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The liberty so kindly extended to me by the officers of your Association of choosing my own subject is, like all liberty, both a privilege and a responsibility. My task at once becomes more enjoyable and more difficult. It would be so much easier to talk on an issue that someone else has created. But to discover in one's own life something that may seem worth talking about demands searching of both experience and conscience. My life for the last four years has been that of government. So rich have been those years in the fullness of their activity that it is sometimes hard to think in terms other than "Life begins in 1933". So, if on occasion, I seem to emphasize too much the happenings since that date, I trust for the extension of some measure of condonement.

Most fascinating to the student of modern government has been the marked acceleration in the development of the administrative commission as an instrument of government - a development which goes back into our history half a century. The significance of that development and the new emphasis played in government by the administrative agency is, I think, worthy of some consideration.

Broadly speaking, the problems of legislation and of administration divide themselves into two phases. The first relates to the determination of what policies to pursue; the second, to the discovery of how to make the chosen policies effective. Political discussion commonly centers about the first. The choice of policy is attended by all the excitement of conflict among varying philosophies and among diverse group pressures. Yet this phase is transitory in character. It is transitory in the sense that it is completed by a relatively short though intensive effort; and it is transitory in the more fundamental sense that policies are often the product of a particular time, and must change as the needs and conditions of society change. The administrative phase, on the other hand, is enduring in character. It requires a continuing effort of indefinite duration; and it is enduring in another and more subtle sense. An effective weapon forged for a particular end may be as useful in the pursuit of other ends, and remain useful until inventive genius defines a more effective social mechanism. Administrative methods and devices for the effectuation of policies constitute the armory of civil government, and the proper stocking, cataloguing, and testing of this armory constitute an essential part of the art and science of government. Yet, by a kind of perverse irony, this second phase all too often receives only casual attention.

Perhaps the most striking development of the last century in governmental invention for the effectuation of policies is the administrative commission. The history of its origin and development in this country constitutes a most revealing chapter in human affairs. The circumstances that led in 1887 to the creation of the Interstate Commerce Commission are well known. First, there was the realization of the need for regulation arising from the complexity and significance of the development of the railroads, and the abuses which attended this development. Secondly, there was the breakdown of the common law procedures as applied to these problems, of which two may be selected as outstanding - unreasonableness in rates and discrimination between persons and communities. Some continuing supervision over the railroad problem as a whole was demanded, for it had become only too evident that its solution could not be left to the casual and sporadic processes of private litigation.

These, then, are the circumstances that led to the creation of the Interstate Commerce Commission. As we examine these circumstances closely, we can discern the fundamental causes for the creation of that Commission, and of other similar agencies, causes which lie deep in the fabric of our society. Various industries and occupations, complex in character, and with manifold internal problems, have from time to time come to assume such significance in our national life that a measure of social control of them has become essential. But this social control has had to be devised and applied in a manner fundamentally consistent with the slow and intricate evolution of the American economic system, and with the processes of democratic government.

The nature of this problem was perceived almost instinctively, and it was solved almost instinctively. The administrative agency came into being not as a single comprehensive philosophical conception but by a process of empirical growth. These agencies have always sprung from a concern over things rather than over doctrine. Their business has related not to society as a whole but to its particularized aspects. Their concern, to give only a partial catalogue, has been with banking, utilities, stockyards, commodity exchanges, securities exchanges, investment banking, telephones and telegraphs, radio, shipping, insurance, busses and trucking. In a few fields, the jurisdiction of the administrative commission has been defined with reference to certain concrete problems that cut across different industries and occupations, rather than with reference to any particular area of economic activity. This tendency is exemplified by the extension of the commission technique of government to such problems as unfair competition and collective bargaining.

Indeed, if one sets aside details for the moment, one perceives that what has actually happened during these years is that groups of men have been entrusted with the direction of particular industries under legislative mandates broad and general in character. Although the objectives are different, the reasons that led men to band together in trade associations instinctively brought forth the administrative commission as the mechanism for regulating an industry. Both growths, strangely parallel in time of organization as well as in powers that are wielded, are not the creation of theoreticians but the response to empiric needs and desires.

One driving impulse in the creation of these new instruments of government was the need for specialization in the art of administration. The complexity of the situations dealt with demanded men who could give their entire time and energy to the particular problem. And for that time and energy to be effective, means for carrying out policies that they devised had to be given them. It was not enough to have them merely in the position of powerless planners.

That mistake had originally been made with the Interstate Commerce Commission. For twenty years power to remedy the admitted evils that gave it birth was denied to it. The courts were jealous of the intrusion of this new governmental mechanism into a domain which they had regarded as their own. They viewed with suspicion the exercise of powers similar to those possessed by them by men untrained in the traditional forms of legal procedure and not too respectful of its antiquities. For years the very vitality of the administrative process was in the balance. But as

confidence in its expertness grew, and administrative powers became a commonplace of government, this judicial resistance became less, and the deposit of power with the Commission greater.

The fact that administrative agencies are the products, not of dogma or of abstract theory, but of the gradual development of control by a democratic government over the varying phases of our economic life, makes generalization about their functions and about the powers that they should be permitted to exercise not only difficult but frequently superficial and misleading. A structure that is built for the railroad problem may have only a casual likeness to that created for banking. If they spring, as they should, from the ground up, their architecture will be indigenous, as varying in its utilitarian characteristics as the Grand Central Station and the First National Bank. True, a certain amount of imitativeness is always present - a method of adjusting stresses and strains found valuable in one structure will be employed in the creation of another. But it is banking, insurance, utilities or railroads that form the dominating motif, rather than some highly theoretical doctrine as to powers that should or should not be possessed.

Illustrative of this point is the creation of the Securities and Exchange Commission. Trading in securities on exchanges is not only a specialized technique but essentially a cooperative enterprise. An exchange begins with an association of men, who, for their earliest functioning, must have a form of government, perhaps only tacit in the beginning, but gradually becoming articulated in the form of a constitution that defines the rights and privileges of its members. As the volume of business increases and its membership grows, this internal regulation becomes more detailed. To protect the members and their business against unfair advantages taken by other members, regulations outlawing certain practices come into being. They expand as the pressure of outside forces demands further protection against the possibilities of exploitation. Other means, besides the banning of certain practices, for the protection of members also develop, chief among which are the requirements for the listing and approval of securities dealt in on the exchange. Devised originally to protect against the illegal over-issuance of securities by corporations, possibilities for further control are envisaged, together with the realization of the necessity for getting some record of the performance of corporate enterprise. Means for the enforcement of these regulations naturally have to be invented, and governing committees come into existence with power to strike the securities of offending corporations from the list and to suspend or expel members guilty of breaking the rules governing the manner of trading.

The exchange is a full-fledged institution by the time it comes within the purview of regulation. In fact, it is a self-governing organization of numerous independent business enterprises, governed badly, it may be true, but still self-governed. Legislative, executive and judicial powers are all possessed by the institution and inextricably intermingled. Powers to impose penalties, that would obviously be arbitrary if exercised by government, are already possessed by it. Procedures that hardly bear any resemblance to traditional court procedures are pursued by the governing authorities in passing upon charges of violation of rules, and practically accepted without objection by its membership.

Obviously a scheme of regulation that took no account of the institutional development of the enterprise with which it was concerned would prove futile. Assuming that some merit attended this scheme of self-regulation, that some contributions to the broader public interest had resulted from its operation, the central issue of regulation focussed upon the area to be allotted to self-government and the conditions of its supervision.

The structural plan of the Securities Exchange Act, under which the exchanges are regulated, when viewed in this light, is of intense interest to the student of government. Some matters the Act deemed of such importance to the public interest at large that it entrusted their regulation and administration directly to government. This was true, for example, of the tactics of manipulation, the prescription of margins and the concomitant control of credit. On the other hand, the Act occasionally divided authority as in its treatment of the listing of securities. Here it required government to insist that no listing could take place without a certain minimum of disclosure, but at the same time left the exchange free to determine, whether, that minimum being met, the security was of the type and quality that it would admit to the list. Again, by a mechanism novel in governmental regulation, the Act entrusted certain aspects of exchange organization and exchange trading to the exchanges with the right, however, on the part of government, in the event that the situations were handled inadequately by the exchange, not to prescribe its own rules but to insist that the exchange should adopt as its rules regulations formulated by government. Finally, by a system of licensing the Act imposed upon the exchanges the duty to police and enforce not only their own rules but also such regulations as government might adopt upon its own motion.

Regulation built along these lines welded together existing self-regulation and direct control by government. In so doing, it followed lines of institutional development, buttressing existing powers by the force of government, rather than absorbing all authority and all power to itself. In so doing, it made the loyalty of the institution to the broad objectives of government a condition of its continued existence, thus building from within as well as imposing from without.

Equally interesting is the choice made of the measures to compel conformance with the requirements of the law. Of course, the traditional heavy artillery of enforcement — criminal penalties of fine and imprisonment — were employed. Then, too, such other common equipment as the court system provided, including injunctive remedies and the duty to respond in damages for wrong done, were availed of. But the exchanges themselves had over the years developed their own disciplinary technique. Nothing was more natural than to adapt this to the uses of the new governing authority. Chief among them was the power to suspend or expel members and the power to strike securities from the list. To exercise them in the manner that they had been exercised by the exchanges seemed the natural course.

The Aristotelian theoretician who would try to make this scheme of regulation comport with some abstract conception as to the separation of powers would have his difficulties. If he conceived that this truly miniature form of government had to turn its back upon the natural course of institutional development, and follow principles devised for other conditions, other times

and other places, he would be simply sacrificing the accumulated experience of today for a dogma of the past. A pragmatic approach to government would judge by the tests of efficiency in promoting the objectives of regulation, and of the disposition of controversies along broad lines of justice and right, rather than by conformance to a page of theory in Montesquieu.

A further underlying assumption as to administrative law and the work of administrative agencies that is widely held but seemingly far from reality, is the assumption that it possesses unrestrained freedom in the pursuit of its policies. Fundamental to the very creation of administrative authority is the fact that its source is legislative. It can be destroyed or altered as easily, if not more easily, than it can be born. Its actions are under the constant scrutiny of the legislature, to which it reports annually. Its appropriations, the life-blood of its being, are a matter of annual grant and possess no inviolability in the eyes of either budget or appropriations committee. In the broad pursuit of its policies, to be effective it must align its objectives with those pursued by the executive. The direction in which it moves within the narrow sphere of its activity has, in the last analysis, to be attuned to the general movement of political thought and will. Its function is to interpret for the complex situations of which it has charge and in which it is assumed to possess expertness, the meaning and impact of the broad program of the legislative and the executive. Indeed, a survey of administrative activity over the past twenty years would give considerable evidence that administrative activity has been weak in purpose and effect when the executive was undetermined and undecided, but has recovered its strength and power as the executive has manifested direction and firmness.

In addition to these safeguards against abuse of the administrative device, there exists the ever-present factor of judicial review. It is, of course, imperative that a reasonable measure of judicial review should exist. I believe it must be recognized, however, that the position of administrative agencies within the past few decades in respect of judicial review has not been an altogether happy one. As Mr. Justice Stone recently pointed out, the problem of judicial review over the actions of administrative agencies is dual; the individual citizen must be protected against abuse, and the administrative agency must be given constructive assistance in the orderly development of its affirmative program. Yet, in the past few decades, the courts have frequently obstructed the orderly development of effective administrative action by assuming the right to fashion or revise matters of policy. Thus, in rate regulation, it was conceived that experts in the problem would evolve a workable base for the computation of a reasonable rate of return. But the results of such impartial expert application were cast aside by the courts — against vigorous dissent from certain of their own members — in favor of a metaphysical theory of valuation upon the basis of reproduction cost. There is grim irony in the fact that it is this action of the courts that is, perhaps, more responsible than any other single factor for the impairment of the whole process of rate regulation, and that this same action has thus indirectly forced resort to the yard-stick method of reducing charges for light and power. In the field of procedure, courts have been somewhat prone to stigmatize any modification of the more conventional forms of legal procedure as a violation of fundamental rights. One of the purposes sought to be satisfied by the invention of the administrative agency was the avoidance of procedures dominated by irrelevant rules of evidence and pleading; yet the courts have on occasion tended to insist that the administrative disposition of controversies must imitate even in many of its details the methods of litigation at common law.

It is revealing to examine the record of judicial review of actions of administrative agencies in the light of the history of the courts themselves. We must be mindful of the fact that, in the broad sense, the courts themselves are a kind of administrative agency, with an ancient history that has defined their character and fixed their status in the public consciousness. It was not until centuries after the courts of England were first set up to execute the royal writs that the people of England came to regard the courts as defenders of the fundamental rights of the citizen.

Even then there was insistence upon the intrusion of the lay element through the jury as a check upon the exercise of tyranny by the judge. During the reign of the Stuarts, in the trial of Colonel Lilburne, we find that champion of freedom asserting that it was for the jury to decide all questions of law as well as fact, and that the judges were "no more but Norman intruders, and indeed and in truth, if the jury please, are no more but cyphers to pronounce their verdict." Toward the close of the ~~nineteenth~~ 18th century another champion of freedom, Charles Fox, pushed through to enactment his Libel Act, which took away from the judges the power to declare whether a particular statement was libelous, and vested that power in the jury.

Moreover, the growth of law and the realization of human claims has been marked by recurrent insistence upon the efficient despatch of justice. History recites that law, as administered by the courts, can become stagnant and rigid. It was this that led in English jurisprudence to the rise of equity, to the creation of a new series of judges, of chancellors, whose consciences would be the guide to their decisions and who had not only the authority but the duty to disregard the formalisms of the law. The creation of this system naturally led to resentment and a bitter contest was waged for years between common law judges and chancellors. It took many years before equity jurisdiction became recognized as an established branch of legal administration, taking its place side by side with the older common law as a protector of the people's liberty.

It is a similar set of conditions and similar needs that have given birth in the last century to the new type of administrative agency. The inadequacies of the old procedures to meet the new claims, the lack of any power in the judicial branch of government to initiate proceedings, the delays attendant upon formalism, the want of that type of specialized application that makes for expertness, these are the basic causes for administrative law. Its creation, like the creation of the older equity, was an effort to grant protection to the common man in the realization of new liberties born of a new economic order. The continuity of the common man's radio programs, the security of his bank deposits, his protection against unfair discrimination in employment, his right to have light and power at reasonable rates, his protection against fraud and chicanery in our securities markets, his right to cheap railroad travel - to mention only a few of the necessities of modern life - these are some of the new liberties which make up the right of today's common man to the pursuit of happiness, and these liberties for their protection today seek the administrative and not the judicial process.

But the existence of the administrative process in modern life, though it may look superficially like a contest between administrative law on the one hand and court law on the other, does not mean the gathering of all

the varied activities of life under its control. Just as equity and law had, over a period of years, to work out a *modus vivendi* between them, so the system of administrative law will have to fit itself in orderly fashion into our existing governmental system. Today it may indeed suffer from growing pains. On the other hand, courts may hold an undue fear of this new neighbor. But neither can arrogate to itself the monopoly of championing our liberties. What is demanded is rather a recognition of those fields where each pragmatically can best bring about the realization of human desires. That issue is one of practicality, not of doctrine; an issue of efficient and fair dispatch of business, not of formalism as to method of procedure. Such an issue should be a welcome one in American life, testing as it does our native genius to fashion instruments sufficient to meet our traditional national aims under the conditions of today. As such, administration whether by court or commission, is a challenge not only to the scientific fervor of the few but to the statesmanship of the many.