BOOK REVIEWS

FEDERAL ADMINISTRATIVE PROCEEDINGS. By Walter Gellhorn. Baltimore: The Johns Hopkins Press, 1941. Pp. 150. $2.00.

The four chapters of this little book made up the James Schouler Lectures in History and Political Science at The Johns Hopkins University in May, 1941.

As a springboard from which to launch his first discussion, under the heading "The Administrative Agency—A Threat To Democracy?", Mr. Gellhorn sets out excerpts from the fulminations of such confirmed opponents of the administrative process as James M. Beck in his "Wonderland of Bureaucracy" and Lord Hewart of Bury in his "New Despotism," tossing in for good measure quotations from the more recent polemics of O. R. McGuire and Jacob M. Lashly. In fact, a purpose to refute the numerous charges brought against the administrative agency by a showing of the facts as to need for, origin, and practical operation of such agencies is discernible throughout the entire book.

An orderly and continuous process of federal administrative development through specific authorizations at the hands of Congress is set out, covering the entire period from the enactment of our original Customs Law of 1789 to the Selective Training and Service Act of 1940—a process that appears certainly destined to continue. This process was not begun, new agencies have not been created, or old ones expanded with any purpose merely to conform to an abstract theory of government, as some critics appear to believe, but to cope with practical problems as they have arisen. Throughout our history it has been the recognized inadequacy of the legislatures and the courts to deal effectively with new and complicated governmental problems that has given rise to the creation of administrative tribunals. The author is careful to point out that this asserted inadequacy has never been considered as reflecting discredit on the legislatures or the courts, but is due to the peculiar nature of the tasks to be performed, calling for specialized full time services and the adaptation of continuing controls to rapidly changing demands, together with the desirability of leaving those bodies free to perform their traditional and orthodox functions. Some agencies, it is recognized, have probably been created partially because of the lack of sympathetic handling of the problems involved by the courts, the best illustration being the workmen's compensation commissions. Perhaps something of the same consideration entered into the creation of the National Labor Relations Board. More important has been the demand for a cheap and speedy forum for those whose economic status is such that the expense and delays commonly attendant upon litigation of the orthodox type would preclude adjustment of claims. Not the least of the factors calling for the separate specialized tribunal is the tremendous volume of cases in such fields as workmen's compensation, labor relations, social security, etc.

Recognition is given to one of the most common and persistent criticisms of the administrative tribunal—the charge that prosecuting and judging

functions are not sufficiently separated. It is the opinion of the author that this criticism is commonly based more on theory than on actual fact. A very large percentage of the federal administrative agencies, it is pointed out, do no prosecuting, and in the case of many that have the power, it is of small importance and seldom used.

It is also pointed out that while the basis of this disqualification in the case of a court, ordinarily stated in terms of preventing one from acting as judge in his own case, is usually a personal or financial interest in the controversy, this situation is not what the criticism is aimed at in the case of the administrative agency. This criticism is frequently directed, the author thinks entirely without justification, at any agency that has within its organization both the power to investigate and initiate actions on the one hand, and the power to decide on the other. A study of the internal organization of these agencies reveals a very large personnel ranging from some 2700 in the Interstate Commerce Commission to from 600 to 1600 in such agencies as the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission. These last three agencies, which are most commonly subjected to criticism, like the Interstate Commerce Commission, maintain a division of labor so that the same personnel that makes an investigation or brings a charge does not perform the deciding function. Such relationship as is found between the heads of these bodies who do the judging and the subordinate investigating personnel is thought to give rise to a distinct advantage in a tribunal 90% or 95% of whose cases are disposed of informally without ever reaching the status of contested cases to be decided on the basis of formal adversary proceedings. Likewise the seriousness of the mere issuance of a formal complaint before such agencies as the Securities and Exchange Commission is such that the head officials responsible for directing the policy of the agency should be consulted about taking such a preliminary step. Where such head officials may authorize a complaint, it is the author's thesis that he is no more unfitted to judge impartially than is the judge of a court who has passed on a preliminary motion or granted a temporary injunction.

One cannot read this excellent discussion of Mr. Gellhorn's without being reconvinced of what every careful student of the administrative process realizes, that the more carefully one studies the operation and internal organization of an administrative tribunal and the more one gains a detailed familiarity with its functioning, the less will his basis for criticism likely become. The author's conclusion is, of course, that neither the existence nor the form of the administrative tribunal is either an alarming phenomenon or a threat to democratic government.

Chapter Two, entitled "The Unjudicialized Administrative Process," considers the problem of judicial review and points out how those who have feared and distrusted the administrative tribunal have constantly sought to extend the scope of court review.

Realizing that judicial review of bad administrative determinations is a poor substitute for initially good administrative decisions, because so

small a percentage can be reviewed and because such harm as results may already have been done, the public has now come to center its greatest interest upon the requisites of proper administrative procedure, assuring full, fair and intelligent consideration of all factors and a thoroughly reasoned and deliberate determination. This is in striking contrast to the chief interest of only a few years ago, centered, as it was, upon the problem of judicial review.

Proper administrative procedure, we must understand, is not sufficiently disposed of when provision is made for a fair hearing. Much controversy in recent years has centered around the functioning of the National Labor Relations Board, but over 90% of its cases are regularly disposed of in the preliminary stages without reaching the stage of a formal hearing, and approximately another 5% do not entail a formal decision based on a hearing.

Even in cases involving alleged violations of statutes or regulations where one is likely to think of the issuance of a formal complaint or the filing of a charge as the initial step, preliminary contacts and informal conferences dispose of by far the greater number.

License or permit cases, which bulk large in the business of many administrative agencies, are largely disposed of without the necessity of formal hearings; an informal conference with a suggestion for changes in applications to eliminate any possible doubt is more often the solution. The use of the "deficiency letter" by the Securities and Exchange Commission is given as an excellent illustration of this type of functioning.

In the case of many agencies, of which the Grain and Seed Division of the Department of Agriculture is given as a typical example, thousands of controversies of vast commercial importance and involving large property values are habitually disposed of by expert investigations, examinations, and tests, without the use of witnesses or hearings, or anything resembling the judicial process. This is not because trial procedure could not be used, but because the other is both more expeditious and more desirable. Many of the procedures used in government dealings with business enterprise, it is pointed out, are merely borrowed from the business practices of the enterprises concerned as being the most practical and at the same time most satisfactory.

Where these wholly informal procedures without formal hearings are used, as is increasingly the case at present, the problem of judicial review necessarily becomes relatively unimportant.

It is the author's contention that no one best procedure exists equally adaptable to all problems, and that the development of an administrative hierarchy with a sense of responsibility for just results may be equally as satisfactory as reliance upon the process of judicial review. It is to be noted, of course, that to the extent to which the suggested safeguard is effective, it has the advantage of being preventive rather than corrective only after an injury may have taken place.

Chapter Three, entitled "Formal Administrative Proceedings Without Formalism," deals with those administrative functions in the performance

of which the so-called formal hearing plays a part, but for the purpose of showing the rather informal way in which such hearings are carried out. The mere fact that a hearing somewhat after the judicial pattern may be considered the best means of finding the facts in a particular type of case does not necessarily mean that all of the formalities of a trial in court must be employed. It is all but universal, of course, that administrative bodies are not bound by the common law or statutory rules of evidence applicable to jury trials, and, in view of the increasing inclination of students and authorities in the field of evidence from Mr. Wigmore on down to advocate a relaxation of such rules and a greater or lesser degree of abandonment of the hearsay rule with its numerous exceptions, there seems to be little or no reason to doubt the wisdom of this practice.

Much greater controversy is found to exist relative to the matter of judicial or official notice before administrative tribunals. Because of the more narrow scope of their jurisdiction and the specialized character of their functioning, there is ample basis for such agencies' making more extensive use of this substitute for proof than in the case of an ordinary court.

The author regards as somewhat unfortunate the effect of Supreme Court decisions denying to the Interstate Commerce Commission the use of anything not introduced in evidence, as partially defeating the real purpost of such agencies in making use of accumulations of knowledge acquired by repeated and continuous functioning within a given limited area. The resulting practices, such as that of the Wage and Hour Division of the Department of Labor in requiring the introduction of identical evidence of wage differentials between north and south in repeated hearings, tends to dissipate valuable skills and to waste both time and money.

Many administrative tribunals do, however, make extensive use of judicial notice, and the author undertakes to indicate some of the factors that should control its use. It should be restricted to the more generalized propositions the tribunal has become aware of by reason of its continued experience and its developed expert understanding of a particular narrow field based on repetition of the same phenomenon in numerous cases. Where special information has been obtained by investigation for a particular case, or has peculiar relation to one case or to certain parties, it goes without saying that it should be introduced in evidence and subjected to the test of cross-examination. It is recognized that the broader use of judicial notice must be guarded against the possibility of surprise to litigants, and that it may complicate the problem of judicial review.

It is also recognized that such requirements as confrontation and cross-examination may frequently become unimportant where principal reliance must be placed upon written evidence or documentary material. The author cites for purposes of contrast the matter of proving costs of production in the textile industry as against proving that a defendant was driving on the wrong side of the road without lights and at an excessive speed. Likewise, many important administrative agencies, such as the Veterans Bureau, the Railroad Retirement Board, or the Social Security Board, func-

tion largely by means of correspondence and informal investigation in arriving at their decisions to the almost total exclusion of oral evidence, cross-examination, etc. Of course, it is to be observed that these are not adversary proceedings in the sense of contests before such agencies as Workmen's Compensation Commissions. But aside from the nature of the proceedings, the great volume of small claims dealt with by such agencies would result in defeating the whole purpose of their functioning if the slower and more expensive court room procedure were insisted upon.

Even in some important instances of controversies between adverse parties, the entirely informal procedure is used successfully. Such, for instance, is the so-called "shortened procedure" of the Interstate Commerce Commission, or the Department of Agriculture when operating under the Perishable Agricultural Commodities Act. Verified statements, exchanged for purposes of rebuttal, replace the formal hearing. While it is not suggested that such procedure should replace the hearing in all administrative functioning, it is the belief of the author that many other agencies could simplify and expedite their procedure by disposing of some specific issues by the use of written evidence, much to the advantage of all parties concerned.

Chapter Four deals with the "Infusion of Lay Elements into the Administrative Process," which becomes particularly important in the formulation of rules and regulations to govern the conduct of private industry. Much of our modern legislation regulative of business enterprise must, of necessity, be largely in outline form, leaving to administrative agencies the function of filling in the details to fit particular and peculiar conditions and of keeping the regulations sufficiently flexible to meet the demands of rapidly changing conditions. It is in this branch of the administrative process that extensive use is being made of the local, the special interest, or the industry advisory committee to help bring the administration to the level of the man in the street and more nearly to fit it to the needs of all concerned. So far from being arbitrarily thrust upon an industry, regulations are formulated only after consultation and joint deliberation with those to be affected. By this process two important purposes are served. By incorporating the views of those to be most directly affected by the regulation a more accurate fitting of remedy to need results, and the cooperative support of those whose conduct is to be controlled is usually assured from the outset. Such a process, so far from being regimentation entirely foreign to our system of government, infuses a democratic element of control into the administrative process scarcely equalled since the days of the town meeting.

While there are many examples of this practice, perhaps the best known and most widespread illustration is the county farmer committee under the soil conservation program of the Department of Agriculture, and the referendum procedure for establishing quota systems and market control for various products within the same department.

It is not suggested that this advisory function of the enterprise affected should be carried to the point of becoming the directive or completely con-

trolling force, else the administrative agency's real function might largely be destroyed and the interest of the general public be made to suffer.

In publishing this little book, Mr. Gellhorn has performed a highly useful service, one that should earn him the thanks not only of all careful students of the administrative process but particularly of those practicing lawyers who have not made a special study of the administrative tribunal, many of whom have been led to believe that it contains the seeds of democracy's destruction.

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THE MYSTERIOUS SCIENCE OF THE LAW. By Daniel J. Boorstin. Cambridge: Harvard University Press, 1941. Pp. 257. $3.00 cloth.

BLACKSTONE'S COMMENTARIES ON THE LAW. Abridged edition of William Hardcastle Browne edited by Bernard C. Gavit. Washington: Washington Law Book Company. Pp. 1040. $6.00.

The vigorously perennial dispute as to whether the age creates the man or the man his age is sometimes rendered moot in the person of those felicitous individuals who conform so closely to the ideals of their own age that they influence the behavior of a succeeding one. This is particularly true when the times are big with potentialities, as was Eighteenth Century England. Sir Henry Maine slightingly referred to Blackstone as "always a faithful index of the average opinions of his day."[1] Where the times are right such an index, happily phrased, can become a classic. Horace's *"aurea mediocritas"* may aptly describe even a writer of commentaries. In Blackstone's age the great stores of learning laid up in the Renaissance were being inventoried and appraised; the first tide of the industrial revolution was beginning to run; the age of contract, the age of the modern lawyer and constitution maker was about to emerge from beneath the horizon. And sometimes chance takes a hand. Gibbon was about to write his *Decline and Fall* in French until he considered the prospects of an English speaking posterity in the American colonies.[2] These same colonies were to make Blackstone's work greater than when it left the author's hands.

Had the age turned out badly, there would have been another story; but the age turned out well, all things considered; and in due time Macaulay in England became the golden index,[3] and Marshall in America the golden jurist, of the next century.

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1. Sir Henry J. S. Maine, *Ancient Law* (N. Y. 1927) E. P. Dutton & Co., p. 148.

2. Edward Gibbon, *The Autobiographies of Edward Gibbon* (London, 1896, Murray) p. 277; *The Decline and Fall of the Roman Empire* (London, 1898, Methuen) Edited by J. B. Bury, Vol. IV, p. 166.

3. "The more I contemplate our noble institutions, the more convinced I am that they are sound at heart, that they have nothing of age but its dignity, and that their strength is still the strength of youth." Inaugural Speech delivered at the College of Glasgow, on the 21st of March, 1849. T. B. Macaulay, *Speeches and Poems.* (N. Y., A. C. Armstrong & Son, 1880) Vol. II p. 81.