Administrative Law—Problem Child*

By E. BARRETT PRETTYMAN,
Associate Justice, United States Court of Appeals for the District of Columbia

Your chairman's generous reference to the happenstance that this Section was conceived during the year of my turn as president of the Association, gives the reason for my place on this program. Some recognition was due the venerable putative progenitor of the present lusty outfit. As a further preliminary, I take it that we all understand that nothing that I may say has the slightest relation to my position on the bench. I am not, of course, speaking for the court, and I shall say nothing in any official capacity. My interest here is that of a retired fellow practitioner and a former administrative official, concerned in the problems which we all have and in which we take such great delight.

We are in the midst, perhaps in the precise crisis, of the development of a great field of law. It is not too great exaggeration to say that the development of administrative law is akin to the development of equity in importance. That development poses problems.

I have a very simple thesis to present. It is that there are vital problems of a procedural nature in the field of administrative law, that they are best solved by a cooperative effort of the agencies and the bar, and that yours is the organization which ought to lead the way.

Let us state some premises. They are trite. The administrative agencies are essential features of a government designed and equipped to govern a complex economic society. They are, therefore, permanent. So it is idle to rebel against them or to protest their existence. To be a little more direct, or perhaps we might say "earthy", about it, the administrative practitioner should be the last of all humans to complain at the fact of administrative agencies. His concern should be for

* An informal address to the administrative law section of the Bar Association of the District of Columbia.

perfection of the system and hence its more certain perpetuation and expansion. We discuss the problems, not in criticism but constructively as subjects of interest, both theoretical and directly practical.

We do have problems. Some of them are procedural. I have said that they are vital. Too many people in the administrative field say that merely procedural matters are of little importance. They are wholly wrong. In the first place, many things which our people hold most precious are procedural. Due process of law is one. Trial by jury is another. A search warrant is another. Ceremonies are merely procedural, but some of them, such as taking an oath of office, or getting married, are pretty important.

Not only is that so, but a major part of the public appraisal of government activity is based on procedural considerations. If a judge proceeds with care and deliberation, in calm order, people generally trust him. When stress comes they support him. If a judge is impatient, disorderly, uncertain, people generally do not believe in him as a judge, even if his answers on substantive matters are right. Curtis Bok, in his "I too, Nicodemus", says that impatient judges ought to be impeached. It is true in all phases of life. If the clerks in a store are discourteous, people do not trade there except for the most compelling reasons. The goods in a shop must be superlative in quality and almost unobtainable elsewhere to attract customers in the face of discourtesy on the part of management and salesmen. "The public be damned" is an impossible premise for successful activity in this country, in purely procedural matters as in substantive matters. It applies in business, in the professions, and with equal force and weight in government.

Of course, I am not minimizing the vital value of substantive policy, program and rulings. But we can put it down as a certainty that if the administrative agencies, or an administrative agency, is defective in its adjective aspects, or if it appears to be so, it is headed for public condemnation. Joe Doaks comes before the agency for something and gets pushed around, or forms a low opinion of the proceeding itself, and he is just as mad as he is about an adverse decision; and usually he is much more vociferous about it. He proceeds to tell all and sundry

about what strikes him as not fair. If an umpire "calls 'em quick and as he sees 'em," Joe may yell and gripe, but in his heart, and when things get rough, he supports that umpire. But if the umpire delays and is generally inefficient in reaching a decision, Joe has no use for him whatever, no matter if his decision is right. So I proceed from the general premise that the procedural aspects of administrative action, the same as any other action, are of prime importance—in fact vital.

I shall not attempt a list of our problems and shall mention only three. The first is our professional craftsmanship as lawyers. By craftsmanship I mean the ability to write pleadings and briefs, to examine witnesses, to cross examine them, and to introduce testimony. The fact is that our profession as a whole is woefully deficient in craftsmanship. We pay little or no attention to it, either in our processes of education or in our practice. I would not overemphasize practice courses to the detriment of substantive law, but I do think that we ought to teach law students not only how to write a will, or a contract, but how to write one well. We teach them all the psychological principles underlying judicial proof, but we ought also to teach them how to ask questions, directly, succinctly, and accurately. Hundreds of lawyers are trying cases upon the general theory that anybody can try a lawsuit. The result is that we take weeks to try issues when a few hours would readily suffice. Justice often miscarries in such process. There is something to be said for the British system of barristers. Francis Wellman says that an experienced trial laywer will require at the utmost not more than a quarter of the time taken by the most learned inexperienced lawyer, and moreover will be more likely to bring about an equitable verdict which may not be appealed from at all, or, if appealed, will be sustained by a higher court. It is true.

Other professions pay great attention to craftsmanship. Doctors have to undergo long internships before they are turned loose on the public. Preachers have to preach sample sermons in the course of their education. Engineers do not let a graduate fresh out of school go to building bridges and structures without senior supervision, and the tests of their ability are practical tests. I truly believe that if we as lawyers learned how to do

most efficiently the things we do, whether it is to write a contract, construct a bond issue, draw a will, examine a witness, write a brief, or make an argument, the administration of justice would achieve a major advance in this country—perhaps even the critical advance necessary to the preservation of our system.

We here are not interested in court trials. But the lack of craftsmanship, so generally prevalent in our profession, is a characteristic of our administrative proceedings. And in those proceedings the need of skillful trial technique is even more acute than in the courtroom. In the first place, the matters being handled are vastly more complicated than ordinary lawsuits. Hence a mixup is worse, and the truth is harder to find. In the second place, the administrative agency is promoted as an instrument of efficiency, and if it be not efficient, public criticism comes quickly. When we as lawyers, by lack of technical skill, so delay disposition of disputed cases as to prevent efficient operation, we are threatening injury to the system we ought on all accounts to be protecting. And when I say "we lawyers" I mean attorneys in both Government and private practice. In the third place, the ordinary rules, such as the rules of evidence, or pleading and the like, which, whatever else is said about them, certainly tend to keep a semblance of order, are relaxed. The skill of counsel becomes one of the chief preventives of chaos.

May we be a little more specific and consider separately the phases of our procedure in disputed cases? They are the presentation of direct evidence, cross examination, a brief and an argument. The results of defective craftsmanship in these matters are days and weeks of wasted time, volumes upon volumes of records, dollars and dollars of expense, and total uncertainty as to the outcome.

The difficulty in the presentation of direct evidence comes in major part in the lack of preparation in the mechanics of the hearing. I sat once in an administrative proceeding in which a young lawyer introduced over 200 photostats of individual letters, one at a time by individual identification by a witness over a period of days, after opposing counsel had offered to stipulate the identification of the whole batch in a blanket stipulation. The young lawyer said that he chose to try his case in his own way and would appreciate no suggestions. On the other hand, I

once looked with joy at a record where counsel said to a witness, "You have prepared a study upon such-and-such a subject in relation to this company? Did you incorporate a narrative statement explaining the computations? Do you adopt the statement and the computations as your sworn testimony? Is this it? I offer this exhibit. Take the witness." Copies of the study had long before been furnished opposing counsel, and cross examination could have proceeded at once and directly at the controverted items in accordance with a well and carefully designed cross examination with a purpose. It is quite a chore to prepare adequately the presentation of direct testimony, but we ought to be required to do it. It is amazing how quickly and how accurately a skillful examiner can draw a word picture from a witness, even of a complicated subject.

I know that lawyers are trained to believe that questions and answers on one small topic at a time constitute the only method of proceeding in a formal hearing. I suggest to you that that may not be so in administrative hearings. We are not before a jury or before a trial judge who must decide the case largely upon what he hears and has not the time to analyze great masses of evidence or to wait for such analyses. The examiner, or board, or commission does not make findings from what he or it hears. The findings are drawn from the formal written record. Our proceedings have three essentials: First, all the evidence placed in a formal record; second, full opportunity to dispute items of evidence by cross examination or by contradictory evidence; and, third, an analysis and summary of the evidence, either in the form of proposed findings or in the form of a statement of facts, so that the formal evidence is accurately directed at the issues in dispute. Our object is not to convince a listener, or to mold a decision instanter. Our object is to convince a reader and to shape a decision which will be fashioned from a stenographic record and documentary exhibits in an unhurried analysis and assembly. Our administrative hearings differ from the usual court proceedings in these important characteristics. We ought to discard the mechanical limitations of the one and design an efficient system of mechanics for our type of proceeding. An administrative proceeding offers no prizes for histrionics; it is the building of a wall, brick by brick.

One respect in which our presentation of evidence is particularly deficient is our handling of voluminous statistical data. We have it in exhibit form, and then we spend hours and days having a witness read long figures into the stenographic record from the exhibit. I do not know the best way to do it, but I do know that a well-prepared exhibit, plus a narrative guide, either oral or written, showing how to find one's way through the exhibit, is a completely sufficient method. I also know that the way we generally do it now is an outrageous waste of time and money and the very antithesis of efficiency. And I also know that if we tried we could devise a method for handling such evidence efficiently and sensibly. The critical feature of statistical data is the summary linking it to the issues. Most of the bulk of it is superfluous.

Another point at which our technique in the presentation of evidence is askew is in the proof of a scientific fact. We have many controversies over scientific facts in administrative proceedings—wave lengths, car safety, electric energy, rate at which ice melts at certain temperatures, and innumerable others. Our method of proof is for one side to employ an expert and have him answer questions. Then the other side employs an expert who testifies to the precise contrary of the first expert. And the same process repeats. The examiner, or the commission, then does the best he or it can to figure the truth from the direct contradictions. It does seem that in an age of complicated scientific facts, with plenty of learned folk who know accurately and fully what there is to know about these facts, the legal profession ought to be able to devise some technique of proof which would insure that decisions of disputed cases involving scientific facts or theories are upon an accurate basis.

Although we are deficient in our craftsmanship on direct examination, we are much more so on cross. A cross examination without plan or objective is not only useless but is a positive impediment to the administration of justice. All of us have known so-called cross examinations to go on for days and weeks when, as a matter of fact, nothing was occurring except an argument, more or less acrimonious, between witness and counsel. The practice is so general as to be, in my opinion, a major problem. It exists both in Government circles and at the private

bar. I teach my class at Georgetown that the rule as to cross examination of experts is "Don't", that there are a few well-defined exceptions to that general rule, and that unless the situation falls within one of those exceptions, they should not indulge in cross. Perhaps the statement is too strong, but I believe it to be true.

The problem of cross examination is particularly acute in administrative proceedings, because there we deal so much with experts in complicated fields. I have never known an expert to change his view because of a cross examination. I have never heard of one doing so. And Mr. Wellman says one never does. A cross examination may serve to throw into relief the weaknesses of his material, his knowledge or his reasoning, or it may supply the basis for impeachment of his credibility but he will never change his mind on the witness stand. Nevertheless, the great majority of lawyers go into a cross examination with the idea that they can argue or harass an expert into changing his answer. That is a complete waste of time. Of course, before a jury, the passing impressions created by a great actor in cross-examining a witness may serve some useful purpose. But in the administrative practice, we are addressing ourselves to a cold, impersonal stenographic record, from which the examiner, or board, or commission will, in deliberate fashion at some later time, extract the facts. It is poor craftsmanship and a definite drag on the process of adjudication to indulge in cross examination without a plan or definite purpose.

Just a word about craftsmanship in briefs and argument, although a full evening could be devoted to the subject. Every disputed case consists of issues. The agency or the court must decide those issues, and when the issues, are decided, the general result is automatic. Good craftsmanship on the part of counsel in brief or argument consists of defining with precision those issues, assembling the evidence pertinent to each, and then stating a process of reasoning from the pertinent data to a conclusion. Do you think that most of us follow that obvious procedure? We do not. Generally speaking, we write, or worse yet merely dictate, a discussion of the case, a general plea for justice, or mercy, an allegation in vehement terms that our opponent is in error, and top it off with a few

selected sentences torn bodily from all context in some cases or textbooks. We make statements of points, such as "The court erred in failing to grant a new trial" or "The commission erred in finding a rate base of $10,000,000" or "The findings are without substantial evidence in support." When we make this last point, do you think that, generally speaking, we lawyers assemble whatever evidence there was in support of a given finding, then state what necessary evidence was lacking, and then proceed in discernible thought processes to show that the evidence present was not substantial in the absence of that which was lacking? We do not. It is sad but nevertheless true that as a class we do not *argue* cases. That is, we do not start with a stated material and proceed in some ordered mental processes to a conclusion. We generally write and speak discussions of the subject, treatises, or just plain pleas.

The second problem I submit to you as besetting the administrative practice is more difficult to state. Justice itself is substantive. But the administration of justice is procedural. Americans have a definite conviction upon that subject. It is not theoretical. It is composed of exceedingly simple, practical elements. The essentials of the American concept of the administration of justice are (1) that opportunity be afforded to present evidence of the facts, (2) that the facts be found exactly as they actually are, to the best of our ability to ascertain them from the evidence, and (3) that the applicable rules be applied, without deviation, to the facts as found. It is just as simple as that.

Much has been written and spoken to the general effect that administrative agencies, or some of them, do not comply scrupulously with those simple rules. It is said vigorously and repeatedly that some agencies find what facts they please, on the barest shadow of evidence, and reach whatever conclusion they have predetermined.

I have no word to say as to whether such allegations are or are not true. My proposition is that the administrative agencies must comply with those simple elements, and not only must they comply but it must be apparent to all who see their work that they comply. It is necessary for the existence of the agencies that they protect themselves, and that we, as practitioners before them, protect them from any reputation of being

arbitrary. The course of any agency to the contrary is to the detriment of all agencies, and of us.

Torchs can properly be carried in the process of fixing policies and programs, when substantive principles are being determined. Such principles can be debated in the abstract and tested upon reason, or theory, or experience. If an agency adopts erroneous principles or program, that is the concern of the whole of the executive branch of the Government and of the Congress. But on the other phase of administrative agency work, that is, in the application of those principles to individuals, no torches can be carried. That is where the greatest danger lies. The process of dealing with the individual and his rights in a disputed matter must accord with the American concept of the administration of justice.

In the first place, our whole concept of law is that reason should control human conduct. Professor Thayer (3 Harv. L. Rev. 143; 4 *id.* 157) said it thus, "But as we use the phrase 'trial' . . . now, we mean a rational ascertainment of facts, and a rational ascertainment and application of rules. What was formerly 'tried' by the method of force or the mechanical conformity to form, is now 'tried' by the method of reason." In the second place, our political concept as embodied in the Constitution is "due *process* of law." And by that phrase we mean a process in which facts are found as they are and rules are applied to the facts as thus found, with cold-blooded objectivity.

The proposition I have put can be conclusively demonstrated on either of the two foregoing bases. But of still greater practical importance is the fact that the public will not permit the continued existence of any agency of government which in its estimation is not fair. That is just a simple political fact. I put it as a scientific certainty that when the people of this country became convinced that a given agency, or officer is arbitrary, or unjust, or unfair, that agency or person is doomed. Congress will surely obliterate it. You can pick your own examples. Prohibition was perhaps the outstanding one. The people did not repeal the 18th Amendment because they wanted liquor back. They could have brought back such liquor as they needed by some controlled method. They wiped the whole business out because the enforcement of the law was so outrageous that

gradually it became a scandal. There are other instances where the substance of the law is uncontroverted in excellence but the methods of enforcement have led the people to destroy the whole business. You may think of examples where the conviction got abroad, however, unjustly, that an agency did not find the facts as they really were, or was not wholly objective in applying the rules to the facts. Those instances stand as tragic warnings against the appearance or the reputation of arbitrary action. On the other hand are those agencies which have built up over the years reputations of cold-blooded objectivity in disputed cases, and when the storms came and beat about their heads, the public came to their support. When that happened, hardly a corporal's guard was in the opposition when the issues were drawn. You can hardly exaggerate the importance of a conviction on the part of the whole public that when a dispute is submitted to a given board or commission, no matter whether the parties be great or small, powerful or important, the facts are found exactly as the evidence shows them to be and the rules are applied to those facts with unvarying objectivity. The validity of policies and programs can be discussed and debated upon a high plane and with reasoning. They are political matters, or matters of substantive law. But the public will have no part of arbitrary administrative action as it sees it. Its dealing in such instances is ruthless and oftentimes tragic.

And to comply with the requirements is such a simple matter. Over and over again we hear arguments and protestations about why a hearing was not granted. In 25 years of administrative law, inside and outside the Government, I assure you that I have never heard a good reason for not having a hearing in a dispute, and I have never known an instance in which any time was saved by not giving a hearing.

The public mind is a strange instrument. The science of governmental regulation and of law enforcement is a complicated and fascinating study. Many characteristics of public thought which are dramatic and maybe alarming, are superficial. For example, a mere gripe is not a real objection. And pressure groups are often infinitesimal in public influence. But there are certain fundamentals which are as invariable as scientific truths. People not only do not relish unfair treatment

for themselves, but they resent it for their neighbor. And they not only resent such treatment *against* their neighbor, but they resent it in his favor. If an American learns of a favor unjustly bestowed upon another person, even one he does not know, he resents it in the same sort of way he resents an unjust imposition on another person. The essence of success in government regulation, or of any law enforcement, is public approval of the conduct of the administrator. You cannot hire enough agents to enforce a law in this country, if the public does not approve that enforcement. By approval I mean fundamental approval, not spasmodic or vociferous acclamation. If the public does not approve, witnesses will not cooperate, juries will not convict, observers will not report violations, and every Tom, Dick and Harry will make a point of ignoring the law or regulation just for the principle of the thing. And finally Congress gets around to it. Therefore, wise regulation is based upon the simple conduct of cold-blooded objectivity which creates a public confidence and approval, an unshakable rock upon which to stand. In and of itself, that approval results in law observance.

I urge upon you the vital necessity of a rigid compliance by all administrative agencies of the simple and easy fundamentals of what the American people consider the proper administration of law.

The third problem which I should like to state is the necessity for a proper coordination between the administrative and judicial functions in these matters. I do not speak in favor of greater judicial review. Neither do I speak from the standpoint of the courts. I do not think that the courts want to venture farther than necessary into the technical and complicated questions which arise in the administrative field. I speak from the standpoint of the agencies. The fact is that the public distrusts any officer or agent who does not want his action to be subjected to scrutiny. I do not think it an accident that the most reviewed of all administrative agencies, the Bureau of Internal Revenue, which deals with the most universally unpopular of all subjects, taxes, has a place of unshakable stability in public estimation and support, whereas agencies with more popular functions but which successfully prevented provisions for review, have been shattered by storms. There is a public confidence in the mere

fact of the possibility of review. Wisdom on the part of the agencies would dictate an insistence by them upon the easy availability of judicial review to the extent necessary to prevent the possibility of arbitrary or unjust action. An insurance for the people against arbitrary action by the agencies is at the same time insurance for the agencies against arbitrary action by the people. Of course, the problem has been largely settled by the Administrative Procedure Act. My proposition is that we ought to lay the debate to rest, for the greater benefit of the agencies and the practioners before them.

And now where does all this leave us? Well, there are two methods of solving mutual problems upon which there are conflicting views. The first we might call the antipathy method, or the ordeal by contact. Mostly we have been following that method. On the one hand the bar has been crying aloud that the agencies want to set up administrative absolutism and to destroy our system of government, to obliterate the rule of law. Well, I have known a lot of administrators. One day Joe Doaks is practicing law like the rest of us. The next day he is Mr. Commissioner, or Mr. General Counsel. And the next day he is Joe Doaks again. He doesn't change so very much in the process. One day he is whooping it up for his client, a bricklayer, or a merchant, or a broadcasting company. The next day he is whooping it up for his client, the Secretary of Agriculture or John Q. Public. Of course, there are some crackpots in the agencies, about the same proportion as there are at the bar, I think, or in any healthy community. And there are some radicals who would like to tear down the whole structure, but again I think the proportion in the agencies is about the same as that among members of the bar, or in a normal community. But neither the crackpots nor the radicals are long-time major problems. Mostly the real trouble is twofold. One is an excess of zealousness. It is a normal human characteristic. You never saw an expert on tuberculosis who didn't think everybody had tuberculosis, or at least ought to be x-rayed for it; or a vegetarian who didn't think eating meat was a terrible evil. Specialists have enormous ideas on their respective subjects. The other trouble is that an expert knows he knows more about his subject than does anybody else. If left entirely alone, without supervi-

sion, he could handle that field to exquisite perfection. And maybe he could.

At any rate, much of the bar is disturbed and curses roundly at the agencies which contest any semblance of a check on their activities.

On the other hand, some agencies are vociferous in proclaiming that the bar is unprincipled, and selfish to boot, and wants to interfere with the efficiency of administrative action, to block dire unpleasantness to their clients. To tell the truth, there is much basis for the charge. But it is not the utter truth. The bar is conservative. It is the most jealous of all groups in protection of those rights spelled out over the centuries in the people's struggle against governmental tyranny. But mostly the trouble is that the lawyers seldom get together on a non-client basis and approach a problem in the detached viewpoint of which they are capable.

On the whole, the solution of mutual problems by non-cooperative antipathy gets exactly nowhere.

The other method we might call the cooperative approach. It has been tried with tremendous success in other fields of the administration of justice. Every federal circuit now has an annual conference of judges and lawyers for the discussion of mutual problems. There is a committee in every state, sponsored by the American Bar Association, for the improvement of the administration of justice, and composed of judges and lawyers. Chief Justice Laws is chairman of that committe in the district of Columbia, and he has recently added laymen to the group. I well remember the pleasure everyone involved received from mutual conferences on procedure between the Bureau of Internal Revenue and the American Bar Committee on Taxation. I also remember what mutual benefit followed when our local Public Utilities Commission called in representatives of the local bar to assist in the preparation of rules for its procedure. I believe that the Interstate Commerce Commission did the same thing. The new Federal Rules of Civil and Criminal Procedure were drafted largely by practitioners at the bar.

What have we here? On the one side, all, or almost all, the federal administrative agencies are here in Washington. On the other hand, in this Association are practitioners who are special-

ists in practice before every agency. All these people live here. They do not have to be assembled from vast distances or confer by correspondence.

What could they do? I am not going to suggest. If enough of you are interested in the matter to take it up, you will think of plenty of things. If you are not interested, nothing will be done anyhow. But I don't mind supposing a little.

Suppose, first of all, that we could coordinate the thought and experience of all the agencies, and of all the various sorts of specialty practitioners, not with the idea of producing a uniform system of procedure necessarily, but with the idea of improving the procedure of each by composite suggestions of all.

Suppose a joint conference were arranged as an annual event, composed of representatives of all the agencies, or such of them as wanted to join in, and a selected group of delegates from this Section, for the joint consideration of problems in administrative procedure?

Or suppose the Attorney General here should institute such an administrative conference, and invite the bar to participate, as the Judicial Conferences do?

Or suppose a joint committee were established, composed of fifteen or twenty of the general counsel of the agencies and their representatives, and the same number of practitioners, the function of the committee being to formulate recommendations for the improvement of administrative procedure?

Now that I come to think of it, it wouldn't be such a bad idea if Attorney General Clark were to institute as a permanent organization an Attorney General's Committee on the Improvement of Administrative Procedure.

Or suppose the American Bar Association put its weight behind such a program and sponsored a committee to be operated by this Section, or in cooperation with this Section?

How would such efforts be started? I suppose by the appointment of a committee of this Section to wait on the Attorney General and the several agencies; or upon the heads of the American Bar Association.

Or suppose this Section prepared and published a book or series of pamphlets, done with great care, and the cooperation of invited participants from the agencies, on the practical feat-

ures of administrative procedure and it peculiarities? "How to prepare an administrative case for trial," "How to ask questions on direct," "When and how to cross examine," "How to get a document into a record," "How to handle statistical information," and so on.

Or suppose this Section instituted a seminar to be held every year with experiment practitioners to lecture on and demonstrate the purely practical side of procedure?

Is all this too ambitious a program? Maybe so, but these are big issues and this is an able body of men.

St. Thomas More Society Meets June 5th

The Annual Meeting of the St. Thomas More Society of America will be held at a luncheon affair at Room 260, *Mayflower* Hotel at 12:15 P.M., Thursday, June 5th. Austin F. Canfield, President of the D. C. Bar Association, will speak on St. Thomas More as a lawyer and Chancellor of England. Members of the Association are invited to attend. Reservation checks for *$2.75* should be sent to James J. Hayden, 1323-18th Street, N. W. and must be on hand by the first mail on Wednesday, June 4th.