THE PROBLEM OF THE ADMINISTRATIVE PROCESS

By ROBERT H. JACKSON

MR. JACKSON: Mr. Toastmaster, ladies and gentlemen, your toastmaster has certainly mastered the art of saying to you very politely, "I am going to listen to you, but I don't believe a darn word you are going to say."

There has been one disappointment in connection with my coming here. I had hoped that I would be able to bring with me and deliver the commission to Ryan Duffy as judge of the district court of the United States. (Applause) It would have been a great pleasure had the senate moved fast enough so that that could have been done. Those are minor disappointments, for I know the commission will arrive by mail in due time, and that while I will be denied the satisfaction of being present when he takes the oath, many of the rest of you will have that pleasure.

I have been wondering how it happened that so many books are given as prizes for your golf games, because it has been my observation that when a man became good enough as a golfer to win prizes at golf he had very little time for books, that he had reached that stage where he answered the book agent as the farmer that I have heard about did when the young fellow called at his farm and tried to sell him a new book on scientific agriculture. The farmer thought it over, and then answered with that solemnity to which men of the soil are accustomed. He said, "I ain't a going to waste no money on new books. I already know how to farm a lot better than I am ever going to farm."

I became interested in the American Judicature Society some years ago when the governor of New York, then

Franklin Roosevelt, appointed a commission to investigate the administration of justice in that state, and I was named to the commission as one of the four representatives of the New York State Bar Association. We conducted an investigation of the courts of the state, and we found, as many other investigators have found in other parts of the country, a situation in which justice was so long delayed that in some cases it was doubtful if justice were being done more by trying cases than it would be by closing the courts. In one court of our state they were so very far behind that they were trying no cases where the issues were not six years old. After six years have done their work in dispersing witnesses and effacing memories, unless they are properly refreshed, it is very doubtful if a court doesn't do more injustice than it can do justice. We found the cost of justice in many cases prohibitive; and we found judges engaged in various practices which we didn't think judges ought to engage in.

The result was that we recommended the creation of two new bodies in that state, one, the judicial council, to bring some kind of order into the judicial administration, and the other the permanent commission on law reform, for the purpose of keeping our statute law up to date. Those things we feel concerned the legal profession, concerned it vitally, because the prestige of the bar after all is largely dependent on their being officers of the court. I do not underestimate the importance of legal education, and yet I think that if you took away from the bar its monopoly on access to the courts of the land, you would take away a good deal of its prestige; and if the prestige of the bar depends upon our being the representatives of the public before the courts and of the courts before the public, then every single thing which causes a loss of respect in the public for the courts is our concern, and most of all when that loss of respect flows from conduct within the courts themselves.

I think there is no more wholesome influence on the courts of the land than a fearless bar, because it is my observation that a judge respects more than any other single thing the good opinion of the men at the bar. He knows that they know whether he is doing his job or not; and if he has that wholesome respect for their opinion he will try to shape his course to meet the approval of the men of the bar, if they are unhesitating in expressing frankly their feelings about the affairs of the bench. Certainly, if we leave to laymen the remedy-

ing of defects in the courts, we take great risks that their remedies will be rough and will not respect our own professional interest.

The layman's answer to all of the delay, to the high cost and to the technicality of litigation in the courts, has been a resort to the administrative tribunal, and I am making my subject tonight a discussion of some of the problems growing out of the administrative tribunal. I do it with some apologies to the ladies. I understand perfectly why it is that lawyers submit to so much punishment listening to other lawyers make speeches at these meetings. It is because they expect to have a chance themselves some time. But it hardly seems fair to inflict these professional discussions upon the ladies of the bar; but I assure you ladies that your husbands in many cases would be much better natured if I discussed legal subjects than they would if I discussed political subjects.

Speaking on May 15 for the supreme court of the United States in the much litigated *Morgan* case, Mr. Justice Stone said:

> "* * * in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." (*United States et al. v. Morgan et al.*, No. 221 decided May 15, 1939.)

This language seems a timely admonition to contestants in the current struggle for supremacy between the formal, traditional judicial method of adjudging controversies that has long prevailed in the conventional law courts and the so-called "administrative" method.

The lawyer is inclined by habit and training to prefer the court over the administrative tribunal. Its personnel, procedure and atmosphere are more congenial to him. I frankly share that preference for a court as a forum in which to practice.

The court belongs to the lawyers. Lawyers only preside, and lawyers alone address it. The administrative tribunal generally includes lawyers, but some of its members are apt to be laymen, sometimes with special training, such as accountancy, or engineering.

The judge has nothing to do but to adjudge. He has no responsibility for the starting of the complaint, or for its policy, nor does he have any participation in the collection of evidence or the preparation of the case. His function begins and ends in hearing and decision. The carrying out of the decision and its effects on policy will be no concern of his. On the other hand the administrative official has an official responsibility not simply for the decision in an isolated case. He is responsible for the development of a consistent policy of law enforcement in the filing of complaints and the preparation and presentation of the evidence as well as in the making of final decisions. The administrative tribunal, unlike a court, can not escape responsibility for an uneven administration of justice by saying that it has faithfully decided each separate case which happened to be brought before it on the evidence which some litigant found it to his own advantage to produce.

Judges dispose of separate cases, and it is for that reason that the judicial conference recently complained that different judges in different courts for almost identical offenses were imposing widely different sentences. The administrative officers have a responsibility not merely for the decision of separate cases but also for the carrying out of a consistent policy with reference to all of their cases.

Most lawyers like court procedure, which is somewhat ceremonial and moves according to a prescribed legal ritual. Administrative bodies, on the other hand, generally sit informally. Their procedure is not rigid, and many of them admit laymen to practice. The court receives evidence only according to technical rules of presentation, competence and relevance. None but the lawyers understand these rules, and they are generally in disagreement about their application, which makes a trial something of a drama of objections and exceptions, with lawyers playing all speaking roles. The administra-

tive tribunal is non-technical about the receipt of evidence, and its procedure is flexible, and even mistakes are easily amended. A layman may actually understand what one of these administrative tribunals is doing and may even appear before them with his own grievance. Such a tribunal may have a better knowledge of the problems at issue than the lawyer who presents the case. It may have its own corps of experts to advise and assist it. Such a tribunal is not as dependent as the ordinary court upon the arguments of partisan counsel to get at the truth. Skilled advocacy is neither so necessary to keep such a body nor is stupid or cute advocacy so apt to blur the merits of a controversy.

When the cause reaches the stage of decision, the court follows the lawyer's doctrine of *stare decisis*. It will generally yield its present opinion to follow precedents laid down in more or less like cases by other courts of superior jurisdiction and by earlier judges of the same court. The administrative tribunal is relatively free from the restraints of this rule. It is often penetrating into new fields where precedents do not exist. Its concern is with the future more than with the past, and it counts the probable progeny of its decisions as of more importance than their ancestry.

Moreover, in new situations, or strange fields of law, or where the court breaks with its precedents, it acts only through the somewhat awkward "leading case" method. Some litigant has to expose himself to the perils and penalties of a law suit before either the people or the profession can learn what the rule of the court is to be. Except in matters of procedure, they have no rule-making power. The administrative tribunal, on the other hand, can, and frequently does, announce rules or regulations which disclose its views and positions on questions within its jurisdiction without waiting for specific cases to arise and without subjecting interested parties to the costs and delays of litigation.

The courts and their methods are therefore naturally favored by lawyers, while laymen have a preference for the more informal and less costly administrative body.

This issue has lately come to have some political aspects. Many of the forces opposing administrative tribunals frequently confuse their existence with the program of the New Deal. The New Deal has, of course, had occasion to create new agencies in greater numbers than any previous administration. It has wisely, and almost necessarily, utilized the administrative tribunal for

enforcement of the securities act, the utilities holding company act, the labor relations act and several others. And those who dislike these activities of government rightly conceive that if they could destroy the administrative tribunal which enforces them, they would destroy the whole plan of regulation itself.

But the controversy over the powers and function of the administrative tribunal was old before the New Deal was new. Constitutionality of the tribunal and its method, and of legislative finality of its findings of fact were all settled in decisions rendered before the New Deal. The whole controversy on both sides was summed up by the supreme court in *Crowell v. Benson,* 285 U. S. 22, more than a year before the New Deal took office, and the finality of the administrative findings was there supported by the argument of the distinguished solicitor general for Mr. Hoover's administration.

It has been possible to give the controversy a partizan tinge only because most of the present complaints center about the newer administrative bodies. Older ones are accepted. In May of 1938 Chief Justice Hughes addressing the American Law Institute referred to the interstate commerce commission as having "won a very high degree of public respect." No one will question the propriety of the tribute. But that body has been many years in acquiring its experience and now the regulated carriers have long since come to accept the philosophy of regulation. But when the battle was being waged for and against it, the interstate commerce commission was subject to bitter attack and was reproved by the supreme court as sharply as any recent agency. Under the presidency of Taft, and the attorney-generalship of Wickersham, the executive branch of the government made its most extreme argument for unbridled and irresponsible power in the administrative tribunal, and it was made in behalf of the interstate commerce commission. In *I. C. C. v. L. & N. R. R.,* 227 U. S. 88, the government insisted that the commission's findings, even though there was no evidence in the record to sustain them and no opportunity was given the party to test, explain or refute its findings, were binding on the court which must presume that the commission had such evidence even if not put in the record.

This position was rejected in 1912. The interstate commerce commission would not now, and no recently created agency would, contend that a decision could rest upon such foundation. In no recent controversy has the

government gone to such lengths in opposing judicial review.

Some of the newer administrative agencies have come into existence to deal with the most bitter type of controversy. They have been obliged to recruit counsel and examiners in haste. They had to enforce basic laws which a large part of the bar and their powerful clients refused to recognize or accept. They must close hundreds of cases where the courts finish but one. History will probably find that the sharp critics in this generation have underestimated the fairness and skill with which these new agencies have performed their tasks, as many that saw the interstate commerce commission begin its work underestimated its work.

That such tribunals have at times been guilty of errors, of pettiness, of laxity, or of misguided zeal, no one can deny, and no one can regret more earnestly than their friends. Upon their disinterestedness, their high-minded and fair approach to their problems depends, not only their success, but the success of many legislative policies that would be fruitless without them. Only an ignorant or a false liberal will advocate or countenance administrative lawlessness which would discredit their standing and endanger their functioning quite as effectively as would super-technical standards of court review.

Judged, however, by the multiplication test, it is plain that administrative tribunals are meeting needs of our day which courts can not meet. Few new functions have been entrusted to judges in the past generation. But the administrative tribunal has been used in legislation by both parties as the agency for making all of the myriad investigations and decisions of facts required in the administration of nearly all of the statutes which have played so large a part in the reform program of the twentieth century. In fact, the administrative tribunal may be said to be the heart of nearly every social or economic reform of the twentieth century, and if the heart fails, the whole body perishes. Sensing this, many who are striking at the tribunals really hope to strike down the reform.

If the solicitor general of the United States is unable to take a dispassionate and fairly neutral view of this struggle, it is no fault of his office. He is called upon to defend both decisions by courts and determinations by administrative bodies, and he is called upon to question decisions of both. He has an unusual opportunity to ob-

serve the quality of the work of both kinds of bodies and to appraise their results to litigants.

In two vital respects I believe those who are assailing administrative bodies are taking positions that my observations will not sustain.

They seek to picture the administrative body as uncontrolled, powerful and irresponsible and the citizen or corporation before it as helpless. The fact, however, is that the administrative tribunal has been, and is today, subject to very extensive judicial control. The extent of this existing subjection to the courts is easily overlooked by many who seek to fetter the administrative process. Judicial supervision over administrative bodies is maintained in three principal ways. First: the administrative body is not authorized to enforce its subpoenas. If a party or a witness refuses to obey, the commission or board must invoke the power of the court to obtain testimony or to produce books and papers. Thus, at the very outset the court has a check on the information the tribunal may get, the evidence it may hear and the kind of record it may make. This protects proper rights of privacy. But it also gives counsel the opportunity to bargain, and often the threat of delay and cost and risk is used by private interests to exact compromises in the inquiry. Second: the decisions of the tribunal are with rare exceptions subject to court review—at least on the law—and as to the presence of evidence to support the decisions—and this field is extensive enough to bring up for review almost every question except pure weight of evidence. Third: the administrative tribunal has no power to enforce its own decrees. Therefore, application must be made to courts for enforcement orders, in the granting of which in practice a wide discretion is exercised. It amounts to a further judicial check on the administrative body.

Notwithstanding this very large measure of judicial control many would further sterilize the administrative tribunal, either by limiting or checking its own powers, or by extending the power of judicial review over its acts. To support this effort they assume that the work of courts is subject to no substantial criticism and that relatively the work of administrative bodies is very badly done. The facts will not support either contention.

There was probably never a more ill-chosen time than now to provoke an argument before the country as to whether federal judges should be given more power over administrative agencies. I am glad to say that I am con-

fident of the complete integrity and conscientious service of the vast majority of federal judges. But the fact remains that it would be a difficult task to prove that their wisdom and integrity are superior to that of men engaged in other fields of public work.

During the term of October, 1937, the supreme court passed on 35 cases involving review of administrative orders. This, as you will see, is a substantial proportion (about 21 per cent) of the total number of opinions rendered in government cases. The character of the work done by administrative bodies is a matter of concern to the solicitor general, and its volume warranted a study of the quality of these administrative decisions in terms of the supreme court's own review of actual and decided cases over a period of 10 years, in order to avoid any question as to its partiality to the so-called New Deal.

Such an inquiry faced obvious limitations. Affirmance, of course, is not always a sure token of competence and impartiality, and reversal is by no means a certain sign of ineptitude or bias. But the basis of judicial review is the assumption that the appellate court reverses the bad decision and affirms the good decision. On that assumption, the comparative record of success in the supreme court offers the only possibility I know of making a pragmatic comparison of the work done by the lower federal courts and administrative tribunals.

In 257 opinions dealing with administrative orders during the 10 terms, the decisions of the lower federal courts were affirmed in 139 cases or 54 percent and reversed in 117 cases or 46 percent. The administrative tribunals in these cases, however, have a somewhat better record. The supreme court affirmed them in 166 cases or 64 percent and reversed them in only 89 cases or 35 percent.

The bare record of affirmance and reversal will present, of course, a greatly oversimplified picture. The typical quasi-judicial administrative decision which reaches the supreme court may be concerned more largely with questions of fact than is the typical judicial decision. The differences between particular courts and between particular administrative tribunals will prevent any composite measure of success in the supreme court from being applicable to any particular court or administrative body. Moreover, many cases in which administrative agencies are parties do not involve their decisions in the exercise of a function similar to and comparable to the judicial function but are concerned with their legal

rights and duties as part of the executive branch of government.

With all of these qualifications this study of the opinions of the supreme court for the last 10 terms is the best test of the quality of administrative decisions that I know of. The detail as to cases and different bodies is to be found in the report of the solicitor general included in the report of the attorney-general for the year 1938.

The significance of the whole study is that the record of the administrative tribunal before the supreme court in review of actual cases gives no support for intemperate attacks upon administrative agencies as generally, or often, usurping, partisan, arbitrary, ignorant or of doubtful integrity. Each of these vices, when at times they do appear, may be matched by examples of the same vices in the judiciary.

Society needs both the judicial process and the administrative process. As Mr. Justice Stone warned, neither should "regard the other as an alien intruder." Each has regrettable deficiencies at times in personnel, and rather than arraying them one against the other our bar associations would be better occupied in cleaning out incompetence and promoting men of ability and understanding and good-will in both administrative positions and in the judiciary.

My own observations, in study of the decisions of many different administrative, as well as many judicial, bodies, can not be stated more fairly or clearly than by quoting a letter to the judiciary committee of the recent New York state constitutional convention, which had before it a proposal to subject administrative decisions to a severe judicial review. The special committee on administrative law of the Association of the Bar of the City of New York, in a spirit that anticipated the words of the supreme court, reported as follows:

> "We believe that the complications and refinements of modern society are such as to make it appropriate that in certain specialized fields decisions be taken by special bodies, the members of which have become expert in the particular field. We recognize that administrative law as thus developing is subject to abuse due to the lack of judicial approach which is often characteristic of members of administrative bodies when they begin to function in a quasi-judicial capacity. We feel, however,

that this defect is an inevitable incident of the initiation of new processes, and that relief should be sought, not by depriving such administrative agencies of all effective responsibility, but by emphasizing the responsible nature of their tasks and seeking to inculcate the judicial spirit of fairness and impartiality, and such segregation of prosecuting and judicial functions as is appropriate to assure this. If the decisions of administrative bodies, irrespective of their personnel and form of organization, were uniformly and as a matter of constitutional requirement made reviewable by the courts on the facts, this would not only often involve duplication which would be costly and delaying, but in certain instances seriously hamper, if not destroy, the usefulness of many agencies. Also, it would tend to discourage a sense of responsibility on the part of administrative agencies which, in turn, might defeat their evolution as useful aids to society." (Applause)

MR. HOYT: Mr. Jackson, we are indeed deeply indebted to you for this able and scholarly presentation, and we feel that we have been very much privileged to have you speak to us tonight.

Twenty-seven years have elapsed since we have welcomed to the eastern district of Wisconsin a new judge of the United States district court. By happy coincidence it happens that the United States senate took final action only yesterday upon the nomination of the Hon. F. Ryan Duffy to that high office of United States district judge, so that it is possible for us tonight to welcome Judge Duffy, and to present him for a few remarks of greeting to this body. I call upon Judge Duffy. (Applause)

JUDGE F. RYAN DUFFY: Mr. Toastmaster, Mr. Solicitor General, ladies and gentlemen, I was wondering how my friend, Ralph Hoyt, felt about the remarks of the solicitor general, wherein he commented upon the slow action of the United States senate in acting upon my nomination, because Ralph had just finished telling me a few minutes before that had not the senate adopted unprecedented speed yesterday in having the subcommittee report to the judiciary committee; and having the judiciary committee hold a special meeting yesterday instead of a regular meeting next Wednesday; and then of having by unanimous consent the nomination presently considered instead of laying over on the calendar; and having unanimously

confirmed, and then waiving the 24 hour period that the nomination is supposed to remain in the senate; that had it not been for such unseemly haste, he certainly would have taken a journey to Washington, and would have talked to the committee and to the senate of what he knew about me as a result of our six years together in the University and in the law school out at Madison. I am very happy, of course, that my former colleagues were so considerate as to shut off that kind of static and interference and act so promptly. I am very happy to be here. I do not feel, however, not having as yet taken my oath of office, that I am in any position here to address this meeting as a judge.

I can only say as a member of the State Bar Association that I think we are all very fortunate to have the opportunity of listening to the solicitor general, who has made such a marvelous record for himself in the presentation of matters before the supreme court and other high courts of this land. Many feel that this gentleman has the qualifications, and all of them, which would fit him for the highest position in the gift of the American people, but by his own remarks here tonight we are not permitted to inject even a thought of partisan politics into the discussion, so I will have to skip that; but, irrespective of that, I am sure that the Wisconsin bar and the members of the judiciary—and the thing that did strike me was how much more brazen the federal judiciary seems to be than the state supreme court, who are all modestly scattered out of sight around this hall tonight—I am sure that we all welcome you, Mr. Jackson, to Wisconsin. We regret that you are unable to remain with us as long as we would like. I am pleased to have had a small part in persuading you to be here this evening, and I hope that you will come back to see us often. Thank you. (Applause)