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GOVERNMENTAL DECISION-MAKING IN THE GREAT SOCIETY

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1959, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This twentieth annual lecture was delivered at a University Convocation March 6, 1968.

It is a very moving experience for me to speak in this series of lectures which is dedicated to the memory of Tyrrell Williams, Professor of Law at Washington University from 1913 to 1943. Since I have followed in his path as a teacher, very largely under the inspiration of his example, perhaps I may be permitted a special word of appreciation of his qualities as a human being, lawyer, educator, and observer of the role of law in society. His knowledge and ability were great. His kindness and concern for students are well known. He abjured pomposity or pretense, both personal and intellectual, and often injected a penetrating realism into class discussions, not hesitating to state extreme positions as a challenge to conventional views. I remember well his repeating a quotation to the effect that law is shaped by arguments that are "forcibly asserted and plausibly maintained." His own devotion to the legal system and the service it can render belied any cynicism on his part concerning it; but it was good for students who might be addicted to laudatory generalizations about law to be confronted with so corrosive a viewpoint.

One of the subjects which Tyrrell Williams taught with distinction during his earlier years on the faculty was Administrative Law, which

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deals with the procedure and powers of government agencies that are not legislatures or courts, in their relations to the community—agencies such as health and tax authorities, workmen's compensation boards, the Patent Office, the Veterans Administration, and regulatory bodies such as state public utilities commissions and the Interstate Commerce Commission. These agencies are in the executive branch of the government, but they do a special kind of work, bearing directly on members of the community, and they have special relations to the other two branches.¹ Under Williams' auspices, the School of Law of Washington University was among the first in this country to include a course in Administrative Law in its curriculum. Williams emphasized the importance for society of the expanding operations of the agencies. As we see matters now, this expansion was then just beginning, by way of response to industrial growth and urbanization. His concern was to produce understanding of this development beyond the classroom as well as within it, especially among the bar. He had practiced law in St. Louis for fourteen years and continued his associations down town. He was chairman of the Committee on Lectures of the St. Louis Bar Association which in 1923 arranged a series of talks on *The Growth of American Administrative Law*, later published as a volume that has been much cited in subsequent literature.² In these talks six leading authorities—a judge, two administrators, a professor, and two practicing lawyers who had been public officials—provided a valuable body of information and commentary relating to the subject.

Among the speakers in the series was Charles Nagel of St. Louis, a senior statesman of the bar and Secretary of Commerce and Labor in the Taft administration, who uttered a plea for humane flexibility in the exercise of governmental power over individuals. He also commented that "The one trend which I think is clearly marked" in governmental operations affecting private interest "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

1. The so-called "independent" agencies, which report to the legislature, are not required to report formally to the chief executive, and make determinations that are not subject to his control, have been called a "headless fourth branch" of government. Agencies which occupy places in the departmental hierarchy are also virtually free of executive direction in so far as they perform similar functions, however; and all agencies in both categories are subject to a variety of executive authority in respect to appointment and removal of personnel, budgeting, and conformity to overall operational policies. The executive branch is in reality a loose agglomeration which embraces all agencies under a spectrum of varying degrees of executive authority.

2. *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923).

regular courts.”³ The first speaker in the series was Professor Ernst Freund of the University of Chicago, Tyrrell Williams’ friend and compiler of the pioneering casebook from which Williams taught his course.⁴ Professor Freund supplied a historical survey in which he traced the development and characterized the methods of administrative agencies. Like later speakers, he confined himself, quite properly for the times, to the handling by those agencies of individual cases, each involving one or a few people, which created the tendency toward judicial methods that Nagel noted. He spoke of inspection of factories, dwelling places, food products, and machines in the interest of safety and health; of occupational licensing; and of the power to issue orders that fixed the rates of public utilities, required the improvement of substandard property, excluded or deported aliens, or prohibited illegal methods of competition by sellers of products. He also dealt with court review of the resulting agency decisions. His lecture and those that followed scarcely mentioned the issuance of general rules by agencies, because on the whole these were less significant at the time and gave rise to few important problems.

It is clear that many important governmental decisions in our society are made by the agencies with which Administrative Law deals. These decisions are not the most basic ones, which are made in elections, in major legislative battles, and in the conduct of foreign affairs. Some of them, however, rank only a little lower in the scale, and they often condition or give rise to later legislative proposals. Many of them, as will appear, are based on specially structured procedures. It requires a certain boldness on my part to discuss these processes before an audience which varies greatly in its knowledge of the subject; but there is genuine interest in the topic, which possibly I can develop.

Since 1923, we have experienced thorough-going regulation of the economy by the all-pervading activities of the National Recovery Administration and related agencies during the Great Depression and the Office of Price Administration and the War Production Board in World War II. More importantly in long-run terms, we have witnessed during the past 45 years the commencement and continuance of the Selective Service System, which touches so many lives, and the seemingly permanent addition of many other government functions admin-

3. *Id.* at 175. (Nagel’s experience as Secretary of Commerce and Labor included responsibility for the Immigration and Naturalization Service. His illustrations of the human impact of agency authority are based in part on the operations of the Service.)

4. E. FREUND, *CASES ON ADMINISTRATIVE LAW* (rev. ed. 1928).

istered by specialized agencies and bearing on activities with which many of us are concerned. These include the regulation of broadcasting by the Federal Communications Commission and of aviation by the Federal Aviation Agency and Civil Aeronautics Board;⁵ the provision of public old-age, disability, and medical insurance, administered by the Social Security Administration;⁶ unemployment compensation and many forms of public assistance administered by the States with Federal financial aid and subject to Federal standards;⁷ the construction and continuous expansion by state highway departments and the Federal Bureau of Public Roads of a vast system of highways, crossing the country, slicing through cities, and conditioning numerous lives.⁸ They also include the expanded activities of the Food and Drug Administration to secure the safety and the efficacy of drugs and the safety of cosmetics.⁹ Much in the news these days are extensive measures to combat concealment and misrepresentation in the marketing of commodities¹⁰ and, soon, in the operations of consumer finance institutions.¹¹ Other relatively recent measures provide a thorough control over the marketing of securities by the Securities and Exchange Commission¹² and the regulation by the Federal Trade Commission of price discrimination and related practices in the sale of goods.¹³ We also have the enforcement of minimum-wage and overtime pay requirements in employment, accompanying the regulation of numerous practices in labor-management relations;¹⁴ the control of much agricul-

5. Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151-55 (1964); Aviation Act of 1958, *as amended*, 49 U.S.C. §§ 1301-55 (1964). Both statutes replace earlier measures.

6. Title II, Social Security Act, *as amended*, 42 U.S.C. §§ 401-423 (1964 & Supp. III, 1968).

7. Titles I, III, IV, V, IX, X, Social Security Act (1935), *as amended*, 42 U.S.C. §§ 301-306, 501, 1101, 1361, 1395 (1964 & Supp. III, 1968).

8. 23 U.S.C. §§ 101-136 (1964 & Supp. III, 1968).

9. Food, Drug and Cosmetic Act (1938), *as amended*, 21 U.S.C. §§ 301-92 (1964). The 1938 Act replaces the Act of 1906.

10. Federal Trade Commission Act (1938), *as amended*, 15 U.S.C. §§ 41-77 (1964); Wool, Fur and Textile Labeling and Identification Acts (1954), 15 U.S.C. §§ 68-70k (1964); Fair Packaging and Labeling Act (1966), 15 U.S.C. §§ 1451-1461 (Supp. III, 1968).

11. Since enacted: Consumer Credit Protection Act, P.L. 90-321 82 STAT. 146 (1968).

12. Securities Act of 1933, *as amended*, 15 U.S.C. §§ 77a-77ad (1964); Securities Exchange Act of 1934, *as amended*, 15 U.S.C. §§ 78a-78gg (1964).

13. Robinson-Patman Act (1936), *as amended*, 15 U.S.C. § 13 (1964).

14. Fair Labor Standards Act, 29 U.S.C. §§ 201-206 (1964); National Labor Relations Act (1947), *as amended*, 29 U.S.C. §§ 141-58 (1964); Labor-Management Reporting and Disclosure Act (1964), 29 U.S.C. §§ 401-530 (1964); Railway Labor Act (1926), *as amended*, 45 U.S.C. §§ 151-163 (1964 & Supp. III, 1968).

tural production and the prices of many farm products;¹⁵ and varying degrees of control by the Federal Power Commission and the Atomic Energy Commission over the production and pricing of hydroelectric power, natural gas, and nuclear energy.¹⁶ There is a network of controls over the production and importation of petroleum and its products.¹⁷ Several agencies carry out national policy in education,¹⁸ housing,¹⁹ urban renewal,²⁰ and highway beautification,²¹ while local and regional land-use planning proceeds apace.²² The regulation of safety in automobile construction and equipment is under way,²³ and the beginnings of control over air and water pollution are with us.²⁴ Long as it is, this

15. Agricultural Adjustment Act of 1933, *as amended*, 7 U.S.C. §§ 601-59 (1964); Agricultural Adjustment Act of 1938, *as amended*, 7 U.S.C. §§ 1281-1393 (1964 & Supp. III, 1968).

16. Federal Power Act (1920), *as amended*, 16 U.S.C. §§ 791a-828c (1964); Natural Gas Act (1938), *as amended*, 15 U.S.C. §§ 717a-717w (1964); Atomic Energy Act of 1954, *as amended*, 42 U.S.C. §§ 2011-2296 (1964).

17. Regulation of the petroleum industry consists of import controls, established by Pres. Proc. No. 3279, 3 C.F.R. 11 (1959), as amended by proclamations listed in Pres. Proc. No. 3820, 3 C.F.R. 96 (1967), under the authority now contained in 19 U.S.C. § 1862 (1964); the announcement of monthly product demand totals by the Federal Bureau of Mines; and correlated action by the production control authorities of the principal oil-producing states, notably the Texas Railroad Commission, which take cognizance of the Bureau of Mines figures in preventing waste under the obligations assumed in the Interstate Oil Compact, 81 Stat. 560 (1967). The original oil compact was entered into in 1935. Interstate transportation of illegally produced petroleum is a federal offense under the Connally Act, 15 U.S.C. §§ 715a-715m (1964). See the 1967 and earlier reports of the Attorney General pursuant to the successive compacts, concerning the operation of this scheme.

18. Morrill Land Grant College Act (1867), *as amended*, 7 U.S.C. §§ 301-49 (1964). The Vocational Education Act, 39 Stat. 929 (1917) as amended, and voluminous subsequent legislation, dating mostly from the National Defense Education Act, 72 Stat. 1581 (1958), are compiled in chapters 2, 13, 17, and 19 of 20 U.S.C. (1964) and chapters 21, 24, and 27-30 of 20 U.S.C. (Supp. III, 1968).

19. National Housing Act (1934), *as amended*, 12 U.S.C. §§ 1701a-1701p (1964 & Supp. III, 1968); Department of Housing and Urban Development Act (1965), 42 U.S.C. § 3531 (Supp. III, 1968).

20. Slum Clearance and Urban Renewal Act (1949), *as amended*, 42 U.S.C. § 1450 (1964 & Supp. III, 1968).

21. Highway Beautification Act of 1965, 23 U.S.C. §§ 131, 136 (Supp. III, 1968).

22. The *Washington University Law Quarterly* and School of Law faculty have published important accounts of the contemporary operation of zoning and planning measures. Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U.L.Q. 1; Lehman, *Thinking Small about Urban Renewal*, 1965 WASH. U.L.Q. 396; Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967); *New Towns: A Symposium*, 1965 WASH. U.L.Q. 1.

23. National Traffic and Motor Vehicle Safety Act (1966), 15 U.S.C. §§ 1391-1425 (Supp. III, 1968).

24. Air Pollution Control Act (1963), *as amended*, 42 U.S.C. § 1857 (1964 & Supp. III, 1968); Water Pollution Control Act (1956), *as amended*, 33 U.S.C. § 466 (1964 & Supp. III, 1968).

list is but a partial one, representative rather than exhaustive; yet it serves to signify the expansion of government, particularly the Federal Government, during the past 45 years and the critical importance of the tasks we call upon administrative agencies to perform.

We need not pause at this point to inquire, much less to determine, whether each of these measures is desirable and should be continued. Few would venture, I think, to advocate dispensing with many of them. All of them have come into existence or been expanded under the programs of both political parties, to meet specific needs through the work of competent, specialized agencies.²⁵ The tempo of expansion has varied according to conditions, but has never slowed to a halt. These varieties of government regulation and service, or suitable substitutes for them, are required because of conditions created by four main causes: continued technological advance, the demands of national security, the increase of population, and the ever more severe crowding of people in a land mass which no longer includes a geographical frontier. Administrative agencies bring to bear through orderly processes the specialized knowledge and technical proficiency of their officers and staffs in carrying out the measures entrusted to them. The task of administrative law is to see to it, so far as possible, that the agencies operate effectively and with justice to those whom their activities concern. This task will increase in magnitude as efforts are made to build the Great Society while technology develops still more rapidly, population increases further, and crowding of people and pressure on resources grow greater.

In the world of Williams, Nagel, and Freund a principal means of promoting justice and contributing to the effectiveness of government agencies was to introduce some of the elements of court proceedings into their processes and to standardize review of their determinations by the courts. These two developments have in fact taken place. Some changes have resulted from court decisions that constitutional provisions require hearings and other procedural protections in a variety of circumstances. Other changes have come from statutes which have provided similar safeguards. In a vast range of proceedings today, from the regulation of public utilities and other commercial enterprises to

25. All agencies of the kind under discussion here specialize in either the affairs of an industry, such as communications or insurance, a particular activity such as collective bargaining, or a government function such as tax collection or dispensing a benefit like social security, unemployment compensation, or patents. Competence turns on the expertness and quality of personnel. These depend, in turn, on financing, methods of selection, and character of both internal administration and over-all executive management.

the dispensing of Social Security and other benefits, an individual or corporation concerned can have a careful hearing.²⁶ The hearing is often conducted by a specially chosen presiding officer who has some of the attributes and powers of a judge.²⁷ A stenographic record is made, on which the agency action will be based. If the affected person is not satisfied with the outcome, he can almost always apply to a court which will set aside the agency determination if abuse or serious error is found.²⁸ The cost of these proceedings may be considerable, but it is usually kept within bounds for ordinary individuals.²⁹

By a parallel development much has been done to regularize and improve the methods which administrative agencies use in adopting general regulations, such as those which establish health and safety standards, control navigation by water or by air, govern the practices of regulated enterprises, or establish the conditions under which government money may be granted or spent. It has been perceived that these regulations, like decisions in individual cases, are extremely important to affected persons.³⁰ At the same time the bodies which formulate them, although hopefully they are composed of experts, do not represent the persons affected by their actions, as legislatures do.³¹

26. The great bulk of matters coming before agencies is disposed of informally by negotiation or by decisions that are accepted. Hearings are available when these processes fail.

27. In the Federal system hearing examiners are chosen, protected in their tenure, and given specified powers by provisions of the 1946 Federal Administrative Procedure Act which are now contained in the 1966 codification of Title 5 of the U.S.C. in sections 556, 557, 1305, 3105, 4301(2)(E), 5362, and 7521. Under some state statutes also, officers who specialize in the conduct of hearings are used; and in California there is a central hearing officer corps provided by statute, which is drawn upon by a variety of agencies. See Musolf, *Independent Hearing Officers: The California Experiment*, 14 WEST. POL. Q. 195, 201 (1961); Clarkson, *The History of the California Administrative Procedure Act*, 15 HAST. L.J. 237, 248-55 (1964).

28. Both Federal and state statutes make specific provision for judicial review of agency determinations. See 5 U.S.C. §§ 701-6 (Supp. III, 1968); MO. REV. STAT. §§ 536.100-150 (1959 & Supp. 1967). Review would be available in many situations if there were no such statutes, by virtue of the general authority of the courts.

29. Many workmen's compensation and social security cases are carried through the judicial stage without prohibitive cost. Alleviation of the expense in such cases should be sought, however, as well as reduction in delay which is often a serious factor. Effective assertion of legal rights to public assistance, such as old-age assistance and aid to the families of dependent children, has not been feasible except in a few instances. Provision of legal services to disadvantaged persons through Office of Economic Opportunity projects and by similar means should be extended.

30. A food standard which determines the allowability of a particular ingredient in a product such as bread is, for example, of vital importance to both consumers and producers of the ingredient.

31. Some agencies, such as the National Railroad Adjustment Board and a few pro-

Those who are regulated, it is now recognized, not only have a stake in what is done, but may have something to contribute to the content, quality, and fairness of the resulting rules. Accordingly, statutes have provided opportunities for those who are concerned to submit information and points of view before such regulations are issued.³² We have, in a word, participation by those concerned.

The administrative law which has resulted from these developments was not even foreseen a century ago.³³ It has now acquired a structure of its own, as a consequence of the elaborate consideration given to it by scholars, administrators, and the bar since the turn of the century.³⁴ In addition to the writings of students of the subject,³⁵ numerous official inquiries and conferences and governmental reports³⁶ have contributed to its development. The Federal Administrative Procedure Act of 1946³⁷ and state statutes of a similar nature³⁸ regulate agency

fessional licensing bodies in the States, are composed of members chosen by organizations of those whom they regulate. Others, but still a small minority, consist of persons appointed from among the regulated groups. See 29 U.S.C. § 153 (1964); Mo. REV. STAT. §§ 328.030, 332.290, 334.120 (1959) (barbers, dentists, physicians). In Alabama, regulation of the practice of medicine has long been entrusted to the Board of Censors of the State Medical Association. This authority is now shared by a State Licensing Board for the Healing Arts, composed of three state officers and served by a lay executive officer. See ALA. CODE tit. 46, § 257 (Supp. 1966); Forgotson, Roemer & Newman, *Licensure of Physicians*, 1967 WASH. U.L.Q. 249, 259-61.

32. The Federal Administrative Procedure Act and similar statutes in many of the States contain such provisions which are broadly applicable. See 5 U.S.C. § 553 (Supp. III, 1968); F. COOPER, *STATE ADMINISTRATIVE LAW* 193-7 (1965).

33. *But see* J. SMITH, *GOVERNMENT BY COMMISSIONS* (1849), *reviewed*, *Cavers*, 47 *YALE L.J.* 675 (1938); R. GNEIST, *ENGLISCHE VERWALTUNGSRECHT* (1863).

34. In addition to Freund *supra*, note 4; see FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW* (1893) and *PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905), which called attention to the trend at an early date.

35. K. DAVIS, *ADMINISTRATIVE LAW* (4 vols. 1958 & periodic pocket supplements), and F. COOPER, *STATE ADMINISTRATIVE LAW* (2 vols. 1965), contain comprehensive discussions. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965), contains a thorough treatment of a large portion of the subject.

36. See REPORT, COMMITTEE ON MINISTERS' POWERS, CMD. NO. 4060 (1932); REPORT, COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, CMND. NO. 218 (1957); REPORT, ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77TH CONG., 1ST SESS. (1941); R. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (6 vols. 1942); REPORT AND TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT (1955); SELECTED REPORTS AND RECOMMENDATIONS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 24, 88TH CONG., 1ST SESS. (1963).

37. 5 U.S.C. §§ 1001-11 (1964), now replaced by 5 U.S.C. §§ 500-59, 701-6 (1964), and sections cited *supra*, note 27.

38. A list of states having administrative procedure statutes appears in 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 13 (1965). The statutes themselves are cited throughout the work. See also K. DAVIS, *ADMINISTRATIVE LAW* § 1.04, 19-20 (Supp. 1965).

procedures and court review of agency determinations on a government-wide basis.

The resulting body of law is, of course, far from perfect, and there is no reason to think that as it stands it will be entirely adequate for the future. Suggestions for improving it are frequently made, including proposals for comprehensive new legislation.³⁹ In 1966 an important Act of Congress enlarged the duty of agencies to provide information to the public at large and to persons more directly concerned in proceedings before them.⁴⁰ This year, under an Act adopted in 1964,⁴¹ the permanent Administrative Conference of the United States is commencing to function. The Conference will consist of knowledgeable persons drawn from the agencies, the private bar, the universities, and perhaps other sources of qualified participants. With a permanent chairman appointed by the President with the advice and consent of the Senate and served by a full-time staff, the Conference is supposed to conduct studies, to remain in touch with the operations of Federal agencies, and to recommend improvements by suitable means. These may range from voluntary reforms to new legislation.⁴²

As to some matters that will remain important, the methods of administrative law have probably been refined about as far as is feasible. The allowability of railway mergers, for example, can hardly be determined by better means than the hearing procedures of the Interstate Commerce Commission applied to particular proposed mergers, subject to the scrutiny of Congress and the courts. The recent mergers that have been approved may be a boon to the economy or, as I think, a harmful enlargement of private economic power; but it is difficult to see what better process of decision could be designed for dealing with such matters in a system of regulated private enterprise. Improvement of the existing process through the provision of greater resources for investigation and the selection of more consistently qualified personnel, especially at the top, should be undertaken; but on the whole, in rela-

39. The proposal for replacement of the Federal Administrative Procedure Act which is now pending, based on extensive hearings and consideration over a decade by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, is S. 518, 90TH CONG. (1968).

40. 5 U.S.C. § 552 (Supp. III, 1968).

41. 5 U.S.C. §§ 571-76 (Supp. III, 1968).

42. Part of thirty numbered recommendations of the temporary Administrative Conference which reported at the end of 1962 and was similar in composition, ranged from detailed procedural recommendations to particular agencies, through proposals which would require amendments to the Administrative Procedure Act, to an unelaborated endorsement of the principle of discovery in administrative proceedings. S. Doc. No. 24, 88TH CONG., 1ST SESS. 415 (1963).

tion to problems such as these mergers, the administrative agencies operate according to a sound design.⁴³

Similar processes are poorly fashioned, on the other hand, to handle some of the matters for which they are used. The rapid reduction of long-distance railway passenger service, for example, which results partly from divided jurisdiction over transportation,⁴⁴ is also a consequence of piecemeal decisions without regulations to guide them, producing results that nobody wants.⁴⁵ As a consequence, in this land of abundance, center-city railway passenger terminals are disappearing; fast public transportation on land across country is less and less available; mail service between many communities is strikingly slower than it was; and people in small towns which are removed from main highways no longer have common-carrier passenger or express service at all.⁴⁶ If, instead, certain basic policy determinations had been made by Congress or a planning agency, authorizing the Interstate Commerce Commission to adopt governing regulations and to apply them in passing on particular requests for subsidies, increases of fare, or discontinuance of trains, a valuable resource might have been retained.

43. See the several opinions in *Baltimore & O.R.R. v. United States*, 386 U.S. 372 (1967), for a discussion of the processes of the Interstate Commerce Commission in these cases, including some of the inadequacies in their execution. See also the dissenting opinion of Commissioner Tucker in *Chesapeake & O. Ry. Control-Baltimore & O.R.R.*, 317 I.C.C. 261, 293 (1962).

44. Divided jurisdiction should have been alleviated, if not ended, long ago through the bestowal of planning functions on an over-all transportation agency, in order to provide a framework within which the rules and decisions of the Interstate Commerce Commission, the Federal Maritime Commission, and the Civil Aeronautics Board would fall. Vested interests were too strong to permit the enactment of legislation along this line in response to a recommendation made to President-elect John F. Kennedy by the Hon. James M. Landis. Landis, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 87 (Comm. Print 1960). The present Department of Transportation Act, 49 U.S.C. §§ 1651-1659 (Supp. III, 1968), does not bestow a role in economic regulation on the new Department, but limits it to regulation of safety factors and certain research, services, and reporting functions.

45. The Interstate Commerce Commission's over-all investigation into the passenger train situation, although it resulted in an illuminating report, was focused upon the problem of the carriers' financial burden rather than on means of providing essential services; *Railroad Passenger Train Deficit*, 306 I.C.C. 417 (1959). Subsequent decisions permitting fare increases that would only drive away traffic, followed by decisions permitting successive train discontinuances, reflect a policy of enabling the carriers to save themselves from acute distress by their own means, without adequate reconciliation of the rates proposed to a standard of "justness and reasonableness" in an economic sense, or adequate consideration of whether, given coordination of services and schedules, a basic transportation need might still have been met at a cost that was bearable.

46. See the account of consequences of the discontinuance of the Missouri Pacific's "Colorado Eagle," *Wall Street Journal*, Feb. 13, 1968, at 32, col. 1.

A tendency for administrative agencies to deal with some kinds of business and personal interests in a more systematic way, with large issues at the center of attention, and to reduce correspondingly the need for separate court-like proceedings in individual cases, has in fact arisen. The Interstate Commerce Commission has used these methods in reaching conclusions about the extent to which hauling of motor-freight trailers on railway flat-cars ("piggy-back") should be permitted or required⁴⁷ and how various kinds of rail, highway, and water carriers should share in hauling freight by new or improved modes of transportation.⁴⁸ The Supreme Court in a case which is now before it will decide the extent to which the Federal Power Commission may validly, under existing legislation, prescribe in a single order the prices to be paid to hundreds of producers of natural gas in an entire field that covers a large area.⁴⁹

This kind of development, displacing many individual cases by means of general determinations, has been approved by the courts in several situations even though the applicable statutes seemed to assure the individuals concerned of the right to a full hearing before they could be made to suffer adverse action. When an individual wishes to secure or renew a license or to resist an order against him he may find, as a result, that a rule recently adopted by the agency with which he is dealing requires the license to be refused or the order issued, and that there is really nothing to be heard. The country's commercial airline pilots, for example, secure pilots' licenses from the Federal Aviation Agency which, according to the statutes, can be revoked only after opportunity for a hearing in the individual case.⁵⁰ A few years ago, however, the Administrator of the Agency adopted a general regulation, pursuant to an authority that was not very specific,⁵¹ to the effect that no pilot more than 60 years old should operate a plane while it was engaged in a commercial flight. The pilots' union challenged the regulation on the ground that it deprived the individual then holding

47. *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1966).

48. *National Auto Transps. Ass'n*, 91 M.C.C. 395 (1962) (Petition for Declaratory Order). See *Motor Convoy, Inc. v. United States*, 235 F. Supp. 250 (N.D. Ga. 1964), *aff'd* 381 U.S. 436 (1965); *United Transps., Inc. v. United States*, 245 F. Supp. 561 (W.D. Okla. 1965), *aff'd* 383 U.S. 411 (1966).

49. The Court's decision on May 1, 1968 sustained the proceeding and the order. *Permian Basin Area Rate Cases*, 390 U.S. 747.

50. 49 U.S.C. §§ 1422, 1429 (1964).

51. The authorization was to prescribe "[r]easonable rules . . . governing, in the interest of safety, the maximum hours or periods of service of airmen . . ." 49 U.S.C. § 1421(a)(5) (1964).

a license, who might be entirely fit to continue to operate a commercial plane after that age, of an opportunity to show that he should retain the privilege which his license secured. The Federal court to which the matter went concluded that the Administrator could validly adopt the regulation and that, manifestly, such a matter could be handled better by this means than in hearing after hearing involving individuals.⁵² Recently more than 800,000 holders of citizens' band radio licenses learned that they must abide by a new regulation which reduced the operations they could carry on under their licenses. The reduction was effected without the proceedings, which would otherwise have been necessary, to change the licenses themselves.⁵³ In other recent instances natural gas producers and organizations of shipping lines, whose operations were subject to regulation by Federal commissions, have been barred without a hearing, otherwise provided by statute, from engaging in their operations, so long as they did not comply with regulations the agencies had adopted a short time before.⁵⁴ The courts have sustained the handling of these matters by the agencies, even though, in some instances, the authority for the regulations that had been adopted was extremely general and may not have been intended to include them.

The result of these decisions is sound on the whole. The regulations which cut off individual hearings were themselves adopted after public proceedings, as Congress has required them to be since 1946.⁵⁵ In these proceedings interested individuals and groups, including the pilots' union in the age-limit proceedings, could bring out facts and offer their views. In the natural gas and shipping situations, the regulations themselves allowed the single gas producer or organization of shipping lines to request an exception to the regulation in its case if it differed significantly from the normal one.⁵⁶ The difference would have to be

52. *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).

53. *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir. 1967).

54. *F.P.C. v. Texaco, Inc.*, 377 U.S. 33 (1964); *Pacific Coast European Conf. v. Federal Maritime Comm.*, 376 F.2d 785 (D.C. Cir. 1967); *Pacific Coast Conf. v. United States*, 350 F.2d 197 (9th Cir. 1965).

55. 5 U.S.C. § 553 (Supp. III, 1968), replacing 60 Stat. 238 (1946).

56. In both *F.P.C. v. Texaco, Inc.*, 377 U.S. 33 (1964), and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), which initially upheld the use of rule-making without opportunity for a hearing of individuals in their own cases on issues covered by the resulting regulations, the Court stressed the possibility of individual hearings on requests for waiver as a safeguard.

significant, however, and the general rule would remain fixed.⁵⁷ The advantages of dealing with groups rather than individuals in these situations are that economy of effort results, that public policy is established with clarity for the guidance of all concerned, and that substantial justice is done even if exact adjustment to the individual case is sometimes lost.⁵⁸ To the extent that individual situations are inherently unique, on the other hand, these advantages are outweighed and the use of fixed regulations as a basis for adverse action should not be permitted.⁵⁹ In decisions on whether corporate mergers should be permitted under the antitrust laws⁶⁰ and whether applicants for disability payments under the Social Security system are eligible to receive them,⁶¹ for example, the unique aspects of each case predominate and call for individual decision with few binding rules or none at all.⁶²

Congress and the courts are expanding the ways in which, after general regulations have been made by administrative agencies, they can, like decisions in individual cases, be brought up promptly for judicial review. The newer statutes often provide that after a regulation has been adopted by procedures in which interested persons have had an opportunity to take part, those who are adversely affected may go to court for a review of the legality of the regulation.⁶³ A growing

57. The loss of opportunity for a full hearing in the individual case on the matters covered by a regulation, which would be available by statute if a rule were not issued, is a ground for objection to the use of a merely general rule-making power with this effect. Cf. Fitzgerald, *Adoption of Federal Power Commission Price-Changing Rules Without Evidentiary Hearing: Statutory Collision*, 18 Sw. L.J. 236 (1964).

58. A fairly extensive literature advocating greater use of rule-making for these and other reasons has grown up. See, e.g., Baker, *Policy by Rule or ad hoc Approach—Which Should It Be?*, 22 L. & CONTEMP. PROBS. 658 (1957); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 145-47 (1962).

59. In many areas of administration, rules may become feasible after a period during which individual case proceedings have provided information and led to judgments that can be brought to bear in over-all fashion. See Fisher, *Rule Making Activities in Federal Administrative Agencies*, 17 AD. L. REV. 252 (1964-66); W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 82-84, 131 (1967).

60. Clayton Act, 15 U.S.C. § 18 (1964).

61. 42 U.S.C. § 423(c)(2) (1964).

62. The Federal Trade Commission, after instituting proceedings to formulate a "Trade Regulation Rule" for application to vertical mergers in the cement industry; see *Permanente Cement Co. and Glacier Sand & Gravel Co.*, TRADE REG. REP. ¶ 16,885 (1963-65 transfer binder, 1964), produced only tentative guidelines for use in later cases. F.T.C. Enforcement Policy with Respect to Vertical Mergers in the Cement Industry, 1 TRADE REG. REP. ¶ 4510 (1968).

63. See 21 U.S.C. § 371(f) (1964) (specified regulations of the Food and Drug Admin-

number of decisions has been rendered in court proceedings of this kind, and there is every prospect that the volume will increase substantially. In May 1967 the Supreme Court, over the vigorous dissent of three Justices, held that even without provision by Congress for immediate judicial review, drug and cosmetic concerns whose manufacturing and selling practices were restricted by new regulations might go to a United States District Court immediately to secure a determination of whether the regulations were valid.⁶⁴ The result is, over-all, that a wide spectrum of agency controls can be established on a generalized basis, followed by court review of the validity of the rules laid down, with interested groups participating throughout. Congress, of course, can intervene in the process or supersede it, to change the results if it disagrees with them. It did so in 1965 when it countermanded the health warnings which the Federal Trade Commission had decreed for the advertising and labeling of a cigarettes.⁶⁵

Perceptive commentators have recognized for some time that many of our most important affairs are directed by an interplay of private and governmental groups and institutions, rather than by the self-determination of individuals or by traditional democratic processes.⁶⁶ This interplay shapes legislation both openly and by means of concealed "influence." Outside of government it results in collective agreements between corporate managements and organized labor, and in subtler ways determines many of the production and marketing practices of manufacturers and distributors.⁶⁷ It operates in the kind of generalized administrative determinations I have discussed and, to a degree, in judicial review proceedings. It is reflected in other procedural developments which there is not time to review here, but some of which have been discussed in the Washington University Law Quarterly and else-

istration); 15 U.S.C. § 1394(a) (Supp. III, 1968) (automobile safety standards); 15 U.S.C. § 1455(b) (requirements for packaging and labeling of consumer goods).

64. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 167 (1967).

65. 15 U.S.C. § 1334 (Supp. III, 1968).

66. W. HAMILTON, *THE POLITICS OF INDUSTRY* 43, 65-68, 136-69 (1957); Nourse, *Book Review*, 6 *PUB. ADMIN. REV.* 177 (1946); see Gardner, *Insurance and the Anti-trust Laws*, 61 *HARV. L.R.* 246 (1948).

67. As to prices in particular, it is the widely accepted view that in oligopolistic industries, in which a relatively small number of sellers dominate the market, "conscious parallel action" often results in price identity on comparable goods of the various sellers, at prices significantly higher than "pure" competition would produce. See Bain, *The Theory of Oligopoly*, in *MONOPOLISTIC COMPETITION THEORY: STUDIES IN IMPACT* 164-70 (Kuenne ed. 1967).

where.⁶⁸ In these agency and court processes, the interplay is carried on under regular procedures and filters through the deliberations of administrators and judges which temper and channel the conflicts of group power. These are valuable methods for use in the Great Society to which many of us look forward, enriching its judgments and adding to the power of reason in dealing with common concerns.

Traditionally our society has emphasized free enterprise and individual liberty and assumption of responsibility as the means of progress and fulfillment, subject to the least possible regulation by law. We have talked about the "free enterprise system," in relation to which law has been viewed as largely an outside force. The watchword today, having reference to a new framework for enterprise and personal opportunity, seems to be "development"—development which of necessity is organized by law to a considerable extent and within which group projects can go forward and individual freedom and responsibility be exercised. For a time the popular word to characterize the new order that seemed to be emerging was "planning"; but planning smacks too much of closeted thought, especially by bureaucrats, turning out rigid blueprints, to satisfy our desires. Development, by contrast, suggests active but considered measures with a strong element of cooperation, to channel the deeds of individuals and groups constructively but not to confine them too closely.⁶⁹ Today, at home, we wish to provide for the development of geographical regions and of institutions and systems such as higher education or mass transportation. Abroad, "development" embraces entire societies. We think of moving mountains, rebuilding cities, maintaining the purity of water and air, and providing

68. Class suits in court, whereby group interests may be litigated, which have undergone considerable development in recent times and are newly regulated in the Federal courts by FED. R. CIV. P. 23, are an example. Much of the relevant literature is cited by the contributors to a symposium on the subject in 32 ANTITRUST L.J. 251-305 (1966). Intervention by interested parties, including public and private groups, in court cases or proceedings before administrative agencies that appear likely to set future policy is another device which has undergone expansion. See Note, *The Law of Administrative Standing and the Public Right of Intervention*, 1967 WASH. U.L.Q. 416.

69. Professor Lehman's penetrating critique of the inadequacies, mistakes, and even deceptive practices of planning which conceives of itself as the imposition of schemes and theories articulated in advance, cited *supra* note 22, is relevant here. It does not follow that laissez faire, leaving basic policies to private decision within market mechanisms, is ordinarily preferable; for the valuations which are reflected as supply and demand by individuals and corporations may be short-sighted or largely uninformed, as well as realistic. Participation in conscious decision-making processes by those affected, giving voice to diverse interests and confronting the intellectual projections of planners by flesh-and-blood concerns, should help to provide a way forward.

stores of energy, transportation facilities, education, and even personal income, that can be tapped by all in proper degree. So we hope to reduce human deprivation and exploitation continuously, to maintain a healthful environment, and to provide the opportunities without which freedom and enterprise will be frustrated and the exercise of responsibility be thwarted.

The questions that remain unanswered about this dream relate partly to technical feasibility but even more largely, it seems to me, to how and by whom these developmental operations are to be managed. Someone must formulate directions and make decisions about what is to be done or permitted, and many of these determinations will have to be made collectively. Who shall control what resources cannot in many instances be left to private determination. How the air shall be kept clean, the rain distributed, public works constructed, social services made available, salesmanship conducted, and education carried on cannot be left to unregulated individual choice. These determinations can be made to a considerable extent in the kinds of proceedings of government agencies which I have described.

Improved methods of reaching these governmental decisions will not be enough to secure good results, of course, and I am far from suggesting that future social problems can be solved simply by turning them over to administrative agencies and courts, even with better methods at their command. Methods and tools—even computers—are only instruments in the hands of users. Whether they will work well or poorly, for good or for ill, depends on the purposes for which they are employed. These will be determined at the highest levels and by public opinion, and ultimately by the quality of the individuals who constitute society. Specialized agencies and expert administrators perform the work to which they are assigned; their actions reflect the demands expressed in their proceedings as well as the judgments and processes they themselves can bring to bear. If a highway is made to appear more important than homes or wildlife in the same location, the highway will be built there. If transportation for elderly people, for the infirm or impoverished, and for those who wish to read as they ride seems only marginally important, it will disappear. If the demand for additional irrigated acres is stronger than the will to preserve a lake for the use of the Indians, the lake will be starved or drained. In the Great Society of the future, equally with that of today, the basic decisions have to be made in the hearts and minds of all of us and in the elections and legislative proceedings in which fundamental policies are laid down.

If we continue, by and large, to undo progress by persistent preoccupation with war and preparations for war; if we remain addicted as a society to emphasis on personal self-gratification through the consumption of goods and the acquisition of "status symbols"; if we fail to overcome the obstinate conflicts and separation between Negroes and whites, between rural and urban interests, and between cities and their suburbs, the future will not hold much promise.

I speak now of means, not ends—of how we can do better if we wish to. We can have an environment that is clean and beautiful, trustworthy enterprises of many kinds, and lives of fulfillment, if as a society we desire them. In the effort to achieve these results, the kinds of governmental processes that were of concern to Williams and Nagel and Freund and their contemporaries, and those that have arisen since their time, provide an important resource.