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Address

on

# THE ADMINISTRATION OF FEDERAL LAWS AFFECTING BUSINESS

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By

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# THE ADMINISTRATION OF FEDERAL

# LAWS AFFECTING BUSINESS

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Federal laws relating to business are general in form and broad in substance. As compared with statutes dealing with easily defined rules of conduct laws affecting business depend for their effectiveness upon administration by individuals or bodies qualified to solve the complex problems inherent in present-day business.

Laws of this nature are not in any sense self-executing. Their administration, as applied to our vast national commerce, calls for such supervision and control over business as is sanctioned by the substantive provisions of the law itself. Efficiency in such administration can be achieved only by the use of individual judgment by officials, boards or commissions. These officials, boards and commissions, for the purposes of this discussion, may be referred to as administrative tribunals.

From the list of all Federal agencies of an administrative character, I shall consider only those which directly affect the general public, and which exercise either adjudicatory or regulatory powers or both. The Brookings Institution places seventeen important authorities within this category. It considers most of these authorities as being charged with the supervision and, to some extent, the direction of business and industry. Their outstanding characteristic is the power with which they are vested to issue orders, judicial in nature and having the effect of law, subject to court review.

It is with this group that we are here concerned. They operate in the fields of fraudulent business practices, unfair methods of competition, price discriminations, transportation, communication, food and drugs, businesses primarily concerned with agriculture, alcoholic beverages, water power, fuel, the tariff, labor relationships, finance, sales of securities, and others.

The development of administrative tribunals has taken place in the past fifty years, although up until 1914, when the Federal Trade Commission Act and the Clayton Act were passed, the function of such tribunals was largely confined to the regulation of railroads by the Interstate Commerce Commission created in 1887. The growth and development of the administrative process has received great impetus within the last few years, with the establishment of such new agencies as the Securities and Exchange Commission, the Social Security Board, the Agricultural Adjustment Administration, the Civil Aeronautics Authority, the National Labor Relations Board, and others.

As long ago as 1916 Honorable Elihu Root foresaw the inevitability of the growth of governmental regulation by means of the administrative

process. In his inaugural address as President of the American Bar Association in that year, speaking of the development of administrative tribunals, he said: "We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong-doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."

What accounts for this growth in number and importance of administrative tribunals? What are the forces which have brought them into being and are these forces increasing or decreasing in volume and intensity? Do these agencies, in theory or in practice, violate traditional concepts of fair play in the administration of public law and does the administrative process contravene the principles of constitutional government?

One seeking an answer to these questions finds a fairly substantial agreement among lawyers, economists and public officials, as well as among business men, that not only is it socially desirable for Government to exercise some supervision over business, but that there is a compelling need for a control that goes beyond the mere exercise of the policing function. There seems to be no dissent from the view that the complexity of our modern economy, the development of large-scale industry and the welding of our nation into an economic whole have pressed problems, relating to business and industry, upon the Federal Government which demand consideration and efforts toward solution by the central Government. Insistence upon action with reference to the problems of business has been exerted upon Congress by representatives of business, or of various segments of business. Some unprofitable but essential industries have asked for and received regulatory laws designed to rehabilitate them. Businessmen at a disadvantage, for one reason or another, in the present-day keen competition for trade, seek legislation to even the scales of the contest or at least to secure rules of conduct by which all must be governed.

However, it cannot be doubted that the forces which have brought about governmental intervention in business affairs cut much deeper into our social economy than would those brought about by a mere contest for profits. Dean James M. Landis, formerly a member of the Federal Trade Commission, attributes these forces to the rise of humanitarianism, to the growing belief that it is a function of Government to maintain a continuing concern with and control over the economic forces which affect the life of the community and nation. He says that the demand has been, not only that Government maintain ethical levels in the economic relations of the members of society, but that it provide for the efficient functioning of the economic processes of the state. Mr. Justice Frankfurter in a very recent opinion said that modern administrative tribunals are a response to the "felt need of governmental supervision over economic enterprise — a supervision which could effectively be exercised neither through self-executing legislation nor by the judicial process."

Others explain the increase of administrative tribunals as resulting from pressures exerted by social maladjustments, by the

growth of monopolistic tendencies, by the concentration of wealth and economic power, by broadening concepts of the functions of Government, and by the inability of the states to cope with nation-wide business.

Whatever the moving force or the reasons for it, it seems fairly clear that by 1914 the demand for some more effective governmental restriction on business practices had become so insistent as to make legislation inevitable. It is true that the Sherman Law had been on the statute books for over twenty years, but it was obvious that at that time it had not realized the hopes of its sponsors in combatting the evils which it was designed to prevent. The problem of Congress has been to fashion the instruments to be used for the administration of the laws so insistently demanded. The outcome has been the creation of administrative bodies acting under grants of varying degrees of restrictive power.

To some tribunals having authority over industries "affected with a public interest", the power of regulation is conferred by statute. In this domain we find governmental fixing of rates, grades and standards, and various requirements of those who seek to engage in the business. In the region of private enterprise, as distinguished from the public interest field, Federal administration has stopped short of this broad control and has dealt with such measures affecting business as the maintenance of free, fair and open competition, the protection of consumers, the establishment and administration of a system of social security, the enforcement of minimum wage and maximum hour standards for workers, the prevention of fraud in the securities field, the fixing of tariffs at economically justifiable levels and other social and economic objectives.

There is substantial agreement among businessmen, economists and leaders in political life that some effective supervision of industry by the Government is not only wise but imperative.

However, the problems of present-day business are so complex that they cannot be solved by resorting to simple codes of conduct.

As was said by Chester T. Lane, General Counsel of the Securities and Exchange Commission, recently:

> "Business and industry are no longer simple and the rules required for their control are exceedingly complicated; they are no longer rules indeed, but codes of regulation as ramified as the business they regulate. Administration, therefore, no longer entails merely prohibition, but the sympathetic understanding of complicated business facts, uniformity of approach, and a constant time-consuming supervisory interest. These are the minimum demands of business itself. Successful administration in the narrow fields of social and economic enterprise entrusted to the administrative agencies requires in addition sensitive awareness of the legislative intent, a keen recognition of the source of abuse and evasion against which the legislation was aimed, and a constant zeal for justice and the public welfare."

In approaching the problem of legislation in the field of business, Congress is met by an array of complicating factors which precludes the possibility of framing laws aimed at concrete offenses capable of exact definition. The task is analogous, to the problem of undertaking to define fraud, nuisance or negligence. The courts for years have had the problem of formulating definitions of these terms concise enough to permit a judgment in advance as to whether a particular set of facts lies within or without the statute making such conduct unlawful. The courts have declined to define these terms except in generalities and have many times doubted the wisdom of attempting to narrowly define them. For example, it has been said that owing to the multiform characteristics of fraud and the great variety of attendant circumstances, no definition which is all-inclusive can be framed, and so each case must be determined on its particular facts. Practices and methods in business are equally multiform in character and attended by an equally great variety of peculiar circumstances.

Faced by this problem the legislative branch of the Government is forced by the very necessity of the situation to lay down a public policy in general terms and to delegate authority to some officer or tribunal to carry it out.

The Supreme Court of the United States has spoken approvingly of legislation by generality. In commenting on the Sherman Act it said that this statute exhibits "a generality and adaptability comparable to that found to be desirable in constitutional provisions. "It does not", said the Court, "go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape."

With the gradual acceptance of the idea that the Federal Government is charged with the responsibility of promoting the economic health of the nation, Congress has passed many laws affecting business. Practically all of these laws have been couched in such general terms as to make it difficult to draw a line between compliance and violation.

For example, the Federal Trade Commission Act declares generally that unfair methods of competition and unfair and deceptive acts and practices are unlawful. The Clayton Act prohibits price discriminations unless justified by differences in cost, and where such discriminations lessen, injure, destroy or prevent competition or tend to promote monopoly. The Transportation Act provides that all charges for transportation shall be just and reasonable and prohibits every unjust and unreasonable charge. The Stockyards and Packers Act makes it unlawful for a packer to use any unfair, unjustly discriminatory or deceptive practice or device or to give any undue or unreasonable preference or advantage to any person or locality.

It is obvious that to apply such general standards as are found in these laws, a broad factual background must be afforded and after the facts are assembled a skilled and informed judgment is required to effectuate the legislative policy. Such laws and others which could be cited demand administration by trained and experienced bodies.

No doubt some grants of authority contained in existing laws could be restated in more definite statutory language, but it is to be doubted whether dependence can be placed on the hope that more detailed and specific enactments are to be expected in the future. The trend has not been in that direction.

Some of the criticisms directed at administrative tribunals are, that the use of the administrative process sets up a system of Government by men instead of Government by a code of law; that the system of administrative law contravenes the constitutional provisions separating the three powers of government; that administrative tribunals offend against traditional concepts of justice by acting as investigators, prosecutors, juries and judges.

It is much easier to advocate a Government by law as opposed to a Government by men than it is to define the respective terms or be specific as to how the former may be achieved. Government by law is a generality expressing an ideal which has never been attained in practice. As long as laws are enforced and interpreted by men, the human element will always be a factor in their execution. No system of democratic Government has ever been devised which does not contemplate the exercise of individual judgment by those charged with its administration.

Government by law is Government by hard and fast rule. The assumption of those who advocate this theory is that it is possible for Congress to formulate a rigid and inflexible code of business law and that it is desirable that this should be done. Furthermore, this position is based on another premise that discretionary power may be withheld from those enforcing the broad legislative policy without paralyzing its administration and effectiveness. Neither of these assumptions will withstand analysis.

The pioneer antitrust act, the Sherman Law of 1890, declared that every contract, combination or conspiracy in restraint of trade or commerce is unlawful. The Supreme Court of the United States in 1910 decided that the statute was to be read in the light of reason, and that only contracts, combinations or conspiracies which unreasonably or unduly restrain trade are illegal. Justice Harlan, in a dissenting opinion, warned the majority that the injection of the rule of reason would lead to the greatest variableness and uncertainty in the enforcement of the law, that there would be as many different rules of reason, as cases, courts and juries.

Since 1910 the authorities charged with the enforcement of the Sherman Act, with no guide except the nebulous rule of reason, have, of necessity, been exercising a discretionary power of determining which cases should be prosecuted and which closed without prosecution. Further than that, in cases in which prosecution was decided upon, there was a discretionary choice between civil suits for injunctive remedy and criminal action. If a civil action was the remedy chosen, such a suit could be settled, with the court's approval, by a consent decree. In cases tried in the courts, the interpretation of the law, as applied to the facts, came before the court for determination. This

entire process is regulatory in the same sense that the administrative process is regulatory, and involves the use of executive and judicial powers by the enforcing officers and the courts.

By citing this example, I have no intention to criticize. I am merely attempting to show that business is regulated under the traditional system of judicial process no less than by the administrative process, and that the so-called separation of the three powers of Government exists as an ideal rather than as a working hypothesis. The Sherman Act and the procedure of enforcing it by judicial process can scarcely be described other than as a combination of regulation by law and by men.

I am persuaded that some of the criticism of reviewable administration by responsible and responsive commissions or boards on the ground that it is inconsistent with the rule of law is based upon a hostility toward any governmental intervention in the business life of the country. The effort to vest the courts with authority to weigh the evidence upon which the administrative agency acts and to overrule the administrative findings as to the facts by a separate judicial appraisal of them is an indication of this viewpoint. Such change, in my opinion, would so fetter the administrative process as to seriously cripple it and would definitely discard the fundamental theory, sanctioned by the Supreme Court, that administrative tribunals and the courts operate in different spheres and each has its own function to discharge.

In a very recent case, the Supreme Court of the United States distinguishes clearly the difference between administrative and judicial tribunals. After calling attention to the fact that modern administrative tribunals are the outgrowth of conditions far different from those which have determined the basic charcteristics of trial procedure in the courts, the Supreme Court points out that each tribunal has a province of its own and that the rules governing the courts are not applicable to administrative tribunals. The Court states that administrative agencies should be free to fashion their own rules of procedure having regard to due process of law and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.

As administrative tribunal, charged with the responsibility of administering a statute laying down public policy in broad terms, of necessity must implement the law to practical realities; in fact, in some cases the statute makes this process mandatory.

Inevitably there are persons who disregard the statute or take issue with the administrative determinations. These the administrative agency must proceed against, if the law is to be enforced.

In this event, a proceeding charging a violation of law comes before the tribunal for determination on the facts which have been assembled. It must determine whether the facts disclose a violation of law. If the determination of the tribunal that the law has been violated is to be made effective, an order restraining further

violations must issue. As an example of the procedure used by some of the administrative tribunals charged with the duty of administering laws affecting business, I may describe briefly that followed by the Federal Trade Commission, with which I am most familiar, and which is the outgrowth of the Commission's experience over a period of twenty-five years.

In a typical case, upon the receipt of a complaint that the law is being violated, the Commission directs that a preliminary investigation be made by its examiners to secure the facts involved. During this investigation the person or company complained against is interviewed and given an opportunity to justify or explain his conduct. The facts as assembled by the examiner are reviewed by the Chief Examiner, who reports them to the Commission. In certain cases, such as false and misleading advertising, the Commission may extend to the party complained against the privilege of disposing of the proceeding by stipulating that he will discontinue the use of the methods charged as being unlawful. In the more serious and important cases, such as those involving a restraint of competition, if the Commission has reason to believe the law is being violated, it directs the issuance of a complaint. This action in issuing the complaint is in no sense an adjudication of the case on its merits, nor does it raise any presumption against the party named as respondent.

The complaint is served upon the respondent. He is given ample time to answer its allegations. Hearings are held before a trial examiner and the testimony offered in support of the complaint and in support of the answer is recorded. A respondent may appear by counsel and has the same rights of cross-examination and of introducing evidence in his own behalf as is afforded a party to a proceeding in a court. A respondent may take exception to rulings made by a trial examiner at the hearings and may argue his exceptions before the full Commission.

The trial examiner makes a report of the facts as shown by the record to the Commission. The respondent is furnished a copy of this report and may point out by exceptions alleged errors. He may file a brief setting forth his contentions as to the facts or the law. The case is then argued on its merits before the five members of the Commission, who individually and collectively consider the matter as presented by the record, the briefs and the oral arguments. Decisions are made by a majority of the Commission. If the decision is adverse to the respondent an order to cease and desist from the practices found to be in violation of law is issued.

A respondent in every case has the right to appeal to the Circuit Court of Appeals from any order to cease and desist. He may call to the Court's attention any finding of fact which he alleges is not supported by the evidence. The Court passes upon the validity of such findings and the correctness of any conclusions of law drawn by the Commission in issuing its order. A respondent unsuccessful in the Circuit Court of Appeals may apply to the Supreme Court of the United States for a further review.

At no stage in any proceeding conducted by the Commission is a respondent denied a full opportunity to defend against the charges in

the complaint. It is a firm policy of the Commission to give to all respondents the widest latitude in meeting the controverted points at issue in the proceeding.

The fusion of the power of prosecuting law violations with the function of deciding controversies and issuing orders has given rise to some of the current criticism of administrative agencies. From the standpoint of law enforcement, there is a definite practical advantage in having the body which assembles the facts review them and determine whether there has been a violation of law.

There has never within my knowledge, been a denial of the right to appeal to the judiciary from the final action of any administrative tribunal. The validity of the final action of an administrative tribunal has always been subject to the reviewing power of the courts. In fact, most administrative tribunals must appeal to the courts for decrees enforcing their orders. If the constitutional rights or liberty of the individual are denied or limited by an administrative order, the courts are always open for redress. It is noteworthy that, despite the criticisms of administrative procedure, the courts, in the past 20 years, in only an insignificant number of cases have found administrative agencies denying individuals fair hearings and procedural due process of law and in these cases the courts have set up guideposts which are not difficult to follow. Able counsel in hundreds of cases have not convinced the judiciary that their clients have been deprived of any fundamental rights by administrative action. There are countless cases which never reach the courts and in which no contention of prejudicial deprivation of lawful rights has been made before the administrative authorities.

Speaking once more of the Federal Trade Commission, I call attention to the fact, disclosed by an examination of the Commission's orders which have been reviewed by the various Circuit Courts and the Supreme Court, that in no case has it ever been said by a judicial tribunal that the Commission's procedure did not meet the requirements of due process of law. In other words, the Courts have always considered in the cases which they have reviewed that the Commission has afforded respondents a fair and full hearing.

The Supreme Court said recently that the term "fair and open hearing" embraces not only the right to present evidence but a reasonable opportunity to know the claims of the opposing party and to meet them. It added that those who are brought into contest with the government in a quasi-judicial proceeding are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. As far as the Federal Trade Commission is concerned, I can say that its procedure has always met this test and that it has never denied a respondent a fair opportunity to refute the charges made in the formal complaint. In addition, I may state that the decisions made by the Commission in controverted cases have been the result of careful judicial consideration in a spirit of complete impartiality and fairmindedness.

It has been said that the administrative tribunals violate the ancient common law principle that no man shall be a judge in his own

cause. This doctrine is one which is indispensable to the integrity of our judicial procedure and no one will question the need for it or its fundamental soundness. However, as used at common law, this maxim means that no man shall be the judge of a cause in the outcome of which he has a pecuniary or personal interest. I am unable to follow the reasoning of those who argue that a prohibitory proceeding conducted by an administrative tribunal is that tribunal's "own cause" in the common law sense, or that the tribunal is interested in the outcome, either from a pecuniary standpoint or otherwise.

The administrative agency has the same interest in a proceeding before it as a district attorney or a judge on the bench has in a case in which the public interest is involved, that is, as public officers to discharge their sworn duty to aid in the enforcement of the public law. The standard measuring the competency of any of these public officers or agencies should not be, and I do not believe that it is, the number of orders issued or convictions obtained.

Active adherence to and sympathy with the policy of the law is essential to its effective execution. A lack of sympathy by any law-enforcing officer for the law he is charged with upholding tends to paralyze its execution. In my opinion, as far as administrative acts, subject to court review, are concerned, interest in favor of enforcement is preferable to lack of interest. It is not difficult to attack the spirit of endeavor on the part of administrative agencies as being evidence of preformed judgments and prejudicial methods. Such attack is nevertheless unwarranted.

Much of the controversy over administrative procedure has arisen through differences of opinion as to the function of reviewing courts in weighing findings of fact made by administrative agencies.

The Courts have the authority to review findings of fact which are challenged as not being supported by evidence. Some current proposals contemplate that the courts shall be permitted to reweigh all the evidence. This would not only add tremendously to the existing volume of work of the courts, but would also place upon them the burden of assuming the primary function for which administrative bodies were created. It is my belief that as long as an administrative agency acts fairly and not artibtarily and an opportunity is afforded to all interested parties to present all pertinent facts surrounding a controversy, and as long as conclusions of law and mixed conclusions of law and fact are reviewable by the courts, there is no necessity of burdening the courts with fact-finding in order to make certain that no person will be deprived of substantial rights.

In this discussion limited by the necessities of time, it has not been possible to do more than to generalize on the more important features of this subject.

My conclusion is that the administrative process is a constitutional and effective means of enforcing the federal laws affecting business; that criticisms in many cases are directed at the policy of the law rather than methods of administration; and that while no doubt there are measures of improvement which could be applied, there is no present

necessity for drastically changing either the function or design of the administrative process. Revisions and modifications, where the need for them has been demonstrated, can, in my judgment, be effected without paralyzing or dismembering the administrative tribunal or appreciably restricting its present sphere of action.

The administrative process, in my judgment conforms to our ideals of democratic government. Administrative tribunals are created by Congress representing the people, and Congress grants the authority by means of which they function. The rights of individual citizens, subject to the inhibitory provisions of the legislation, are safeguarded, both by procedural requirements laid down by the courts and by the right of appeal to the courts. In no sense is the administrative process undemocratic or alien to our concepts of popular government so long as it stays within these limits.

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