the American Law Institute Restatements, the new Federal Rules, and the Uniform Commercial Code, with which William Schnader and Karl Llewellyn will forever be identified. These, too, were great collaborative undertakings. They all show what can be done when competent and dedicated lawyers unite their efforts determined to achieve needed improvements in the legal system. They point the way toward other similar possibilities to be undertaken in the future.

If you look back over the history of the common law, you find surprisingly few really great surges of constructive activity for the improvement of the legal system. There was the first awakening that resulted in the development of trial by jury in the twelfth century. There was the next great awakening that resulted in the fifteenth century in the amelioration of the too rigid common law Register of Writs by establishing chancery jurisdiction. Then there was the great advance in the forepart of the seventeenth century when the idea of the supremacy of the law over the crown was born. Sir Edward Coke is the great name. Then there was the monumental procedural reform movement in England in the nineteenth century. Jeremy Bentham was the evangelist and the British Reform Acts of 1832, 1833, 1835, and 1873 were the result. There was also the Field Code of New York of 1848, this in a way being the father of reformed procedure in this country. These were great reform movements. They happened about once every two centuries prior to the present era. In recent years the tempo has increased. An enlightened legal profession is rapidly filling the Hall of Fame with new twentieth century accomplishments. The developments in the field of administrative procedure during the last thirty years deserve a prominent place in the same Hall of Fame.

THE FUTURE

We must now turn the corner from the past to the future. It will be a great pity if the momentum of improvement in adminis-

trative law of the last thirty years is not maintained or even increased. Where do we go from here in the legal research and developmental task?

Procedural Studies

It is clear that we shall continue with all vigor to do the necessary research to support further procedural improvements, both those currently before Congress and also those that will surely be undertaken in the future. If the Conference on Administrative Procedure is eventually established, it will, undoubtedly, engage in research designed to support its recommendations for the improvement of the procedural features of the administrative process that fall within its jurisdiction. This will be good, especially if the Conference is placed under leadership equivalent to that afforded for the Conferences of 1953 and 1960.

Substantive Studies

I do not, however, have complete faith that a Conference in the framework now written into S 1664, with its members preponderantly representative of agency interests, will take care of all the needs. I cannot help but think of the venturesome but valuable contributions of carefully selected smaller groups of dedicated persons, the Attorney General's Committee, the Task Force of the second Hoover Commission, the Advisory Committee on Federal Rules, with men like Judge Charles Clark, Edmund Morgan, Edson Sunderland, George Wharton Pepper, and William Mitchell to guide its destinies. I venture to hope that, if the permanent Conference is established by Congress, means will be found also of invoking the energy, enthusiasm, and imagination of similar smaller groups not necessarily drawn from the Conference, but selected from time-to-time because of special interest and competence for the purpose of tackling some of the major problems that lie ahead, problems not so likely to be found on the agenda of the Conference on Administrative Procedure.

For example, research efforts must in the future be directed more and more toward the substantive aspects of administrative law. Procedure has had its combing over during the last thirty years. The lines of advance have become well understood—the research, although never complete, is certainly plentiful.

On the other hand on the substantive side of the house, virtually

nothing has been done. The standards written in the statutes are in most instances broad generalities—not carefully conceived guide lines for action—in no sense “ring fences” around administration, and only vaguely serving to define prevailing policies. Statutes conferring very great powers are drafted with standards only sufficient to satisfy constitutional requirements. Administrative discretion reigns supreme. We have done virtually nothing to promote Ernest Freund’s often expressed ideal of gravitation from discretion to law. The next step is to examine with care and to improve the precision of such statutory deficiencies. They affect at least three phases of the administrative process.

1. Standards governing rule making powers. (These are especially in need of more precise definition.)

2. Standards prescribing jurisdictional limits and the factual bases of quasi-judicial decisions of administrative agencies. (All too often these are so vague as to offer no useful guide lines for hearing officers, for the agencies, or for the courts on review.)

3. The authority to attach “terms and conditions” to official action. (Often this is so broadly stated as to provide no guiding standard whatsoever, opening the door to unlimited administrative discretion and to conditions that bear no relevance to the basic intent of Congress.) Such situations need study and correction.

I predict that studies in these and related substantive areas can and will be made in the years to come, and perhaps they will be even more fruitful than the procedural studies of the past thirty years.

Vertical Studies

There is yet another phase of productive scholarship in administrative law that merits careful attention. Much would be gained if we should take a leaf out of the notebook of the Attorney General’s Committee of 1939 and prepare comprehensive “vertical” studies for each of the principal federal agencies, studies that in each case would encompass among other matters an historical statement, a discussion of the organization of the agency, its functions, the performance of rule making functions, the same for quasi-judicial functions, and the numerous special problems confronting the agency—studies in depth, not only descriptive, but also analytical and evaluating. Brief vertical studies of thirty-seven federal agencies were prepared twenty years ago by the

research staff of the Attorney General's Committee, under Walter Gellhorn's careful direction, but these have long since become out of date. If, within the framework of the legal research of the future, skilled reporters, with able Advisory Committees, could be employed who would undertake on a knowledgeable basis the preparation of such vertical studies the results would not only be valuable to practicing lawyers and scholars alike, but they would greatly facilitate and point the way to specific needed improvements of both the procedural and substantive aspects of federal administrative law.

Sources of Research Skills

A final question—Who or what organizations or persons are going to assume in the future the burdens of research in the field? The Attorney General's Committee, the Hoover Commission, the Conferences on Administrative Procedure are no more. If a new Conference is established, this will, presumably, become an important focus for research activity in the future, particularly on the procedural side, but it need not be the only such focus. The experience of the past has demonstrated the value of other types of organizations and persons in the field. Certainly the good works of the Administrative Law Section, the Special Committees of the American Bar Association, the National Conference of Commissioners, and the many top grade research scholars in the law schools must be continued and multiplied.

I also look upon the American Bar Foundation as a possible source of research skills in the field. The Bar Foundation is in a strategically favorable position to tap the intellectual resources of the bar itself, the practical experience of men who are constantly rendering professional service to clients, or to the public, and who are thus in a position to observe the deficiencies of the law in action. No other legal organization is in as good a position to marshal these professional resources on such a comprehensive basis. Furthermore, the Foundation can in many instances enlist the interest and scholarly skills of members of the teaching branch of the profession. It can, in other words, assist in the formation of a potent across-the-board professional partnership for the further development of administrative law in this country. I hope it may play an important role.

Fifteen *billion* dollars are expended in this country each year for

research and development in the physical sciences. It would seem that the legal system should devote more than the ten *million* or so currently being expended for research and development in the law and administration of justice. There is so much to be done to update our legal system, to place it in a position to meet the demands of the future. The technology of mankind must not be permitted to outdistance man's ability to live with himself. We can well afford to give earnest attention to the ways and means of achieving the best in administrative law. The past thirty years of research and development may be looked upon with admiration. The future must keep pace with the past.

A personal word in conclusion—it has been a source of tremendous satisfaction to me to have lived with the development of administrative law throughout these last thirty years. I look upon it as one of the few truly significant events in legal history.