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FEDERAL DEPARTMENTAL PRACTICE.¹

The subject which has been assigned to me is hardly capable of the precise treatment which is customary in the discussion of questions of law. No doubt some of my colleagues remember my method as a lecturer while a member of the Law School faculty. My well known disposition to disregard the letter of the law, in order that its spirit may be correspondingly served has, I imagine, induced the committee to select for me a subject that allows of considerable latitude in its consideration.

I can not believe that at this time it would be safe to speak of settled departmental practice. Rules have no doubt been adopted in every department, but it is my impression that they are not common to all the departments, and I am very clear that in the great field of modern administrative development departmental practice is only in the making. The one trend which I think is clearly marked is the disposition in all independent administrative bodies to provide for hearings, and in many respects to adopt in some degree at least the methods of regular courts.

1. Address by Hon. Charles Nagel delivered before the St. Louis Bar Association on April 16, 1923.

Before entering upon the particular discussion of my subject, it would be interesting, if time permitted, to give a picture of the composition of executive branches, the relation of each to the chief executive, the relation which they bear to each other, and, finally, the relation which they sustain to the two other great departments of the government. For illustration, it is generally overlooked that by degrees Congress has imposed upon members of the cabinet distinct duties, the enforcement of which it might sometimes be difficult to reconcile with the decision of the President himself. Again, the opportunity for voluntary co-operation and for co-ordination by legislative act between the departments would afford a fit subject for an entire address. The inevitable grasp for power has made it difficult to accomplish as much in this direction as conditions seem to demand. Nevertheless, the movement which was inaugurated during President Taft's administration has made distinct progress, and the further advance during the Harding administration must be accepted as proof that public opinion has been sufficiently crystallized to make a decided impression.

The relation of the executive departments to the legislative branch is of course very close, by reason of the power which can always be exercised by means of appropriation. That this power is sometimes abused can not be questioned, but, on the other hand, it should not be left out of mind that this is an inherent power reserved to Congress which can under no circumstances be surrendered. Any attempt, for instance, to interpret the budget system as affording a restraint upon this legislative discretion can only result in a set back for the budget system itself.

However, the relation of the executive branches to both the legislative and the judicial departments is important for the discussion of my subject, chiefly because of the modern movement to delegate to the executive a combined authority

embracing the exercise of both legislative and judicial discretion.

This brings me to the question which I regard as the one of most immediate moment. There is an undoubted trend to enlarge the power of the executive branch by a gradual delegation to it of mixed powers—partly legislative and partly judicial. This trend marks a decided departure from the earlier conception of the three distinct branches of government. At least two lecturers who have participated in this course (Prof. Freund and Judge Pound) dealt with the significance of this movement, and undertook to define the purpose and the limitations of such delegation of authority. The same question is considered in the articles by E. F. Alberts-worth and Warren H. Pillsbury in the *Harvard Law Review* of December, 1921, and February, 1923, respectively.

We had lived in the complacent belief that when the form of a free government was adopted our problem had been solved. We were unmindful of the fact that every form of government depends for its guaranty of freedom upon the use to which it is practically put. Freedom and prosperity can not be made secure by providing for them in the books. Their achievement depends in a large measure upon the manner in which our rules of conduct are employed.

We found of late years that the sharp distinction of three departments might be suitable for our country in the early days; but as the conditions and need for their control became more complicated and novel, we realized that no one distinct department could deal with them alone; and we resorted to the employment of a combination of authority to obtain our results. Instead of adhering to the old distinction, we bowed to necessity; and when the constitutional right to do this was challenged, we had the letter of the constitution yield to the spirit of the demand.

We were unwilling to be left unequipped for any necessities which the complication of our conditions and the simplicity of our system presented. Even in the early days, with respect to the much treasured distinction of reserved rights in the States and delegated rights in the Federal Government, it was pointed out that no zone can be left uncovered, and that in case of necessity, either one of the authorities provided for, or both combined, must be invoked.

Similarly, our National Government can not be permitted to fail for the technical reason that neither branch is exclusively charged with the performance of a particular act. Although some of the anti-trust laws read like bills of particulars in indictments, Congress must practically be content to make general rules. It can not prescribe in official detail for every contingency. Performance must finally be left to the executive in the exercise of a much needed discretion. If the exercise of that discretion is inextricably tied up with judicial opinion, the courts will say, as they have said, that where neither of the other departments is clearly encroached upon the courts will not interfere for the protection of either.

We have here the best possible illustration of that natural growth of government for which the Anglo-Saxon has been noted. It may be admitted that with respect to principles he has been a great borrower; but when it comes to the actual application and employment of principles, guided by the influence of common sense, the Anglo-Saxon has no equal in history.

There is no question of this trend to lodge in the executive branch delegated authority from the other two branches. But in thus endeavoring to meet modern problems forced upon us, we must not be unmindful of a corresponding danger. The arbitrary rule from which our free institutions were thought to protect us, may be re-introduced in this fashion. Perhaps we have advanced far enough now in our experiments with

government to realize that a ruthless majority may be as oppressive and as mischievous as a monarch. Professor Burgess has shown in his book, "Reconciliation of Government and Liberty," how far we are from having solved the problem of self-government with due regard to the liberty of the individual man. Francis Lieber (distinguished writer upon political science), asked to be remembered for one thing, and that was that he had been the first to warn against democratic absolutism. No one will deny that a tendency sufficiently strong before the war has been tremendously aggravated by the exigencies of war. We were virtually taught to disregard the constitution to save it. The mere mandate of the law, when it stood in the way of immediate war necessity was swept aside, and today, after war necessity has been removed, there is a strong inclination to perpetuate the measures which it called into life.

It is therefore of first importance that both the legislative and judicial branches jealously guard their essential functions, yielding only where the pressure of unquestioned necessity renders it wise to do so, and always resisting the false clamor of misguided popular emotion.

Fairly speaking, it must, however, be admitted that ex-President Cleveland was right when he said that the president is the true representative of the people, because to him we look to execute the laws that have been made for our protection. It should be said, I think, that his obligation is even greater and more delicate than this bare statement would imply. He does not execute all the laws all the time. The multitude of our statutes has in itself rendered that impossible. A rule of wise conduct would presuppose a discriminating judgment. The executive's discretion has been enlarged by necessity until we may almost be prepared to say that all statutes are only intended to give general authority, to be employed by the executive when and where particular

cases call for such action. Thus, some laws become dead letters by the mere fact of permanent disuse. Others suffer temporary abatement in the discretion of a wise or unwise executive. The result is that the executive department, which is now given the power to interpret both law and fact, has greater freedom than the courts themselves. In spite of the restriction fixed by the Congress and the restraints imposed by the courts, there is a tremendous uncontrolled discretion lodged in the executive branch of which the president is a mere example. Undoubtedly he is the most prominent, but the great subordinate body is by far the most potent.

The ancient method of giving official recognition to popular custom, elevating it into rules of conduct, and finally giving it the force of law, is as much invoked today as it was in the olden days when the common law was beaten into shape. Public sentiment always made the law, and is today just as active and influential in that process as it ever was.

Dean Pound, in his article in the Harvard Law Review of April, 1923, speaks of "the tendency of legislation to enact a mere skeleton, leaving the details actually governing the conduct of enterprises to be fixed by administrative regulation, and the tendency of common speech to speak of administrative interpretation as law. Popular speech is sometimes much nearer to reality than legal theory. It is quite possible that new forms of law may be growing up under our eyes of which our science of law is blindly ignorant."

I venture to submit, however, that the great difference between the old and the modern system is that the recognition of the results of this process has now been in much greater measure taken over by the executive. The common law was the growth of custom accepted by the courts in their effort to enforce the highest possible standards which the community could be hoped to sustain. But our statutory system has

narrowed that avenue of growth, however great may be the improvement otherwise resulting from the change. We ask ourselves why so few successful lawyers are ambitious for the bench. In my judgment, one explanation is to be found in the fact that the most attractive function of the judge has been greatly reduced. The modern statutory system practically dictates the court's decision. In a large sense the judge has been made a recorder of prescribed conclusions. There is, no doubt, much freedom left to find fact and to interpret law, but generally it operates upon individual cases. It does not rise to the dignity of establishing advanced rules of conduct for common guidance. Under the modern system, broadly speaking, the judge is compelled to use the man to save the rule; but the executive is free to use the rule to save the man.

It can not be said that the executive retained the power which he now enjoys. On the contrary, he is charged and entrusted under the old rule of necessity with a much larger discretion than he was originally contemplated to have. To deny this would in the exigency of modern development mean little less than to stop modern government.

Here, then, lies our peril and our hope—the ancient distinction between license and liberty—with this difference, that we are not ruled by the order of the monarch; but we are asked to heed the voice of the people. The obvious danger is illustrated by instances of plain denial of the law to satisfy spasmodic enraged public opinion. Sometimes that opinion is created by the privileged classes. Sometimes it is the restless protest of less favored classes. We read it in verdicts, in judgments, and in executive acts. The war abounded in illustrations; sometimes by way of refusal to surrender individual judgment or conscience to established order; often in the failure to meet responsibility in obedience to law. Our hope lies with those officials who diligently and scrupulously

seek to employ the law for its honest intention. For the true province of the executive is to make the written law work equitably. Every case has its moral value; and the question is, has the executive the strength of character and the practical discernment to give force to its real intention?

We know, for instance, that presidents have employed appropriations for the army to give relief to flood sufferers. It is impossible to reconcile law and necessity in such a case, unless we resort to the old principle that a man may trespass to save from destruction. But it is possible to find illustrations that bring out more clearly the border line between the letter and the spirit of the law; and, for an instance, I am tempted to resort to my own experiences. The immigration law provided that no one shall be permitted to land who is found to be of unsound mind. There came to our shores a Danish woman and two children to meet her husband who had been in this country for some years. Before landing the two children were taken with measles, and under the confusion of our Federal and State rules, the children were taken to the New York State Quarantine. Inasmuch as the mother did not have measles, she was taken by the Federal authorities to Ellis Island. The first thing this woman ever heard of her children again was that they were both dead and buried. It is needless to say that the woman suffered great mental distress. It was thought possible, if not likely, that she would lose her mind. I saw her at Ellis Island, and do not believe that ever in my life I saw a human being who expressed in silent attitude more supreme contempt for anything that authority might do. The officials thought she ought to be rejected because of her mental condition. I decided that her only hope for recovery was to let her join her husband; that we were responsible for the condition in which she now was, and that according to the true meaning of the law she must be admitted as she was.

Again, the law provided that any alien who had been convicted of a felony in the country of his origin must be deported if the fact of his conviction was disclosed within three years of his coming to this country. An inspector reported that an Italian in Nebraska who had been in this country two years and eleven months had been convicted for felony fifteen years before coming to our country. This man protested that he was innocent, admitting that he had been charged with a grave crime; that only six months had been imposed, which term he had served; he insisted that the real criminal had been discovered at a later date, and had been tried, convicted and sentenced to fifteen years. Also that the witnesses upon whose testimony he had been convicted were now his best friends in this country, and would do anything within their power to make amends for the injury which they had inflicted upon him. I had the records in Italy examined, and found that his statement was confirmed. The inspectors insisted that I had no discretion because the man had been convicted and the law was mandatory. I ruled that the offense was stale in any event; but that apart from that the letter of the law should never be used by an executive to defeat its spirit.

In each case it was natural, and perhaps this should be the attitude of the subordinate, to abide by the letter of the law. In each case it was, as I understood it, my province to enforce the undoubted purpose and spirit of that law, giving it sufficient flexibility to save it. This, as I take it, illustrates the great problem of the modern system of executive power. Sound discretion is the one thing that is most difficult for government to secure. Most of us like power. If we doubt it we need only observe how close a conductor will permit us to approach his car before he closes the door. The man in a subordinate position is apt to use his power to deny. The man in controlling position inclines to use that power to grant. The rational combination of the two points the true way. To secure that result we undoubtedly need ability and, above all,

devotion to service; and, as a general proposition, this means better compensation than the government now grants.

We level most of our criticism at high places. We complain of the decisions of appellate courts and of high executives. In my opinion, the greater cause of unrest comes from below, and most of the mischief is done there. The infinite number of small cases with their delays and disappointments, while not prominent enough to invite general comment, nevertheless constitute an aggravation sufficient to grow into general unrest. This inspires opposition to authority, gives life to the idea that the State is something apart, as it was of old, when in truth we are bound for our own salvation to accept that we are the State.

Successful government depends upon common understanding. That in turn is possible only by a degree of contact between the people and official representatives, which at this time is far from perfect. We are dealing too much at arm's length. The private citizen sees little difference between our government and the sovereign from whose control his fathers fled. It is my deliberate opinion that one of the chief causes of our difficulty is the tremendous centralization of authority. Not so much the centralization of power in the National Government (although that is dangerous enough) as the centralization of administration, and that in a particular center, far removed from the greater part of this country. As it is, Federal authority is virtually lodged in Washington. Prosecuting attorneys and even grand juries take their orders. Citizens may be indicted at the Capitol and tried there, being put to the necessity of bringing witnesses and counsel to attend. The Post Office Department makes its decisions at Washington, compelling attendance for the purpose of hearings. Practically every income tax case is decided at the Capitol. It involves innumerable visits, interminable correspondence; and cases are shuffled between clerks so that if

there is prospect for a decision, it is apt to go to a new man who may be innocent enough to call for further enlightenment. The fact is that the representatives of our departments are slow to recover from the war fever, and much of their conduct still breathes the spirit of autocracy. For illustration, if the Treasury Department decides that a contribution to the Knights of Columbus is not a proper subject for deduction as a charity, it is disconcerting to read on the same day that the President has congratulated the Knights of Columbus upon their useful and practical work in behalf of the former service men, and expresses the hope that the coming year's effort will be marked by the same excellent and useful accomplishments that have so uniformly been achieved by this splendid organization. The decision may be technically correct, but the executive's recommendation is calculated to induce contributions upon the opposite theory.

In my judgment, Federal administration should be decentralized. It should provide for competent representatives throughout the country, so that substantially all subordinate difficulties may be threshed out at home, without subjecting citizens to the embarrassment and expense of a visit to the Capitol, or employment of counsel at that point. I recall an experience which brought home to me the disadvantages under which people labor under our system of long distance government. It was my custom to visit virtually every station of any importance at which subordinates were engaged for my department. Traveling by boat from Dawson to Fairbanks, in Alaska, I noticed that the steamer was supplied with two distinct classes of life boats. One class had deep keels, and seemed to conform to all the requirements of our regulations. The other class was peculiarly flat, and not well calculated, to all appearances, to resist stormy weather. I inquired of the captain what the purpose was in overloading his decks with two kinds of life boats, and received the somewhat apologetic answer that the one class was kept to comply with

our rules in case of inspection, and the other class was kept to save passengers in case of accident.

I venture, therefore, to say again that one of the chief causes of dissatisfaction and unrest is to be found in the fact that our government is not sufficiently in touch with the people upon whose good will its discretion ultimately depends.

It is sometimes superficially said that whatever else may be true of this system, the lawyer is the gainer. Perhaps he is; as it may be said that the whole system of over-legislation under whose burden we now labor, contributed to his profit alone. But we must admit that so long as we are content to tolerate such a system, our popularity with the public can not be said to recommend it to general approval. I feel that the responsibility of the lawyer is as great as it has ever been; and that his activity, instead of being decreased, must constantly be on the increase. The problem in the administrative departments is just as it was in the judicial department. Will the lawyer be content to be a mere manager or agent of a client; or will he accept his responsibility as an officer of the court, or, if you please, of the government, even while he is representing an individual interest? His responsibility for the public's respect for the government is more immediate than that of any other citizen. His opportunity is far greater than that of any one else. As Dean Pound says, in his article in the *Harvard Law Review* of April, 1923:

“The element of most enduring effect in legal development is professional and judicial ideals of the social and legal order. In the transition to a new stage of growth the key to our problem is here. We need to study these ideals scientifically instead of ignoring them. We need to learn whence they are derived, how they take form, and how they are used. If we would avoid the temporary return to Oriental justice which has been so marked a feature of periods of legal growth

in the past, and is suggested today by the continual development of administrative jurisdiction in the United States and in England, we must learn how to supply substantially the same ideal picture of the social order to all our judicial magistrates, and to make it the best, the most critical, and the most complete that is compatible with social progress. We must learn where such pictures are to be resorted to and where not, and how to use them with intelligence and assurance.”

The defense of the judicial system of our country can not be left to the courts alone. They can not protect themselves successfully, because they can speak only when particular cases are submitted to them for decision. The real responsibility for the system rests with the bar. By its character, its conduct, and its preservation of the ideals will the whole judicial system, and now, in some measure even the executive system, be judged.