PHLET

Speeches. SEC Staff

ADDRESS

of

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About two months ago, it was my privilege to be in Indiana to address a meeting of the Associated Harvard Clubs in Indianapolis. It was after, rather than before that talk, that I was asked to come here to talk to the Indiana State Bar Association. That, as you can readily see, enhances tremendously the privilege of being here tonight. For Josh Billings once said that everybody has to take the chance of being bitten by a mad dog once, but, if the dog is really mad, nobody goes back for a second bite. So when Judge Treanor asked me to come here, I took it that I had, at least, the absolution of the Supreme Court of Indiana. And to many of us in government these days the absolution of any Court is an event of some significance.

In these last four years that I have spent with government, I have rarely had the opportunity to talk to a group of lawyers. True, there has been both the necessity and the opportunity to talk to groups of financial lawyers, whose bread and butter came from struggling to master the new law that we were making. But these were technical talks, where the mechanics of administration overshadowed the philosophy underlying the larger objectives. Tonight, however, I shall refuse to be technical. And also, not yet having returned to the professional life, I am privileged not to be profound.

Instead I want to take you on an inquiry, where, perhaps, the best we can do is to raise questions rather than find answers. And my inquiry concerns the relationship of our traditional concepts of law and the processes of adjudication to the processes of administration.

I start with a few simple facts that concern the governmental unit known as the administrative commission. Its origin, as you know, is of comparatively recent date. In the federal government we begin in 1887

with the Interstate Commerce Commission. Just as utilities are and have been a pressing problem of the last quarter of a century - a problem that every political party has had to wrestle with - railroads was one of the major problems of the latter part of the nineteenth century. Out of its attempted solution, the administrative commission was born.

We will do well to trace this movement briefly. Following the railroad issue, the nineties began the task of trying to fit the new aggregations of capital, made possible largely by the use of the corporate device, into the warp and woof of our society. Relying first on the ordinary processes of the criminal law, as was done in the Sherman Act, some twenty years later an effort was made to supplement these by recourse to the administrative process and another commission - the Federal Trade Commission - came into existence.

But we need a little more history to point up our problem. When the panic of 1907 demonstrated the inherent weaknesses present in our credit structure, again we became convinced that some enduring solution to that problem had to be devised and again we turned to a form of administrative commission, the Federal Reserve Board. When the possibilities of conserving the "white coal" of the nation by orderly development became apparent, the Federal Power Commission came into existence. Out of the necessities of the World War, the United States Shipping Board was born, later to concentrate upon the problems of our ocean born traffic that were so dramatically brought to the forefront in that crisis. When by 1927 the air as a medium of communication became of immense importance, in an effort to bring some order in the claims that individuals were making upon that medium, we created the Federal Radio Commission.

Since 1933, this movement has naturally grown apace, is the fertile forcing ground of the depression brought into sharp relief the necessity for seeking some solution to problems that had already been pressing since the War. Thus we have, for example, the Securities and Exchange Commission, the National Labor Relations Board, the Bituminous Coal Commission, the Federal Deposit Insurance Corporation, the Social Security Board, the proposed commission to deal with wages and hours of labor, to say nothing of the strengthening and reorganization of some of the older commissions. Here and there, it is true, that a few of the new regulatory functions of government have been handled through the routine of the existing governmental departments, sometimes because the problem seemed to have essentially a small compass, such for example as meat inspection or plant quarantine, or sometimes, as was true of the regulation of stockyards, because political pressures were such as to place regulation in the hands of an agency then deemed more amenable to the interests of those who were to be regulated.

This same development of administrative technique has taken place in the states as well as the federal government. There, also, as the public finally determined to put itself in the driver's seat with reference to some of the major problems of its life, it created these new mechanisms of administration to serve its ends.

If we call the roll of the functions that administrative agencies today serve, one is struck both by the territory that they cover and by the fact that their creation represented an apex of public agitation concerning the greater problems of the past fifty years. Indeed, it is difficult to think of issues of greater practical concern to our daily life than those that related to railroads, shipping, banking, utilities, securities markets,

communication, labor relations, monopolistic and unfair practices, old age and unemployment insurance. To put the picture in less of a political and more of a juristic setting, it is worthwhile to attempt to portray the rights for which ordinary citizens now look to administrative agencies for protection. A partial catalogue of these rights would include such mundane but important matters as the continuity of our radio programs, the security of our bank deposits, the safety of our life insurance, our protection against fraud and chicanery in the sale of securities, our necessity for having light and power at reasonable rates, our protection against discrimination in railroad tariffs, or as workmen, our protection against unfair discrimination in employment or our right to compensation for industrial accident.

The outstanding characteristic of these rights, which today seek their prime protection from administrative agencies, is that they spring out of the necessities of modern civilization. Light and power, for example, were unknown not only to the pioneer but to the urbanite of a century ago. Cheap railroad travel only becomes a concern when, due to our changing mode of life, it becomes the only practical method for overland transportation of goods. Until the use of the corporation made possible nation-wide participation in the ownership of huge plants and property, control over the issuance and sale of securities could be left to the common law of deceit and warranty. In other words, these rights are the liberties peculiar to modern civilization, and the agencies of their protection are administrative rather than judicial.

Many of you will recall Sir Henry Maine's famous generalization about the three factors that made for growth in the law, namely fiction, equity and legislation. To these three, it seems clear that one can now add a fourth - the administrative agency.

Before examining into the causes that made and still make for the growth of administrative law, it is worthwhile trying to generalize about its characteristics. Generally speaking, administrative agencies are indigenous in the sense that each springs from efforts to grapple with a particular phase of our national life. They concern themselves, as I have said, with concrete problems such as railroads, securities markets, utilities, and the like. Unlike courts to which general law is committed for enforcement, each administrative agency limits its operation to a limited business or professional field. Empowered, for example, as the Securities and Exchange Commission is to deal with fraud in the sale of securities, it is not concerned with fraud in the sale of other articles. True, the general principles applicable to fraud are given particularized application in the field of securities, but the Commission is authorized to impose rules of conduct whose principles do not by the force of analogical reasoning govern conduct in fields beyond its jurisdiction. As distinct from courts of general jurisdiction, specialization seems an essential characteristic of its creation.

A second characteristic of these agencies and the law they administer is the grant to them of limited legislative powers. The area of these powers varies with the complexity of the subject matter with which they deal. Sometimes their legislative functions are something akin to the limited legislative functions which courts exercise in promulgating rules for the ordinary disposition of business before them. In other cases, however, administrative agencies possess broad legislative powers enabling them to shape policies within the scope of the general standards enunciated in their legislative grants.

A further characteristic of these agencies is the new and novel sanctions given to them to carry out their policies. Those possessed by courts

have been limited to relatively few in character. But the very creation of an administrative agency implies a consideration of new sanctions in aid of enforcement. For example, the Securities and Exchange Commission is armed with sanctions never possessed by courts, but commonly vested in the governing boards of stock exchanges, such, for instance, as suspending and expelling members from exchanges or suspending securities from being traded in on exchanges.

A fourth characteristic of these agencies is their power to initiate action against those who act in violation of the law. Here, of course, they add to their other functions that of prosecutor, seeking to insure observance of the laws committed to them.

One further characteristic is worth notice. That is the attempt to insure some continuity in their policies by seeking to remove them to a degree from the ordinary pressures of political life. In seeking to make them different to a degree from the ordinary political agency, the hope seems to have been that the policies that they have been authorized to pursue will survive the ordinary vicissitudes of politics.

From an examination of these characteristics, one can discern the reasons for the phenomenal growth of administrative law. Foremost among them, I would put the demand for specialization. It is too much to expect one man to dispose wisely of all the many kinds of current controversies, even though he be implemented by all the normal techniques of the law. And yet this is, in essence, the method of government which prevailed in our law until less than a hundred years ago. Except for the casual and sporadic intervention of the legislature, the weighing of the various claims of individuals and of society was left with the *nisi prius* judge, subject to such review as might be given by an appellate tribunal. It is small wonder

that law failed to realize the common man's hopes in many fields. On occasion a judge with rare experience would succeed in bringing order into a new field of human activity, as, for instance, when Lord Mansfield created the law of bills and notes out of the customs of London, a few principles of common law and some borrowings from Rome. But by the end of the nineteenth century, when one considers the burdens already present on the judges, it is not surprising that there should have arisen a demand for expertness and an essential limitation of endeavor, leaving to the general jurisdiction of the courts a duty to review the work of the expert agency for departure from broad standards of fairness and equity. Rather than resent a division of labor of this character, the legal profession should in my judgment welcome it, since it affords adequate time and opportunity for courts to handle the type of business in which they are adept and for the just disposition of which they are so necessary. A proper coordination between this work and the work of the expert tribunals can be effectuated through the processes of judicial review.

Fields still exist in the law where in my judgment the initial shaping of the law by persons whose function is continuous concern with that particular problem would be advantageous. Judges of general jurisdiction can perforce only give these problems sporadic attention as the accident of litigation brings one phase of the broad problems within their jurisdiction. For example, the problem of labor relationships in its manifold phases suffers considerably from lack of adequate definition of rights and responsibilities, - a definition impossible of formulation merely by legislation but capable, I believe, of being pricked out coherently and justly by men ready to devote their lives to the task. Much of the same situation exists in the field of corporate reorganization, where elucidation of concepts

of fairness and equity is still scant and obscure. Equally true is this in the field of corporate promotion, where the less meteoric character of a country which has emerged from the prodigal pioneering period compels a shift from the hazards of speculation to an attempt to emphasize safety of principal and stability of return. We have yet in this country to find a basic philosophy not only as to the allowable extent of the promoter's profits but even as to his disclosure of these profits to those whom he invites to become partners in his enterprise.

The second characteristic of the administrative agency that I mentioned was its possession of limited legislative powers. The need for an institution with powers of this character is two-fold. The increasing social interdependence of modern life has made regulatory activity an increasing feature of government. Forces that once could go unrestrained have demonstrated their capacity for harm in such vivid fashion that the safety of great portions of our public demands certain restraints. These restraints must be preventive in character. Mere compensation such as legal redress affords is too frequently futile. An Ivar Kreuger is more to be feared than a runaway locomotive, and is creative of damage for which there can be no adequate redress. The demand for rules of conduct is too intense for a legislature to satisfy, so that in the nature of things there must be delegation. Furthermore, the administrative agency can employ the legislative power delegated to it to write plain and clear the patterns pricked out by its own adjudication of great numbers of concrete cases. Into regulations governing accounting, for example, has gone the substance of a multitude of individual decisions. Into tax regulations flow an infinite number of decisions. It is the scarcity rather than the plenitude of this aspect of regulation that should be deplored. The scarcity springs

from lack of time or lack of surplus professional attainment, for frequently more difficult than the process of decision is the process of concisely articulating the net balance of such efforts.

Even in the field of administrative law, as well as court law, imaginative creation of effective sanctions has been lacking. Hardly a judge that I know has not bewailed this lack. In the field of penal administration we are slowly beginning to think in terms other than mere fine and imprisonment. In the civil field great strides were made a century ago in the shaping of the equitable remedy of injunction. Its possibilities, as limited by tradition, seem near to exhaustion. Reason for the growth of the administrative agency lies in part in the greater choice of weapons that it possesses in this connection. The right to revoke a license, the right to require further reserves as a condition of continuing in business, the right to require indemnity as a condition precedent to action, the creation of a competing force, these are samples of some of the sanctions that have been granted. A notable device, full of potential danger and yet possessing enormous force, is that simply of publicity. The reliance is placed there upon those moral and social sanctions that restrain individuals from doing openly what they would not hesitate to do were they permitted to keep the fact a secret. A searching analysis of the potentialities as well as dangers of this device has still to be made.

A further characteristic of the administrative agency that I mentioned was its power to initiate action. This power has been likened to the function now exercised by the district attorney. That analogy, however, I believe, is highly superficial. The district attorney is almost exclusively an officer for the enforcement of the criminal law, whereas an

administrative proceeding, although the moving party in it is the government, is primarily civil in character.

As such it fulfills a need long felt in our law. For the ordinary individual without means the cost of maintaining litigation in a complex case is such that he foregoes it. To take an illustration from our own field, the small investor who sincerely wishes to oppose a plan of reorganization sponsored by the management is practically helpless. Even if he can succeed in organizing a small minority committee, the cost of making the type of investigation necessary to convince a judge of the inequity of the proposed plan is such as to be beyond his means. What usually happens is that his only hope lies in badgering management to give him as an individual preferential terms. Contrast this situation with that under the supervision of an administrative agency. The plan is explored independently from the ground up. If there is any merit in one small investor's claim, his mere statement of it will bring him the support of expert assistance. The agency explores his claims not because it is his but because of its interest in the great class of individuals of whom he is one. Or to take another illustration, an investor believes that some manipulation is taking place in his stock. For him to gather the information upon which a provable claim of that character could be made is substantially impossible. Even though the offense is criminal in character, a mere complaint of that character directed to the district attorney's office could not by force of circumstances receive attention. What concerns the investor is that the conduct of which he complains should cease. And yet, in the hands of an administrative agency, a complaint of that character would be probed to determine whether any reasonable cause for believing it to be true exists. In substance, a device is created to

furnish legal aid and assistance to groups of individuals powerless themselves to act and incapable of being welded together into a unit substantial enough to bear the burden of litigation.

Jhering, in his famous essay on the struggle for law, details how the carving out of new rights has been accomplished by the effort of individuals who were willing to be martyrs to their conception of what the law should be. Pym and Hampden in English law are, of course, exemplary of this thesis. But there are others less well known, because their contributions were less spectacular. In many fields, however, the place of individuals of this character is being taken by the cooperative public effort of the administrative agency. In its field, to use Jhering's phraseology, it must eternally be struggling for law and thus bring a dynamic force into law, and seek as well to make that struggle not merely casual but expressive of a basic philosophy towards its problem. To draw an illustration from the early history of the Federal Trade Commission, it was of profound social consequence that that Commission continued to adhere to a sound philosophy of unfair trade practice, instead of being discouraged by a series of judicial setbacks. Its philosophy in many aspects was finally to prevail, partly because the courts were eventually convinced of the correctness of its position, and partly because Congress through legislation adopted the position that the experience of the Commission had led it to take.

I shall touch only for a minute on a characteristic of the administrative agency that I adverted to before, namely, the grant to the agency of some degree of independence from political influences. A recent commentator on the subject has attributed the fashion of creating independent commissions to the fact that they exercise in part judicial functions. That, he

argues, has led subconsciously to an effort to build them in part upon the analogy of courts with definite tenure and freedom from removal except for cause.

Without attempting to argue the desirability of the independent administrative agency as presently constituted, it seems to me that an equally important reason for their creation along a well definable pattern has been the desire for a certain continuity of administrative policy. As important as the efficient and independent discharge of their judicial functions, is their freedom in matters of administration from minor political disturbances. From major political and social trends they cannot and should not be immunized. But two things flow from their present patterning. Unquestionably, whereas the ebb and flow of political dominance has, on occasion, brought about an equal ebb and flow in the policies of the executive departments, the administrative agencies have pursued a more even course. Secondly, a concept of professional service in the sense of treating government as a career has featured their makeup. Perhaps it is the creation of this spirit that is of the most consequence, so that in the final analysis it will be seen that the term "independence" is but synonymous with the professional attitude of the career man in government.

I trust that you will not construe these remarks as a championship of administrative justice as contrasted with judicial justice. My effort has been simply to describe some of the salient features of a phenomenon which I believe is as significant to the growth of the law as was the institution of the courts of equity. Its lacks, its wants are apparent on every hand. But at the same time one must recognize the seeds of strength in it. Its implications for the traditional methods of legal adjudication cannot be ignored. Its increasing championship of the rights and the new liberties

of masses of individuals is certain to give it a foundation of great strength. Intrinsic to the next few decades of law will be the study of this phenomenon with the effort to share up its weaknesses; to work out a more adequate modus vivendi between it and the courts; to systematize its adjudications so that they form a national and fair system of law. These challenges are particularly significant to the legal profession. The administrative process like the legal process will be committed to their charge. How well that responsibility will be met, will depend as I see it partly upon the foresight of the legal profession to understand the new liberties of today's world, and partly upon its sympathy and readiness to create and refashion mechanisms of justice that will make these new liberties effective.