ON January 12, 1937, the President of the United States forwarded to the Congress his message concerning reorganization of the administrative departments of the Federal Government. The message dealt with and made recommendations concerning many phases of the administrative structure, one of them the so-called independent agencies. The President said,

“There are over one hundred separate departments, boards, commissions, corporations, authorities, agencies and activities through which the work of the Government is being carried on. Neither the President nor the Congress can exercise effective supervision and direction over such a chaos of establishments, nor can overlapping, duplication and contradictory policies be avoided.”

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The term “independent” is used because the agencies are not within any of the ten major executive departments, and hence they are not subject to control by any cabinet officer. There are, however, varying degrees of independence in fact. Many of the agencies, though not within any major department, are subject to the control of the President, either because they have been created by and hence may be destroyed by executive order, or because the statutes creating them give the President full power of control by way of appointment and removal, or otherwise. On the other hand there are about a dozen agencies which are not only independent in the sense that they are not within any of the major executive departments, but also they are beyond reach of the President’s power of removal except for causes specified in the statutes. Among them are the so-called “independent regulatory commissions” created by the Congress to regulate certain areas of business or industrial activity. The members of these commissions serve for terms fixed by statute. They cannot be removed in the discretion of the President. Hence they are controllable only through the budget. In Humphrey’s Exr. v. United States, 295 U. S. 602, 55 S. Ct. 869 (1935), the Supreme Court denied to the President the power of removal of a member of the Federal Trade Commission. The President attempted to remove Humphrey for the sole reason that the commissioner’s views on matters of policy were not in harmony with the administration.
Further he said that

"the present organization and equipment of the executive branch of the Government defeats the constitutional intent that there be a single responsible Chief Executive to coordinate and manage the departments and activities in accordance with the laws enacted by the Congress."

The President proposed, as a part of the task of reorganization, that Congress

"overhaul the one hundred independent agencies, administrations, authorities, boards and commissions and place them by Executive order within one or the other of the following twelve major executive departments: State, Treasury, War, Justice, Postoffice, Navy, Conservation, Agriculture, Commerce, Labor, Social Welfare and Public Works; and place upon the Executive continuing responsibility for the maintenance of effective organization.

"This program," the President said, "rests solidly upon the Constitution and upon the American way of doing things. . . . If we do this we reduce from over one hundred down to a dozen the operating executive agencies of the Government, and we bring many little bureaucracies under broad coordinated democratic authority. But in so doing, we shall know that we are going back to the Constitution and giving to the executive branch modern tools of management and an up-to-date organization which will enable the Government to go forward efficiently."

No doubt overhauling is needed. However, a consistent and rational theory for the integration of the independent agencies with the remainder of the governmental structure is a condition precedent to an intelligent overhauling. This article constitutes a groping for such a theory. First, I shall discuss some of the more significant attacks which have been made in recent years upon modern administrative organization. Then, the reasons for these attacks will be examined and appraised, for they reveal certain pathological conditions which need excision. Finally, and with all due deference to the other reme-

2 See Appendix, p. 566, infra, for list of federal agencies.
3 No doubt, also, overhauling is impending. Following the President's message on the subject the late Senator Robinson introduced a bill designed to accomplish at least some of the objectives sought by the President. S. 2700, 75th Cong., 1st sess. (1937). Extensive hearings on the bill were held in August, 1937, before the Select Committee on Government Organization of the Senate. Rumor has it that work on a revised bill is now in progress.
dies that have been suggested, I shall venture a theory of approach to the overhauling process.

I

Principal Attacks upon Administrative Organization

At the outset it should be noted that the Federal Government is not unique with its overwhelming multitude of independent administrative agencies. The forty-eight state governments are to a greater or less extent similarly afflicted. In the states we find such agencies as public utility commissions, blue sky commissions, workmen’s compensation commissions, tax commissions, welfare boards, liquor boards, unemployment insurance commissions, and licensing boards, licensing everything from the practice of law and medicine to chiropody and cosmetology. Nor is that all. Even among the local governments we find a liberal sprinkling of similar agencies—for example, tax reviewing and equalization boards, boards of zoning appeals, local civil service commissions, etc., etc. Their number is legion, and all of the governmental structure from the top to the bottom is involved. Many of these agencies are simply the result of the ever increasing complexity of the administration of modern government. Each new governmental service carries its commission, board, administration or other agency—and more often than not the agency is set up outside existing governmental departments. Many more of the agencies are the result of the ever increasing demand for regulation of private business and industrial activity. Almost every corner of our twentieth century streamlined economy is invaded by the regulatory powers of government, usually acting through the medium of one or more administrative commissions.

A. Distinction between Administrative Agencies and Administrative Tribunals

In considering this array of agencies, a distinction must be clearly observed between administrative agencies in general, and administrative tribunals as that term is nowadays being used—a distinction which is based upon the nature of the functions performed. Many of the agencies exercise functions which are purely administrative in nature; that is, they simply engage in the carrying out of completely defined provisions of the law requiring ministerial or discretionary action for execution. Such agencies offer few difficulties. On the other hand, many of the agencies exercise not only administrative powers but also powers
normally regarded as belonging either to the legislative or to the judicial branch of government or both. This union of powers in a single hand raises important and troublesome questions of governmental organization. While we shall not lose sight in this article of the agencies performing purely administrative functions, nevertheless the principal objective is scrutiny of the second type, i.e., those exercising, in addition to administrative powers, one or both of the other powers of government. These latter agencies are currently being called “administrative tribunals.”

As an aid to understanding it is desirable to look more closely at this union in the administrative tribunal of all three of the major classes of governmental powers. The Interstate Commerce Commission furnishes illustration. We ordinarily regard as legislative any governmental action which sets forth policies to be pursued or prescribes rules of action with respect thereto. So when the Commission promulgates rules concerning the assignment of coal cars to coal mines in times of car shortage, it is engaged in rule making and is in reality exercising a legislative function.\(^4\) Again, when the Commission fixes rates, either singly or in the form of complicated tariff schedules, it is said to be exercising a legislative function.\(^5\) On the other hand, we regard as judicial any action which adjudicates private rights on the basis of existing law and past events. So when the Commission enters an order commanding a carrier to pay reparations to a shipper who has been subjected to excessive freight charges, it is acting much as the courts would act under similar circumstances pursuant to the prin-

\(^4\) In fact, the instance cited is a prime example of the exercise of delegated legislative power in a field requiring a high degree of technical competence. The regulation of coal car distribution to the coal mines in times of peak demand has occupied the attention of the Commission on many occasions and during a long period of years. The conflicting interests of coal producers, coal consumers and mine labor give a highly controversial angle to the problem. The skill with which the Commission has marshalled the facts and evolved the rules to be applied is both a tribute to the tribunal and a justification of delegated legislative power. For the early history of the matter see Railroad Commission of Ohio v. Hocking Valley Ry., 12 I. C. C. 398 (1907); Traer v. Alton R. R., 13 I. C. C. 451 (1908), sustained in Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 30 S. Ct. 155 (1910), and Interstate Commerce Commission v. Chicago & Alton R. R., 215 U. S. 479, 30 S. Ct. 163 (1910). For later history, see Assigned Cars for Bituminous Coal Mines, 80 I. C. C. 520 (1923); ibid., 93 I. C. C. 701 (1924), sustained in Assigned Car Cases, 274 U. S. 564, 47 S. Ct. 727 (1926).

\(^5\) In Prentis v. Atlantic Coast Line, 211 U. S. 210 at 226, 29 S. Ct. 67 (1908), the Supreme Court, Justice Holmes writing the opinion, said, “The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.”
principles of the common law, and it is performing a judicial function. Again, when the Commission revokes a license or a certificate of convenience and necessity it is probably engaging in a judicial or at least a quasi-judicial act. And finally, when the Commission is engaged in the evaluation of a railway’s physical property, not in connection with any specific rate proceedings, but to have on hand statistical information for future use, it is acting administratively. Thus the Interstate Commerce Commission exercises all three of the conventional powers of government.

Of course, this arrangement gives the appearance of running counter to the familiar American constitutional doctrine of separation and distribution of governmental powers. For this as well as for other reasons, the administrative tribunal exercising a combination of the characteristic powers of government is one of the principal objects of attack and one of the principal reasons for the demand for administrative reorganization. Now, reorganization of the multitude of purely administrative agencies, to the end that they may be eliminated, consolidated with major executive departments, subjected to greater executive

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6 The English Committee on Ministers’ Powers in its Report to Parliament, presented in April, 1932, defined judicial and quasi-judicial functions as follows (pp. 73-74):

“The word ‘quasi,’ when prefixed to a legal term, generally means that the thing, which is described by the word, has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them. For instance, if a transaction is described as a quasi-contract it means that the transaction has some of the attributes of a contract but not all. Perhaps the best translation of the word ‘quasi’ as thus used by lawyers, is ‘not exactly.’ A ‘quasi-judicial’ decision is thus one which has some of the attributes of a judicial decision, but not all. In order, therefore, to define the term ‘quasi-judicial decision,’ as it is used in our terms of reference, we must discover which of the attributes of a true judicial decision are included and which are excluded.

“A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:

“(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

“A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister’s free choice.”

domination, etc., is highly commendable and not open to question. Reorganization of administrative tribunals, however, is a vastly different affair. It calls for a much clearer understanding than seems generally abroad concerning the nature of these tribunals, their purposes, their functions and their relation to other branches of government. Our scrutiny will be directed primarily toward them, and first, toward the attacks being directed against them.

**B. Attacks Upon the System by the Legal Profession**

Almost from the beginning, the administrative tribunal with its jointure of powers has been subjected to criticism by the members of the legal profession. This criticism calls for careful examination, because it reveals conditions demanding correction. In 1929 a prominent member of the New York City Bar delivered a lecture before the Association of the Bar of New York City in which he very ably stated in a few words the gist of the professional criticism. He said:

> "The American people will not long be content to have their legal rights conclusively determined by administrative edict or fiat, but will turn back to the courts of justice and insist upon a judicial hearing, with its guaranty of a fair day in court, and to impartial tribunals and reasoned judgment consistently applying ascertained general principles and precedents and excluding bureaucratic discretion with its danger of operation and action dictated by caprice, prejudice or passion. They will not permanently tolerate uncontrolled administrative power in any form however temporarily expedient or benevolent. The corresponding danger of ultimate oppression or injustice is altogether too great. In the last analysis, as I am convinced, the survival of liberty in self-governing democracies will depend upon maintaining the supremacy of the law and affording the protection of judicial hearings."*8

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As long ago as 1914 Dean Pound, in an article entitled "Justice According to Law," 13 Col. L. Rev. 696 (1913), 14 Col. L. Rev. 1 at 24-26, 103 (1914), summed up the juristic difficulties of administrative adjudication as follows:

> "Granting that administration should be left to administrative officers, what are the advantages of executive justice in the determination of ordinary controversies and the application and enforcement of the rules of private law? Those which are claimed for it are those which are claimed for justice without law; directness, expedition, conformity to the popular will for the time being, freedom from the bonds of purely traditional rules, freedom from technical rules of evidence and power to act upon the everyday instincts of ordinary men. Obviously, therefore, its defects are those
In short, we demand a government by law and not by men. Translated into more technical form, when the function being performed is judicial in nature there is merit in the regularity of procedure and the following of ascertained rules of law, as compared with unlimited discretionary power in administrative officers. This view, very commonly held among some of the more thoughtful members of the profession, finally resulted in the American Bar Association taking a substantial interest in the subject. In May, 1933, the executive committee of the Association set up a special committee on administrative law for the purpose of studying administrative tribunals and their functioning in this country. In 1933, 1934, 1936 and 1937, respectively, this committee presented four exhaustive reports to the association, exploring
in great detail the structure of federal administrative agencies exercising quasi-legislative and quasi-judicial powers.  

In its second report filed in 1934, the committee turned its attention to certain specific evils which it felt to be present in the system. These evils were ascribed chiefly to three characteristic features: (1) the combination of judicial with executive or legislative powers or both; (2) the fact that the tenure of office of administrative officials exercising judicial power is insecure; and (3) the lack of effective independent judicial review of administrative decisions.

In elaborating upon the first of these evils, the committee expressed itself as follows:

"When judicial power is combined with executive or legislative power, a maxim fundamental to the administration of justice is disregarded, that a man should not be permitted to adjudge his own case. When an administrative tribunal is charged with investigation of an alleged violation of the law or of its own regulations, and with the preparation and conduct (through its own attorneys) of the very proceedings on which it sits in judgment, and (again through its own attorneys) with the defense of its own decisions on appeal, it is doing exactly what the experience of ages has demonstrated to be unwise and, indeed, unworkable. When an administrative tribunal is charged with the legislative power of making the very regulations, on violations of which it thereafter sits in judgment, it also sits as a judge with an interest in the cause; a disinterested interpretation of the regulations and an impartial and uniform application and enforcement of them can hardly be expected, and, indeed, as experience seems to indicate, are all too frequently lacking. Furthermore, a tribunal exercising such a combination of powers can with the greatest difficulty, and only if its personnel have an unusual share of judicial temperament and integrity, maintain the necessary aloofness from ex parte presentations of fact and arguments offered to them off the record. They are legitimately accessible to interested parties when they act as executives and legislators; it is hard, sometimes impossible, to avoid having the same parties address them in chambers with regard to pending or prospective cases." 

This statement in a few words expresses one of the most potent objections to the modern trend of conferring upon administrative

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9 58 A. B. A. REP. 407 (1933); 59 A. B. A. REP. 539 (1934); 61 A. B. A. REP. 704 (1936); A. B. A. ADVANCE PROGRAM 168 (1937).
10 59 A. B. A. REP. 539 at 545 (1934).
tribunals the power to adjudicate controversies between individuals, or between an individual and the state. It brings out a danger which must be met and eliminated so far as possible if administrative adjudication is to survive as a satisfactory working mechanism.

In order to focus discussion, study, and criticism of the issues presented by the report, the American Bar Association's committee cooperated in the preparation of a bill for introduction into Congress. The bill, known as the Logan Bill, was introduced by Senator Logan of Kentucky. If it had been enacted it would have made radical changes in the course of development of American administrative law. In effect it provided for the segregation of all of the judicial functions now exercised by federal administrative agencies, and the establishing of an independent legislative court to which these functions would be delegated for decision both upon issues of fact and of law. The federal independent commissions would have been stripped of their judicial and quasi-judicial powers and left with only their legislative and administrative powers.

The Logan Bill was not enacted, and, because of opposition which developed from a number of quarters, it is now reasonably apparent that it will never become law. The American Bar Association committee has withdrawn its support of the basic idea involved in it. At the 1937 annual meeting of the association a substitute proposal was offered, recommending legislation providing intradepartmental administrative appeals to boards to be set up in the several administrative departments and agencies. Such boards were to decide fact questions conclusively, but on questions of law their decisions might be reviewed in the courts. This proposal was approved in principle by the house of delegates of the association, although the specific bill prepared by the committee was not acted upon. The principal objective of this new proposal seems to be the elimination of the danger of arbitrary official action by providing for, first, a regularized administrative appeal on both the law and the facts, and, second, a simplified review of questions of law by the courts.

12 The Special Committee on Administrative Law accompanied its 1937 recommendations with a draft of a bill. The provisions of the bill having to do with the review of administrative decisions are contained in Sections 3 and 4. A. B. A. ADVANCE PROGRAM 225 (1937). Section 3 provides that, in every department where judicial or quasi-judicial decisions are made, the head of the department shall from time to time designate three of the employees of such department, one of whom shall be a lawyer and who shall act as chairman, to serve as an intradepartmental appellate
The special committee on administrative law of the American Bar Association is continuing its labors, and will, no doubt, eventually crystallize the criticisms of the profession into constructive suggestions for the improvement of American administrative tribunals and their functioning.

C. Attacks Upon English Administrative Agencies

While perhaps not of direct importance to us in this country, it is interesting, not to say comforting, to note that other countries are facing or have faced similar difficulties. Furthermore, we may conceivably derive aid in dealing with our own problems by observing how other countries handle theirs of a similar nature. England, for example, has been subjected to administrative adjudication and legislation to a degree which makes experience in the United States seem comparatively mild.

In 1929 the Rt. Hon. Lord Hewart of Bury, Lord Chief Justice of England, wrote and published a book entitled *The New Despotism*, a scathing denunciation of what he characterized as “bureaucracy,” as it has developed in England following the war. In particular he criticized the extent to which judicial and legislative powers had been delegated by Parliament to administrative officials. He looked upon board. No member of a board hearing a particular case shall have previously decided the case or shall have been responsible for any of the rules or regulations involved.

When any person is aggrieved by a decision, act or failure to act by any officer or employee in a department, such person may take an appeal to the board. He shall state his objections to the decision appealed from in writing. He shall have an opportunity for a full and fair hearing before the board. The testimony shall be taken by a stenographer, documents and other exhibits shall be introduced in evidence, and a complete written record shall be prepared. Arguments shall be heard and the board shall prepare written findings of fact and its decisions thereon.

In the case of commissions, boards or other agencies already consisting of not less than three members, provision is made for initial hearing by trial examiners and a final decision by the full board.

It is further provided that any party to a proceeding who feels aggrieved by the result of the intradepartmental appeal may appeal to the circuit court of appeals, setting forth the alleged errors in the decision of the administrative board. It is provided that “Such court may affirm or set aside the decision or order of any board or independent agency or may direct such board or independent agency to modify its order in accordance with law. No such decision or order of any board or independent agency shall be set aside by said court unless it is shown that the decision or order is unsupported by evidence, or was issued without due notice and a reasonable opportunity having been afforded for hearing, or was based on arbitrary and capricious findings of facts, or is beyond the jurisdiction of the board or independent agency, or infringes the Constitution or statutes of the United States.” It is finally provided that the judgment or decree of the circuit court of appeals shall be final except that it shall be subject to review by the Supreme Court of the United States on writ of certiorari.
it as an invasion of a foreign creed. He likened it to a transplanting of the French *droit administratif* to English soil, but he felt that it was even more insidious and invidious. The French system of administrative law, enforced as it is through the *Conseil d'Etat*, he regarded as at least attaining the dignity of a system of law, though different and distinct from the law provided for controversies between private individuals.\(^\text{18}\) The trend in England, on the other hand, Lord Hewart characterised as one of "administrative lawlessness," for the reason that all too often the administrative officials to whom legislative and judicial powers were delegated were completely beyond reach of any established regulations, principles or courses of procedure that could be dignified by the name of law. This Lord Hewart regarded as exceedingly dangerous.

Partly because of Lord Hewart's attack upon English adminis-

\(^{18}\) France has for many years regularized its processes of administrative adjudication. There a body of administrative law known as the *droit administratif* has been developed as a part of the legal system. It is quite separate and distinct from the civil law. It is this law rather than the civil law that governs the rights of citizens who are aggrieved by official action. Controversies arising in such cases are tried in a system of administrative courts, the principal member of which is the *Conseil d'Etat*, the decisions of which are not subject to review by the ordinary courts. To resolve conflicts between the administrative courts and the ordinary courts there is a *Tribunal des Conflicts*. The *Conseil d'Etat* has built up its own system of case law.

The *droit administratif* has been criticized by English and American jurists as something alien to the genius of the common law. It has been said that since the official is governed by a body of law separate from that which governs the private citizen, and especially since the law is applied by administrative courts, bureaucratic preferences are likely to flow from it. On the contrary, however, it is seemingly true that in many respects the law as developed by the *Conseil d'Etat* is more successful in protecting the rights of citizens against illegal encroachment by administrative officials than is the Anglo-Saxon common law which has but a single body of legal rules for all purposes. The *Conseil d'Etat* has in fact come to be regarded as the especial guardian of the rights and liberties of the French people, and their bulwark of protection against a bureaucratic and highly centralized administration. It occupies a place in the French popular esteem fully as high as that enjoyed by the Supreme Court of the United States among the American people.

It is interesting to note how differently the doctrine of separation of powers, which came to us from French political philosophy, has affected the growth of administrative law in the two countries. In France the doctrine, together with the early distrust of the civil courts, has produced a practically complete separation of the administrative courts from interference by the ordinary courts. With us on the other hand separation of powers, together with our due process clauses, is used as a device to confer upon the courts the power of review of administrative action. It is thus used as a device which, far from producing a separation of areas of action, instead gives the judiciary a potent means of control over administrative officers.

trative tribunals and partly from other causes, the so-called Committee on Ministers' Powers was appointed in October, 1929, by the Rt. Hon. Viscount Sankey, Lord High Chancellor, to investigate those administrative officials to whom the Parliament had delegated subordinate legislative and judicial powers. The committee was required to report what safeguards were deemed desirable or necessary to secure for England "the constitutional principles of sovereignty of Parliament and the supremacy of law."

The report of this committee was filed in 1932. It is a mine of information on the subject of the administrative law in England. Without going into detail as to the disadvantages and dangers found to be present in the system, suffice it to say that the committee felt that too broad delegations of sublegislative or rule-making power were undesirable, that the principle of supremacy of the law was being jeopardized by conferring judicial powers upon administrative officials, that the principle was too valuable to be cast into the discard, and that care must be taken for its preservation. The report is a monument of wisdom so far as its recommendations for the future handling of the growth of the administrative mechanism is concerned. Space does not permit the examination of these recommendations in detail. Again, suffice it to say that the report did not recommend any radical or sweeping changes in the existing order, any vast reorganization of governmental departments, any wholesale transferring of governmental powers. Instead, in characteristic British fashion, it in effect accepted the existing order as more or less inevitable and confined itself to a long series of recommended improvements which should be worked out and safeguards which might be utilized to minimize the dangers felt to be present. These improvements and safeguards might well be given consideration in connection with improving our own system of administrative justice. The principal recommendations are set forth in the footnote.14

14 The recommendations of the English Committee on Ministers' Powers are set forth on pages 64-70, 115-118 of the Report to Parliament (April, 1932). In summary the most important recommendations were as follows:

(1) It was recommended that all delegations of legislative power should be accompanied by a clear definition in the statute of the limits upon the powers conferred; that, except in cases of very great need, powers to legislate on matters of principle or policy should never be delegated; and that the power to impose taxes should never be delegated.

(2) It was recommended that all rules and regulations be published, and that the Rules Publication Act of 1893, under which rules had been published in the past, should be amended to be made more comprehensive and satisfactory.
D. Report of the President's Committee on Administrative Management

Reference has already been made to the President’s message of January 12, 1937, proposing a reorganization of federal administrative agencies. This message was the sequel to an extended report which was presented to the President on January 8, 1937, by a special committee on administrative management which had been appointed by

(3) It was recommended that in the preparation of rules and regulations by administrative officers, the appropriate department should consult the particular private interests which would be especially affected by the proposed exercise of the delegated law-making power.

(4) It was recommended that all regulations adopted pursuant to delegated legislative powers should be promptly laid before Parliament and be subject to annulment by that body should it deem it advisable. Of course, Parliament has always had the power to take such action with respect to departmental rules, so the effect of this recommendation is largely one of improved publicity and the consequent check upon ill-advised action.

(5) It was suggested that the drafting of delegated legislation should be carried on by persons skilled in the art of draftsmanship and possessing specialized knowledge and experience similar to those possessed by the office of Parliamentary Counsel which prepares bills for Parliament.

(6) As to delegation of judicial functions, it was recommended that such functions should normally be entrusted to the ordinary courts of law and only under exceptional circumstances should they be conferred upon a minister or a ministerial tribunal. Note, however, that in the committee's report a distinction was drawn between “judicial” and “quasi-judicial” functions. See note 6, supra. The committee recognized the propriety of delegating quasi-judicial functions to administrative officers, particularly to the several ministers.

(7) It was suggested that where Parliament considers it necessary to depart from the normal course as to the conferring of judicial functions, they should be entrusted to “ministerial tribunals,” i.e., bodies separately constituted and independent of the ministers, rather than to the ministers personally.

(8) It was recommended that all judicial and quasi-judicial action by ministerial tribunals or ministers be preceded by notice to and hearing of the parties affected by such action.

(9) It was recommended that all tribunals and ministers exercising judicial or quasi-judicial functions should prepare and publish their opinions and decisions in respect to the cases decided by them.

(10) It was recommended that there should always be a right to appeal from a ministerial tribunal or a minister on questions of law involved in judicial or quasi-judicial decisions, including questions of jurisdiction, and that a uniform and simple procedure should be established for such appeals.

(11) It was recommended that as a general rule, there should be no appeal to a court of law from the judicial or quasi-judicial decisions of a minister or ministerial tribunal on issues of fact. In exceptional cases Parliament might, however, find it desirable to set up provisions for appeals on facts to an appeal tribunal to be constituted by the Lord Chancellor and to consist of three persons, at least one of whom should be a member of the bar.
him on March 16, 1936, and which had been directed to study and report concerning needed changes in the administrative structure of the government of the United States.

Concerning such independent administrative tribunals as the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, the Federal Communications Commission, etc., the committee recommended in substance that all of their administrative and legislative powers be sheared away and transferred to the several major executive departments of the government, and that the commissions continue simply as quasi-courts to exercise their judicial powers as needed. This recommendation of the committee was approved by the President in transmitting his message in the language set forth at the beginning of this article.

The recommendation of the committee is so important, and, if followed, will make such a marked modification of the regulatory machinery of the Federal Government that a careful consideration of the supporting reasoning is merited. The report states:

"there are now in the Government of the United States over one hundred separately organized establishments and agencies presumably reporting to the President. Among them are the ten regular executive departments and the many boards, commissions, authorities, corporations and agencies which are under the President but not in a department. There are also a dozen agencies which are totally independent—a new and headless ‘fourth branch’ of the Government.

“The Executive Branch of the Government of the United States has thus grown up without plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm. . . . No President can possibly give adequate supervision to the multitude of agencies which have been set up to carry on the work of the Government, nor can he coordinate their activities and policies. . . . The constitutional principle of the separation of powers and the responsibility of the President for the ‘executive Power’ is impaired through the multiplicity and confusion of agencies which render effective action impossible. Without plan or intent there has grown up a headless ‘fourth branch’ of the Government, responsible to no one, and impossible of coordination with the general policies and work of the Government as determined by the people through their duly elected representatives."  

15 REPORT OF THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 32 (1937).
"[The commissions]," so says the report, "are vested with duties of administration and policy determination with respect to which they ought to be clearly and effectively responsible to the President, and, at the same time, they are given important judicial work in the doing of which they ought to be wholly independent of Executive control.... We speak of the 'independent' regulatory commissions. It would be more accurate to call them 'irresponsible' regulatory commissions for they are areas of unaccountability. . . .

"But though the commissions enjoy power without responsibility, they also leave the President with responsibility without power. Placed by the Constitution at the head of an unified and centralized Executive Branch, and charged with the duty to see that the laws are faithfully executed, he must detour around powerful administrative agencies which are in no way subject to his authority and which are, therefore, both actual and potential obstructions to his effective over-all management of the national administration. The commissions produce confusion, conflict, and incoherence in the formulation and in the execution of the President's policies. Not only by constitutional theory, but by the steady and mounting insistence of public opinion, the President is held responsible for the wise and efficient management of the Executive Branch of the Government. The people look to him for leadership. And yet we whittle away the effective control essential to that leadership by parceling out to a dozen or more irresponsible agencies important powers of policy and administration.

"At the same time the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.

"Furthermore, the same men are obliged to serve both as prosecutors and judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself." 16

16 Ibid., p. 40.
To eliminate these objectionable features the committee suggests that Congress should create two additional major executive departments (there are ten such departments at the present time) and adopt as a general policy the practice of bringing all administrative operating agencies within one or another of these executive departments. The executive task of reorganization in accordance with this policy is to be placed in the hands of the President. Furthermore, the power of reorganization in the Executive is to be a continuing one to be exercised from time to time as the need arises. Each administrative tribunal is to be divided into two sections, an administrative section and a judicial section. The administrative section is to be a regular bureau or division in a major executive department. The judicial section is to be within that department for "administrative housekeeping" such as budget, personnel, administration, supplies, etc., but it is to be independent of the department with respect to its judicial decisions.

The report states that "The division of work between the two sections would be relatively simple." 17 The administrative section would "formulate rules, initiate action, investigate complaints, hold preliminary hearings," and keep records. "It would, of course, do all the purely administrative or sublegislative work now done by the commissions—in short all the work which is not essentially judicial in nature." 18 Then, even as to certain of the judicial work it is recom-

17 Ibid., p. 41. It is perhaps not so simple as might at first be imagined. Many questions would arise concerning the classification of the numerous functions of administrative tribunals which would not be at all easy to answer. Indeed, there is no sharp line which may be drawn between judicial, legislative and administrative functions. For example, the granting of a certificate of public convenience and necessity has been held by the United States Supreme Court to be administrative in nature. Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 S. Ct. 389 (1930). How shall the revocation of such certificate be classified? In Public Service Commission of Puerto Rico v. Havemeyer, 296 U. S. 506, 56 S. Ct. 360 (1936), the Supreme Court held that the revocation for cause of a franchise was a judicial act. Would the same classification be made with respect to the revocation of a certificate of convenience and necessity, or would it be classified as administrative. Some courts have classified proceedings for the revocation of licenses as administrative. For example, see People ex rel. Lodes v. Department of Health, 189 N. Y. 187, 82 N. E. 187 (1907). Jurisdictional questions of this sort with no satisfactory theory upon which to resolve them will plague any attempt to subdivide the functions of administrative tribunals in the manner urged in the report of the President's committee.

18 Ibid., p. 41. Note that this would carry into the administrative section all of the functions of rate-making as well as rule-making in the more usual sense. The significance of this recommendation can hardly be overestimated. It is not clear that the Committee itself recognized the sweeping effect of its recommendation for, in testifying
mended that “where the volume of business is large and quick and routine action is necessary, the administrative section itself should in the first instance decide the cases and issue orders, and the judicial

before the Select Committee on Administrative Reorganization of the United States Senate, Luther Gulick, a member of the Committee, testified that the President’s committee was not endeavoring to suggest the specific functions to be transferred, that in fact it had not made detailed studies of the several tribunals in order to reach definite conclusions concerning such transfers, but that it was simply recommending a general plan of attack upon the problem, leaving the details to subsequent study and executive action. S. Hearings on S. 2700, 75th Cong., 2d sess., (1937), pp. 91-98 inclusive.

Mr. Joseph B. Eastman, a member of the Interstate Commerce Commission, however, was fully cognizant of the sweep of the recommendation. In discussing the functions of the Interstate Commerce Commission and particularly those of a legislative nature he stated as follows:

“The Commission is, primarily, an arm of Congress. The creation of the commission arose out of the necessities of the Congress. It was faced with the need of dealing with an extensive and very complex field of legislation which it could not deal with in detail, and for that reason it created the Commission as an agency to apply certain general rules of law which the Congress established. In other words, the Commission was to apply these rules to concrete situations as they arose. An illustration, of course, is the prescription of railroad rates for the future which has always been regarded as a legislative function. State legislatures have done it directly in the past, but when it came to interstate rates it was wholly impractical for Congress to undertake that, and therefore it laid down the rules which were to govern rates and created the Commission to apply those rules.

“That is true of the great bulk of the Commission’s work. It is legislative in nature. It applies to the issuance of certificates of convenience and necessity, control of consolidations and other forms of unification, regulation of security issues, regulation of car supply and service, safety devices, accounting, and other matters. In other words, the great bulk of the duties of the Commission are legislative, or, as it is often expressed, quasi-legislative, or sublegislative.

“Now, Congress realized that it was giving a tremendous power to the Commission when it created it for that purpose, and for that reason felt it necessary to protect the exercise of that power against abuse, in order that there might be scrupulous regard for the rights of all concerned, some stability and continuity of policy, and freedom from political influence.

“To secure that safeguard against abuse it did three things: It required, first, that the Commission base its action, for the most part, on records openly and publicly made at hearings where everybody concerned would have the right to be heard. In other words, it required the Commission to proceed after the manner of a court. That means that while the function which it is performing is quasi-legislative, the procedure which is followed is quasi-judicial.

“The second thing which it did was to make the Commission bipartisan and, hence a nonpartisan and nonpolitical body.

“I might say that in my 18 years’ experience on the Commission, although its membership represents the two political parties, I have never known it to divide on any question on political lines. Furthermore, in making its appointments, I have never known it to inquire either as to the politics or the religion of any of its appointees.

“The third thing the Congress did, in order to assure some stability and continuity of policy, was to give the Commissioners rather long terms of office, and to
section should sit as an appellate body to which such decisions could be appealed on questions of law." The division of functions between administrative judicial sections is to be worked out experimentally by executive order.¹⁹

Comparison of the objectives of the President's committee and those of the American Bar Association is interesting, not to say revealing. The latter was first interested in transferring and more recently in modifying the judicial functioning of administrative tribunals; the former is desirous of transferring the legislative and administrative functions. The two programs taken together seem completely to cover the ground. Indeed, if the American Bar Association committee's original proposal transferring the judicial functions to legislative courts had become the law, and if also the President's committee's recommendations of transferring the legislative and administrative functions were put into effect, the independent administrative tribunal in the federal system would offer but little further threat to constitutional government and to supremacy of the law.

stagger those terms so that no new administration coming in could make a clean sweep and overturn the entire institution.

"Now, in my experience, those three things are, by far, the most important characteristics of the Commission, and it is those that have been threatened in the recommendations of the President's committee. . . ." HEARINGS BEFORE THE SELECT COMMITTEE ON GOVERNMENT ORGANIZATION OF THE UNITED STATES SENATE ON S. 2700, 75th Cong., 2d sess. (1937), p. 179.

¹⁹ In their testimony before the Joint Committee on Government Organization having under consideration the message of the President and the Report of the President's Committee on Administrative Management, the chairman of the committee testified that the transferring of the powers of any particular administrative tribunal would be preceded by further research, and that the transfer would actually be made only if such further research indicated the wisdom thereof. See HEARINGS on S. Doc. No. 8, 75th Cong., 2d sess. (1937), p. 10. However, the Report itself contains no such qualification. It is sweeping in its indictment of all administrative tribunals, and the recommendations if followed would dismember all of them. The bill drafted by the Committee set forth on pages 26-44 of the volume of Hearings gives the President the power to "transfer or retransfer the whole or any part of any agency or the functions thereof to the jurisdiction and control of any other agency." (Sec. 2a.) The term "agency" is defined to include "any executive department, independent establishment, commission, legislative court, board, bureau, service, administration, authority, federally owned and controlled corporation, agency, division or activity of the United States." (Sec. 501a.) The recommended bill does not, therefore, command the dismemberment of administrative tribunals. It simply empowers the President to act. However, should the President pursue the governmental theory concerning administrative tribunals advanced so vigorously by the committee the result will not be in doubt.
II

SUMMARY OF THE CRITICISMS OF ADMINISTRATIVE TRIBUNALS AND APPRAISAL THEREOF

We may with profit examine more closely and appraise briefly the various criticisms levelled at administrative agencies exercising quasi-judicial and quasi-legislative powers. Some of the criticisms are meritorious and must be met. Some are meritorious but must simply stand as disadvantages to be weighed against offsetting advantages. Still others lack merit altogether.

1. It is said that the conferring of discretionary (quasi-judicial) powers upon administrative tribunals is destructive of supremacy of the law; that it will reduce our system from a government by law to a government by men. This points toward bureaucracy in its most odious sense. No doubt there is measurable impairment of supremacy of the law. It is a danger to be reckoned with. It can and should be met by taking every available means of fostering gravitation from discretion to rule; of compelling the tribunals themselves, by regularizing their processes, by publication of opinions and decisions, by following their own precedents, to build up systems of administrative law circumscribing their own discretionary powers. The Interstate Commerce Commission is doing it, and the result is encased in 223 volumes of reports of decisions. The Federal Trade Commission has issued 21 volumes. Many satisfactorily functioning courts of today, yielding fully to the doctrine of supremacy of the law, were yesterday administrative agencies with broad discretionary powers—the Court of Claims, the Court of Customs and Patents Appeals, indeed the courts of chancery themselves are illustrative. Gravitational forces press from discretion to rule and prevent supremacy of the law from being long impaired. Furthermore, gravity can and should be aided by appropriate devices, such as statutory requirements concerning hearings, promulgation and publication of rules and orders, etc.

2. It is said that the union into a single hand of two or perhaps three of the major powers of government is destructive of our constitutional doctrine of separation of powers. Of course, it does represent a fractional invasion of the venerable doctrine. However, governmental needs have changed since Montesquieu wrote his L'Esprit des Lois. The administrative tribunal exercising two or more powers of government is a modern regulatory mechanism designed to meet modern conditions and to bring to bear the force of government upon
certain areas of business, commercial, and industrial activity which in the public interest need regulation. Effective regulation usually demands implementation with all three of the governmental powers in question. The task of the commission is unitary in nature, and to accomplish the task properly it must have all the needed tools. We must choose between effective regulation on the one hand and, on the other, a rigid adherence to the doctrine of separation of powers. 20

20 A few words as to the history of this doctrine will throw light on its real significance. The doctrine of separation of powers was born with Aristotle. In his "Politics," without distinguishing between governmental powers and governmental agencies, he described governments as divided into three parts, deliberators, legislators, and judicial functionaries. The division corresponds very well with the division of our American constitutional governments into legislative, executive and judicial departments. Aristotle’s division into parts is purely descriptive. No reason is given for it, nor argument offered in favor of it.

John Locke, the first great English empiricist philosopher, further developed the idea. In Chapter 12 of his Second Essay on Civil Government published in 1690 he stated the doctrine. He advanced a little beyond Aristotle and distinguished between power and agency in government. Governmental powers he divided into three parts, governmental agencies into two. He spoke of legislative, executive and federative powers, and legislative and executive agencies of government.

Montesquieu’s L’Esprit des Lois was published in 1748. He also clearly distinguished between governmental power and governmental agencies and urged separation of both, recognizing the advantages of specialization in government and pressing the separation of powers as a protection against tyranny. He said (Book XI, c. 6):

“In every government there are three sorts of power: the legislative, the executive in respect to things dependent on the law of nations, and the executive in respect to things that are dependent on the civil law.

“By virtue of the first, the prince or legislators enact temporary or perpetual laws, and amend or abrogate those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion. By the third, he punishes crimes or hears the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state. . . .

“When the legislative and executive powers are united in the same persons, or in the same body of magistrates, there can be then no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.

“Again there is no liberty if the power of judging be not separated from the legislative and executive powers. Where it is joined with the legislative the life and liberty of the subjects would be exposed to arbitrary control, for the judge would be then the legislator. Where it joined to the executive power the judge might behave with all the violence of an oppressor.

“Miserable indeed would be the cases where the same man or the same body, either of the nobles or of the people, were to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.”

Blackstone, who published the first volume of his Commentaries in 1765, was affected by Montesquieu. He also advocated the separation of powers between the
Let it be noted furthermore that the union in the hands of a single executive department of the government of two or more of the powers of government is no less offensive to the doctrine of separation of powers than is such union in the hands of an independent governmental agency. Hence the proposal to place legislative powers in the hands of the major executive departments is not free from constitutional blemish.

A well known analogy may make the apparent violation of the doctrine of separation of powers seem less objectionable. We all know that municipal governments exercise all three of the characteristic powers of government. The fact holds no terrors for us. On the contrary we demand it. We commend it as municipal home rule. We even embalm the idea in our state constitutions so that the legislatures may not interfere with it. We thus create "little bureaucracies" in urban geographical areas and do it without question. We should do it.

The administrative tribunal can be looked upon as a mechanism not wholly unlike the municipal corporation, except that it has for its jurisdictional area not a geographical field but an economic-functional field. It is a small pool of power created to do a particular job where concentration of governmental power is necessary, just as the municipality is another type of pool of power. The reasons for the one are equally as good as the reasons for the other. In fact, the task of government is today so very complex that subdivision of power and responsibility is not only desirable but inevitable.

3. It is said that the independent federal agencies should be reorganized in order to comply with the provisions of the Constitution concerning a single executive head of the government. The Constitution provides that "The executive power shall be vested in a President of the United States." No administrative commission exercises any important "executive" power as that term is used in the Constitution. Such executive powers as they possess are more properly char-
acterized as merely administrative and are of a comparatively insigni-
nificant nature (keeping records, collecting statistics, investigating and
presenting complaints, etc.). If from the language quoted from the
Constitution an inference be drawn that all executive and administrative
powers are to be reposed in the Chief Executive, it can only be said the
inference should, like the doctrine of separation of powers, give way
to a slight degree in aid of proper accomplishment of the design,
intent and desire of Congress to carry out its principal objective, i.e.,
that of regulating private business.

4. It is said that joining in the hands of a single agency the power
to investigate complaints and prosecute violations of the law together
with the power of adjudication of the cases makes for partiality of
decision and militates against fairness in the judicial process. This is
a legitimate and potent objection. It is, however, an objection which
can and should be eliminated by proper internal organization of the
commissions themselves. In fact, in many of the more wisely organized
administrative tribunals we find that the bureaus of inquiry and prose-
cuting officers are, by virtue of the internal details of organization,
quite effectively separated from the commissions themselves which
ultimately decide any controversies arising. This is true, for example,
of the Interstate Commerce Commission. There the separation is
almost, if not quite, as complete as is the separation between the district
courts and the prosecuting attorneys throughout the country. On the
other hand, in certain other instances of administrative organization the

21 This close association of the power of decision with that of prosecution is
apparently not unconstitutional. Brinkley v. Hassig, (C. C. A. 10th, 1936) 83 F.
(2d) 351. A number of the state courts, however, have invalidated decisions of
administrative tribunals on account of an alleged interest resulting from one or more
of the members of the tribunal having engaged in the prosecution of the case. Abrams v.
Jones, 35 Idaho 532, 207 P. 724 (1922). In England the principle that one shall
not be judge in his own case is deeply rooted. The English courts have vitiated
decisions rendered by quasi-judicial bodies when one or more of the members of the
tribunal were connected with the prosecutions. Frome United Breweries Co., Ltd. v.
Justices for County Borough of Bath, [1926] A. C. 586; Queen v. London County
Council, [1892] 1 Q. B. 190. See Robson, Justice and Administrative Law
58-66 (1928).

In the Frome United Breweries case, at pp. 590, 591, Viscount Cave, L. C.,
holding invalid a revocation of a license by the authorities because some of the mem-
ers of the tribunal had aided the prosecution, said, “if there is one principle which
forms an integral part of the English law, it is that every member of a body engaged in
a judicial proceeding must be able to act judicially; and it has been held over and
over again that, if a member of such a body is subject to a bias (whether financial
or other) in favour of or against either party to the dispute or is in such a position
that a bias must be assumed, he ought not to take part in the decision or even to sit
separation is not so clearly apparent.\textsuperscript{22} A case study of the principles of internal organization of the administrative tribunals is indicated, to the end that forms of organization may be developed pursuant to which the powers of prosecution and decision shall be separated so far as possible. Consideration should also be given the feasibility of establishing intra-departmental appeals as a means of correcting injustices by proper internal organization.\textsuperscript{23} Furthermore, it must be remembered that the courts may always set aside arbitrary administrative decisions. Appeal to the courts should be made simple, direct and expeditious. By such means the hazards occasioned by too close affiliation between the functions of prosecution and decision can be minimized if not completely eliminated. Certainly there is no need to wreck the whole regulatory process by dismemberment of all administrative tribunals in order to accomplish this desired end.

5. It is said that efficiency will be promoted by dividing the administrative tribunal into two parts—an administrative section and a judicial section, distributing its functions between the two different sets of officers. It is not easy to see how efficiency will be promoted by this means. For example, rate-making is a sublegislative function and presumably will be given to the administrative section. Passing upon reparations claims, however, although it involves much the same

upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others. . . . From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated.”

\textsuperscript{22} The Federal Trade Commission has been criticized on the ground that its organization does not adequately accomplish a separation of the processes of inquiry and prosecution from that of adjudication. \textit{Henderson, The Federal Trade Commission} 83-84 (1924). A chart showing the outline of procedure before the Commission is set forth in its 1935 Annual Report, opposite page 43. It appears from the chart that, when it receives informal complaints from the public, the commission directs an investigation to be made; an examiner investigates and makes a recommendation to the commission as to whether or not proceedings should be commenced; if the commission decides in favor of a proceeding a complaint is issued and the commission’s counsel prepares the case; testimony is taken before an examiner; the examiner reports on the facts to the commission and the commission receives briefs and arguments. Finally the commission decides the case and issues its orders. In short, the commission takes the initiative in the first instance and to a greater or less extent directs the prosecution throughout.

\textsuperscript{23} This is of course the objective of the most recent proposal of the American Bar Association Special Committee on Administrative Law. See note \textsuperscript{12}.
technique as rate-making, will be left in the hands of the judicial section. Two different agencies will be engaged in studying and acting upon the same materials. It is inconceivable that greater efficiency will result. Experience, on the contrary, has proved that, in handling the complex technical details of the regulation of private business, efficiency is really best conserved by giving all the necessary governmental powers to a single agency. That agency, informed by experience with its subordinates trained in the technicalities of a particular area of activity, acquires a technical competence of peculiar value. To split the functions is to divide the competence and impair the efficiency.

6. It is said that the commissions constitute "areas of unaccountability," that they should not be called merely "independent," but should more properly be called "irresponsible." The suggestion must originate in a lack of understanding. Federal tribunals are always subject to the will of Congress; state tribunals to that of their state legislatures. Federal tribunals are created by Congress—they can be destroyed by Congress. Their action in connection with rule-making can be nullified by Congressional enactment. With Congress almost continuously in session it is hard to see how any great tyranny can flow from "irresponsibility."

Furthermore, the action of the tribunal is subject to judicial review. Doctrines of judicial review permit the courts to set aside administrative action when it is arbitrary or capricious,\(^{24}\) or when it is based upon irregular or tyrannical procedural methods,\(^{25}\) or when it is not supported by evidence,\(^{26}\) or when it exceeds the jurisdiction conferred upon the tribunal by the legislature,\(^{27}\) or when it exceeds the limits of the Constitution.\(^{28}\) In all cases judicial review of questions of law is available, and in some cases the statutes expressly provide also for review of fact questions. The courts have not been noticeably partial to administrative adjudication or legislation, and have not hesitated to set them aside if legal grounds were found to exist. Tyrannical exercise of power seems therefore subject to a double check.

Nor is this all. The executive also has a check upon the administrative tribunal. He appoints the members of the commission. He can dismiss them for any reason provided by statute. He also controls the budget. All in all, undue tyranny resulting from "irresponsibility" seems beyond the range of possibility.

7. It is said that the policies initiated by the administrative tribunals, pursuant presumably to their rule-making powers, should be consistent with the policies of the chief executive who is elected by and responsible to the people. Properly speaking, administrative tribunals initiate no policies. The policies are formulated by the legislature and are expressed in the form of legislative "standards." The commissions make rules to fill in the details pursuant to these standards. This rule-making function involves careful knowledge of the technology of the field, but it cannot properly be regarded as policy forming. However, it must be conceded that the rule-making power is one of tremendous scope and consequence.\(^{29}\) One may well question the desirability of placing the power to elaborate legislative standards into the hands of either the politically pressed principal executive officers or the anonymous servants in their several executive departments. Under the present system the administrative commissions are made up of men serving comparatively long terms, "appointed by law and informed by experience,"\(^{30}\) selected by the President, confirmed by the Senate, qualified for their tasks as highly as is possible under a democratic system. So far as responsiveness to the policy of the administration is concerned, be it noted again that the commissions are created by Congress and can always be abolished by that body. Congress, though not necessarily more responsible to public will than is the Chief Executive, is at least equally as responsive and is more representative.

8. It is said that the administrative tribunal is unsatisfactory as a judicial agency because the tenure of administrative officials exercising judicial powers is insecure. This is valid criticism to a certain extent, though in the \textit{Humphrey} case\(^{31}\) it appeared that the lack of security is not so great as might have been supposed prior to the date of that

\(^{29}\) Practically the entire task of the Interstate Commerce Commission is quasi-legislative. See the quotation from Mr. Eastman's testimony before the Select Committee on Administrative Reorganization of the United States Senate, note 18, supra. Rate-making power as well as rule-making in the more usual sense is to be classified as quasi-legislative.


decision. In any event, permanence of tenure for all of the members of the judicial structure, while it may be desirable, can hardly be said to be indispensable. The majority of our state judiciary are elected by the people and to that extent are insecure as to tenure. Desirable as it may be to accomplish perfect security as to tenure for officers performing judicial functions, again the question is presented as to whether or not we should wreck the regulatory process by dismembering it in order to accomplish the end of perfect security. It seems obvious, of course, that members of administrative commissions should not, at the present stage of development at least, be appointed for life.

9. It is said that administrative tribunals are objectionable in their judicial aspect, at least, because they are given the power to pass upon questions of fact, and their decisions are to a greater or less extent conclusive of the fact issues involved; that independent judicial review is either not permitted under the law or is not practically obtainable. Reference has already been made to the use of judicial review as a check upon “irresponsibility.” It is difficult to be convinced that inadequacy of judicial review on fact issues is an insuperable objection to administrative adjudication. In some fields where technical competence plays a large part and political considerations are either absent or inconsequential, administrative conclusiveness may be highly advantageous. In other cases the scope of the courts’ powers of review can easily be modified to suit the occasion and judicial review of fact issues made available. It is apparent, of course, that, to the extent that judicial review is both permissible and effective, the possibility of serious harm resulting from erroneous administrative action on fact questions is minimized. If the determining power of an administrative tribunal is reduced to zero by virtue of subjecting its decisions to full judicial review upon both the law and the facts, and if, pending judicial review, the status quo is preserved, the administrative tribunal is as completely shorn of judicial power as though it were reduced to the status of a prosecuting officer. Under such circumstances it becomes in effect a referee, preparing records for the court to use in actually deciding the cases. In short, it is possible by simply adjusting the scope of judicial review to suppress erroneous action wherever it is likely to rear its head. On the other hand, where erroneous action is not so likely to appear, the technical advantages of administrative adjudication can be retained.

Under present doctrines in force in this country all questions of fact involving constitutional right and all questions of “jurisdictional”
fact arising in connection with the judicial determinations by administrative tribunals are open to judicial review,—the door cannot constitutionally be closed. In many instances also the statutes expressly provide for review of other fact determinations. On the other hand in probably a greater number of instances such other fact determinations of administrative officers are made conclusive if supported by evidence, substantially as are jury verdicts in law actions.\textsuperscript{32} However, even though fact determinations are made conclusive, arbitrary and capricious action of administrative tribunals may always be set aside by the courts, just as the courts may order new trials in the case of verdicts of juries found to be contrary to the great weight of the evidence. Furthermore, the courts may always determine just what constitutes arbitrary action, and in this way they can retain a throttle hold on dangerous tendencies. In any event, in view of this relationship between the administrative tribunal and judicial review it becomes apparent that an intelligent attack upon an unsatisfactorily functioning administrative tribunal can be made by exploring and improving the powers of the courts to review the administrative decisions.

The foregoing constitute the principal objections advanced concerning the functioning of administrative tribunals in this country. Some of the objections are obviously valid. Others are of only relative validity. Still others seem inconsequential.

In evaluating the criticisms it must be borne in mind that the

\textsuperscript{32} For example, observe the following provisions relating to the scope of judicial review of the decisions of the Securities and Exchange Commission and the Federal Trade Commission.

Securities Exchange Act, 48 Stat. L. 901, as amended by 48 Stat. L. 926 (1934), 15 U. S. C., § 78y (1934): "Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States ... by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. ... No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. ..."

Federal Trade Commission Act, 38 Stat. L. 719 (1914), as amended by 43 Stat. L. 939 (1925), 15 U. S. C., § 45, subjects the orders of the Commission to review either in connection with offering a defense to enforcement proceedings brought in the Circuit Court of Appeals pursuant to the provisions of the statute, or in connection with applications made by aggrieved parties to the Circuit Court of Appeals to set aside the orders. In either type of proceedings the statute prescribes that "The findings of the commission as to facts, if supported by testimony, shall be conclusive."
administrative tribunal is designed to accomplish a specific task of regulation. Its principal reason for being is that the Congress or the state legislature, as the case may be, has concluded that a certain area of business, industrial, economic, or social activity demands regulation, and, being unable to regulate by self-executing legislation, an administrative tribunal is created for the purpose. The principal task of the tribunal is to regulate. To aid it in its task it is implemented with a variety of powers. Some of these powers happen to look somewhat like, and may be classified as, judicial in nature. Others may be classified as legislative in nature. Still others may be administrative. However, all of their powers are simply incidental to the principal objective, regulation. Any reorganization which cuts away the tools provided to serve the regulatory process necessarily will reduce the effectiveness with which that process is carried on.

All of this is not to say that the system of administrative tribunals does not need a substantial amount of overhauling. No doubt it does. The valid objections hereinbefore referred to must be met and overcome if the fullest advantage is to be obtained from this modern agency of regulation. However, if what has been said up to this point is sound it must be clear that dismemberment of the tribunals is neither necessary nor wise, that many of them, at least, should be insulated from rather than subjected to passing political pressures, but that there are faults and important faults in the functioning of the system at certain points which demand corrective measures. Then what should be done?

III

A PROPOSED METHOD OF APPROACH TO THE PROBLEM

An intelligent attack upon the problem demands recognition of three basic factors: (1) In the first place, each agency presents a different problem and must be considered separately—there is no single formula that can be resorted to for the purpose of disposing of all of them. (2) In the second place, each agency must be so placed in the governmental structure as best to serve its principal objective, and in the case of the administrative tribunal this objective is the adequate policing of its jurisdictional area. (3) In the third place, each agency must be scrutinized individually to the end that its defects may be brought to light and appropriate corrective measures applied.

The first proposition seems self evident. The various agencies differ too markedly to be subject to a common formula. Some of them
are governmental service agencies; others are engaged in the regula-
tion of private business. Some of them are primarily administrative in
nature and their quasi-legislative or quasi-judicial powers are so insig-
nificant that they assume a minimum of functional importance. This
is true of most of the governmental service agencies, for example, the
Social Security Board and the Veterans' Administration. On the
other hand, some of them perform functions which are primarily
legislative in nature, although they also possess judicial and adminis-
trative powers of an incidental sort. Their principal task is filling in
details pursuant to standards prescribed by Congress. This is true,
for example, of the Federal Communications Commission, the Inter-
state Commerce Commission, and others. Finally, there are those

33 The principal powers of the Social Security Board, 49 Stat. L. 635 (1935),
42 U. S. C., § 901 (Supp. II, 1936), are as follows:
1. Approves or disapproves state plans for "old age assistance" and thereby
determines whether or not federal aid shall be extended to the several states. The
act provides that the federal appropriation for old age assistance shall be divided among
the states which have adopted plans conforming to specifications set up in the Social
Security Act. The Board determines whether or not the specifications are met.
2. Certifies to the treasury the amounts to be paid to the several states as
federal aid for old age assistance.
3. Directs minor adjustments in the amounts to be paid under the "old age
retirement" provisions of the Social Security Act. The allowances under this act are
definitely defined by the statute for the most part, but minor adjustments are required
in certain special situations and the Board is empowered to deal with them.
4. Approves or disapproves state plans for unemployment insurance. If they are
approved by the Board the states become entitled to receive aid for the administration
of their state unemployment insurance acts. Furthermore, if the plans are approved
the federal unemployment insurance tax is reduced from three per cent to three-tenths
of one per cent upon all employers within the state. The specifications for approved
state plans are set forth in detail. The Board simply determines whether or not the
specifications are met.
5. Approves or disapproves state plans for aid to dependent children, and thereby
determines whether or not federal aid shall be extended. Again the specifications of
proper state plans are set forth in the act in detail. The Board determines whether or
not the specifications are met, and approval by the Board permits the state to share
in the federal grant in aid.
6. Furnishes the Secretary of the Treasury with estimates of the federal aid
to be paid to each state under the plans so approved.
7. Approves or disapproves state plans for aid to the blind. Again the speci-
fications for such plans are set forth in the act. If the Board approves the plan of any
state, that state may share in the federal appropriation for the purpose.
8. Certifies to the Secretary of the Treasury the amounts to be paid to each state
as a federal grant in aid to the blind.

34 The principal powers of the Interstate Commerce Commission are as follows
(49 U. S. C., § 1 et seq.):
1. Establishes reasonable rules, regulations and practices with respect to car
service to be rendered and facilities furnished.
that perform functions chiefly judicial in nature, that is they are engaged primarily in the adjudication of private rights and duties on the basis of existing law and events which have already taken place. These agencies may also possess legislative or administrative powers of an incidental sort. This is true of the United States Employee's Compensation Commission, the United States Board of Tax Appeals,

2. After due hearing prescribes the just and reasonable rates, fares or charges to be observed by the carriers.

3. After due hearing prescribes the just, fair and reasonable regulations as to classifications and practices of carriers.

4. Establishes through routes, joint classifications, joint rates, fares or charges.

5. Passes upon applications by carriers for the privilege of extending or abandoning their lines (certificates of convenience and necessity).

6. Passes upon applications for exceptions to be made to the "long and short haul" clause.

7. Passes upon applications for the privilege of making combinations, consolidations, mergers, purchases, leases or acquisitions of control of rail carriers.

8. Passes upon applications of carriers for permission to issue shares of capital stock or bonds or other evidences of indebtedness, the application to be approved when compatible with the public interest.

9. Investigates complaints filed by injured parties alleging violation of the numerous duties imposed upon carriers by the act. May also proceed of its own motion.

10. After hearing, prohibits practices of carriers involving rebates or giving undue or unreasonable preferences or advantage to any person or locality.

11. After hearing, orders reparations to be paid in the case of excessive charges made by carriers to shippers.

12. Inquires into the management of the business of the carriers subject to the act, and keeps itself informed as to the manner and method in which the business is conducted.

13. Evaluates the physical properties of the carriers. This is not necessarily done in connection with rate making proceedings, but sometimes is done simply as administrative procedure for the purpose of providing statistical information concerning investments in rail properties.

14. Requires reports from carriers, prescribes the forms of accounts and records to be kept by carriers, examines such accounts and records for the purpose of informing itself as to the business of carriers.

15. Requires carriers to install safety devices which comply with specifications prescribed by the Commission.

The principal powers of the United States Employees' Compensation Commission administering the Longshoremen's and Harbor Workers' Compensation Act are as follows (33 U. S. C., § 901 et seq.):

1. Holds hearings and passes upon claims for compensation allowable under the act. Compensation is to be paid if disability or death results from an injury occurring upon the navigable waters of the United States. The proceedings are judicial in form. Testimony is taken and an award is entered. Provision is made for judicial review by injunction proceedings.

2. Holds hearings and passes upon applications for changes in awards on the ground of change in conditions. The same judicial type of procedure must be followed in such cases.

3. Establishes compensation districts and assigns suitable personnel to each district.
the Federal Trade Commission and the National Labor Relations Board.

It seems obvious, in view of these differences in major characteristics, that no single formula can be devised to cut across the whole field and satisfactorily dispose of all the agencies. Both the committee of the American Bar Association and the President’s committee have made the mistake of seeking a single formula.

If it may be assumed that no single formula will sweep the field, a basic principle which will aid in the placing of each of them individually must be sought. As to this, each tribunal should be examined with the object of determining the nature of its primary functions. If they are primarily administrative, as are those of the Social Security Board, let them be placed in one of the major executive departments of the government. If they are primarily legislative, as are those of the Interstate Commerce Commission, let them be placed in the hands of an independent commission reporting to Congress, the source of legislative power. If they are primarily judicial, as are those of the Employee’s Compensation Board, let them also be independent, subject, of course, to judicial review even as the courts themselves are independent of the other branches of the government. If in addition to the primary functions they exercise some incidental functions which superficially seem to belong in some other department of the government, good sense demands that the fact be ignored. It is essential to recognize that the powers conferred upon any one tribunal are unitary with respect to the task which the tribunal is supposed to carry out. To the extent that the powers are a unit in a functional sense they should be left in a single hand.\textsuperscript{86}

4. Directs the vocational rehabilitation of permanently disabled employees, and arranges with appropriate public or private agencies for education of such persons.

5. Makes investigations with respect to safety measures, also examines into causes of injuries covered by the act. From time to time makes recommendations to Congress as to proper means of preventing such injuries.

\textsuperscript{86} Those actually engaged in the work of the administrative tribunals see this point clearly enough. Joseph B. Eastman, a member of the Interstate Commerce Commission, in testifying before the Senate Committee concerning S. 2700, stated the needs of the Commission in regulating interstate commerce as follows: “the Congress saw that it was necessary to create more than a mere tribunal. What it created was an administrative tribunal. The Commission is not a mere adjudicator of controversies, but, in addition to that, it is the guardian of the general public interest. It is a fact-finding body, with the duty and power to get the facts and protect the public interest. It can act not only on complaint but on its own initiative, and the statutes make that its duty.

“Now, there are proposals to split those functions; in other words, to separate the functions, so that this body, which has been given the duty and the responsibility
Finally, it remains to consider what shall be done to correct the defects found in the functioning of certain of the administrative tribunals. A detailed discussion of the process of reformation would lead to get the facts, will be deprived of control over the machinery and organization which is necessary for that purpose.

"There has in this connection been a great deal of talk about the administrative functions of the Commission, although no one has clearly stated what he was talking about in that connection. It is highly desirable to distinguish the work of the Commission which is executive, from the point of view of governmental functions, from that which is administrative, in relation to the Commission’s own organization.

"I may illustrate that by the regulation of railroad rates. The Commission is there performing not a simple job, but a most complex one, requiring an extensive organization. As a part of this regulation carriers must publish and file tariffs and schedules of their rates and charges under rules and regulations prescribed by the Commission. Tens of thousands of such tariffs are filed, and an extensive staff is required to index and examine them, and see that they conform to the rules and regulations. In the process of regulating rates, also, it is essential that accurate statistics will be available, with respect to carrier operations and their financial results. The prescription and policing of accounting systems are essential to the accuracy of the statistics, and they also require the filing by the carriers of appropriate periodical reports. In connection with these matters and with the derivation and publication of the necessary statistical information therefrom, an extensive staff is required. Furthermore, the proceedings involving the regulation of rates and charges run into very large numbers each year.

"Examiners must be employed to hear cases, review evidence, prepare drafts of reports, and otherwise assist the Commissioners. Of course, much stenographic and clerical assistance is also required. At times, in important rate cases, special examinations of carrier records or operations are necessary to obtain information which could not otherwise be made available. The accountants and statisticians of the Commission are used in such special examinations, and sometimes the inspectors who are normally employed on safety work.

"This description of the incidental work which is of necessity a part of the regulation of rates, and of the staff which it requires, could be duplicated in the case of the other legislative work of the Commission, such as the supervision of security issues and unifications, the granting of certificates and permits, the prescription of safety standards, and like matters.

"Much of the work of the staff of the Commission, therefore, can properly be classified as administrative, from the point of view of internal organization, but it is not executive from the standpoint of governmental functions. On the contrary, it is in reality only a part, or a phase of the legislative work, since it is vital to the proper and efficient conduct of that work.

"Now, there are certain duties which the Commission performs which are quasi-executive, from the standpoint of governmental functions. . . .

"The best illustration of these duties which are quasi-executive is in connection with the railroad safety work, and that is a thing that is often mentioned, and I think it is desirable to say a word about that.

"The original Safety Appliance Act was passed in 1893, and the then Secretary of the Commission, Edward A. Moseley, was one of the men who was chiefly responsible for that act. The Congress required automatic couplers, power brakes, and freight-car appliances of various sorts. Later it passed similar laws with respect to locomotive boilers and equipment, and with respect to hours of service, and
through the entire range of administrative procedure. Space is not available for full discussion. But wiser procedures can be devised, more illuminating hearings may be required, findings of fact may be demanded, publication of rules, orders and opinions may be required, better dissemination of administrative rules can be brought about, appeals to the courts can be simplified, in cases where arbitrary action is likely to occur the scope of judicial review can be increased, in other cases efficiency can be promoted by decreasing it. The number of procedural devices available is legion. Nor is that all that can be done. Measures can be taken to insure the best available personnel being placed upon the tribunals. Civil service laws may be extended to the subordinate personnel of the agencies. For the sake of giving the chief execu-

the Commission was empowered to have a staff of inspectors for the purpose of enforcing those provisions of the law. Still later it was given certain legislative duties in regard to safety devices, but primarily its duty under the safety acts is one of enforcement, and that is an executive function, but under the statute it performs that task in conjunction with the Department of Justice. In other words, the Commission cannot enforce directly but only through reports to the Department of Justice and action on their part.

"The proponents of that measure, 44 years ago, wanted preliminary enforcement work with respect to safety in the hands of a body which was acquainted with railroads, and nonpolitical in character. The arrangement has worked well ever since. This work could be transferred to the Department of Commerce, to be administered along with the similar work of the Bureau of Navigation—but why?

"There are similar policing and enforcing duties with respect to other statutory prohibitions and requirements, such as the law against rebating, but all of the preliminary duty of enforcement has been given to the Commission because of its expert and specialized knowledge, and for the aid of the Department of Justice.

"Then there are certain judicial functions which the Commission has come to have for similar reasons, and which are closely associated with its legislative work. For example, it awards reparation for rates which were unreasonable in the past, and it makes other awards of just compensation. If reparation is awarded, that is a judicial function, because it formerly was done by the courts. It is committed to the Commission because the duty is performed in exactly the same way as the prescribing of rates for the future.

"There are other judicial functions, like valuation, the Clayton Act, but all are subject to full court review.

"Summarizing what I have said in regard to the Commission as an institution, it is essentially an arm of Congress in performing quasi-legislative functions under quasi-judicial procedure, organized so as to have some stability and continuity of policy and to be removed from political influence, with a mandate to get the facts on its own initiative, if necessary, equipped for this purpose with a staff under its own control, and accountable to the Congress, the courts, and the President in the manner I have indicated. In addition, it has a few duties which may be classed with executive or judicial functions of government, but which are largely preliminary to action by the Department of Justice, or the courts, and which have been given to it because of its specialized knowledge of transportation matters." 

Hearings before the Select Committee on Government Organization on S. 2700, 75th Cong., 2d sess. (1937), pp. 180-182.
tive a more adequate check on certain of the independent administrative tribunals where a check is needed, and of giving him a better opportunity to guide them in matters of policy, a broader power of removal of commissioners than that which now exists might in certain cases be conferred by statute.

These, and indeed many other devices, are available to improve the functioning of the system. Let it be repeated, however, that it is first necessary to examine each tribunal to ascertain its particular defects. Having ascertained the defects, the application of an appropriate remedy is not such a difficult matter.

Such a course of action with reference to the independent agencies would be sensible instead of merely formulary, would be careful instead of superficial, would be thoughtful attack instead of grandiose reform.

Appendix

The "one hundred independent agencies, administrations, authorities, boards and commissions" are not listed either in the President's message or in the Report of the President's Committee on Administrative Management which furnished the background for the message. The following, however, is a fairly complete list of the more important agencies. It is compiled partly from the Independent Offices Appropriation Act for the year ending June 30, 1937 (49 Stat. L. 1168) and partly from other sources.

American Battle Monuments Commission
Aviation Commission
Board of Governors of the Federal Reserve System
Board of Tax Appeals
Central Statistical Board
Civil Service Commission
Community Credit Corporation
Director of Emergency Conservation Work
Electric Home and Farm Authority, Inc.
Employees' Compensation Commission
Export-Import Bank of Washington, D. C.
Farm Credit Administration
Federal Alcohol Administration
Federal Communications Commission
Federal Deposit Insurance Corporation
Federal Emergency Administration of Public Works
Federal Emergency Conservation Work (Civilian's Conservation Corps)
Federal Emergency Relief Administration
Federal Farm Mortgage Corporation
Federal Housing Administration
Federal Oil Conservation Board
Federal Power Commission
Federal Prison Industries, Inc.
Federal Savings and Loan Insurance Corporation
Federal Trade Zone Board
General Accounting Office
Home Owners Loan Corporation
Inland Waterways Corporation
Interstate Commerce Commission
National Academy of Sciences
National Advisory Committee on Aeronautics
National Archives
National Bituminous Coal Commission (in Department of the Interior for budget purposes)
National Capitol Park and Planning Commission
National Forest Reservation Commission
National Labor Relations Board
National Mediation Board
National Resources Committee
National Youth Administration
Pan American Union
Public Works Emergency Housing Corporation
Railroad Retirement Board
Reconstruction Finance Corporation
Rural Electrification Administration
Securities and Exchange Commission
Smithsonian Institution
Social Security Board
Tariff Commission
Tennessee Valley Authority
United States Board of Mediation
United States Maritime Commission
United States Railroad Commission
Veterans' Administration
War Finance Corporation

The Brookings Institution publishes from time to time in the American Political Science Review information concerning this bewildering array of federal administrative agencies. A complete tabulation was first published in 27 AM. Pol. Sci. Rev. 942 (1933). Subsequent changes are set forth in supplementary lists published as need arises. See 28 AM. Pol. Sci. Rev. 250, 872 (1934); 29 AM. Pol. Sci. Rev. 67, 631, 1017 (1935); 30 AM. Pol. Sci. Rev. 546, 930 (1936); 31 AM. Pol. Sci. Rev. 699 (1937). These lists not only set forth the names of the various agencies, but also give citations to the statutes and executive orders pursuant to which changes have been made from time to time, and in brief form give useful details concerning powers, personnel, previous history, etc.

Of the foregoing list the following are seemingly so constituted, and so implemented with either quasi-judicial or quasi-legislative powers or both, as to be beyond the President's discretionary power of removal, and hence they are independent in the most complete sense (see note 1): Board of Tax Appeals, Federal Communications Commission, Federal Power Commission, Federal Trade Commission, General Accounting Office, Interstate Commerce Commission, National Bituminous Coal Commission, National Labor Relations Board, National Mediation Board, Securities and Exchange Commission, Social Security Board, United States Maritime Commission.

A complete list of all the departments, boards, commissions, authorities, corporations and activities of the government of the United States as of January 1, 1937, is set forth in the report of Hearings before the Joint Committee on Government Organization of the United States Congress having under consideration the message of the President on reorganization, S. Doc. No. 8, 75th Cong., 2d sess. (1937), pp. 190-192. The list is classified.