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INFORMATION ON WHICH ADMINISTRATIVE DETERMINATIONS ARE BASED

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The Final Report of the Attorney General's Committee on Administrative Procedure pointed out that

Most of the controversy over administrative procedure has centered around formal adjudication, though it is the smaller part of administrative adjudication as a whole.

To those who have given much thought to the necessity of providing some sort of judicial control over formal adjudication procedures, the notion that the latter do not constitute the most important part of the work of an administrative agency may come as something of a novelty. The fact is, however, that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication, and are truly the lifeblood of the administrative process." And the Committee goes on to say that "no study of administrative procedure can be adequate if it fails to recognize this fact and focus attention upon improvement at these stages." This need is amplified by the Benjamin Report which recommends that "study should cover the entire range from informal determinations of fact or law by correspondence or conference to the most formal determinations." In order to find out how administrative agencies obtain the information upon which action is taken, therefore, attention must be given to both formal and informal procedures of all kinds. The problem goes much deeper than the adoption of the rules of evidence at common law.

Since "the very point of the administrative process is to provide for specialized and non-judicial judgment of facts," administrative agencies "in the performance of their functions ... must obtain facts in order to effectuate the purposes of the statutes under which they operate and to decide the controversies which come before them." In the process of rule making, agencies rely in the first place upon the specialized knowledge of their staffs, but they must also seek information in other ways. The reason for an agency's

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2. Id. at 35.
3. Ibid.
5. ABA Section of Judicial Administration, Brochure on Administrative Law 60 (1943).
existence "is that it is expected to bring to its task greater familiarity with
the subject than legislators, dealing with many subjects, can have, but its
knowledge is rarely complete, and it must always learn the frequently clash-
ing viewpoints of those whom its regulations will affect."  Not only in the
matter of rule making but also in the matter of adjudication, whether formal
or informal, agencies make their initial decisions "upon the basis of inform-
ation gathered by their staffs and submitted informally by the claimants." 8
Much of the needed information is supplied voluntarily, or at least without
compulsion.

The great bulk of the information needed is obtained without
compulsion by voluntary testimony and production of documents,
and by the use of public records and official reports. At times,
however, the necessary information cannot be obtained without
compulsion. To meet these situations Congress has provided three
methods by which administrative agencies may secure factual
material not voluntarily produced: (1) the power to require reports,
(2) the power to inspect books, records, and premises, and (3) the
power to subpoena witnesses and documents. (Attorney General's
Committee) 9

Not all agencies have these powers and some have none of them,10 but
long before a controversy reaches the stage of formal adjudication, the infor-
mation an agency obtains either with or without compulsion conditions its
handling of a case. "Much that occurs at a hearing or conference is condi-
tioned by the investigation of the problem which may have preceded it, or
of which the hearing may be a part." 11

Furthermore, "where conferences and hearings are not held, the initial
investigation is of all-embracing importance in the rule-making process." 12
The Attorney General's Committee Report goes on to say, "the initial
investigation is of primary significance in most instances of rule making,
[and] the methods by which it may be conducted are of great importance
to affected private interests." 13 The same significance attaches to investi-
gations preliminary to adjudications. Often "the most important element
in the decision is the judgment of the man who saw and tested the ship or
grain or fruit or locomotive . . . [and] the soundest procedure in cases of
this type is that which recognizes the reality that the inspection or test is
and must be the decisive element." 14

Besides the inspection or test which may be all-important in the adjudi-
cation of claims or licenses, and the oral or documentary evidence which an
agency compiles from reports or documents submitted to it, voluntarily or

7. Id. at 102.
8. Id. at 39.
9. Id. at 414.
10. Ibid.
11. Id. at 111.
12. Ibid.
13. Ibid.
14. Id. at 37.
by compulsion, the information which it acquires on its own initiative may also be very important in the determination of private interests concerned. In this connection it should be remembered that an agency is often set up in pursuance of a statute by which it is charged with specific duties in ensuring that the statute is observed. On this the Attorney General's Committee points out that:

Where, on its own motion or on complaints from outside sources, an agency has an option to institute disciplinary action against private interests charged with infraction of an applicable statute or regulation, the issuance of a formal complaint is ordinarily not the first step in the administrative process; rather, it is the culmination of a period of investigation and consideration by the staff of the agency. This is true whether the alleged violation is first brought to the agency's attention in the course of a routine inspection by its own staff or by a complaint from an interested person not connected with the agency.

After the preliminary investigations have been made, an agency may proceed by holding informal conferences or by arranging for a hearing. Both methods are used in the rule making as well as in the adjudication stages. With respect to the former, "hearings differ from consultations and conferences," says the Report of the Attorney General's Committee, in that they are publicly announced in advance and any interested party is permitted to attend and testify." In rule making, administrative hearings are analogous to those held by legislative committees, since they are called for the purpose of providing the agency with information designed "to protect private interests against uninformed and unwise action." However, administrative agencies, no more than legislatures, are bound to be influenced in their decisions by the evidence submitted at such hearings, their authority having been specified in the statute setting them up, which has already determined the policy decided upon by the government. With respect to hearings held in connection with adjudications, much has been written to show that nothing more than a "fair hearing" culminating in a decision based on "substantial evidence" is required by the courts upon review. Because this aspect has received more attention than the technique of conferences, through which the bulk of the controversies are settled without ever reaching the hearing stage, it need not be considered at length here.

It is in connection with conferences that most of the information compiled by agencies is utilized. So important has the conference become that as long ago as 1938 a Committee of the Bar Association of the District of Columbia, appointed to report on admissions to practice before federal agencies, observed that the need for the "conference lawyer" should be

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15. Id. at 286.
16. Id. at 105.
17. Id. at 108.
18. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 191-198 (1951) and cases there cited; Stason, "Substantial Evidence" in Administrative Law, 89 U. of PA. L. Rev. 1026 (1941).
recognized as much, if not more, than that for the more popularly con-
ceived advocate in "the orthodox fields of law." While it is notable that
the bulk of administrative cases are settled informally through conferences,
or through negotiations carried on by correspondence, in which the private
party accepts the administrative decisions without resort to the courts, it
should, however, be recognized that the information upon which the deci-
sion may be based is not equally available to the private party and to the
agency. Often the agency's information may come from confidential reports
in its field of whose existence an attorney unacquainted with "bureau
practice" may not even be aware. Even if the sources of some of the
information in the possession of the agency are known, the precise data
may not be available to the private party through either formal or informal
techniques. Nevertheless the practice of holding conferences is generally
considered advantageous in developing understanding, at least, on both
sides. As the Report of the Attorney General's Committee says of the
conference at the rule-making stage:

The practice of holding conferences of interested parties in con-
nection with rule making introduces an element of give-and-take
on the part of those present and affords an assurance to those in
attendance that their evidence and points of view are known and
will be considered. As a procedure for permitting private interests
to participate in the rule making process it is as definite and may
be as adequate as a formal hearing. If the interested parties are
sufficiently known and are not too numerous or too hostile to
discuss the problems presented, conferences have evident advantages
over hearings in the development of knowledge and understanding.

In the adjudication stage, the use of the conference technique may
determine the issue. This is recognized in Section 5 (b) of the Adminis-
trative Procedure Act. Section 7 (b) also permits settlement of
certain issues by consent even though a formal hearing is called for.
And Sections 6 (a) and (d) authorize conferences not connected with
hearings. The latter are applicable to the rule making as well as to the
adjudication stage. It should be noted that settlements by consent without
a formal hearing, even though the latter may be required by statute, are
sometimes permitted in adjudication cases, although that would not
ordinarily be the case in rule making proceedings because of the greater
number of persons potentially affected by the latter. A definite advantage
of the conference technique is found, even when a formal hearing may

19. D.C. Bar Ass'n, Comm. on Ad. Proc., Report on Admissions to and Con-
trol over Practice Before Federal Administrative Agencies 2-26 (1938), quoted
in McFarland and Vanderbilt, Cases and Materials on Administrative
Law 558 (1947).
20. Final Report, supra note 1, at 104.
§ 1004(b).
22. Id. at § 1006(b).
23. Id. at § 1005(a), (d).
be held, in the formulation of stipulations\textsuperscript{25} through which, as in pre-trial procedures in the courts, trials may be shortened by eliminating the necessity of introducing evidence on points no longer in dispute.

When a formal hearing is held, whether because required or permitted by statute, the process of producing information raises questions regarding the traditional rules of practice and the production of evidence at common law. Definite rules with respect to notice, designed to protect the right to be heard, have been developed for administrative proceedings, as well as provisions regarding subpoenas which indicate an obligation to appear. Sections 4 (a) and 5 (a) of the Administrative Procedure Act\textsuperscript{26} provide respectively for notice in rule making\textsuperscript{27} and in adjudication procedures,\textsuperscript{28} while Section 6 (c) covers the issuance of subpoenas.\textsuperscript{29} There are comparatively few cases involving the application of the rules of evidence in administrative proceedings once the hearing is under way, as Mr. Justice Harold M. Stephens indicated in his pioneer book on the subject,\textsuperscript{30} a situation which has changed little since he wrote. There has, however, been a general recognition of the fact that the technical knowledge required and the absence of a jury permit considerable leeway in admitting kinds of evidence which would be excluded at common law. The need for inclusion of desired information has been considered of greater importance than the maintenance of safeguards built up with respect to exclusion in jury trials. Relying upon an apparent analogy to equity in this respect,\textsuperscript{31} hearing examiners are supposed to eliminate from the factors leading to their decision those portions of evidence introduced which would influence their decision unfairly with respect to the facts at issue.

As the Benjamin Report said,\textsuperscript{32}

The exclusion (under a technical exclusionary rule as to competency) of logically probative evidence whose actual probative value could be appraised with reasonable accuracy by the tribunal, is far more likely to lead to the wrong result than the admission of such evidence would be. A trained hearing officer's experience, and his familiarity with the particular field of inquiry, should often enable him to appraise more accurately the weight properly to be accorded to such evidence than could a jury or even a judge unfamiliar with the field of litigation. The precautionary measures that are thought necessary in judicial proceedings would . . . often operate as an unwarranted hindrance to rational inquiry in a quasi-judicial proceeding.\textsuperscript{32}

\textsuperscript{25} **Final Report**, supra note 1, at 64-68.
\textsuperscript{26} **Supra** note 21, §§ 1003(a), 1004(a).
\textsuperscript{27} **Sen. Rep. No. 752, 79th Cong., 1st Sess.** 16-17 (1946).
\textsuperscript{29} **Id.** at 33; **92 Cong. Rec.** 5757 (1946). As to risk in refusing to obey subpoena, see **Benjamin, op. cit. supra** note 4, at 153-155, cited in **McFarland and Vanderbilt, op. cit. supra** note 19, at 196.
\textsuperscript{30} **Stephens, Administrative Tribunals and the Rules of Evidence** (1933).
\textsuperscript{31} **McFarland and Vanderbilt, op. cit. supra** note 19, at 688, n.
\textsuperscript{32} **Benjamin, op. cit. supra** note 4, at 175.
The same report cites the authority of Wigmore in pointing out that "most of the rules of evidence are merely rules of caution, i.e., they are based upon a possibility of error; so that the failure to observe the rule is perfectly consistent with a high probability of truth." Furthermore the report points out that

Freedom to testify simply, naturally and directly, without undue interruption, is usually more important than strict adherence to rules of relevance, materiality and competency. One further point should be noted. Where the hearing officer is inclined to exclude evidence, but is in doubt on the question of competency, relevance or materiality, the evidence should usually be admitted, particularly where the hearing officer is not himself to make the final determination. The considerations in favor of a complete record are, on the whole, more important than those in favor of limitation; the analogy of practice before special masters in Federal equity cases is persuasive.

Among the definite innovations in administrative practice with respect to evidence is the admission of written material as a substitute for, and sometimes in preference to, oral testimony. Written submittals in the sense used here differ from depositions, documents, or statistical exhibits, in that they are nothing more nor less than verified written statements of testimony, particularly of technical or complicated testimony that would be difficult to follow orally, which are exchanged between the parties in advance of the hearing. This so-called "shortened procedure," which was developed by the Interstate Commerce Commission, may be clarified, if necessary, at the hearing, through cross-examination of its author. Authority for its adoption in federal administrative hearings is given by Section 7 (c) of the Administrative Procedure Act.

To safeguard from possible abuse the practice of gathering information by means of required reports, Congress in 1942 passed the Federal Reports Act specifying that needed information should be obtained with a minimum burden upon business enterprises and placed the responsibility for coordinating the collection of information desired from ten or more persons upon the Bureau of the Budget by which all requests must first be approved. An amendment to the Criminal Code, passed by Congress in 1934, provided against false, fraudulent or fictitious information made knowingly or wilfully on any matter within the jurisdiction of any department or agency of the United States.

34. Benjamin, op. cit. supra note 4, at 175.
35. Id. at 179-180.
36. A brief discussion of this innovation may be found in McFarland and Vanderbilt, op. cit. supra note 19, at 685-6.
37. Supra note 21, § 1006(c).
There is one limitation specified in Section 6 (b) of the Administrative Procedure Act which should be noted also in appraising the practices governing the admission of evidence in administrative hearings. The statute states that "no process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law." The purpose of this section is said in the Report of the House Judiciary Committee to be to preclude 'fishing expeditions' and investigations beyond jurisdiction or authority. It applies to any demand, whether or not a formal subpoena is actually issued. It includes demands or requests to inspect or for the submission of reports. An investigation must be substantially and demonstrably necessary to agency operations, conducted through authorized and official representatives, and confined to the legal and factual sphere of the agency as provided by law.

Matters such as the burden of proof, the burden of going forward with the evidence, and the possible shifting of the burden, are usually governed by statute. Presumptions generally are either specified in the statutes or follow the rules of common law. But there is one subject of particular importance in any consideration of how administrative agencies acquire information, and that is the problem of "official notice." Like judicial notice, which it resembles in holding that no proof need be offered of obvious, notorious facts, the principle of official notice is intended to simplify litigation by assuming some knowledge of facts "which experience has shown to be safely assumable." Official notice differs from judicial notice, however, as to what some of these facts are. Facts of which courts may take notice are also admitted by administrative tribunals. The variance is accounted for by a larger area of special knowledge which agencies acquire by reason of their specialization. How much of that special knowledge should be recognized as requiring no evidentiary proof is a serious question for law. The fact that Mr. Justice Brandeis, before his appointment to the Supreme Court bench, had been responsible for the modern expansion of judicial notice through the famous "Brandeis Brief," does not make the solution of the problem in administrative law easier. On the contrary, it tends to complicate the situation. If courts are to take judicial notice of official statistics and census reports, which are sometimes subject to various challenges and interpretations, then administrative agencies may be expected to take official notice of more

41. Ibid.
complicated material within their special fields. But may this not in effect beg the very question at issue by assuming that as established which is in fact subject to challenge?

The problem of official notice brings to a focus the converging lines which lead to the essence of the administrative process. As already noted at the outset, "the very point of the administrative process is to provide for specialized and non-judicial judgment of the facts." Not only is this stated or implied generally by Congress in enacting statutes setting up the various administrative agencies but it is also recognized by the courts who afford no judicial review of findings of fact made by the agencies unless "jurisdictional facts" or "mixed questions of law and fact" appear to call for review of the legal authority assumed by the agency in making determinations on the facts. Administrative tribunals are essentially fact-finding instrumentalities, and the procedures they provide must be exhausted before any recourse on legal or constitutional grounds may be had in the courts.

As in the case of the courts, the first question to be asked concerns the matter of jurisdiction. If in fact jurisdiction has been granted to them by the legislature over a special subject-matter, then they may proceed without judicial interference in respect to the character and weight of the evidence which may be received in the process of reaching a decision. The only question courts ask on review about evidence is whether it may qualify as "substantial evidence." For purposes of review, the courts will examine the "whole record" to see if there is more than a "scintilla of evidence" that could justify the decision reached. If the "whole record" discloses that there was in fact "substantial evidence" sufficient to avoid a declaration of arbitrariness in reaching a decision in disregard of or contrary to or without evidence, the courts will go no further in the direction of determining the weight in the event that the evidence is conflicting. This position of the courts is generally taken in conformity with the terms of the statutes setting up the agencies and setting forth their jurisdiction and powers.

By statute and by rules developed by the courts in the process of judicial review "an administrative agency is not only an operating instrumentality but it is usually the primary and exclusive tribunal of first resort" which has ousted the courts from original jurisdiction in matters affecting persons and property within the scope of its specialized knowledge. This means of

45. ABA Section of Judicial Administration, Brochure on Administrative Law 60(3) (b) (1943).
46. In re Segal and Smith, 5 F.C.C. 3 (1937).
47. COOPER, Administrative Agencies and the Courts 320-329 (1951) and cases therein cited.
50. MCFARLAND AND VANDERBILT, op. cit. supra note 19, at 489.
ousting the courts from jurisdiction by legislative authority is an important example of a trend observable in other branches of the law, such as workmen's compensation, arbitration, and Calvo clauses in international law,\footnote{For references to Calvo clauses see Indexes to Am. J. Int'l L. e.g., Spiegel, Origin and Development of Denial of Justice, 32 Am. J. Int'l L. 63, 70, 80 (1938).} where, either by statute or by agreement between the parties, recourse is no longer made to the courts in the first instance, or perhaps at all, for relief from injustice. The reasons for such a trend are usually given as the need for speedier settlements than judicial processes provide, or for specialized knowledge in the resolution of complicated situations. Both arguments are presented to justify the expansion of administrative law. In evaluating the merits of the substituted procedures, consideration must be given not only to the efficiency engineering methods thereby introduced into the law but also to the traditional merits of courts with respect to fairness and impartiality in deciding controversies.

One of the fundamental principles of sound judgment is that no man should be the judge in his own cause. In the administrative law field, the tribunals, unlike courts, are set up under statutes which charge them with carrying out policies. The more zeal with which they undertake to carry out those policies for which they are established, the less impartial the determinations of "adversary proceedings" are likely to be. That most administrative hearings are in form, if not always in effect, adversary proceedings is particularly notable in the methods of receiving evidence, which are consciously borrowed or adapted from rules developed by courts out of traditionally adversary situations. When the techniques of receiving evidence are expanded to include a principle like "official notice" which may well include special knowledge familiar to the agency but perhaps unknown to or disputed by the other side, the tendencies toward ex parte or self-serving statements, which judicial rules of evidence have been devised to guard against, are considerably increased. When the "whole record," even when it is carefully and formally prepared with an eye toward possible judicial review, cannot undertake to include information secured from agency files or existing in the minds of experts on the staff, there is obviously a fund of information which has actually gone into the making of a decision which neither a reviewing court nor counsel for the other side can reach. The efforts made by Congress in the Administrative Procedure Act\footnote{Supra note 21, § 1004(c).} to separate the functions of adjudicator from those of prosecutor in the same agency do little more than touch the surface of the problem of bias, with the result that charges of arbitrariness still are made by the people whose rights with respect to person or property may be affected adversely through agency decisions.

To point out that the administrative setup may be open to criticism from the standpoint of bias is not at all to imply that determinations may
have been influenced by "passion, prejudice, or personal hostility." Even where Cabinet officers have an important place in seeing that a government policy is carried out successfully, and may have expressed strong views on matters believed to be in issue, it is not to be inferred that they are ipso facto disqualified to serve in a judicial manner in a particular fact situation which may be affected adversely by the policy. This was pointed out by the United States Supreme Court in the Morgan case, where Mr. Justice Frankfurter said, "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are; both may have underlying philosophy in approaching a specific case, but both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."  

The difficulty with respect to bias reaches much further back in agency activity than the moment of adjudication. Of particular importance is the point where the initial investigation begins. It is acknowledged that the "exercise of investigatory power is one of the critical points of administrative law." Elsewhere it has been noted that "the principal testimony against the licensee is often that of the Authority's own investigator." Another implicit source of potential bias may occur where a hearing officer without legal training is "instructed" on the case before deciding it. To quote the Benjamin Report again:

It should be noted further that where a hearing officer is to conduct a hearing alone, with no other representative of the agency to present the agency's case before him, he must ordinarily know something about the case if he is to conduct the hearing effectively. Thus even if the hearing officer has had no contact with the case in its early stages, he must learn something about it before the hearing actually begins, and perhaps more than he can learn from the pleadings. It is obviously desirable that this process of instruction should be carefully limited to its proper purpose.

The same report goes on to note an even more subtle possibility of partisanship that a hearing officer or an officer carrying on conferences or negotiations should be constantly on guard against:

If the hearing officer participates too actively in the hearing, there is danger that he may develop a partisan attitude which will make impartiality difficult when he reaches the stage of decision or recommendation. The risk is substantial if he engages in rigorous cross-examination of the outside parties and their witnesses, and greatest if that cross-examination relates to credibility.

Besides the recognized difficulties of bringing out all the evidence

53. In re Segal and Smith, supra note 46.
56. Benjamin, op. cit. supra note 4, at 17.
57. Id. at 110.
58. Ibid.
necessary to prove a point at issue, there are also to be considered the psychological factors involved in fact-finding. One of the greatest hazards has to do with the very nature of a fact, and the tendency to ignore the necessity of interpretation of observed occurrences in nature that is implied. This necessity introduces subjective elements in testifying to the occurrence of a fact, no matter how sincerely objective the observation may be. Since the essence of administrative procedure is the need for better methods of complicated fact-finding than the traditional practices of the common law provide, it is particularly important to give special consideration to the nature of a fact. It is also necessary to keep in mind psychological difficulties like economic predilections which often unconsciously affect the attitude with which conscientious examining officers may approach an investigation. Especially in view of the finality with which findings of fact are settled in administrative agencies serving as tribunals of first and last instance, psychological hazards such as these take on considerable importance in meeting charges of arbitrariness.

The fact that an administrative hearing is in form an adversary proceeding offers additional implications of a rather subtle nature. Not only are hearings preliminary to adjudication usually adversary in form, but also hearings preliminary to rule making may at times have that character. When they do, there is necessarily some restraint placed upon the effective advocacy of the counsel for the outside party who may become subject to disciplinary action by the agency. The Committee on Administrative Practice of the Bar Association of the District of Columbia pointed this out in its Report in 1938 when it said:

It must not be overlooked that disciplinary proceedings before administrative agencies usually involve the prosecutor-judge combination, thus depriving the practitioner of important safeguards and assurances of due process of law. In such a situation there is an unfortunate latitude for the play of personal or political considerations as distinguished from those of a truly professional character. . . . Particularly where the agency is itself a party to a proceeding, and where an adversary atmosphere may be to some extent unavoidable, the possibility of disciplinary action by the agency would tend to impair the lawyer's independence in the representation of his client's interests as he sees them.

The risk an attorney must take is grave from the standpoint of penal sanctions in the event that he refuses or counsels a refusal to obey a sub-

59. Muensterberg, On the Witness Stand (1908) drew attention to the various interpretations which may be made of a single series of events observed by several people.
60. McFarland and Vanderbilt, op. cit. supra note 19, at 339.
61. Final Report, supra note 1, at 56.
poena that he believes an agency may have no right to issue. As the
Benjamin Report said: 64

Under a misdemeanor statute, however, a witness must, without
the benefit of a prior determination by a judge, take the risk of
conviction and punishment, if he thinks that the administrative
officer's ruling is wrong and refuses to obey it, and if it is later
decided in the criminal prosecution that he was mistaken in so
thinking. This is a good deal of a risk to impose on the witness,
and it is arguable that it is unfair to impose it, particularly where
the hearing officer is not a lawyer, or where the agency is in effect
an adverse party to the proceeding.

Adversary proceedings as a means of obtaining information have been
characteristic of the common law for centuries. In contrast to the procedure
of the civil law, where the judge takes more initiative in supplying himself
with information he considers necessary to decide the case fairly, the
common law judge has been accustomed to rely on the interests at stake for
the opposing parties to operate as incentives toward bringing out all possible
information favorable to those interests at the same time that unfavorable
information offered by the adversary is submitted to severe challenge. It
then becomes the judge's functions to weigh with scrupulous impartiality
the weight of that evidence introduced which remains unimpeached at the
end of the trial. The theory, supported by centuries of experience, is that
in this way the best relevant information obtainable on all pertinent aspects
of a case in issue will have been considered in reaching the narrow judg-
ment by which it is decided.

In criticism of the realities of this procedure as applied to individual
situations, it has often been pointed out that for one reason or another
all the relevant information has not in fact been introduced by opposing
counsel, or, if introduced, has not been properly validated by competent
challenge, and that, either on that account, or because the judge for one
reason or another, has not in fact viewed the evidence as objectively and
impartially as his office requires, the process at times results in injustice
rather than justice. It has also been criticized very generally for the diffi-
culty of presenting complicated scientific evidence according to adversary
methods, as well as for the great amount of time consumed by this
procedure.

Administrative procedures have been developed as a substitute for
traditional common law procedures in order to meet these and similar
criticisms. However, instead of developing a means of improving upon
adversary procedures they have retained them in form but eliminated
many of the safeguards in their operation which had been found necessary
on the basis of experience. And since, in administrative procedures, the
government is usually one party in interest, the effect of retaining pro-
cedures which are still adversary in form has been to place the government

64. BENJAMIN, op. cit. supra note 4, at 155.
in a much more advantageous position in every issue than the private party whose interests are at stake. The result has been that the traditional practices of the common law which were developed to protect individuals against unwarranted encroachments by king, crown, or government, have been utilized by our modern governments to assert and maintain the supremacy of governmental power over the citizens.

There has been much concern about inequality of bargaining power in enforcing the bindingness of contracts, especially in the field of employer-employee relations. It has been argued rather effectively that, in order for democracy to prevail in the economic sphere as well as in the political, coercion in maintaining contracts of employment is unjustified if there is in fact inequality of bargaining power between the parties. It is all but superfluous to point out that a single individual is pretty helpless against any coercion that the corporate strength of most modern employers could command unless association or governmental assistance comes to his aid. There has been much less thought given to the inequality apparent in administrative proceedings having adversary form but where practically all the powers of coercion are in fact on the administrative side.

Among the principles of the common law traditionally designed to protect the individual against unwarranted encroachment by the government upon his rights to life, liberty, and property, there are, in addition to impartial adversary trials, the provisions that a party called in any way to account for his actions before a tribunal shall have the right to know what the charges are, to be confronted by the witnesses against him, to have his day in court, or, rather, an opportunity to be heard, and to be represented by counsel. Especially in state trials, when the government is a party, usually as prosecutor, these traditional rights have been carefully safeguarded by the courts. And from time immemorial, it has been essential to fair judicial determinations that no man should serve as judge in his own cause. Perhaps the continuing charges of arbitrariness in administrative proceedings are largely due to the implicit abrogation of these guarantees in administrative proceedings in spite of the careful draftsmanship of the Administrative Procedure Act.

It is particularly significant that all these principles, recognizable by breach rather than observance, occur in the aspect of obtaining information on the part of administrative agencies. Because the very reason for the existence of agencies is their expertise, or expert knowledge of a specific subject-matter in a technical field, the private individual appearing before them is rarely in a position of equality with respect to general information in the field. When the information practices of requiring reports, making extensive investigations, and relying on the principle of official notice are permitted in all types of adversary proceedings, ranging from informal conferences to formal adjudication hearings, the inequality between the parties is obviously increased to such an extent that the answers offered
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by the private party may not be adequately responsive to the charges or questions directed to him because he does not know in fact with any degree of exactness what those charges may be. The witnesses against him have the refuge of anonymity afforded by the corporate activity of the agency. The “day in court” may be largely illusory because the decision affecting his interest may be based on much greater information in the possession of the agency than any he is notified of or permitted to produce or controvert. The subtle restrictions upon adequate representation by counsel because of potential disciplinary powers in the agency have already been noted. An additional obstacle is presented by the inability of the attorney to elicit necessary information from agency files, even if he is familiar with “bureau practice.” The principle that no man should be the judge in his own cause can scarcely be maintained in any degree in administrative matters because the very reason for the existence of the agency is the expertise or knowledge of a technical subject-matter which is involved. The provisions of the Administrative Procedure Act separating prosecuting from adjudicating functions undoubtedly constitute a definite advance toward fairer trials but they do not profess to meet the criticism inherent in expertise itself and the expert information it implies. Something more must be done to protect the private party in his dealings with administrative agencies, either by eliminating the form of adversary proceedings and recognizing them for what they are—instruments of government with governmental powers of coercion not unlike state trials—or by reintroducing into this branch of public law the traditional safeguards based on full knowledge which the common law painstakingly developed through the centuries to protect individuals against the insistent and often overpowering encroachments of government.

To point out these serious flaws in the legality of administrative determinations generally is not to imply that there have been no meritorious traditions built up already in the new field of administrative law itself. On the contrary, among the best of the agencies, there has been built up an experienced personnel which goes about its work with great conscientiousness. Not only is every effort made to be fair and impartial in balancing one case against another, either past, current, or possible in the future, but there occur more frequently within the agency than persons outside the government may believe, strong expressions of opinion on the citizen’s behalf. Criticisms can so seldom be made that decisions are based upon partiality or favoritism that it is almost safe to say that unfairness because of these factors is practically non-existent. Such injustice as is encountered by a citizen is much more likely to be attributable to zeal in serving what are thought to be the government’s—and therefore, presumably, the citizen’s—best interests than to taking a prejudiced position in an individual case. The fact that the citizen may be better served by

65. Supra note 21, § 1004(c).
less zeal on behalf of the government is not often considered when legisla-
tive provisons are in process of enactment but the effects must be weighed
in the future if the citizen's inherent rights against unwarranted invasions
of his privacy or property rights are to be adequately protected.

There is, of course, one very important aspect of administrative law
which must be distinguished from public law principles if improvements
are to be made, and that is the necessity of regulating corporate activity.
The confusion of thought which treats corporations like real persons66 and
thereby affords them the same protection against government regulation
as individuals are accorded has already led to great difficulties in our law.
Corporations as a matter of fact tend to become powerful leviathans no
less than governments do, and to have the same effect in developing
inequalities with respect to individuals. As with governments, many cor-
porate activities are benign and are welcomed by the majority of the
people. As compared with democratic governments, corporations, are,
however, less representative of popular interests, since the people generally
lack the opportunity to participate in policy decisions in the same way that
they do in government. Particularly in such concerns as public utilities,
when they cannot express their disapproval of policies by refusing to
patronize the business, the people have insufficient direct influence on
policy decisions and frequently have been so helpless with respect to rates
that they were in effect taxed, and thereby deprived of a proportion of
their property without opportunity to be heard. It has been resentment
against this type of arbitrariness which led the people to call upon the
help of the government against the corporations and gave rise to admin-
istrative agencies. It is ironic that although corporate arbitrariness has not
yet been fully controlled, the governmental agencies set up to bring about
reasonable control have themselves been criticized for arbitrariness, and that
criticism increases to the extent that the agencies have failed to provide a
satisfactory means of participation on the part of the people in their
decisions.

The right of the people to know, and to be heard in their own behalf,
is so essential to economic or political or any other kind of democracy
that any procedures which in fact limit these hardly won rights inherent
in human personality cannot be viewed with equanimity. Even though
such procedures may function smoothly and satisfactorily for a time, the
possibility of abuse must be anticipated as long as the theory upon which
they are based is fallacious. Conversely, if the theory at the base of legal
institutions is sound, like that of the Declaration of Independence and
the United States Constitution or of the common law itself, then the

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66. Rooney, Maitland and the Corporate Revolution, 26 N.Y.U.L.Q. Rev. 24-40
(1938).
institutions themselves are likely to function to the satisfaction of the people. Legal issues are won or lost first and last in the realm of ideas.

It is among the unfortunate coincidences in the history of ideas that the need for devising machinery for government regulation and protection against the excesses of corporate activity had to be met at a time when continental notions of law and government were being received rather uncritically in this country. An examination of the influential law reviews of the last half century discloses that the ideas of state supremacy expressed by jurists and philosophers like Kant, Hegel, von Ihering, Kohler, Stammler, von Gierke, and Jellinek, who wrote in German, were attracting as much interest as those who wrote in French like Durkheim, Duguit, and Sorel. Had their views been read critically, a healthy comparison of continental notions of state supremacy with American principles of self-responsibility and protection of the rights inherent in human personality could have been made showing the fallacies in theories of state supremacy, whether dictatorial or socialistic, which might have prevented the issue from being fought out again and again on the battlefields.

Instead, many young men in our universities considered them important because of their novel and learned sound, and used them as a reservoir of information out of which increasing criticisms of traditional American institutions grew. The presence of Harold Laski in this country during the catastrophic years of the first World War was instrumental in introducing some of our ablest young men at Harvard and at Yale at that time to Duguit and to Fabian Socialism. The fact that the first chair of Administrative Law, the Byrne Professorship, was being established at that very time at Harvard Law School, with Mr. Justice Frankfurter as first occupant, is very significant in attempting to understand how an instrument for needed governmental regulation of railroads, begun in 1887, became, after 1916, the archtype of administrative agencies of expertise whose practices the courts were persuaded to sustain under a mistaken view that the government knows best.

When the Interstate Commerce Commission was set up, it was established for protecting the people against economic imperialism. Not for many years afterward, until the theories of state socialism were carried in on the wings of so-called economic democracy, was it necessary to point out to the administrative agencies newly established by the legislatures that the people not only need protection by the government but also from the encroachments of government, and to recall the provisions of the Bill of Rights on an international scale.

The necessity of evaluating over again the premises upon which

67. See list of student editors, as well as of contributors, to the Harvard and Yale law reviews, especially between 1915 and 1918; also, for a criticism of Laski’s writings, see Rooney, Pluralism and the Law, 13 New Scholasticism 301-337 (1939).
current theories of administrative law are developed is particularly impor-
tant at present because of the advancement of administrative agencies to
such a dominant position that they constitute in effect a Fourth Arm of
the government. As a Fourth Arm, they can function through the inter-
pretation of statutes setting them up; through the drafting and promulga-
tion of regulations made in pursuance of the statute; through expertise, and
economic predilections; and even at times through "framing" the fact
situations upon which findings, consciously or not, are determined, in
order to put into effect far reaching rules which are subjected no longer
to serious legislative or judicial review. Indeed, if the practice in England
regarding "Henry VIII clauses" be copied in this country, administrative
agencies may even be authorized eventually to extend the statutes in such a
way as to effecuate a policy not fully spelled out by the legislature.

In appraising the significance of this Fourth Arm it should be kept in
mind that, unlike the legislature, in so functioning the agencies are not
staffed by direct representatives of the people. Unlike the executive, their
officials are not directly responsible to the people. And unlike the judiciary,
their rulings and decisions are not subject to review or to professional
criticism in the way that judicial opinions are. It is the theory upon which
administrative agencies function—the theory of expertise—which constitutes
at once their strength and their weakness. In order to preserve the desirable
features of technical competence and speed with which they operate, safe-
guards must be established both in theory and in practice, which will ensure
(1) that both the people and the agencies have greater knowledge of
each other's position than is afforded by "the whole record;" (2) that the
people be permitted greater opportunity to participate in the functioning
of the agencies; (3) and that the practice whereby the people are treated
as adversaries in their own tribunals is changed in accordance with the
traditional principles of public law devised for their protection.

In theory, administrative agencies are often thought of as a modern
attempt to introduce an element of preventive law into our legal system.
Adopting and improving upon equitable devices like the injunction in
certain instances, and modifying to some extent the declaratory judgment
technique of the courts, administrative investigations and hearings, par-
ticularly in the rule making stage, are intended to be remedial by anticipating
wrongs instead of waiting until after damage occurs. They therefore
constitute one important modern development in meeting the challenges
of Jeremy Bentham over a hundred years ago for desirable reform in legal
procedures. Because they meet a real functional need, they have grown

69. 59 A.B.A. REP. 547 (1934); McFarland and Vanderbilt, op. cit. supra note
19, at 666.
70. McFarland and Vanderbilt, op. cit. supra note 19, at 279; Schwartz, Law
and the Executive in Britain 57-65 (1949); and Sieghart, Government by Decree
134 (1950).
71. Landis, The Administrative Process 90 (1938); Bentham, Theory of
rapidly and extensively and are not likely soon to be replaced. It is exceedingly important, therefore, that they be continually examined and improved with respect to the traditional safeguards of life, person, and property for the individual citizen against unjustifiable encroachment by the government, which the experience of the common law has shown to be necessary for many centuries and under diverse conditions. If administrative agencies are in fact to constitute an acceptable Fourth Arm of government\textsuperscript{72} and not a supervening empire taking the place of legislature, executive, and courts, the basis of information upon which they act must be carefully watched over and continually revised in accordance with the soundest principles of knowledge and information that philosophy and psychology can provide.

\textsuperscript{72} \textit{Landis, op. cit. supra note 71, c. 2.}