Part VI

Federal Problems

Federal Developments in Administrative Law

*Herbert W. Clark**

The most important federal developments in the field of administrative law are the reports of the Second Hoover Commission¹ and the Report of the President's Conference on Administrative Procedure.² The former had a statutory origin,³ the latter had not. Only the first will be herein considered. It was made to Congress in March 1955 and was accompanied by the report of its Task Force on Legal Services and Procedure.⁴ Their application to California administrative law is neither immediate nor direct. It lies

* Member, San Francisco Bar; member of Task Force on Legal Services and Procedure of the Commission on Organization of the Executive Branch of the Government. [EDITOR'S NOTE: The Commission is popularly referred to as the "Hoover Commission" since Mr. Herbert Hoover served as Chairman of the Commission.]

¹ COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, A REPORT TO THE CONGRESS: LEGAL SERVICES AND PROCEDURE (1955) (hereinafter cited as COMMISSION REPORT); TASK FORCE ON LEGAL SERVICES AND PROCEDURE, REPORT ON LEGAL SERVICES AND PROCEDURE (1955) (hereinafter sometimes cited as TASK FORCE REPORT). The Chairman of the Commission was Mr. Herbert Hoover. Other members were Attorney General Herbert Brownell, Jr., James A. Farley, Arthur S. Flemming, Senator Homer Ferguson, Senator John L. McClellan, Robert G. Storey, Representative Clarence J. Brown, Representative Chet Holifield, Joseph P. Kennedy, Sidney A. Mitchell and Solomon C. Hollister.

² PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT (1955). See Collins, *Administrative Procedure: The Conference Submits Its Final Report*, 41 A.B.A.J. 311 (1955).

³ 67 STAT. 145 (1953), 5 U.S.C. § 138a-f (Supp. II, 1954).

⁴ The Chairman of the Task Force was Hon. James M. Douglas, former Chief Justice of the Supreme Court of Missouri. Other members were Herbert W. Clark, San Francisco, Calif.; Cody Fowler, Tampa, Fla.; Dean Albert J. Harno, College of Law, University of Illinois; James M. Landis, New York City; Carl McFarland, President, Montana State University, Missoula, Mont.; Ross L. Malone, Jr., Roswell, N. Mex.; David F. Maxwell, Philadelphia, Pa.; Hon. Harold R. Medina, New York City, now Judge, Court of Appeals for the Second Circuit; Hon. David W. Peck, New York City, Presiding Justice Appellate Division, First Department, Supreme Court, New York; Reginald Heber Smith, Boston, Mass.; Dean E. Blythe Stason, University of Michigan Law School, Ann Arbor, Mich.; Hon. Elbert Parr Tuttle, Atlanta, Ga., formerly General Counsel for Treasury Department, now Judge, U.S. Court of Appeals for the Fifth Circuit; Edward L. Wright, Little Rock, Ark. Consultants were the late Justice Robert H. Jackson; George Roberts, New York City; and Hon. Arthur T. Vanderbilt, Newark, N. J., formerly Dean of New York University Law School, now Chief Justice, Supreme Court of New Jersey. The Staff Director was Whitney R. Harris, Dallas, Texas. The Research Director was Courts Oulahan, Cleveland, Ohio.

largely in such influence as they may ultimately have in eliminating from the federal field conflicts with state authority.

This article will deal in a general way with the growth of federal centralized power, some developments in the United States which accentuate the desirability of improving the administrative process in the executive branch of the federal government and some of the steps recommended by the Task Force on Legal Services and Procedure in the administrative agencies and the performance of those agencies in the interest of the citizen.⁵ It will then state, in summary form, what the Second Hoover Commission and its Task Force tried to do. Limitations of space and the fact that this article is intended to be general in character, prevent doing more than to call attention to the peaks and valleys, so to speak.

No less authority than Chief Justice Arthur T. Vanderbilt, of New Jersey, has stated that administrative law is the "outstanding legal development of the Twentieth Century, reflecting in the law the hegemony of the executive arm of the government . . ."⁶ "Nor," writes Professor Bernard Schwartz, "is the realization of this confined to members of the legal profession. Indeed, as significant to the student of administrative law as the tremendous extension of his subject, has been the widespread public interest displayed in it in recent years."⁷

Every man comes into contact nearly every moment of his life with government and its agents. The local butcher can sell meat only between certain hours of the day. When we buy milk, file a tax return with a municipality, county, state or the Collector of Internal Revenue, we encounter government regulation. When we are born the requirements of a bureau of vital statistics must be obeyed and when we die burial or cremation permits must be obtained and reports must be made to some government agency. Literally from the cradle to the grave we are regulated. Government, especially the federal government, for many years has been rapidly growing in power and authority over the individual citizen and his affairs and activities. There are dangers inherent in such growth. "It is in this ceaseless contact of the individual with the state that the danger of arbitrariness has especially arisen."⁸ In the United States, as in England, "the most distinctive indication of the change of outlook of the government of

⁵ No completely satisfactory definition of administrative law has yet been made. Perhaps as good a definition as any other is that it "is that branch of the law which deals with the field of legal control exercised by law-administering officers or agencies other than the courts, and the field of control exercised by the courts over such officers or agencies." CORP. JUR. SEC. (1951).

⁶ SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* (Introduction by Arthur T. Vanderbilt) xiii (1954).

⁷ SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW* 283 (1955).

⁸ *Ibid.* (quoted from Dugit, *Manuel Droit Constitutionnel*).

this country in recent years has been its growing preoccupation, irrespective of party, with the management of the life of the people.'” The legislature “‘ . . . finds itself increasingly engaged in legislation which has for its conscious aim the regulation of the day-to-day affairs of the community, and now intervenes in matters formerly thought to be entirely outside its scope. This new orientation has its dangers as well as its merits. Between liberty and government there is an age-long conflict. It is of vital importance that the new policy, while truly promoting liberty by securing better conditions of life for the people of this country, should not, in its zeal for interference, deprive them of their initiative and independence which are the nation’s most valuable assets.’ ”⁹ “The administrative tribunals clearly are here to stay,” wrote the late Justice Robert H. Jackson, “and probably to increase in number and powers. The values affected by their decisions probably exceed every year many times the dollar value of all money judgments rendered by the federal courts. They also affect vital rights of the citizen.”¹⁰

In the federal jurisdiction, which has few, if any, ascertainable limits at present, the urge to regulate has had its most fertile field of growth. So strong has this urge become that some activities of the citizen are now regulated by several different federal agencies as well as by many of the states. It may be assumed with considerable assurance that if Congress should get the notion that the hobby of growing flowers for home use exclusively might affect interstate commerce, the now undoubted federal power to regulate would be asserted, possibly in the form of a law telling the California housewife she must not grow in her garden any flowers but petunias. The present scope of federal regulatory power can be readily seen by comparing what it was before *Hammer v. Dagenhart*¹¹ with what it has become since *United States v. Darby*.¹²

The *Hammer* case, usually called the Child Labor case, involved the constitutionality of an act of Congress which prohibited the transportation in interstate commerce of goods made in a factory which employed children under a specified age. The purpose of Congress in passing this law

⁹ *Id.* at 283-84.

¹⁰ JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 51 (1955). The remainder of the paragraph from which this quotation is taken reads as follows: “There have been instances of excessive zeal and abuse of power. The same may be said of the judiciary. My own belief is that every safeguard should be thrown about the process of administrative adjudication so that its fact-finding will be honest, unprejudiced, neutral, and competent. It should be isolated from the prosecuting function. As a prosecutor, the body serves a constituency and promotes an interest. As a judge, it should know no constituent and serve no interest except justice. But in time we shall see these defects in the administrative process corrected, and the process will help supply the shortcomings we have found in the three original branches.”

¹¹ 247 U.S. 251 (1918).

¹² 312 U.S. 100 (1941).

was to aid in the suppression of child labor by denying the market of interstate commerce to manufacturers who sought to profit from it. This, the Supreme Court held, was beyond the power of the federal legislature. The court reasoned that the regulation of the manner in which manufacturing establishments were conducted was essentially a matter of local concern and was reserved to the states. "To sustain this statute," said Justice Day for the majority, "would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate power among the states."¹³

The dual federalism approach of the majority in *Hammer v. Dagenhart* limited the extent of federal regulatory power over local matters. That approach has been rejected by the decisions of that court since 1937.

In 1941, the Supreme Court expressly overruled its decision in *Hammer v. Dagenhart*. The Fair Labor Standards Act of 1938¹⁴ provides for the fixing of minimum wages and maximum hours by an agency of the federal government. It prohibits the shipment in interstate commerce of goods manufactured by employees whose wages are less than the specified minimum or whose hours of labor are more than the specified maximum. This law is somewhat similar to the law litigated in *Hammer v. Dagenhart*, which had prohibited the transportation in interstate commerce of goods produced by child labor. In *United States v. Darby* the Supreme Court refused to follow its *Hammer v. Dagenhart* decision. Instead, it declared that its prior decision rested upon a conception of federal-state power which was outmoded, and the decision itself must be considered as overruled.¹⁵

The reasoning and conclusion of the court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the commerce clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

And then the court proceeded to state that the tenth amendment to the Constitution, under which all powers not granted by that instrument to the Congress are reserved to the states, did not have any effect on the question at issue.¹⁶

The Amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that

¹³ *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

¹⁴ 52 STAT. 1060, 29 U.S.C. §§ 201-19 (1952).

¹⁵ *United States v. Darby*, 312 U.S. 100, 116 (1941).

¹⁶ *Id.* at 124.

it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the Amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

To regard the tenth amendment as a mere "truism" is in effect to destroy the basis upon which the doctrine of dual federalism was based. Under the present view of the Supreme Court of the United States, that amendment no longer requires the dividing into two parts the federal and state power, with the exclusive authority in the states serving to limit the area in which federal action may be taken. To take the regulation of commerce as an example, the dual federalism doctrine demanded the division of commerce into two mutually exclusive categories: state and national. Only the latter was within the orbit of federal control. Under the more recent decisions of the Supreme Court, this division, which served to preclude federal regulation of local economic activities, has been abandoned.¹⁷

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Since the *Darby* decision in 1941, the federal law regulating wages and hours has been held to be constitutionally applicable to employees engaged in the maintenance and operation of the building in which substantial quantities of goods for interstate commerce were produced;¹⁸ to the employees of a window cleaning company which cleaned windows of people who were engaged in interstate commerce;¹⁹ to the employees of a local newspaper with a limited circulation;²⁰ and to women doing embroidery work for pay in their own homes.²¹

Although the activities held subject to federal regulation in these cases appear to have been local in character, federal action with regard to them was sustained because of the court's opinion that they might have some effect upon interstate commerce. But what local activity does not have some effect upon interstate commerce, one may well ask? It would seem that under present conditions, the economic system is so complicated and interconnected in its parts that there are very few, if any, even purely local business activities which may not have at least some effect upon commerce

¹⁷ *Id.* at 118.

¹⁸ *Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942).

¹⁹ *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946).

²⁰ *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946).

²¹ *Walling v. American Needlecrafts Inc.*, 139 F.2d 60 (6th Cir. 1943).

which extends beyond state lines. If that is true, federal regulation of local commerce is no longer prohibited. In 1942, in a case involving the constitutionality of federal regulation of the price of milk produced and sold entirely within the State of Illinois, the regulation was upheld because the intrastate milk was sold in competition with milk transported outside the state:²²

[T]he marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity. It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power.

Again in 1942 the Supreme Court upheld a federal law extending federal regulation of wheat production to wheat not intended in any part for commerce but solely for consumption on the farm. "[E]ven if appellee's activity be local," wrote Mr. Justice Jackson, "and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' . . . Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."²³

Cases like those just discussed tell us plainly that the American Union today is not based upon a division of sovereignty between governmental equals. It is characterized by the predominance of federal power over state power. Federal regulatory power is now all-pervading. It may be exerted over any subject chosen by the Congress and it is no objection to its exercise that it may come into conflict with the accustomed powers of the state.

The growth of federal power can be illustrated by referring to a field not related to interstate commerce—the field of taxation.²⁴ There is no limit to the rate of tax Congress may levy on either *gross* or *net* income, except the limit imposed by the self restraint of the members of Congress or the pressure of public opinion.²⁵ Worse yet, under the general welfare

²² *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942).

²³ *Wickard v. Filburn*, 317 U.S. 111, 125-29 (1942).

²⁴ U.S. CONST. amend. XVI: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

²⁵ The growth of so-called pressure groups and of local self-interest seems to obliterate self-restraint.

clause²⁶ of the Constitution, there are no longer any legal restraints imposed upon the power of Congress to appropriate or spend funds. It may take the taxes paid by one group and blandly appropriate them for the benefit of another group or for the benefit of foreign countries. Payments by federal agencies to state and local governments have risen from \$126 million to over \$2¼ billion annually, an increase of over 1700% since 1934.²⁷ In 1943 the federal government owned or was in the process of acquiring 383,600,-533 acres of land—"an area equal to one fifth of the entire United States or to the combined area of 21 eastern states." By 1949 the land holdings of the federal government had been increased by an additional 71,546,193 acres.²⁸ In the fiscal year 1951 the federal government spent over \$905 million for education, not counting \$1.9 billion in readjustment allowances spent for veterans' education and training benefits. In that year the President urged Congress to begin a program of grants-in-aid to the states for educational purposes that would require \$290 million for 1953 and would grow to amounts of approximately \$2 billion annually.²⁹

Any unbiased person would admit that many of the functions now exercised by the federal government are national in scope and that many are not. Many of these functions could be as well or better exercised by state or local governments than they have been or are exercised by the federal government. "The first great step in overcoming our national political imbalance is to return to the state and local governments that which is truly theirs and to free their functions from the influence of grants by the federal government A federal system necessarily involves checks on the interference of the central government with the states, just as the doctrine of the separation of powers involves checks on the interference of one department in the work of the other departments of the central government. If the Congress or the courts ignore the enforcement of these checks, they do so at the peril of the welfare of the nation."³⁰

"[P]owerful centralization of government . . . administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit It may ensure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation."³¹

"But what should concern us most about the federal government is its

²⁶ U.S. CONST. art. I, § 8, cl. 1.

²⁷ VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS* 61 (1953).

²⁸ *Id.* at 63.

²⁹ *Id.* at 61-62. This prompts Chief Justice Vanderbilt to ask: "If this program of federal spending continues, how much longer may we expect our schools to remain under local or private control and how much longer can socialized medicine be avoided?"

³⁰ *Id.* at 66.

³¹ DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 109 (2d ed. Bowen 1863).

phalanxed strength," says Vanderbilt. "The railroads, for example, are subject to the direct supervision of four federal administrative agencies—the Interstate Commerce Commission, the Railroad Retirement Board, the National Mediation Board and the Wage Hour Division of the Labor Department—and the indirect regulation of five others—the Securities and Exchange Commission, the Internal Revenue Bureau, the Department of Defense, the Bureau of Public Roads of the Commerce Department, and the General Accounting Office."³²

It is at least a part of the task of administrative law to avoid some of the dangers of government overwhelming the liberty of the individual citizen entirely. It can do this by making as certain as possible that governmental functions will be exercised in accordance with what the late Chief Justice Stone referred to as the "all-pervading doctrine of the supremacy of law." This should be so because "the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by the courts."³³

The distinguishing feature of an administrative agency is its possession of the authority to determine, either by rule or by decision, private rights and obligations.³⁴ In the administrative process, the various stages of making and applying law, traditionally separate, "have been telescoped into a single agency."³⁵ Delegated legislative authority and authority to adjudicate³⁶ have become and are the principal instruments or weapons of the American administrative agencies, whether federal or state. In the 1930's it was customary for lawyers in the United States to consider and discuss the powers exercised by administrative agencies as if such powers were something entirely new. The fact is, of course, as pointed out in the report of the Attorney General's Committee,³⁷ "the promulgation of general regulations by the executive, acting under statutory authority, has been a normal feature of Federal administration ever since the Government was established." The executive branch of the government would not have been

³² VANDERBILT, *THE DOCTRINE OF SEPARATION OF POWERS* 64-65 (1953).

³³ Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 5 (1936).

³⁴ ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 7 (1941).

³⁵ *Id.* at 204.

³⁶ Adjudication, the act of adjudicating, is judging, if one is realistic. It would seem to be mere double talk to write in terms of *quasi* in speaking of performing this function. The real difference between adjudication by an agent and adjudication by a court is that the latter is done by a traditional court in accordance with traditional methods. The former is not done by a court. See and compare LANDIS, *THE ADMINISTRATIVE PROCESS* 98-106 (1938), and POUND, *JUSTICE ACCORDING TO LAW* 79-81 (1951).

³⁷ ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 97 (1941).

able to function with any effectiveness at all if such had not been the case. Under existing theory, legislative power can be conferred upon the executive branch of government if the legislative grant of authority is limited by prescribed standards. The stated theory is that there must be an ascertainable legislative intent to which the exercise of the delegated power must conform.

Any discussion by lawyers, courts, or commentators of the congressional delegation of legislative powers³⁸ to administrative agencies centers largely upon the constitutional aspect of that subject. They are concerned with the validity of particular administrative action, or a failure to act, pursuant to a congressional delegation of power. Such concern is required by the constitutional mandate that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."³⁹ The power is also granted "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers"⁴⁰

The citizen also should be concerned with this constitutional prohibition. He should scrutinize the judicial determination of the cases with special emphasis upon the test utilized by the court in determining whether the constitutional prohibition has been violated. This concern not only requires an awareness of the test advanced by the judiciary, but should also prompt an acute examination of that criterion to determine whether it is one of substance or merely a parroting of an abstraction which will clothe any artfully drawn statute with constitutional immunity.

The concern of the governed, however, should go beyond the constitutional issue involved. A citizen is justified in complaining of a statute delegating legislative power if he can illustrate that more precise standards for agency guidance in the statute would have perhaps resulted in more efficient and better government. However, a litigant attacking the validity of such a statute must be satisfied, as a litigant, if the court holds the delegation is within the outer limits established by judicial precedent.⁴¹

³⁸ The term "delegation of legislative power" is used herein as a convenient description of the process whereby Congress imposed duties upon agencies in the executive branch of the government. The term in and of itself carries no connotation in this article of constitutional invalidity or validity.

Although the difference seems to be disappearing in the federal field under the decisions of the courts, as will be seen later in the discussion of the *Yakus* case, a distinction should be taken between a "self-executing" statute, in which the duties and liabilities of the administrative agency are created, and a statute delegating power to an administrative agency to effectuate a program but which creates no liability or duty until the administrative agency puts the program into operation. See Comment, 41 CALIF. L. REV. 523, 529-30 (1953).

³⁹ U.S. CONST., art. I, § 1.

⁴⁰ *Id.* at art. I, § 8, cl. 18.

⁴¹ *E.g.*, *Yakus v. United States*, 321 U.S. 414, 425-26 (1943), "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion

A citizen's interest in seeing that Congress establishes concrete standards in statutes which impose duties on agencies is evident regardless of whether or not the particular administrative action is subject to the Administrative Procedure Act.⁴² Placing agency action which is now exempt from the APA under that Act would not be of much avail if the basic statutes contain vague and indefinite standards for agency guidance. One seeking to obtain, or to oppose, agency action will find little succor in precise procedural rules if the agency's position or contentions cannot be ascertained. And likewise, judicial review will approach empty formality if the agency has nearly unlimited discretion in effectuating a vague congressional mandate.

Despite the implication that the applicability of the APA is not a panacea for statutes which contain vague and ill-defined delegations of legislative power, it is readily apparent that the problem is more acute where the proceedings taken pursuant to such statutes are not governed by the APA.

Law review commentators differ as to whether *Panama Refining Co. v. Ryan*,⁴³ popularly known as the *Hot Oil* case, was the first case in which a congressional statute⁴⁴ was held invalid because the delegation violated section 1 of Article I of the Constitution.⁴⁵ However, they all agree that this case was the first real indication that the judiciary stood ready to strike down such legislation.

The *Hot Oil* case was soon followed by *Schechter Poultry Corp. v. United States*,⁴⁶ in which the Supreme Court held that section 3 of the NIRA⁴⁷ was invalid because the delegation of power sought to be made to the President was unconstitutional. The court also based its decision on the ground that the statute was an attempt to regulate intrastate commerce.

Although the court talked in terms of adequate standards in the *Schechter* and *Hot Oil* cases, it is not clear what precise test was utilized in determining the constitutional issue.⁴⁸ It is clear, however, from the opinions of Chief Justice Hughes in the above two cases that if the subject of the President's (or his agents') authority was not defined in the statute, the statute did not contain adequate standards. But this disposes of only

to administrative officers.³⁷ In discussing this case, law review commentators usually raise the question of whether this decision leaves any vitality in the *Schechter* holding. See, e.g., Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 578-81 (1947); Note, 30 CORNELL L.Q. 504, 510 (1945).

⁴² 60 STAT. 237 (1946), 5 U.S.C. § 1001-11 (1952).

⁴³ 293 U.S. 388 (1935).

⁴⁴ National Industrial Recovery Act, 48 STAT. 195 (1933).

⁴⁵ See, e.g., Note, 30 CORNELL L.Q. 504, 505 n.10 (1945).

⁴⁶ 295 U.S. 495 (1935).

⁴⁷ See note 44 *supra*.

⁴⁸ See Note, 30 CORNELL L.Q. 504-505 (1945).

the easy cases like the *Schechter* case which was characterized by Cardozo as a case of "delegation running riot."⁴⁹ Adjudication of the *Hot Oil* case was more difficult as the subject of presidential authority was defined. Cardozo, J., discussed both cases in terms of subject matter, means of enforcing the granted authority, and the occasion for its exercise. He thought the legislation under attack in the *Hot Oil* case should be upheld because only the occasion was placed within the President's discretion.⁵⁰

The *Schechter* case and the *Hot Oil* cases had their impact on legislative draftsmen. Subsequent legislation and cases arising thereunder illustrate that the reference in the prior cases to adequate standards did not go unnoticed.⁵¹

In *Sunshine Coal Co. v. Adkins*⁵² the appellant argued, *inter alia*, that the act in question was invalid because it contained an unconstitutional delegation of power. The Court rejected this challenge as to the act in general, referred approvingly to cases which had validated legislation conferring authority on agencies by standards of "just and reasonable," "public interest," and "unreasonable obstruction," and concluded that the standards being scrutinized in the case before it far exceeded "in specificity others which have been sustained."⁵³ The Court held that the statutory definition of "bituminous coal" was "sufficiently precise for an intelligent determination of the ultimate question of fact by experts."⁵⁴

⁴⁹ In his concurring opinion Justice Cardozo made this clear. He said:

"But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptance as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plentitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 552-3 (1935).

⁵⁰ 293 U.S. 388, 433 (1935). See DAVIS, ADMINISTRATIVE LAW 53, § 15 (1951); Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, 36 COLUM. L. REV. 871, 906 (1936); Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 569 (1947); Cousins, *The Delegation of Federal Legislative Power to Executive Officials*, 33 MICH. L. REV. 512, 538 (1935).

⁵¹ E.g., *The Bituminous Coal Act of 1937*, 50 STAT. 72.

⁵² 310 U.S. 381 (1940).

⁵³ *Id.* at 398.

⁵⁴ *Id.* at 400. Delegation of legislative power akin to that discussed in the *Sunshine Coal* case was also upheld in the following cases: *United States v. Rock Royal Co-Op.*, 307 U.S. 533, 574 (1939), sustaining the Agricultural Marketing Agreement Act of 1937; *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941), sustaining the Fair Labor Standards Act of 1938.

The Supreme Court has suggested in *Fahey v. Mallonee*⁵⁵ another basis for distinguishing the early cases. Fahey, the administrator of the Home Owners' Loan Act of 1933, had appointed one of the defendants as a conservator of a California bank pursuant to subsection (d) of section 5 of that act.⁵⁶

The appointment as conservator was made pursuant to rules and regulations promulgated pursuant to the above-noted subsection of the act. Plaintiffs, as stockholders of the bank, sought to restrain the conservator from merging the institution with other banks. Plaintiffs contended that subsection (d) of the act was void because it conferred legislative power upon the board. A three-judge court upheld this contention, and in doing so cited the *Schechter* and *Hot Oil* cases. The Supreme Court reversed that decision, holding (alternative holding) that the delegation of power was not invalid. In distinguishing the cases relied upon below, Justice Jackson stated:⁵⁷

Both cited cases dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom. The latter case also involved delegation to private groups as well as to public authorities.

He then pointed out that the regulations under attack in the instant case provided remedies for mismanagement of banks, which remedies were well recognized in existing laws. He concluded, "A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in unchartered fields."⁵⁸

It should be obvious that Congress cannot provide a specific rule to govern every minute situation in the present-day world, and the problem is intensified in wartime because of the increased need for legislation. However, it is difficult to read many of the opinions in cases which discuss delegation of legislative power without concluding that much of the talk about standards is a sham. It is true that some statutes contain reasonably precise standards, but others can be summarized in a phrase borrowed from Professor Davis, "Here is the problem. Deal with it."⁵⁹

The Emergency Price Control Act of 1942,⁶⁰ which was sustained in the *Yakus* and *Willingham* cases, is an example, it is believed, of the ability of draftsmen who have mastered the teachings of the *Hot Oil* and *Schechter*

⁵⁵ 332 U.S. 245 (1947).

⁵⁶ 48 STAT. 128, 12 U.S.C. § 1464(d) (1952).

⁵⁷ *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947).

⁵⁸ *Id.* at 250.

⁵⁹ DAVIS, ADMINISTRATIVE LAW 46, § 12 (1951).

⁶⁰ 56 STAT. 23, 50 U.S.C. 901 (1952).

cases. Section 1(a) of the act contains a lengthy statement of the policy and purpose of the act, and the draftsmen, mindful of Chief Justice Hughes' unsuccessful search for a Congressional declaration of policy in the NIRA, carefully predicated the Administrator's action in the OPA legislation upon the statement of policy and purpose set forth in section 1(a). At first glance it appears that the hand of Congress rests at all times on the Administrator's shoulders and that he will be guided in the performance of his duties with precision. Closer examination of section 1(a), however, is likely to give the examiner the uneasy feeling that it is not a guide for action, but rather it is a statement of "things hoped for"; something which in most instances is pleasant to contemplate but not when its function is to aid the man who will tell the butcher the maximum price of beef.

Persuasive argument has been made that broad delegation is not evil per se, that it does not necessarily mean that the governed are being governed without consent, that Congress can watch the administrators and control them if they get out of line and that procedural safeguards are the answer to the problem.⁶¹

Certainly there is a real amount of truth and comfort in all of these contentions, but it seems that the real answer is to insist on as precise standards as possible in delegating legislation and that this insistence should be made to Congress, rather than to the judiciary.

Professor Davis contends that the delegation doctrine is a judicially created device.⁶² If such is the fact, the creation of the doctrine and its present status would seem to be, paraphrasing a biblical quotation, a case of "The courts giveth, and the courts taketh away." For it is submitted that only an incorrigible optimist could study the cases involving statutes delegating power and conclude that the courts are now an effective barrier to broad delegation of legislative power to the Chief Executive and his agents. Perhaps the judiciary might balk at the wholesale delivery of the power to legislate for an entire industry to industry groups, such as was attempted in the *Schechter* case, but no other limits can be foreseen. Artful legislative draftsmanship will allow the delegation of very broad powers to the administrative agencies.

If the foregoing is a correct summary of the present status of the delegation doctrine, persons concerned because of the constitutional issues involved may have to be content with the development of self restraint by Congress as to the delegation of its powers. And, as already indicated, all citizens interested in better and more efficient government should demand a proper relationship between Congress and the administrative agencies, regardless of the constitutional aspects of the problem.

⁶¹ DAVIS, ADMINISTRATIVE LAW 54-59 § 16 (1951).

⁶² *Id.* at 43, § 11.

The citizen who initiates or opposes agency action cannot intelligently present his case on the administrative level if the legal limits of the agency's power are so undefined that the citizen is unable to pin-point the issues, or facts, upon which his success should depend. Furthermore, if judicial review of agency action is to be meaningful, the agency must entertain and frame its disposition of the case with reference to concrete standards or findings. A requirement that agencies should bottom all administrative action upon evidentiary or subsidiary findings would greatly improve the administrative proceedings and any judicial review resulting therefrom. Ultimate findings to the effect that a particular regulation will effectuate the purposes of the act pursuant to which the regulation was promulgated, or that a certain price is fair and equitable, or that prices have risen in a manner inconsistent with the purposes of the act, are of little use. Such findings are more objectionable than a court's general finding that the allegations of the complaint are true for in that case the allegations are usually specific enough to enable a reasoned appeal.

In summary on the problem of delegation of power, two points are now urged:

1. Congress should be made aware of its great responsibility to exercise self-restraint in delegating power to the Chief Executive and his agents. Congress must realize that the courts will go far in allowing an abdication of the legislative power by Congress, and that, therefore, the important restraint on such abdication is self-restraint by Congress. The Original Renegotiation Act⁶³ demonstrates that Congress has not always accepted this responsibility. Surely the factors developed by the administrators of the act for determining which profits were "excessive profits," and which were subsequently incorporated into the act, could have been enacted in the original act.⁶⁴

2. If certain administrative action is not to be governed by the APA, the legislation upon which such action is based should require findings or a statement of reasons which are evidentiary in nature so that adequate judicial review of administrative action is meaningful.

Having touched upon the probable futility of seeking court protection through constitutional interpretation and the judicial propensity to find standards in statutes even where competent commentators can find none, a few words must be said about the haphazard increase in the number of federal administrative agencies, the conflicts in jurisdiction among the agencies themselves and the conflicts of jurisdiction between federal agencies and the states.

⁶³ 56 STAT. 245 (1942), 50 U.S.C. § 1191(b)-(c) (1952).

⁶⁴ 63 STAT. 79 (1944), 50 U.S.C. § 1191 (a) (4) (A) (1952). See *Lichter v. United States*, 334 U.S. 741, 774-99 (1947).

Almost constant increase in the problems coming before Congress, and their complexity, make it impossible for Congress to deal with them except in very general terms. Congress must delegate power to some other agency or agencies of the government or the government will not be able to function at all. The result of this pressure has been that almost every time Congress has felt the need to delegate power it has delegated it to a new agency. Little attempt has been made to apportion powers among already existing agencies in accordance with the functions involved. This has led to the creation of some seventy administrative agencies in the executive branch of the federal government. It has also given rise to jurisdictional disputes among the agencies, to assertions by two agencies of the jurisdiction to regulate the affairs of one citizen or of one business.

Conflicts of federal and state jurisdiction occur, among others, in the fields of rate fixing, accounting required of public utilities and other types of corporations, mergers, and food and drug regulation. Take the case of the public utility subject to regulation by both the Federal Power Commission and a state regulatory body. The Commission has rejected the argument that it could not issue accounting orders in conflict with those which a state agency might issue.⁶⁵ The result was the dilemma in which a regulated utility found itself in *Federal Power Comm'n v. East Ohio Gas Co.*⁶⁶ The company estimated that compliance with the Commission's accounting and report orders would cost between one and a half to two million dollars. East Ohio's problem was thus stated:⁶⁷

It appears that the present particular issue arises because the Commission has theories of accounting different from those the state has seen fit to accept. The Federal Commission has ordered East Ohio to change its entire accounting system for all of its properties at a very heavy cost. This requires it either to conduct its accounting contrary to laws of Ohio and the orders of the State Commission or perhaps to keep two sets of books.

Except where the national interest is vitally concerned, as in defense, the basic purpose of federal action generally should be to supplement, and not to displace, state power. If the states themselves can do the job, there should be no need for Congress to assert its authority. Where the states do not have the power, Congress, of course, must act.

The worst examples of duplicating and overlapping jurisdiction occur as between one federal agency and another. The result is not only needless duplication of the administrative effort and a waste of public funds, but also an unwarranted inconvenience and expense to those subject to regula-

⁶⁵ *In re Northern States Power Co.*, 33 P.U.R. (N.S.) 279 (1940), *aff'd*, 118 F.2d 141 (7th Cir. 1941).

⁶⁶ 338 U.S. 464 (1950).

⁶⁷ *Id.* at 478 (dissent).

tion. Such duplication and overlapping occur in such fields as food regulation, among the Bureau of Internal Revenue, the Food and Drug Administration, Federal Trade Commission, and Department of Agriculture; and bank regulation, among the Treasury Department, Federal Deposit Insurance Corporation, and Federal Reserve Board. As the U.S. District Court for the Northern District of Ohio has stated in *Barnard v. Carey*:⁶⁸

When different administrative agencies are empowered by Congress to make rules and regulations applying to the same subject matter there is bound to be conflict and confusion. If such conflicting orders are absolute and must be enforced, property is in effect confiscated without compensation and citizens are put out of business.

Congress can do much to correct such a situation by restricting authority over the same subject matter to a single agency.

"But for three quarters of a century Congress has continued to launch these agencies without facing and resolving the administrative law problems which their functions precipitated."⁶⁹

Notwithstanding the adoption of the APA, which Chief Justice Vanderbilt has described as "the most important statute affecting the administration of justice in the federal field since the passage of the Judiciary Act of 1789,"⁷⁰ Congress has recognized that there are still many defects in the administrative process. That is one reason why the Second Hoover Commission was created. It reported favorably with recommendations, on the subjects of legal service, representation before agencies, and legal procedure. The Task Force on Legal Services and Procedure in 434 pages reported on legal service, legal procedure and legal representation. With its report to the Commission it submitted a Legal Services Act and a proposed Administrative Code.

Among the unanimous recommendations of the Task Force on Legal Services and Procedure, five are of particular interest.⁷¹

1. An administrative court of the United States should be established to consist of two sections having jurisdiction, respectively, in the fields of trade regulations and taxation. To the Trade Section would be assigned the exercise of the jurisdiction now vested in the Federal Trade Commission and in eight other federal agencies, including the Interstate Commerce Commission, vested with limited authority over trade practices in their fields of special competence.⁷²

⁶⁸ 60 F. Supp. 539, 541 (N.D. Ohio 1945).

⁶⁹ JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 46 (1955).

⁷⁰ N.Y.U. SCHOOL OF LAW, *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* iv (Warren ed. 1947).

⁷¹ Adopted almost verbatim from Schwartz, *Summary of the Reports*, 30 N.Y.U. L. REV. 1270 (1955).

⁷² For an excellent symposium on the Hoover Commission and Task Force Reports on Legal Services and Procedure, see 30 N.Y.U. L. REV. 1265-417 and especially Schwartz, *Administrative Justice and Its Place in the Legal Order*, *id.* at 1390-417. See also the comprehensive

2. Examiners under the APA should be replaced by hearing commissioners appointed by a chief hearing commissioner. The latter, to be appointed by the President by and with the advice and consent of the senate, should be attached to the proposed administrative court. The tenure, status, compensation and removal of commissioners should be fixed by law.

3. Judicial functions, such as the imposition and compromise of money penalties, the award of reparation or damages, and the issuance of injunctive orders should be assigned to the courts wherever possible.

4. An Office of Legal Services and Procedure should be set up in the Department of Justice to assist agencies in simplifying, clarifying, and making uniform rules of substance and procedure; to insure agency compliance with public information requirements; and to receive and investigate complaints regarding legal procedures.

5. The APA should be substantially amended and improved. Specific amendments suggested include:

(a) All general exemptions from APA should be repealed;

(b) The publication requirements of section 3 of the APA should be broadened;

(c) The rule-making procedure provided by section 4 of the APA should be strengthened by eliminating exemptions therefrom and providing greater opportunity for public participation in rule making;

(d) In cases where the Constitution or statute does not require an agency hearing, notice of a proposed decision should be given, and an opportunity for intra-agency review should be provided;

(e) Judicial review of jurisdictional questions should be permitted in subpoena enforcement cases;

(f) Internal separation of functions should be extended to all formal adjudicatory proceedings; including the process of final decision by agency heads;

(g) The powers of hearing officers in formal cases should be greatly strengthened, both at the hearing and in the decision process. Such officers should prepare initial decisions in all cases, and agency review of such decisions should be limited;

(h) Formal agency hearings should be governed, to the extent practicable, by the rules of evidence applicable in civil non-jury cases in the federal district courts;

(i) The exceptions to judicial review at the beginning of section 10 of the APA should be repealed;

(j) A simplified, uniform system of review by petition should be provided for;

series of articles by Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A.J. 497, 618, 713 (1955); and Proceedings of the House of Delegates: Midyear Meeting, February 20-21, 42 A.B.A.J. 371 (1956). See also MACNEIL & METZ, *THE HOOVER REPORT 1953-1955*, 65-81 (1956).

(k) Agency findings of fact should be set aside on review if "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record";

(l) There should be full review of agency applications of law to fact;

(m) No sanction should be imposed or rule or order issued against any person for pursuing a normal, customary or previously acceptable course of conduct unless such conduct shall have been proscribed or restricted by agency rule;

(n) No sanction should be imposed or rule or order issued for any act done or omitted in good faith reliance upon any rule or written advisory statement issued by duly authorized officers of an agency;

(o) Courts of competent jurisdiction should be empowered to enjoin, at any stage of an agency proceeding, agency action in excess of constitutional or statutory authority.

Two recommendations were not unanimously made. The first of these recommended that an immigration section of the proposed administrative court be established to provide judicial determination in cases involving exclusion, deportation, fines and bail. Nine members of the Task Force joined in this recommendation; three opposed it; two neither favored nor opposed it. The second recommendation urged that the establishment of a labor section in the proposed administrative court, to have jurisdiction over cases involving unfair labor practices presently decided by the NLRB. Twelve members of the Task Force approved this recommendation; one opposed it; one neither favored nor opposed it.

The Task Force also submitted its recommendations in the form of a proposed bill at the end of its report. This bill, called the Administrative Code, is intended to supplant the APA. It is much more comprehensive in scope than that statute; hence the use of the term "Code" in its title.

In its report to the Congress the Commission itself adopted in substance all the recommendations of the Task Force which did not deal directly with proposed amendments to the Administrative Procedure Act of 1946. Thus, the Commission urged that, (1) an administrative court should be established to be composed not only of a tax section and a trade section, but of a labor section as well; (2) the examiner problem should be resolved as recommended by the Task Force; (3) an office of legal services and procedure should be set up in the Department of Justice along the lines suggested by the Task Force; and (4) Congress should look into the feasibility of transferring to the courts certain judicial functions of agencies, such as the imposition or remission of money penalties, the award of reparations, and the issuance of injunctive orders.

Only three commissioners approved unreservedly the Task Force recommendations that involve proposed amendments to the Administrative Procedure Act. One commissioner reserved the right to disagree with

them in his capacity as a member of the Congress. Another commissioner, Representative Holifield, dissented from the Commission's report as too "legalistic." Six members of the Commission, including the chairman and the Attorney General, did not vote for these recommendations because of their possible consequences and possible increases in the expenditures of the government. However, they expressed themselves as feeling that in view of the searching investigation of the Task Force who proposed the recommendations in question, these should be furnished to the Congress but without Commission action upon them. A similar action was taken by Commissioner Farley who stated that he voted in favor of the recommendations, with reservations, so that by commission action they would be transmitted to the Congress for its consideration.

In spite of the congressional policy of limited functional exemptions, legislation subsequent to the adoption of the Administrative Procedure Act of 1946 has provided for widespread exemption. In the words of the Senate Judiciary Committee, the result has been "only to chip away the framework of what was intended to be a uniform structure of safeguards for the citizen in his dealings with Federal administrative agencies . . ."⁷³ Under the proposed Administrative Code, every agency of the executive branch of the federal government, other than subordinate local governmental units, would be subject to general statutory controls over the administrative process, except where a functional exemption is clearly required for the national security or in the public interest.

Most practicing lawyers will agree that administrative procedures should be made uniform and formalized, so far as practicable, in conformity with the traditional standards and safeguards that have been developed by the courts, in order that the administrative process will follow well-defined channels of authority and procedure, known to all parties, without the delays and unfairness of *ex parte* consultation, political pressure, or improper influence. But most executive agencies oppose any practicable formulation of rules of procedure along well-developed judicial standards. With a few significant exceptions like the Tax Court, Federal Trade Commission, and Securities and Exchange Commission, adoption of judicial rules of evidence and procedure to administrative hearings is opposed within the government as "weakening" the administrative process. This ground of opposition overlooks the plain fact that practicable uniformity on judicial lines can only result in strengthening the administrative process, by affording private citizens and nonfederal governmental bodies greater protection for their rights and by restoring public confidence in all phases of administrative activity. On the other hand, weakening will occur in the exercise of undiluted administrative discretion.

⁷³ Senate Committee on Judiciary, *Amending the Administrative Procedure Act, and Eliminating Certain Exceptions*, S. Rep. No. 111, 83rd Cong., 1st Sess. 4 (1951).