ADDITIONAL VIEWS AND RECOMMENDATIONS OF MESSRS. McFARLAND, STASON, AND VANDERBILT

Administrative agencies are staffed for the most part by intelligent, capable, hard-working, and conscientious men and women. No careful student of administrative law would impair their efficiency, yet all desire that their procedures promote justice, fairness, and responsiveness to the public will, as in a democracy they should. "The objective of this committee," as the President of the United States stated in his message of December 18 (House Document No. 986, 76th Congress, 3d Session, page 4) vetoing the Logan-Walter Bill, "is not to hamper administrative tribunals, but to suggest improvements, to make the process more workable and more just, and to avoid confusions, and uncertainties and litigations." From the standpoint of the citizen as the Committee recognizes again and again in its studies and report, there are unnecessary defects, confusions, and uncertainties in existing procedures.

The report of the Committee represents a composite of studies, views, and recommendations which, if carried out, would go very far toward effecting major improvement. We have asked the privilege of adding further views and recommendations in order to secure, as we see it, a more adequate solution of present difficulties. In so doing, we have accepted the major outlines of the report and, in order to simplify the matter as well as in recognition of the adjustments necessary in any joint inquiry, we have departed as little as possible from the solutions suggested by the full Committee. Indeed, in this separate statement we have made free and full use of the studies, views, and experience of all our associates.

The three principal topics with respect to which, in our judgment, the report or recommendations fall short are (1) the separation of prosecuting and judicial functions, (2) the scope and practice of judicial review, and (3) the need for a legislative statement of standards of fair procedure.

I. THE SEPARATION OF FUNCTIONS

History and tradition have given English-speaking peoples a governmental pattern which they regard as the essence of fair adjudication. They regard the legislature as the first forum in matters between the government and the citizens; in the legislature, made up of representatives of all the people, their needs are presented and general solutions devised. The investigator or prosecutor follows; it is his duty to enforce the law by discovering wrongdoing and bringing wrongdoers to justice. But the prosecutor is not allowed to judge as well as to prosecute. Instead, he must prepare his case, summon witnesses, and present reliable evidence at a hearing before

a court which is independent of the prosecutor. Even a judge in a court of law is not the sole judge. A jury of citizens must first say whether they approve the imposition of criminal penalties or money damages. The judge may then say whether, notwithstanding the permission given by the jury, the imposition of penalties or damages is "lawful." Not even then is the process finished, for the right of appeal to a higher tribunal has come to be regarded almost as essential as the right to a trial.

In the administrative process, however, these stages of making and applying law have been telescoped into a single agency. In this concentration customary and separate procedures have disappeared. The legislature no longer prescribes the rules but in large part leaves this function to the administrative agency. And administrative rules are usually incomplete, since it is easier for an administrative agency to judge each case as it arises than to formulate rules. The agency which prescribes rules is also the investigator, the prosecutor, the judge, and to a large extent the appellate tribunal. It is given a staggering load of work and must necessarily delegate many of these functions to subordinates. One employee acts as prosecutor, another as presiding judge, and another as appellate judge. There is no jury. The litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere.

Moreover, the consolidation of functions has done more than enable a single agency to act successively as legislator, investigator, prosecutor, jury, judge, and appellate tribunal. Agencies are empowered to act in several of these capacities at a single stage of proceedings. As investigator, an administrative agency, after making its own rules and regulations, may often summon witnesses and examine them in secret—a privilege otherwise accorded only to grand juries and denied to such important public officers as the Attorney General and the officials of the Department of Justice. It may, under some statutes, "visit" or inspect premises without a warrant—a power accorded no other public agency except a judge or a jury, and then only after a case has been instituted and the parties apprised of the charges against them. It may threaten the imposition of penalties if its demands for information are not met—a power otherwise accorded only to judges, and then only after valid subpenas have issued. It may threaten to impose regulations—a power otherwise accorded only to Congress. It may threaten to prosecute and to judge—a power otherwise divided between the Department of Justice and the courts. It may threaten to withhold benefits—a prerogative otherwise accorded only to Congress. Though this it not the normal course of administration, the exercise of such power is restrained only by human forbearance.

Origins of the combination of functions.—Concentration of administrative powers has been brought about by a combination of historical, legal, and practical factors. We may discern certain significant stages in the evolution of administrative justice. The Executive Branch, because of its responsiveness to political pressures, so often handled administrative functions, including investigations and prosecutions, in a dilatory, vacillating, or partisan manner that

independent agencies were established by Congress to provide a measure of continuity and uniformity in law enforcement. The most significant step in this connection was the creation of the Interstate Commerce Commission to regulate railroads. Having established independent agencies, it was convenient to confer upon them all types of functions relating to a given subject. It seemed plausibly unnecessary to create two administrative agencies for a single subject, one to make rules, to investigate, and to prosecute and another one to judge. The existing courts were not utilized because they were too few, were not specialized, and were limited by constitutional interpretation as to the functions they could perform. Having come to combine functions in independent agencies, it was but a step to confer similar functions upon bureaus and officers of the executive departments.

When, however, enough people are affected, when matters seem to warrant a reorganization, when someone has studied a particular field sufficiently to make detailed recommendations, specialized and separate tribunals for adjudication have occasionally been established. Thus we have the Court of Claims, the Customs Court, and the Board of Tax Appeals (which is a court in all but name). A court may be created for special functions, its members need not be lawyers, their terms may be limited as are those of administrators, and their functions may be prescribed and fitted to any administrative problem. It is as simple to create a special court as to create a board or new commission. The essential demand is that adjudication in contested cases be vested in an independent group, whether a court (such as the Court of Claims) or a board (such as the Board of Tax Appeals).

The place of administrative justice.—In emergencies, or to meet new problems speedily, it is ordinarily not feasible to devise such a whole new system. It may be necessary to vest consolidated powers in a single agency in order to reorganize some familiar field or to initiate a new field of governmental control. Thus the Interstate Commerce Commission was created to undertake railroad rate regulation when state regulation broke down. The Federal Trade Commission was created to develop a modern body of fair trade practice law; the Radio Commission, to govern a new science; the Labor Board, to initiate a new labor policy; and the Securities Commission, to regulate a field which, unregulated, had brought the nation to the brink of disaster. The point is that, in such cases, there may not be time or information in which or upon which to debate or devise more than a rudimentary system. Something must be done quickly, and something is done.

But, once established, such agencies need not be, and should not be, regarded as fixed and immutable. They may be fitted into the traditional governmental structure as the subjects they administer become clarified so that Congress can intelligently deal with them. Nevertheless, the strong tendency to avoid creating new governmental units and the difficulty in reaching agreement on reorganizations make readjustment difficult.

These views and problems are not new. They have often been voiced, and nowhere in stronger or more reasoned language than in the recommendations of President Franklin D. Roosevelt. On Janu-

ary 12, 1937, the President transmitted to Congress the report of his Committee on Administrative Management, together with a special message in which (Report with Special Studies, 1937, pp. iii–v) he said:

> I have examined this report carefully and thoughtfully, and am convinced that it is a great document of permanent importance. * * * The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution.

The plan submitted by the President included the separation of judicial from all other functions performed by any agency, whether an independent board or commission or a bureau within an executive department. The report states (pp. 32–33, 39–40) that:

> The Executive Branch of the Government of the United States has * * * grown up without plan or design. * * * To look at it now, no one would ever recognize the structure which the founding fathers erected a century and a half ago. * * * Commissions have been the result of legislative groping rather than the pursuit of a consistent policy. * * * They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. * * * There is a conflict of principle involved in their make-up and functions. * * * They are vested with duties of administration * * * and at the same time they are given important judicial work. * * * The evils resulting from this confusion of principles are insidious and far-reaching. * * * Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.

A complete and drastic program of separation was posed.[1]

The report of the present Committee discusses the principal points of the problem in part B of chapter IV, but reaches the conclusion that the adjudication of contested cases by agencies which do not also investigate and prosecute them would be unwise if not definitely harmful to both the Government and the citizen. It is said that "an administrative agency is not one man or a few men but many," that an agency is not "a collective person," and that it is not true that "the same person is doing both" the job of prosecuting and judging. But every agency is actually controlled by a few officials, who work in close cooperation. It is said, in the Committee report, that there would be a division of responsibility for policy if one agency could

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[1] The proposal was (pp. 41–42) that regular agencies should "be divided into an administrative section and a judicial section. * * * The judicial section * * * would be wholly independent. * * * Its members would be appointed by the President with the approval of the Senate for long, staggered terms and would be removable only for causes stated in the statute. * * * The administrative section * * * would formulate rules, initiate action, investigate complaints. * * * It would of course do all the purely administrative or sublegislative work now done by the commissions—in short all the work which is not essentially judicial in nature. The judicial section would sit as an impartial, independent body to make decisions affecting the public interest and private rights. * * * This proposed plan * * * guarantees the complete independence and neutrality for that part of the work which must be performed after the manner of a court."

See the special studies and more detailed explanations and recommendations which were transmitted to Congress as a part of this report at pages 207–210, 215–219, 222–223, 230–239.

settle cases by consent but only a separate agency could decide disputed cases, yet this is what the Department of Justice and the courts do in the judicial system as we know it and it is what takes place in the administration of the tax, customs, and criminal law. It is said that separation would mean hindrance of "amicable disposition of cases" and "a break-down of responsibility." But this has not been true of the Department of Justice, which must go to the courts with contested cases, nor of the Bureau of Internal Revenue, which must go to the Board of Tax Appeals with contested tax matters. Finally, it is argued that the prosecuting agency would have to litigate to find out what policy to pursue. But, as a matter of fact, through possession of the rule-making power and the guidance of statutes, the prosecuting agency may, in the same way as the Commissioner of Internal Revenue does, so prescribe policies that any separate adjudicating tribunal will chiefly do no more than apply those policies to the facts of individual cases.

The Committee report nevertheless takes the position that the "commingling of functions of investigation or advocacy with the function of deciding are * * * plainly undesirable." Such commingling, it believes, may be avoided "by appropriate internal division of labor." To this end the Committee has recommended specially selected hearing officers of fixed compensation and tenure of office who shall themselves perform no prosecuting functions. At the risk of some repetition of the excellent analysis of the subject by the Committee, we think we should outline just what we mean by the separation of functions and wherein we recommend its application.

Degrees, methods, and points of separation of functions.—There are, of course, different degrees and points of separation of functions. Many functions are properly of the clerical, investigatory, or prosecuting type. These include the keeping of records, the receipt of applications, the investigation of complaints, the initiation of formal action by way of complaints or stop orders, the informal disposition of matters capable of agreed settlement, and a variety of similar activities.[2] It is only the formal adjudication of contested matters—the taking of evidence and the decision of contested cases—that requires separation. It is not necessary, in our judgment, that there be a series of separations but only that there be some adequate separation in the ultimate determination of contested cases. The problem is, therefore, how and in what respects the separation of hearing and deciding from all other functions should be attempted.

In the first place, there are obvious difficulties in such separation in areas of administrative law in which the practice of administrative discretion is large—for example, the function of passing upon licenses or applications for benefits. In general we believe that, so far and so

[2] Rule making has always been recognized as a purely administrative or executive function. The Bureau of Internal Revenue, for example, both makes rules and prosecutes tax disputes. As a practical matter, rule making may properly be vested in an agency which is also a prosecutor, for several reasons: In making rules, the prosecutor announces his view or interpretation of the law, so that the citizen knows (if rules are adequate) what to expect—which is a great advantage both to the citizen and to the Government. Rules apply in the future, to all who come within their terms, and ordinarily cannot be regarded as motivated by bias against a particular person. An improper rule is easily spotted, readily reviewable by the courts on its application to given facts, and subject to legislative and popular correction or criticism; whereas an adjudication is narrowly applied and, if the losing party complains, he is likely to be dismissed as merely a discontented litigant. We think, therefore, that the rule-making power is properly granted to agencies which also investigate and prosecute cases. Moreover, the alternative is to combine rule-making with adjudication of cases; whereas experience has shown that rule making is slighted when so combined and the law is kept vague and indefinite, because it is simpler to make adjudications in cases as they arise than to state general rules or policies.

rapidly as possible, the legislative standards under which such discretionary powers are exercised should be made more precise. Unless and until such discretion is reduced, separation of functions is peculiarly difficult since, if functions are separated, two agencies would determine policy. In the meantime, we believe, in these cases there should be both a practical form of "internal" separation and a broad power of review by an independent administrative tribunal or specialized court.

Secondly, an agency may properly adjudicate cases between two private parties, rather than between the Government and a party. This sort of administrative function is found in the reparation cases of the Interstate Commerce Commission and the Department of Agriculture. Here the agency does not prosecute. Its function is typically judicial. But, peculiarly enough, in the instances mentioned complete trials de novo in the courts, rather than mere review, are required because of constitutional provisions—where least needed. These cases pose a problem not of separation but whether such adjudication ought not in the first instance be vested in the courts, as the Interstate Commerce Commission has recommended with respect to its own reparation jurisdiction.

Thirdly, in cases involving factual issues between the investigating or prosecuting agents of the Government and private parties, the same agency should not issue complaints, prosecute the proceedings thereunder, and adjudicate the cases where there is no opportunity for the citizen to have a readjudication by an independent tribunal. This is the typical situation where the prosecutor-judge combination is criticized. In practice, it takes two forms—either the agency initiates proceedings on its own motion, or private parties make complaints and the agency then makes those complaints its own (as often happens in prosecuting attorneys' offices). But these differences in form are not significant. Here we think complete separation, with adjudication by wholly independent agencies, is normally to be preferred.

"Internal" separation of functions.—As a general policy, the whole Committee agrees that at least a separation of functions within each agency should be provided. The principal recommendation in its report deals with the creation of special commissioners who shall hear and initially decide contested cases. We agree that, in the absence of complete separation, this general plan could be made to aid greatly in producing impartiality in administrative adjudication, if coupled with adequate provision for judicial review and the enactment of a code of standards of fair procedure. But in our judgment the plan cannot fully achieve the complete independence that is essential for the exercise of the adjudicatory function; and therefore, as an exclusive means of separation, it should be confined to those cases where complete separation of functions is not possible.

Special problems are raised where there is no complete separation of functions, but an agency attempts to separate functions within its own staff. First, can there be a practical separation of prosecuting and deciding functions where both are subject to one ultimate authority? To a limited extent, we think it may be possible to achieve such a separation. Secondly, is it proper for an agency, which must decide cases, to supervise generally the institution and prosecution of such cases? We think such supervision is inevitable,

given the organization of prosecuting and deciding functions within a single governmental unit which must have a single ultimate head. While the effectiveness of any form of internal separation is thereby limited, such supervision is a necessary part of the present system of administrative justice. Thirdly, is it proper for deciding officers to participate in attempted settlements or informal determinations? Here again, for the same reasons, complete separation of functions is impossible within a single agency. Fourthly, shall deciding officers go beyond the formal record in contested proceedings and, after formal proceedings are commenced, consult with the agency's own prosecuting attorneys, investigators, experts, and specialists? Emphatically, we think (and the Committee fully agrees) that at this stage of procedure deciding officers should, except for proper use of official notice and clerical help, confine their consideration strictly to matters of record produced during formal proceedings.

At best, internal separation of functions is difficult to achieve. It can succeed only to the degree that it is definitely framed, accepted, and acted upon by the entire personnel of a given agency. Even then there are definite limitations to such a segregation of investigating and prosecuting from hearing and deciding functions. So long as both investigators and prosecutors, on the one hand, and hearing and deciding officers, on the other, are subject to the same superior authority, there is an inevitable commingling of all these functions. Hearing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting. Of course, this dependence may be diminished by various devices, as the Committee has very rightly attempted. We think it clear, however, that such dependents cannot be eliminated by measures short of complete segregation into independent agencies.

II. JUDICIAL REVIEW

The problem of separation of functions and the problem of judicial review are interrelated. Where there is no separation of adjudicating functions, or where there is merely a partial or "internal" separation, the reviewing function of the courts is of paramount importance. Where powers of legislation, investigation, prosecution, adjudication, and appellate review are merged in a single agency, we believe, as does the Committee, that the courts must exercise broad authority to prevent abuses of power. In chapter VI of its report, the Committee, after sketching the outlines of the authority of the courts over administrative determinations, concludes that no change by legislative act should be attempted "so long as the courts continue to discharge conscientiously the functions of review" as they now exist. We believe, however, that Congress should prescribe the scope of judicial review rather than leave it to the courts to venture into this controversial field upon their own initiative and without needed statutory direction.

Judicial review is one of the important balances of our governmental system. It should not be too broad and searching or it will hamper administrative efficiency. It should not be so restricted

or so devitalized as to fail as a check upon palpable administrative error or abuse of power. The proper dividing line between the power of administration and that of the courts is not easy to draw, but the attempt to draw it intelligently must be made and certainly every effort should be made to eliminate the more obvious defects.

Deficiencies and uncertainties in present practice.—We have been asked by the President to "detect existing deficiencies." These, while perfectly clear and definite to those who are familiar with judicial review in action, are nevertheless elusive if discussed in the barren terms of existing statutes or the stereotyped formulas enunciated by the courts. We shall attempt to enumerate some of them, therefore, in nontechnical language.

(1) Certainly the haphazard, uncertain, and variable results of the present system or lack of system of judicial review constitute a major "deficiency." As is well stated in Chapter VI of the committee report, the general statutory phrases now in use,[3] purporting to express the the congressional intent as to the scope of judicial review of administrative determinations of facts, are freely interpreted by the courts. Wide variations in results in specific cases defy explanation. Furthermore, a fundamental change is taking place in the concepts of the scope of judicial review hitherto derived from the implications of due process, separation of powers, and the nature of judicial power under Article III of the Constitution, so that the question is likely to loom even larger in the future than it has in the past. The opinion of the majority of the Supreme Court handed down last June in *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, and touched upon in chapter VI of the Committee report, forces us to the conclusion that, in the future, fact issues involving due process, equal protection, and doubtless also other constitutional guarantees will in all probability no longer be subject to court review as a matter of constitutional right. Since cases involving these issues generally deal with important interests and often raise questions of high emotional or political content, it follows that the present state of uncertainty constitutes an even greater defect than heretofore, and the importance of proper attention to judicial review of fact determinations is very great.

(2) The present scope of judicial review is also subject to question in view of one of the prevalent interpretations of the "substantial evidence" rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called "substantial evidence" is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the deci-

[3] The Communications Act of 1934 provides with respect to permits and licenses "that the review by the court shall be limited to questions of law and that findings of fact by the Commission, if *suported by substantial evidence,* shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." The Federal Trade Commission Act provides that "the findings of the Commission as to the facts, *if supported by evidence,* shall be conclusive." The National Labor Relations Act contains a similar provision. The Securities and Exchange Act provides that conclusiveness shall attach to the findings of the Commission as to the facts if they are *"supported by substantial evidence."* Similar phraseology is found in the case of the Federal Alcohol Administration Act, the Federal Power Act, the Fair Labor Standards Act, and the Bituminous Coal Act. The Interstate Commerce Act provides as to reparations cases that the findings of the Commission shall be *"prima facie evidence"* of the matters recited therein. Under the Walsh-Healey Act the findings of the Secretary of Labor are conclusive *"if supported by the preponderance of the evidence."* Under the Commodities Exchange Act, orders of the Commission reviewing or revoking designations of contract markets must be supported *"by the weight of the evidence."*

sion without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions *clearly* contrary to the *manifest* weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error.

(3) The present statutory formulas of judicial review fail to take account of differences between the various types of fact determinations, not only as between agencies but also within a single agency. Some fact determinations involve highly technical matters and require special experience and training; others involve technology in small degree or not at all. Some impinge heavily upon private rights; others do so lightly, if at all. Some are intended to be merely preliminary to the exercise of validly conferred administrative discretion; others involve no discretionary element but are quite objective. Some are rendered by long-established, well-tried tribunals in whom all persons have confidence; some come from new and hurriedly organized agencies. Yet, for the most part all these different types of fact determinations are cast into a single mold, with a single general formula for judicial review. The lack of a reasoned approach to the problem is obvious. It is small wonder that the courts sometimes feel entitled and, indeed, obliged to indulge in free interpretation of the statutory language of review.

(4) The present standards of judicial review are unsatisfactory because of the very manner of their establishment. The scope of review is, in effect, determined by the usual case-to-case procedure of the courts. This results in a microscopic view of the field as each point is determined in the line of demarcation. The process is unfair to litigants and burdensome to the courts. We think it would be a major improvement if the several types of issues decided by each administrative agency were enumerated and precise and definite language were adopted to indicate the intended scope of review for each type. This, if it is to be done at all, must be done by Congress itself. The present piece-work process is not likely to produce anything more satisfactory than a patchwork result.

Recommendations.—Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review—including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and

discretionary authority of each agency. We have framed such a provision in the appendix to this statement.

In the second place, Congress should classify types of cases and provide special degrees of review as to each. If, for example, Congress should feel that important issues arising under a regulatory statute, involving the limits of interstate commerce, should be protected by a closer judicial scrutiny than other issues, those issues could be singled out for review according to the "weight of evidence" or some other appropriate formula. On the other hand, and again to offer only a single example, if Congress should desire only a minimum of review of fact questions arising under employees' compensation legislation, these too could be singled out for special treatment.

Without attempting to analyze the various types of cases and to formulate the proper standard of review to be applied to each, a few general observations may be made. First, though the judiciary cannot be expected to do the work of administration, it should be utilized to protect against clear error. The graver the possible effects of the error, the more searching should be the judicial power of review. Secondly, when discretionary power is validly conferred by Congress upon an administrative agency, the courts should not interfere in its exercise unless there is an obvious abuse of discretion. Thirdly, the courts should pay due attention to the fact that the decision under review has been rendered by a tribunal trained by experience to decide the questions at issue. Fourthly, since *manifestly* incorrect decisions by administrative agencies should not be permitted to stand, the "substantial evidence" rule, if it means a more restricted review, should be clarified by more precise legislative language.

The Committee has concluded in chapter VI of its report that in any given case—

> the court should review the proceeding sufficiently to be satisfied that administrative determination is not arbitrary and is within permissible bounds of administrative discretion. * * * The Congress has power to regulate the extent of the courts' participation. When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires.

In view of existing deficiencies, we think it not sufficient to await and rely solely upon the benefits of a reorganization of subordinate administrative hearing officers and their procedure as recommended by the Committee, although such reorganization, if adequately directed by statute and faithfully carried out, will be productive of much good. It is unsatisfactory to the citizen and unfair to the courts to provide for judicial review without defining its scope. In effect the courts are asked to choose between themselves and other public agencies, they are asked to assume or deny themselves power of review, and they are made a party to the result of conflicting statutory interpretations. Under these circumstances, it is natural that the courts should lean backwards to deny themselves powers which Congress has not clearly conferred upon them.

III. LEGISLATIVE STANDARDS OF FAIR PROCEDURE

As the report of the Committee states, "the administrative process * * * is as old as the Government itself." But, in a practical sense, it is the phenomenon of a single generation. It is needless again to emphasize the fact that Federal administrative agencies have developed from their primitive estate of a generation ago until they are now an enterprise of gigantic proportions, far overshadowing in power, personnel, and prestige the largest industrial establishments. Administrative rule making and administrative adjudication are all-pervasive—they affect in a vital way virtually every man, woman, and child in the land. Yet, without implying criticism of those in authority, it may be said that the structure has so grown, without the benefit of an over-all guiding hand to appraise and improve, that now there are few who deny that reexamination and corrective measures are greatly to be desired.

Elsewhere the term "haphazard" has been used in reference to administrative agencies, though the term "formless" may better characterize the bulk of present-day administrative procedures. Indeed, if our committee studies reveal anything at all, they show that the numerous Federal administrative agencies have developed amorphously on the procedural side, with only rudimentary rule making procedures, with substantial defects in adjudicatory practices, and lacking in useful form and pattern of action. This lack of procedural pattern is a sin of omission rather than commission, but it has brought is train of disagreeable consequences.

Administrative agencies have been devised by Congress under the pressure of events for the exercise of new powers in new fields. Yet Congress has rarely undertaken to state the principles under which they shall operate. Views as to their proper method of operation range from entire absence of restrictions to and beyond the requirement of full judicial procedure, as in jury trials at common law. Not only has Congress given the agencies themselves little direction, it has given the public and the reviewing courts almost no indication of its desires as to their methods of operation.

Of course, whatever the procedure or lack of procedure, most citizens acquiesce in the judgment of "the Government." Those of modest means or humble interests rarely question a decision by a Federal official. Others feel that, no matter what the outcome, their business or their pocketbooks suffer by a contest. Anyone must recognize the uncertainties of such a contest. For these reasons, it is the more necessary to devise methods, and constantly improve them, by which the exercise of the diverse and far-reaching powers of the national Government will be kept more nearly within those channels of justice which everyone feels to be desirable. At the same time, we must take care that we do not cripple the nation by elaborate routines which stultify rather than aid the purposes of Government.

Suggested remedies.—In the absence of a complete separation of functions (as discussed under I above) and in addition to a proper and practical system of judicial review (as discussed under II above),

various procedural devices are available and are essential to promote fair adjudication and to remove uncertainties and confusions.

Since this Committee was created, a measure known as the Logan-Walter Bill (H. R. 6324, 76th Cong., 3d sess.) has received much attention as a solution of the problems of administrative law and procedure. Indeed, this proposal has assumed such prominence that it would be confusing to make recommendations on the same subject without indicating wherein our recommendations differ, and why. It was passed by both Houses of Congress and failed of enactment only by the veto of the President. The veto was placed in part on the ground that this Committee was about to make its report.

The Logan-Walter Bill, however, merely directs administrative agencies to make rules and regulations, provides a method for making adjudications, and hands the result to the courts for review of both rules and adjudications—without tangible directions. Moreover, it provides a single and rigid method for the making of rules or regulations, regardless of the kinds of rules or the practical needs of the subject; and it seems to contemplate judicial review of rules even in the absence of controvery. These and other important defects in that proposal are indicated more specifically in the appendix to this statement.

The measure proposed by this Committee, which is Exhibit I of its report, embodies in legislative form some of the essential conclusions of the Committee, although its report as a whole ranges over much more ground. That proposal, in essence, provides for the selection and functions of "hearing commissioners" (Sections 5–7 of Title I, and Title III) to replace the now common "trial examiners." These new officers are to be given powers to make decisions where present trial examiners are authorized only to make recommendations.

The significance of a reorganization of the hearing and decision process in the field of administrative justice is not to be minimized. A revision of the status and powers of hearing officers, such as the Committee suggests, involves a salutary change in the dynamics of the system. It aims at responsibility and simplicity, where anonymity and formlessness now exist. It enables parties to come face to face with an officer who is to hear, and decide in the first instance, any contested case. It necessarily aims at recruiting competent and independent officers for this purpose, without unduly dividing responsibility for the execution of public policy. Our point is, however, that it is insufficient merely to provide the means for the reorganization of the present process—it requires also the express legislative statement of a number of directions or standards as to the operation of that reorganized process.

The need for a legislative statement of standards of fair procedure.—In some quarters there is a fear of unduly hampering the freedom of action of administrative agencies, and a conviction that it is either impossible or unwise to provide by legislation for the great variety of administrative subjects and processes. The answer, we think, is to identify the few basic considerations and express them in legislative statements of policy, of principles, or of standards for the guidance of administrators, subject always to reasonable variation to meet varying needs. Modern legislation, by which the most intimate and vital interests of society are governed, is cast for the better part in similar terms. To say that man can be so governed,

but that the agents of the state cannot or should not be so governed, is a recognition of rejected forms of government. To govern the courts by weighty tradition, a bulky "Judicial Code," and uniform rules of practice but to give administrators only slight statutory attention is at least questionable in a democracy.

Administrative agencies are peculiarly sensitive to procedural and substantive provisions of statute, however general their terms—far more than to the statements of courts. Where controversy is stirred over a specific agency, we have only to look to the legislation under which it acts. If Congress has given constant attention, as it has to the Interstate Commerce Commission, a better result has been achieved. Without impairing government, a legislative statement of principles will go far toward dispelling the cloud that hovers over the administrative process. It will guide administrators and protect the citizen far more than the judicial review of particular administrative cases, which is available only to those few who can afford it. What is needed is not a detailed code but a set of principles and a statement of legislative policy. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies.

Such a statement would be of invaluable assistance to the private persons on whom powers of government impinge, for they could learn more readily and clearly when, where, and how to proceed. Greater cooperation with Government officials would be assured. It would be of inestimable value to government itself by helping to alleviate the disrespect, distrust, and fear now felt by too large a percentage of citizens. Finally, there is reason to believe that administrative officials would welcome the assistance of general procedural instructions which, instead of leaving them groping in the dark, would furnish a pattern of action.

There is another and perhaps even more important reason for formulating such a statement of the essentials of administrative procedure—a reason which involves the fundamentals of modern government. An adequate pattern of procedure is imperatively needed to serve as a guide to and check upon administrative officials in the exercise of their discretionary powers. Little has been said in the committee report regarding administrative discretion, but we know the great extent to which discretionary powers figure in contemporary government. The administrative agency is a principal means of injecting the element of discretion into government, and bringing the judgment of men to bear upon the multitude of situations which arise in the daily enforcement of statutes. Such discretionary power is a necessary adjunct of present-day government, but people generally do not blind themselves to the possibilities of abuse which it affords. No more satisfactory way can be found of minimizing abuses, or the fear of abuses, than by legislative statement of standards of administrative procedure to chart the course of action, to insure publicity of process, to give the citizen every reasonable opportunity to present his case, and to insure that public officials act under circumstances calculated to produce a fair and prompt result.

Manifestly, Congress must provide alternative procedures for the making of the various kinds of rules and regulations which administrative agencies issue. In the matter of administrative adjudica-

tion, Congress should say whether or not, and in what respects, there shall be notice; whether a party is entitled to see the evidence and know the witnesses against him; whether consideration of cases shall be confined to the record or whether administrators shall be entitled to roam at large in securing additional private and untested information; whether deciding officers shall make the decisions they purport to make or whether anonymous persons shall do so; whether the uncertainties in judicial review shall be dispelled and such review simplified; and a group of similar or related subjects.

Upon such a statement of fundamentals any number of different formal procedures may be predicated. Some uniformity should be provided in the essentials. As Justice Brandeis (dissenting in *Burdeau* v. *McDowell*, 256 U. S. 465, 477) once said, "In the development of our liberty, insistence upon procedural regularity has been a large factor." To care for all possible contingencies, we propose that the President be given authority to suspend the operation of any provision as to any type of function or proceeding of any agency whenever he finds it impracticable or unworkable, upon full publicity and a report to Congress in connection with each suspension order. Such a provision, we think, is a necessary part of any legislation in this field.

One further purpose must be served by any such legislative statement. In several respects most agencies lack one or more essential powers of administration. A galaxy of regulatory statutes, for example, speaks solely in terms of the Secretary of Agriculture, thus ignoring the essential need for the Secretary to utilize assistance. Again, agencies are without formal direction or authority to issue types of rules or regulations which are indispensable if the citizen is to be informed of the organization and policy of any agency. Congress should recognize, specify, and confer these and other necessary powers. Otherwise, administration is unduly complicated; necessity leads to subterfuge, inactivity, hardship to the citizen, or the public, and unwarranted expense to the Government; and the cry for justice is thwarted by lack of the simple means to do justice.

A judge is surrounded by an elaborate and traditional system, but an administrator is often plucked from private pursuits and given scant guidance. He must have direction, for he has no established practice to show him the way. He must have a staff and auxiliary powers because he has no grand jury, state's attorney, or police to aid him. He must have discretion to organize and manage his job, because the pressure of events has allowed Congress no time to organize it for him. Within broad limits his judgment must be honored, because existing appellate tribunals have been organized for, and are busy with, different tasks. Such direction and such aid can be given or authorized only by Congress.

As a tangible illustration of the foregoing suggestions, we have appended to this statement what we conceive to be a basis for an administrative code of procedural powers and standards. In it we have embodied, among other things, the essential proposals and recommendations of the whole Committee as expressed in its report. An explanation of its titles and provisions is given in the form of notes.