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## WHO IS THE JUDGE, AGENCY OR COURT?

JOHN W. CRAGUN\*

If I mention the magic words "administrative law" to many lawyers over this country, I get an uneasy reaction. Some will claim they don't know what administrative law is; others claim they never touch the darn stuff; others are aware of the magnitude of the place which this field of the law has assumed, but feel baffled as to how to grapple with the problems it raises in fulfilling their professional duties. I will not dwell today on the place of administrative law in the state hierarchies, but with the federal problem, the federal government having preempted so much of the regulation of the economic life of our nation.

And when I speak of "administrative law" this audience should readily realize that I am using merely a short, though fancy, word for a very familiar process, the process of legislation and adjudication. It is a process of legislation and adjudication carried on not by Congress and the Courts, but by other organs of government which have been accorded the powers of legislating or deciding law suits. The field of administrative law is the field which deals with the powers and procedures of these other agencies of government.

The last twenty-five years has seen rather a wholesale shift to the agencies from the Congress and the Courts of the bulk of determinations involving the rights and property of citizens. Today there are more federal trial examiners than there are U. S. District Judges. They decide more cases and I speak of ordinary law suits within the field of the particular agency's authority, than do the federal courts themselves. The dollar value of the cases they determine is far and away greater than what is determined by the federal courts; and this is only one facet of agency work.

Another with which we are concerned is their legislative function. For those of you who subscribe to the Federal Register it comes as no surprise to know that the actual output of legislation through the agencies is vastly greater than that of Congress itself. The United States Code is a compact little set of three volumes and supplement compared with the two and one half shelves occupied by the Code of Federal Regulations. And even the Code of Federal Regulations does not contain nearly all these agency made statutes. In the smallest details of our ordinary lives we are affected by this legislation. In a great part of this country we cannot flip a light switch without affecting, sometimes hundreds of miles away, a switchboard which must comply in detail with these agency statutes called regulations. We cannot tune in a radio or television station; usually we

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cannot buy a stock or bond, nor can we market our wares and merchandise, without being affected by this body of law. An unfortunate byproduct for the lawyer from this standpoint is that frequently the interpretation of these agency made statutes, and the building of the client, the handling of his legal problems vis a vis the agency, even the trial of his lawsuits before the agency, has become a function of some layman or lay group which fosters the notion that the mere understanding or interpretation of these laws is something actually beyond a lawyer's competence and in the realm of the esoteric.

It seems to be the considered view of substantially everyone who has studied and written on this phenomenon that the agencies are with us to stay and that there cannot be a total reversal of what has been done so as to bring about a shifting back to Congress of the actual statute making and a shifting back to courts of the trial and determination of the lawsuits heretofore placed with the agencies. That is not to say that when a pattern becomes sufficiently crystalized and sufficiently "judicialized" as the professors call it, in a particular agency that the agency cannot then become a court. Thus, the court of Customs and Patent Appeals at length has become a part of the federal Judicial system; and there is hearty endorsement from all except the lay practioners before it for the Tax Court of the United States to be transferred from its present status as a merely administrative court to the judicial branch of the Federal Government. The same could be done with the purely judicial function of the National Labor Relations Board, or with those of the Federal Trade Commission. There are others. But this vast administrative herarchy cannot be totally resolved back into the pattern of our traditional theory of separation of powers. Possibly this country would not have gone further and faster had we continued more closely to respect our fundamental theory of separation of powers and not have become so hypnotized with so-called "expertise". Whether so or not, we give simple recognition to the practical fact that the bureaucracies have taken so firm a grip on government and business and everyday thought, they have so allied themselves with the special interest or pressure groups which individually they are supposed to regulate in the public behalf, that any thought of limiting them to police, investigative, prosecutive and similar functions while having the courts try the lawuits and Congress do the substantial legislating is mere dreaming.

Rather, the feasible solution has appeared plain; i.e., to insure that there is essential fairness in the functions of the agencies. Our profession has not stood still in this respect. It was lawyers, not the agencies, who sponsored legislation in the early 1940's which, after veto and compromise, finally emerged as the Administrative Procedure Act. That act was approved in July, 1946. It sought to insure that the public would be granted information as to the organization, the procedures, and the rules of the various agencies; that the public and persons affected would be

accorded a degree of participation in so-called "rule making" which is the process by which agencies adopt these statutes called regulations; that fair trials of "ajudicatory" proceedings would be guaranteed, which means that where the agencies act in the trial of cases which might have been tried by United States Districts courts the agencies are bound to give the litigants some of the same guarantees of fairness to which the public feels entitled in our courts of law; and finally to accord a better scope of judicial review of agency proceedings so that no longer would the agencies be a law unto themselves.

So far as that act went it has worked out satisfactorily. To be sure, not always have the courts accorded the scope of judicial review which the proponents of the legislation had hoped they might; but then neither have the courts refused to apply the act in some situations where the agencies contended it was inapplicable. Those agencies which initially expressed misgivings about its operation, which sometimes forecast disaster for the public interest, have found that the act works well in fact.

Inevitably, experience under the Administrative Procedure Act, experience of the agencies themselves, the industries they regulate, and the public, has pointed to further improvements and has pointed to the advisability of extending the principle of the Administrative Procedure Act to other cases, and to the need to improve the draftsmanship of that act.

Thus, the second Hoover Commission gave detailed consideration of reforms needed in this field. Significant and detailed recommendations were made in the report of that commission on Legal Services and Procedures, and in the underlying report of its task force on Legal Services and Procedures of the Federal Government. Meantime, too, the President's Conference on Administrative Procedure had been called by the President of the United States on April 29, 1953, and had brought the federal agencies together for their own consideration of means of eliminating unnecessary delay and expense in agency procedures and had provided detailed recommendations to the agencies.

Both of these thoughtful studies have in turn been given consideration by lawyers throughout the United States for more than the last three years. The various proposals have been debated and sifted in the light of arguments advanced by the agencies, the litigants who appear before them, the industries which are subject to regulation by the federal departments, boards and commissions, and the lawyers who appear on either side of the controversies with which those agencies deal. Tried in the fire of controversy which the many proposals for further reforms had provoked, the American Bar Association adopted a statement of principles on this subject at its mid-winter meeting in 1956.

In the intervening time since the first adoption of these principles by

the American Bar Association, its committees have labored diligently to bring forth a codification of the Administrative Procedure Act which would give concrete form to the method through which these principles could be carried into effect.

Let me read you just one of the resolutions which was adopted by the American Bar Association in 1956 as a considered view and, therefore, a guidepost to its Sections and Committees as to the reforms which should be sought in the Administrative Procedure Act:

2. RESOLVED, That the American Bar Association sponsors the enactment of a comprehensive Code of Federal Administrative Procedure which will, among other features:

2.1 PUBLIC INFORMATION. Provide more adequately and effectively for public information on the administrative process, including

(a) Broadening the requirements concerning publication of rules, statements of policy, interpretations and instructions, but providing appropriate means for authorizing short form or alternative methods where desirable.

(b) Broadening the requirements concerning the publishing of orders and final opinions, or in the alternative making them available for public inspection.

(c) Requiring that no agency rule, statement of policy or interpretation of statute intended to have general application or effect and required by a statute or rule to be published shall, in any particular case, be a basis for a sanction or a ground of decision unless previously so published; provided that this shall not preclude the formulation of ad hoc policies or interpretations arrived at as a result of particular proceedings if clearly within and relevant to the issues thereof.

(d) Developing the Code of Federal Regulations in order that it may be made still more useful for public informational purposes.

2.2 RULE MAKING. Provide for improvements in the administrative rule making process by

(a) Enlarging the applicability of formal hearing procedures by extending such procedures to all rule making which any statute hereafter enacted shall require to be made after a hearing unless such statute indicates an intention to prescribe merely a legislative type of hearing, and further providing for an examination to be made of previously enacted statutes prescribing rule making hearings to determine whether or not formal procedures should appropriately be required in rule making thereunder.

(b) Broadening the coverage of provisions for notice and opportunity for public participation in rule making where formal procedures are not required by eliminating in appropriate instances exceptions now included in Section 4 of the Administrative Procedure Act so far as it may be done without occasioning delay or expense disproportionate to the public interest.

(c) Making applicable to formal rule making proceedings the principle of separation of functions now established by the courts and by Section 5(c) of the Administrative Procedure Act.

2.3. HEARINGS AND DETERMINATIONS. Provide for improvements in the administrative hearing and decision processes by

(a) Making applicable to agency members, informal adjudication and formal rule making, the principle of separation of functions now established by the courts and by Section 5 (c) of the Administrative Procedure Act.

(b) Providing that informal adjudication the rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil or non-jury cases in the Federal Courts.

(c) Providing that in formal adjudication and formal rule making, where the agency has not presided at the hearing, the hearing officer who has presided shall make and file an initial decision.

(d) Providing that in formal adjudication the hearing officer's findings of evidentiary fact, as distinguished from ultimate conclusions of fact, shall not be set aside by the agency on review of the hearing officer's initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence.

2.4 JUDICIAL REVIEW. Provide for more effective judicial review of agency proceedings by

(a) Providing that the scope of judicial review of agency determinations of fact in formal proceedings be equivalent to the scope of review by the United States Courts of Appeals of determinations of fact by United States District Courts in civil non-jury cases.

(b) Providing that statutory interpretation in the course of agency adjudication be subject to full judicial review.

(c) Extending the scope of judicial review of the exercise of agency discretion by authorizing judicial review where agency action constitutes an abuse or clearly unwarranted exercise of discretion.

(d) Authorizing reviewing courts, subject to appropriate safeguards and upon a showing of irreparable damage, to enjoin at any stage of an agency proceeding agency action clearly in excess of constitutional or statutory authority.

(e) Providing for a prompt judicial remedy for every legal wrong resulting from agency action or inaction except where the Congress has expressly precluded judicial review.

The 1956 resolutions referred to cognate provisions such as an independent office of administrative procedure to effect coordination of rules and public information practices, regulate the appointment of hearing examiners and their assignment to cases, regulate a career service for lawyers in government designed to make them more professionally responsible, establish courts in the federal judicial system to handle some of the lawsuits now tried by agencies, and to effect regulation of those who represent others before the federal agencies. These resolutions I will not read. Many of the aims of these other matters have been covered by bills introduced in the Congress which is now adjourned. For that matter, so has a draft of the bill to codify the Administrative Procedure Act, i.e., the bill to establish a Code of Federal Administrative Procedure. This latter bill was introduced as S. 4094 (85th Congress) by Senators Ervin and Butler. Requests are pending from the Committee to the agencies for an expression of views. The American Bar Association hopes to have hearings held at the outset of the new Congress when the bill is re-introduced. Although

there will be a storm of protest from the agencies just as there was with the Administrative Procedure Act itself, it is the earnest hope of the American Bar Association at large that the recommended improvements in the administrative adoption of statutes and the administrative determination of lawsuits will be adopted by the next Congress.

The pattern of agency opposition is worth a note. Rather than attempting to controvert the principles involved, which are plain and, I submit, incontrovertible as I read them a few moments ago, the agencies will be heard to set up a chant more or less as follows: This agency was set up under a charter by Congress to look after the public interest in the field of its jurisdiction (anything from the deepest mines to outer space). This agency has functioned well. There is no genuine demand for improvement of its practices or procedure or for greater review by the courts; and any greater review by the courts would be time consuming and constitute a delay in bringing about the fulfillment of the public interest with which this agency is charged. While this agency does not doubt that some improvement could be effected, it submits that those improvements ought to be considered in connection with the particular statutory context which has been so carefully developed and devised to support the public interest, rather than through an attempt to improve them by a broadside bill such as the proposed Code of Federal Administrative Procedure.

As I say, this is the pattern of opposition with which the profession is faced. The agency people, often shrill and insistent, refuse to examine the principles or to meet them head on, but instead try to shift the burden of proof, and principle be damned. The shallowness of this device in opposition to the movement of the organized bar is obvious enough to lawyers no matter how well it sounds to the agency, its staff, and the people who are constantly before the agency and who with the agency have come to a happy mutuality of views, an existing tidy situation which they ardently do not want upset.

What I have said is a matter which I believe all of you know, or recall upon being refreshed as to the history of the efforts of the organized bar to bring common sense principle and fairness into play in the administrative adoption of statutes and the administrative trial of lawsuits. So much for a prelude, I wish to devote myself in the last minute to the matter which concerns me above all others, the abdication by the courts of the control and regulation of agencies in cases and controversies under Article III of the Federal Constitution. This is a matter to which we as lawyers have contributed, particularly those of us who have ascended the bench. I refer to the natural desire of the courts to rid their calendars of a whole class of cases and to leave the problems involved to the agencies, almost without limit.

I ask you to recall Dr. Bernard Schwartz, the same man who directed the hearings last spring which showed that deep freezes are not much different from free trips and entertainment, that pastel minks are not

greatly different from vicunas, and whose name is now part of our language to describe the technique of hearings known as "Schwartzmanship." Years ago Dr. Schwartz wrote a blistering law review article entitled "Administrative Remedies and The Exhaustion of Litigants." Were I to write an article on the subject I might entitle it: "Let George Do It."

There is a similar doctrine, the doctrine of "primary jurisdiction" which says that no matter how plain the facts and law are, if Congress has committed any aspect of the matter to an agency then first you must go through the whole gauntlet of procedures specified by the agency before you can get to the courts at all. If the court gets rid of a case on the docket in that way, it has postponed the evil day when it must hear and determine one more case. Maybe the litigant will indeed be exhausted before he comes back. Perhaps it is true that the matter presented is an ordinary lawsuit between two ordinary parties involving only ordinary issues of the construction of a statute or contract or right. Nonetheless, since the individual can get a hearing before an agency, make him go through the entire tortuous agency procedure (or the agency bull session, as it has been described) even at the expense of a record including not merely what is competent, relevant and material, but where anything goes. Most litigants are exhausted by that time; but, if not, then time enough to come to court.

The way we as lawyers contribute to this dismal process is through paying our entire attention to the courts and not to the bulk or main value of federal litigation. We are upset, we are appalled, at the law's delay. We condemn and denounce the courts for their delay. We do not examine the delay by the agencies. Thus, two weeks ago at Los Angeles the Chief Justices of the States engaged in a bit of Soviet type self examination and self abnegation, and joined in the chorus of denunciation of the courts for their unconscionable delays. But the courts could learn from the federal agencies, which do not measure delay except from the time the case is referred to a hearing examiner, which might be ten years or so after it become ripe for referring to the hearing examiner. Then, if the hearing examiner gets to it within a month or so, the agency sweetly records that there has been only a month or so's lag. The courts might learn to measure time from the day the case was placed on the ready calendar or the daily trial assignment or whatever the local practice points as the final act before actual trial.

I suggest that we ought to be more concerned with principle than with time. We ought to be more concerned that a case is determined correctly than that it is determined instantly. Justice can be denied as well by erroneous decision as by mere delay and time consumed. There ought to be no reward to a United States District Court by way of a happy statistic or one more case disposed of that he has glommed onto a synthetic reason, "primary jurisdiction", or "failure to exhaust administrative remedies" and has denied justice in the particular case by sending the litigant on an exhausting and unnecessary quest.