# RECENT DEVELOPMENTS IN AMERICAN ADMINISTRATIVE LAW

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In 1972, this writer and Professor Wade published a comparative study of administrative law in Britain and the United States.[1] Though it is less than a decade since this work appeared, there have been significant developments in American administrative law in the intervening years. Indeed, while the book was being printed a leading federal jurist, Judge Bazelon, could state: "We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts."[2] Since this statement was made, important cases have been decided and statutes enacted. They make it possible to see, albeit dimly as yet, some of the outlines of the emerging "new era".

This article seeks to set forth the important developments that have taken place in American administrative law since the Schwartz-Wade book was published. Its aim is to enable the Canadian jurist to understand the essential changes that are taking place in a system that is, at the same time, so similar to and so different from his own. Perhaps the outstanding feature of present-day American administrative law is its Heraclitean nature; the subject is one in a continual state of flux. The United States, during the past decade, has been in the midst of a virtual administrative law explosion. A few years ago, Judge Friendly asserted that "we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution".[3] The same has been true, though perhaps to a lesser degree, of the other areas covered by American administrative law; the entire subject is going through a period of well-nigh unprecedented change. To one working in administrative law, it may truly be said (with Heraclitus): "The world's a scene of changes, and to be Constant, [in such a field] were inconstant."

## I. *Administrative Power.*

Administrative power is, of course, as old as government itself. In the American system, the very first session of the first Congress

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[1] Schwartz and Wade, Legal Control of Government: Administrative Law in Britain and the United States (1972), hereinafter cited as Schwartz-Wade.

[2] *Environmental Defense Fund* v. *Ruckelshaus* (1971), 439 F.2d 584, at p. 597 (D.C. Cir.).

[3] Friendly, Some Kind of Hearing (1975), 123 U. of Pa. L. Rev. 1267, at p. 1273.

enacted three statutes conferring important administrative powers. Well before the setting up of the Interstate Commerce Commission (ICC) in 1887—the date usually considered the beginning of American administrative law— agencies were established which possessed the rule-making or adjudicatory powers or both that the American administrative lawyer considers to be characteristic of an administrative agency. Modern administrative law in the United States, nevertheless, may be said to start with the ICC, the archetype of the American administrative agency. It has served as the model for a whole host of agencies that were vested with delegated powers patterned after those conferred upon the first federal regulatory commission.

Conscious use of the law to regulate society has required the creation of an ever-growing administrative bureaucracy. The ICC has spawned a progeny that has threatened to exhaust the alphabet in the use of initials to characterize the new bodies. According to a recent Supreme Court opinion: "The term 'alphabet soup' gained currency in the early days of the New Deal as a description of the proliferation of new agencies. . . . The terminology required to describe the present [system] suggests that the 'alphabet soup' of the New Deal was, by comparison, a clear broth."[4] Nor has the expansion of administrative power been limited to the ICC-type economic regulation. A trend toward extension into areas of social welfare began with the Society Security Act of 1935. Disability benefits, welfare, aid to dependent children, health care, and a growing list of social services has since come under the guardianship of the administrative process. The increasing concern with environmental matters has also given rise to new agencies with expanded powers. The traditional area of regulation is now dwarfed by the growing fields of social welfare and environmental concern.

The Schwartz-Wade book noted the substantial shift that had occurred in the administrative centre of gravity toward the non-regulatory area. As Lord Diplock put it in a Foreword: "American administrative law is also increasingly concerned with the affairs of ordinary men and women, their homes, their health and their welfare—a problem of which our earlier commitment to the welfare state has given us a riper experience."[5]

During the past decade, there has been an intensification of the trend toward non-regulatory administration in the United States. In particular, there has been a dramatic increase in the number of cases decided under federal social welfare programmes. Just before the

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[4] *Chrysler Corp.* v. *Brown* (1979), 44 U.S. 281, at pp. 286-287.

[5] Schwartz-Wade, p. xiii.

Schwartz-Wade book was published, the United States Supreme Court decided *Richardson* v. *Perales*[6]—the leading case on administrative procedure under the Social Security Act. In its opinion, the court stressed the magnitude of the agency caseload under the Act. "The system's administrative structure and procedures, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend." The court illustrated its point by noting that the Social Security Administration (SSA) then dealt with some half a million claims a year for disability payments, and held some 20,000 formal disability claim hearings annually. The numbers involved led the court to refer to "the sheer magnitude of that administrative burden".[7]

By fiscal year 1976 (only five years after *Richardson* v. *Perales*), the caseload under the Social Security Act had grown by leaps and bounds. Disability claims filed had increased to over 1,200,000 and the number of disability claim hearings to some 100,000 annually. In addition, during the same fiscal year, the SSA processed over 3,500,000 retirement and survivors insurance claims, almost a million supplemental security income claims, and over 120 million claims under the so-called Medicare programme (providing for extensive federal programmes of hospital and medical insurance). Including the disability hearings already referred to, the SSA held some 150,000 formal hearings during the year in question.[8]

The caseload under the Social Security Act illustrates the rise in the United States of what may be termed mass administrative justice. When we move from the more traditional ICC-type regulatory agency to those administering social welfare programmes, such as the Social Security Administration, we move into mass administrative justice, where cases are measured not in the thousands but in the many millions.[9] One of the key problems on the current American administrative law agenda is that of making mass administrative justice workable. Of course, as the United States Supreme Court puts it, "Such a system must be fair;" but, even more important, "it must work".[10] The fully judicialized procedure developed in American regulatory agencies may be ill adapted to the needs of mass administrative justice. What is needed is, as the American Supreme Court has stressed, procedure that is not only fair, but

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[6] (1971), 402 U.S. 389.

[7] *Ibid.*, at pp. 399, 406.

[8] The statistics are given in Schwartz, Administrative Law: A Casebook (1977), pp. 19-20.

[9] See Friendly, Some Kind of Hearing (1975), 123 U. of Pa. L. Rev. 1267, at pp. 1289-1291; Baum, The Welfare Family and Mass Administrative Justice (1974).

[10] *Richardson* v. *Perales, supra,* footnote 6, at p. 399.

procedure which works—procedure which can cope with the volume of cases and is suited to the relatively small sums involved in most of them.

Judge Friendly has called for American administrative law "to abandon the adversary system in certain areas of mass justice, notably in the many ramifications of the welfare system, in favor of one in which an examiner with no connection with the agency would have the responsibility for developing all the pertinent facts and making a just decision. Under such a model the 'judge' would assume a much more active role with respect to the course of the hearing; for example, he would examine the parties, might call his own experts if needed, request that certain types of evidence be presented, and, if necessary, aid the parties in acquiring that evidence".[11] Experiments along the lines called for—what Judge Friendly calls "the investigatory model"[12]—have been taking place in a number of American agencies, notably in the SSA itself.

*Delegations of Power.*

During the past half century a prime task of American administrative law was to legitimize the vast delegations of power that had been made to administrative agencies, particularly at the time of President Franklin D. Roosevelt's New Deal. The 1935 *Schechter* and *Panama* cases[13] struck down the most important early New Deal measure on the ground that it contained excessive delegations of power because the authority granted under it was not restricted by a defined standard. Since those cases, however, the United States Supreme Court has moved away from the strict *Schechter-Panama* view that an enabling act must be invalidated unless it contains an ascertainable legislative framework within which the exercise of the delegated power must fit. The Schwartz-Wade book discussed this development and concluded that: "The much-vaunted 'standard' has . . . become, in the words of a British comment, 'hardly more than a ceremonial incantation from an earlier constitutional era.' "[14] Broad delegations have been the characteristic Congressional responses to the endemic crises of the contemporary society, and, since the *Schechter* and *Panama* cases, such delegations have been uniformly upheld by the federal courts.

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[11] Quoted, in Schwartz, *op. cit.*, footnote 8, p. 377.

[12] To avoid the pejorative connotations of the more traditional term "inquisitorial".

[13] *Schechter Poultry Corp.* v. *United States* (1935), 295 U.S. 495; *Panama Refining Co.* v. *Ryan* (1935), 293 U.S. 388.

[14] Schwartz-Wade, pp. 86-87.

*Amalgamated Meat Cutters* v. *Connally*,[15] a case decided while the Schwartz-Wade book was being published, illustrates dramatically the extent to which the limitations upon delegation of legislative power have given way in the American system. At issue was the President's order of August 15th, 1971 imposing a ninety-day price and wage freeze. The order was promulgated under the authority delegated by the Economic Stabilization Act of 1970. Under it, the President "is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970". The power delegated is the same broadside one which was granted by a 1942 statute during World War II and upheld in *Yakus* v. *United States*.[16] But the *Yakus* case turned both upon the fact that the delegation there had been made during a period of declared war and that the 1942 Act contained defined standards. The standards in question may have been broad, but at least they were present and might arguably be said to give the delegate some guide. This factor was absent in the 1970 Act. If ever there was a delegation without standards, this was it.

Despite this, the court had little difficulty in upholding the 1970 Act against a claim of invalid delegation. According to the court the standards of the Act were sufficient, in the context of history, to permit the court to ascertain that the ninety-day freeze was in conformance to the legislative will. But that could be said of most broad delegations. A Presidential order fixing prices and wages at any level above the statutory floor was plainly within the Congressional delegation. Yet it was entirely up to the President to decide when to act, what ends to accomplish by his action, and at what levels and for how long to fix prices and wages. No guides were given by Congress, except the fact that it "was, of course, acting against a background of wage and price controls in two wars".[17] A decision like that in *Amalgamated Meat Cutters* makes it hard to see what, if any, delegations would go too far. Under the court's approach, the requirement of a standard has become a vestigial euphemism, virtually shorn of practical meaning.

This does not, however, mean that there are no longer any limitations at all upon American delegations.[18] There are still powers

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[15] (1971), 337 F. Supp. 737 (D.D.C.).

[16] (1944), 321 U.S. 414.

[17] *Supra*, footnote 15, at p. 748. It should be noted that no appeal was taken to the Supreme Court, so the decision of the district court remains *the* decision in the case.

[18] For a recent call by a federal judge for enforcement of limitations upon delegation, see Wright, Beyond Discretionary Justice (1972), 81 Yale L.J. 575. For

which only Congress itself may exercise directly. Notable among these is the power to levy taxes. In a 1974 case, the Federal Communications Commission had ordered an increase in the fees imposed on certain television systems. The Supreme Court held that the statute did not authorize the Commission to order the increase. Though the case, strictly speaking, involved only statutory interpretation, it also has constitutional implications. The court stressed that it "would be such a sharp break with our tradition to conclude that Congress has bestowed on a federal agency the taxing power" that the enabling statute had to be read "narrowly as authorizing not a 'tax' but a 'fee' ".[19] The implication is that a delegation to levy taxes would still be invalid in the American system.

*Legislative Control.*

Perhaps the most important recent development with regard to delegated legislation in the American system has been the emergence of legislative control under a technique comparable to that long provided for in British administrative law. The technique in question has come to be called the "legislative veto". It is exercised through statutory provisions empowering one or both Houses of Congress to disapprove delegated legislation by passage of an annulling resolution. The technique is, of course, similar to the practice of "laying" delegated legislation before Parliament, subject to annulment by resolution of either House, which has long been an established feature of British law.

The use of the legislative veto in America is a direct reflection of the growing malaise over uncontrolled delegation. In the words of a *New York Times* leader: "Imperial Presidencies and imperious agencies have made the 'legislative veto' increasingly attractive to Congress. . . . It has been only natural for Congress to seek a redress in the balance."[20] The great need in an era of ever-expanding administrative authority, accompanied as it is by an almost reciprocal disillusionment with governmental agencies, is to establish effective safeguards. One response to that need has been the growing interest in more adequate legislative review of delegated legislation through techniques such as the legislative veto. The movement to provide for legislative review has been spreading in recent years. According to a 1976 House of Representatives report, at least 183 legislative veto provisions have been included in federal statutes since 1933;[21] by a more recent estimate, Congress has

a contrary view, 1 Davis, Administrative Law Treatise (2nd ed., 1978), §§ 3:1-15, hereinafter cited as Davis.

[19] *National Cable Assn.* v. *United States* (1974), 415 U.S. 336, at p. 341.

[20] N.Y. Times, June 26th, 1978, p. 18, cols 1-2.

[21] H.R. Rep. No. 1014, 94th Cong., 2d Sess. 14 (1976).

resorted to the device in forty-eight measures over the past four years.[22]

The legislative veto technique has also been used extensively in the American states. Currently, provisions for some form of legislative review are part of the statute-book in at least twenty-eight states.[23] At its 1977 annual meeting the National Conference of State Legislatures recommended that its members adopt procedures for reviewing administrative rules and regulations.[24] This recommendation should stimulate the spread of legislative review techniques throughout the United States. There is strong sentiment in Congress for setting up an analogous federal system of general review of agency rules. A bill providing for such a system narrowly failed to receive a required two-thirds majority in the House of Representatives in 1976.

It is probable that a law providing for general legislative review of delegated legislation will be among the measures enacted by Congress in the next few years. Though critics (including President Carter)[25] have attacked the constitutionality of the legislative veto, the few cases in point uphold its validity.[26] We may predict that the legislative veto and comparable legislative review techniques will play an increasingly important part in American administrative law, since they enable American legislatures to assume their rightful place as effective supervisors of delegated powers. This may help restore the balance which has been tilted unduly by the judicial reluctance, already noted, to exercise control over the delegations of power themselves.

*Freedom of Information.*

The position of Americans vis-à-vis administrative power was strengthened by the 1967 Freedom of Information Act (FOIA), under which the citizen is, for the first time, given a legally enforceable right of access to government files and documents. The key FOIA provision gives a person whose request for identifiable records is refused by an agency a right of action to compel production in a federal court. Unless the documents in question come within one of

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[22] See *op. cit.*, footnote 20.

[23] See Schwartz, The Legislative Veto and Constitution—A Re-examination (1978), 46 Geo. Wash. L. Rev. 351, at pp. 362-363.

[24] *Ibid.*, at p. 361.

[25] N.Y. Times, June 22nd, 1978, p. 1, col. 1.

[26] See particularly *Atkins* v. *United States* (1977), 556 F.2D 1028 (Ct Cl.).

the nine exceptions specified in the Act, the court will order production.[27]

The Schwartz-Wade book noted the beneficial influence already exerted by FOIA.[28] There were, however, certain weaknesses in the Act, which impaired its effectiveness. Congress dealt with them by important amendments, which were passed over President Ford's veto in 1974.[29] In the first place, agencies had been defeating the intent of FOIA by charging unreasonably high fees for documents. The 1974 amendments prohibit this practice, requiring that "fees shall be limited to reasonable standard charges for document search and duplication", which shall cover only the direct costs incurred.

In addition, under FOIA as originally passed, agencies were left with discretion on when to respond to individual requests for records. Before refusal, an FOIA action might not be brought and complaints were heard of undue agency dilatoriness in disposing of FOIA requests. The 1974 amendments sought to correct the situation by providing a short time limit during which agencies must deal with FOIA requests. Agencies must now determine FOIA requests within ten days and decide appeals on such requests within twenty days. If the agency fails to comply with these time limits, the person making the request "shall be deemed to have exhausted his administrative remedies with respect to such request"—which means that he can then bring an FOIA court action.

In the FOIA court action, too, the 1974 amendments seek to expedite matters. Defendant agency must now answer or plead within thirty days after service of complaint and FOIA cases are to take precedence on the docket over all cases and shall be assigned for trial at the earliest practicable date and expedited in every way.

But the amendment with the broadest implications arose out of the 1973 *Mink* decision[30] interpreting the exemption from FOIA of "matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy". The *Mink* case held that, under this language, the court in an FOIA action might not go into the merits of an executive classification. The court might determine only whether in fact the Executive had classified the documents at issue: "the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret."[31]

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[27] 5 USC § 552, 81 Stat. 54. See Schwartz-Wade, p. 77. For a general discussion, see Davis, §§ 5:1-26.

[28] *Ibid.*, p. 79.

[29] 88 Stat. 1561-1564.

[30] *Environmental Protection Agency* v. *Mink* (1973), 410 U.S. 73.

[31] *Ibid.*, at p. 82.

A primary purpose of the 1974 amendments to FOIA was to overrule the *Mink* decision in this respect. Under them the first exception now applies to matters authorized by an Executive Order to be kept secret in the interest of national defense or foreign policy only when they "are in fact properly classified pursuant to such Executive order." And the court in an FOIA action is given the express power to examine the records in camera to determine whether the records should be withheld under the exception. Under the amendments the court in an FOIA case may now determine *de novo* whether an invocation of executive privilege was justified.

## II. *Administrative Procedure.*

### *Delegated Legislation.*

After noting the trend to uphold broad delegations of power, the Schwartz-Wade book noted that the emphasis in American administrative law has shifted from the constitutionality of delegated legislation to the procedure for making it.[32] The Federal Administrative Procedure Act (APA)[33] (a statute enacted by Congress in 1946, which imposes general procedural requirements on American administrative agencies) provides for a system of antecedent publicity. General notice of any proposed rule-making (the common American term for exercises of powers of delegated legislation) must be published in the *Federal Register*. The agency must then afford interested persons the opportunity to participate in the rule-making process through submission of written data, views, or arguments, with or without opportunity to present them orally, and all relevant matter so presented is to be considered by the agency.

Rule-making under the APA is usually called "notice and comment" rule-making, since the APA does not mandate anything more than that the agency publish the notice of proposed rule-making and give interested persons some opportunity to comment on the proposed regulations. Notice and comment rule-making under the APA has been criticized as not providing enough procedural safeguards. This has been particularly true in the newer fields of environmental and nuclear regulation, which involve complex scientific or technical issues, involving mathematical or experimental data. The factual issues in those fields have been deemed inappropriate for trial-type procedures. Instead, rule-making has been expanded into these fact-intensive areas, with the issues resolved in rule-making proceedings. Some courts have been

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[32] Schwartz-Wade, p. 87. See generally Davis, §§ 6:1 *et seq.*; Hamilton, Procedures for the Adoption of Rules of General Applicability (1972), 60 Calif. L. Rev. 1260.

[33] 5 USC §§ 551 *et seq.*, 60 Stat. 237.

unwilling, in such cases, to allow the agencies to limit themselves to the informal procedural requirements imposed by the APA, asserting that proceedings such as those involving nuclear regulation involve factual components of such relative importance that a greater assurance of accuracy is required than that which accompanies notice and comment procedures. The Court of Appeals for the District of Columbia, in particular, handed down a series of decisions holding that, in these rule-making cases involving complicated scientific issues, procedures in excess of the bare minima prescribed by the APA may be required.

The United States Supreme Court has, however, now aborted this line of cases. In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*,[34] the District of Columbia Court of Appeals had struck down a rule of the Nuclear Regulatory Commission dealing with the uranium fuel cycle in nuclear power reactors because of inadequacies in the procedures employed in the rule-making proceedings. The agency had complied with the APA notice and comment requirements, but the court held that more should be required, to enable the issues to be ventilated fully. In particular, the court accepted the argument that the agency's decision to preclude discovery or cross-examination denied a meaningful opportunity to the environmental association which had intervened to participate in the proceeding. The Supreme Court held that such a ruling was wrong. The APA lays down the only procedural requirements for informal rulemaking. To require more "almost compels the agency to conduct all rule-making proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearings".[35]

The Supreme Court decision means that, if agencies are to be required to follow stricter rulemaking procedures than those imposed by the APA, such requirements will have to be imposed by Congress, not the courts. It would, however, be undesirable for the APA to be amended to require more than notice and comment procedures in most rulemaking. Recent years have seen an expansion of powers of delegated legislation. Both Congress and the courts have fostered the trend toward rulemaking. But that does not mean that rulemaking should be moved in a judicialized direction; that would defeat the principal advantages of the rulemaking process. As a member of the lower court in *Vermont Yankee* himself concedes, "requiring cross-examination in a rulemaking proceeding is radical therapy, which may cause the patient to suffer a slow, painful

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[34] (1978), 435 U.S. 519.

[35] *Ibid.*, at p. 547.

death''.[36] Of course, as the Supreme Court recognizes, agencies are free to grant additional procedural rights in rulemaking; ''but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them''.[37]

*Adjudicatory Procedure.*

In the field of adjudicatory procedure, there have been two important recent American developments. With regard to both, there have been significant changes since the Schwartz-Wade book was published. The first development referred to was the extension of the right to an evidentiary hearing[38] from the older field of regulatory administration to the burgeoning benefactory apparatus of the Welfare State. Before 1970, the latter was still beyond the due process pale, since there was a constitutional right to procedural safeguards only in cases where the administrative decision adversely affected the individual in his *rights*. If the individual was being given something by government to which he had no preexisting ''right'', he was being given a mere ''privilege'' and was ''not entitled to protection under the due process clause''.[39]

All this was changed by the landmark decision in *Goldberg* v. *Kelly*,[40] which held that public assistance payments to an individual might not be terminated without affording the person an opportunity for an evidentiary hearing. The court specifically rejected the rule that there was no right to a hearing because public assistance was a mere ''privilege''. ''The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'.'' It is no longer accurate to think of welfare benefits as only privileges. ''Such benefits are a matter of statutory entitlement for persons qualified to receive them.'' In this sense, they are ''more like 'property', than a 'gratuity' ''.[41]

*Goldberg* v. *Kelly* did away with the distinction between *rights* and *privileges*, upon which the due process right to an evidentiary

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[36] *National Res. Def. Council* v. *Nuclear Regulatory Com'n* (1976), 547 F.2d 633, at p. 655 (D.C. Cir.).

[37] *Supra*, footnote 34, at p. 547. For a discussion, see Davis, § 6:35; Stewart, Vermont Yankee and the Evolution of Administrative Procedure (1978), 91 Harv. L. Rev. 1804; Byse, Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View (1978), 91 Harv. L. Rev. 1823.

[38] The term used by the U.S. Supreme Court to describe the formal trial-type hearing held prior to American administrative adjudications. *Matthews* v. *Eldridge* (1976), 424 U.S. 319, at p. 325.

[39] *Gilchrist* v. *Bierring* (1944), 14 N.W.2d 724, at p. 730 (Iowa).

[40] (1970), 397 U.S. 254.

[41] *Ibid.*, at p. 262. For a discussion of *Goldberg* v. *Kelly*, see 2 Davis (2nd ed., 1979), § 11:11; Friendly, *op. cit.*, footnote 9, *passim*.

hearing used to turn. Even where the individual is given something by government to which he has no prior right, if he is entitled to it under the governing statute, his statutory entitlement is protected by the due process right to be heard.[42] The Supreme Court has extended the concept of *entitlement* to include entitlement of a civil servant to his position[43] and that of a student to a public education.[44] The court has, however, receded from *Goldberg* v. *Kelly* in one important respect. *Goldberg* gave a right to a *pre*-termination hearing before public assistance payments might be ended. The more recent decisions permit *post*-termination hearings in other cases involving monetary entitlements. Thus, in cases dealing with disability payments, the required evidentiary hearing may be held after the payments to the individual concerned have been terminated by the Social Security Administration.[45]

The second important recent development with regard to American adjudicatory procedure has been a culmination in the movement to set up an independent administrative hearing officer corps under the Federal APA. The Schwartz-Wade book stressed the importance of this movement and showed how the APA set up within each agency a corps of independent hearing officers called hearing examiners. These examiners, who were given hearing powers comparable to those of trial judges as well as substantial decision-making powers, were to preside over evidentiary hearings. Under the APA examiners were empowered to issue initial decisions, which were to become *the* decisions of the agencies concerned unless those decisions were appealed.

What the APA did was to set up within each federal agency the equivalent of trial and appellate levels. The trial level was to be at the hearing stage, before an independent hearing officer, vested with the power to make a decision, subject to appeal to the agency heads, who were thus relegated to the appellate level.

The Schwartz-Wade book stated that the development of the new corps of independent hearing examiners was perhaps the greatest contribution of the APA. "The A.P.A. examiners have acquired much of the status and prestige of 'administrative judges' and there have been recent attempts to vest them with the formal title as well."[46] The attempts referred to have come to fruition in the

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[42] *Board of Regents* v. *Roth* (1972), 408 U.S. 564.

[43] *Arnett* v. *Kennedy* (1974), 416 U.S. 134, though the hearing may be a post-termination one, as will shortly be seen.

[44] *Goss* v. *Lopez* (1975), 419 U.S. 565.

[45] *Mathews* v. *Eldridge, supra,* footnote 383 with retroactive payments if the individual prevails after the hearing. See generally 2 Davis, § 12:1-15.

[46] Schwartz-Wade, p. 111.

years since the Schwartz-Wade book was published. The hearing officers provided under the APA have now evolved into an administrative judiciary. In 1972, the United States Civil Service Commission promulgated a regulation that made the change. Under the regulation the title of hearing officers appointed under the APA was changed from "hearing examiners" to "administrative law judges". By a simple administrative stroke of the pen the federal agencies were endowed with a full-grown administrative judiciary that was vested with the power to make initial decisions in most adjudicatory proceedings. In 1978, Congress confirmed this development by a statute which expressly changed the title of APA hearing officers to "administrative law judges".

The evolving system of American administrative justice brings to mind an opinion of the United States Supreme Court a quarter century ago, which referred to the distinction between American law, in which one system of law courts applies both public and private law, and the practice in a Continental country such as France, which administers public law through a system of administrative courts separate from those dealing with private law questions.[47] The French administrative courts are specialized tribunals that review the legality of administrative acts. Although proposals have been made for establishment of comparable American administrative courts, the French concept of administrative reviewing courts has largely remained foreign to American administrative lawyers.

Under the Federal APA provisions discussed, however, the American system has taken its own path toward establishment of an administrative judiciary—but, in the American version, an administrative *trial* judiciary. The evolution of hearing officers under the APA, culminating in their new judicial status as administrative law judges, will set the pattern for the developing system of American administrative justice. In particular, we can project a continuing increase in the size of the administrative judicial corps. When the APA provisions went into effect, the federal agencies employed 197 examiners. At the beginning of 1980, there were 1,120 administrative law judges in twenty-nine federal agencies; over half (646) were in the Social Security Administration, thereby reflecting the impact of that agency's mass justice upon the administrative process. Only the fiscal squeeze of recent years has prevented the number from rising substantially higher. The Social Security Administration alone projects an administrative law judge corps of well over 1,000 in the next decade. In the next century, we can predict that there may well be a federal administrative judiciary running into the thousands and administrative law judges in ever-increasing numbers dispensing

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[47] *Garner* v. *Teamsters Local 776* (1953), 346 U.S. 485, at p. 495.

both regulatory justice and the mass justice of an expanding Welfare State.

## III. *Judicial Review.*

*Availability.*

The widespread availability of judicial review is an outstanding feature of American administrative law. "Indeed, judicial review of . . . administrative action is the rule and nonreviewability an exception which must be demonstrated".[48] A preclusive clause is normally not enough to demonstrate nonreviewability. The Schwartz-Wade book quoted the Supreme Court statement that "preclusion of judicial review of administrative action is not lightly to be inferred".[49] The statement was illustrated by a leading case holding that judicial review was available despite a statutory provision that the challenged administrative decision shall be "final".[50]

A provision of this type of administrative finality is, however, only the mildest type of preclusive clause. What about a clause which ousts judicial jurisdiction by what one commentator called "a provision so blatant as to be positively indecent"?[51] Recent cases indicate that even such a provision will not be enough to bar judicial review. Thus, a federal court held that a provision that a decision by the Secretary of Housing and Urban Development "shall be final and conclusive and shall not be subject to judicial review" does not bar all review. According to the court, the separation of powers and delegation concepts mandate review even in the face of the preclusion provision to insure that an agency has not violated its statutory authority.[52] Similarly, the even stronger preclusive clause in the Micronesian Claims Act ("final and conclusive for all purposes, notwithstanding any other provision of law to the contrary and not subject to review") does not forestall judicial cognizance of complaints that the agency has disregarded statutory directives or constitutional commands.[53] According to the Court of Appeals for the District of Columbia, to frustrate the ability to obtain judicial redress would be to call into question the seriousness of the American devotion to human rights and fundamental freedoms.

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[48] *Barlow* v. *Collins* (1970), 397 U.S. 159, at p. 166.

[49] Schwartz-Wade, p. 302, quoting *ibid.*

[50] *Shaughnessy* v. *Pedreiro* (1955), 349 U.S. 48.

[51] Willis, The Parliamentary Powers of English Government Departments (1933), p. 103.

[52] *Owens* v. *Hills* (1978), 450 F. Supp. 218 (N.D. Ill.).

[53] *Ralpho* v. *Bell* (1977), 569 F.2d 607 (D.C. Cir.).

In his Foreword to the Schwartz-Wade book, Judge Friendly took issue with the authors' "proposal that we follow England in not demanding 'standing' as a prerequisite to challenging administrative action". Friendly's conclusion on the matter was that: "One may . . . endorse recent relaxation of the requirement of standing . . . without agreeing to its abolition".[54] The standing requirement has been further relaxed in the more recent American cases. Under them, standing to seek judicial review may stem from non-economic values as well as from economic injury.[55] "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process".[56] All that is now required for standing is that plaintiff allege that he has suffered harm (economic, qualitative, aesthetic, or environmental) as a result of the defendant agency's action. But this does not mean that the action for judicial review in American administrative law will ultimately be treated as the *actio popularis* of the later Roman law—that is, an action with no restrictions on the standing of those who seek to bring it. The American plaintiff will still be required to show some injury in fact (even if causation is attenuated[57])—"some particularized injury that sets him apart from the man on the street".[58]

*Scope.*

The scope of review in American administrative law has been molded by a judicial posture of deference toward the administrative expert. The result has been a theory of review that limits the extent to which the expert may be scrutinized by the nonexpert judge. The basic approach was one stated a generation ago: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission".[59]

The Schwartz-Wade book showed how the American courts had tended to narrow the scope of review over mixed questions of law and fact and jurisdictional facts. The situation with regard to the

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[54] Schwartz-Wade, p. xx.

[55] See *United States* v. *Students Challenging Regulatory Agency Procedures* (1973), 412 U.S. 669, at pp. 686-687.

[56] *Sierra Club* v. *Morton* (1972), 405 U.S. 727, at p. 733.

[57] See, *e.g.*, *United States* v. *Students Challenging Regulatory Agency Procedures, supra,* footnote 55.

[58] *United States* v. *Richardson* (1974), 418 U.S. 166, at p. 194. See Albert, Standing to Challenge Administrative Action (1974), 83 Yale L.J. 425.

[59] *Board of Trade* v. *United States* (1942), 314 U.S. 534, at p. 548.

latter was summed up as follows: "Thus there is a single principle for both jurisdictional and non-jurisdictional questions".[60] In a 1978 case, however, the United States Supreme Court held that a court reviewing the legality of a deportation order had to review fully the claim that the deportee was a citizen. The court stated that "the Constitution requires that there be some provision for *de novo* judicial determination of claims of American citizenship in deportation proceedings".[61] A resident of the United States has a right to *de novo* determination by the reviewing court of a claim to United States citizenship, since citizenship is a "fact" upon which both Congressional and agency power to order deportation depend. In cases involving personal, as opposed to property rights, there may still be room for emphasis on jurisdiction comparable to that in British law,[62] with full review of findings on which administrative jurisdiction depends.

A recent decision by the Supreme Court of California goes even further in enunciating a rule of broader review. As stated by the court: "If the order or decision of the agency substantially affects a fundamental vested right, the trial court, in determining . . . whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence".[63] The California rule is a direct consequence of the increasing judicial vigilance to protect individual rights and the growing disenchantment with the claims of administrative expertise. The California court has asserted that when an agency decision affects a fundamental right, full review is appropriate because "abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction".[64] The result is a substantial broadening of the scope of review, which may set a pattern for other American courts in coming years.

From a broader point of view, the California decision may indicate a changing attitude on the part of the American judge toward the administrator. American courts are articulating increasing doubts about the desirability of the trend toward narrow review of administrative authority. According to Judge Bazelon, it is no longer enough for the courts regularly to uphold agency action "with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise". A more positive judicial role

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[60] Schwartz-Wade, p. 234.

[61] *Agosto* v. *Immigration and Naturalization Service* (1978), 436 U.S. 748.

[62] See Schwartz-Wade, pp. 236-237.

[63] *Strumsky* v. *San Diego Retirement Assn.* (1974), 520 P.2d 29, at p. 31 (Cal.).

[64] *Ibid.*, at p. 33.

is demanded by the changing character of administration ligitation: "[C]ourts are increasingly asked to review administrative litigation that touches on fundamental personal interests in life, health, and liberty. . . . To protect these interests from administrative arbitrariness, it is necessary . . . to insist on strict judicial scrutiny of administrative action".[65] Such expressions of judicial doubt in an era of growing malaise about the administrative process are most suggestive for the future of judicial review in American administrative law.

### IV. *Suing the State and Public Officers.*

Under the Federal Tort Claims Act of 1946,[66] Congress acted "to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit".[67] The tort liability of the United States under the 1946 statute was, however, drastically limited in *Dalehite* v. *United States*,[68] where the court held that the Act did not impose the *Rylands* v. *Fletcher*[69] type of strict liability upon the United States. The Schwartz-Wade book severely criticized the *Dalehite* decision.[70] But the United States Supreme Court specifically reaffirmed the *Dalehite* restriction in *Laird* v. *Nelms*.[71] The decision there held that damage from sonic booms caused by military planes was not actionable under the Tort Claims Act, where no negligence was shown in either the planning or operation of the flights. Though Congress intended to make the Government liable within the reach of the *respondeat superior* doctrine, it excluded liability based solely on the ultrahazardous nature of an activity undertaken by the Government. As noted, the court expressly reaffirmed the decision in *Dalehite* that the Act did not authorize the imposition of strict liability of any sort upon the United States Government. The *Laird* decision is unfortunate. The Tort Claims Act plainly makes the United States liable for "negligent or wrongful acts" where a private employer would be. Under applicable tort law, a private person who creates a sonic boom is absolutely liable for any injuries caused thereby. The creation of a sonic boom is thus a "wrongful act" within the Tort Claims Act. To hold otherwise is to read an exception into a case that seems covered by the express language of the Act.

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[65] *Environmental Defense Fund* v. *Ruckelshaus* (1971), 439 F.2d 584, at pp. 597-598 (D.C. Cir.).

[66] 28 USC 1504, 60 Stat. 844.

[67] *United States* v. *Spelar* (1949), 338 U.S. 217, at p. 221.

[68] (1953), 346 U.S. 15.

[69] (1868), L.R., 3 H.L. 330.

[70] Schwartz-Wade, pp. 195-196.

[71] (1972), 406 U.S. 797.

In other respects, however, there have been positive developments in American law with regard to sovereign immunity and tort liability. The Schwartz-Wade book discussed the use of sovereign immunity by the American courts to bar actions seeking injunctive or mandatory relief against federal officials, as well as legislative proposals to correct this situation.[72] In 1976, Congress enacted a law[73] which provides that an action seeking specific relief against federal officials shall not be dismissed on the ground that it is an action against the United States. Under this statute, when an American hurt by governmental action seeks relief other than money, sovereign immunity is no longer a bar to his suit.

In addition, the trend toward judicial abolition of the immunity of state governments from tort liability, noted in the Schwartz-Wade book, has continued. In 1977, a state court could declare that the sovereign immunity doctrine had been abrogated by the courts in twenty-nine states and the District of Columbia.[74] Extension of the trend toward elimination of sovereign immunity as a barrier to tort claims, should soon make public tort liability part of the law throughout the United States.

Mention should also be made of an important recent case on the personal liability of administrative officers. As the Schwartz-Wade book pointed out, the trend in American law during this century has been toward immunity for individual officers. "The common law rule of strict personal liability of public officers has been replaced in the American system by an ever-broadening rule of immunity".[75] The trend toward immunity culminated in a 1959 decision, where absolute immunity from tort liability was extended to virtually the entire federal bureaucracy acting within "the outer perimeter of [their] line of duty", even where malice was alleged.[76] Absolute, immunity was thus extended by the courts from the highest ranks to officers in the lesser ranks of the administrative hierarchy.

All this appears to have been changed by *Butz* v. *Economou*.[77] The Department of Agriculture had brought a proceeding to revoke the registration of respondent's commodity futures commission company. After hearing, the Department's Chief Hearing Examiner recommended in favor of revocation. The Judicial Officer, to whom the Secretary had delegated his decisional authority, affirmed; but

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[72] Schwartz-Wade, pp. 196-198.

[73] (1976), 90 Stat. 2721.

[74] *Jones* v. *State Highway Com'n* (1977), 557 S.W.2d 225, at p. 227 (Mo.).

[75] Schwartz-Wade, pp. 195-196.

[76] *Barr* v. *Matteo* (1959), 360 U.S. 564.

[77] (1978), 438 U.S. 478, 98 S. Ct 2894, 57 L.Ed. 895.

his order was vacated on judicial review. Respondent filed an action for damages against petitioner officials (including the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner who had recommended sustaining the administrative complaint, and the Department attorney who had prosecuted the enforcement proceeding), alleging that by instituting unauthorized proceedings against him they had violated various of his constitutional rights, including violation of his right to procedural due process. The Government moved to dismiss, on the ground that the individual defendants, as federal officials, were entitled to absolute immunity for all discretionary acts within the scope of their authority. The court ruled that dismissal should be denied, holding that federal officials are not absolutely immune from liability for damages, where they knowingly infringed a plaintiff's constitutional rights. All they are entitled to is a qualified immunity, where their action is taken in good faith and based upon reasonable grounds.

The basic consideration is that a federal official may not, with impunity, ignore the limitations which the law has placed on his powers. He is protected for tortious action only if his acts were authorized by controlling federal law. The prior case law did not purport to abolish the liability of federal officers for actions beyond their line of duty. If they are accountable when they stray beyond the limits of statutory authority, it would be incongruous to hold that they may willfully or knowingly or without reasonable grounds violate constitutional rights without liability.

Under *Butz*, the rule of absolute officer immunity does not apply in tort actions charging violations of constitutional rights. A citizen suffering a compensable injury to a constitutionally protected interest can invoke the general jurisdiction of the federal courts to obtain damages against the responsible official. The right of action appears to apply to all damage suits against officials charging violations of constitutional rights. This means that *Butz* opens the door to some of the liability apparently foreclosed by the prior cases, since tortious official conduct in the United States can frequently be described in constitutional terms. Cases where recovery had previously been denied can readily be recast in *Butz* terms: illegal detention[78] can be reframed as a constitutional deprivation of liberty, abusive treatment of prisoners[79] as infliction of punishment without due process, and seizure of property to satisfy a pretended tax lien[80] as a taking of property without due process. If *Butz* can be pressed

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[78] *E.g.*, *Gregoire* v. *Biddle* (1949), 177 F.2d 579 (2nd Cir.).

[79] *E.g.*, *Norton* v. *McShane* (1964), 332 F.2d 855 (5th Cir.).

[80] *E.g.*, *Bershad* v. *Wood* (1961), 290 F.2d 714 (9th Cir.).

that far, it may make for a major extension of liability in cases involving constitutional deprivations by public officers.

It should be noted that, though *Butz* rejected the claim of absolute immunity, it did not do so for all the defendants. Instead, it held that absolute immunity did exist for administrative prosecuting and hearing officials—that is, for those in an agency who are responsible for the decision to initiate or continue a proceeding subject to administrative adjudication, to those agency personnel who present evidence on the record in the course of an adjudication, as well as to those persons performing adjudicatory functions within the agency. Of particular interest, in view of our previous discussion of the development of a federal administrative judiciary, is the court's discussion of the role of the administrative law judge, which the court says is "functionally comparable" to that of a judge. The court discusses in detail the functions of these agency hearing officers and stresses their judicial-type independence. "In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women".[81] The considerations that led to absolute immunity for judges[82] apply as strongly to agency personnel entrusted with adjudicatory authority.

### *Conclusion*

What do the recent developments which have been discussed tell us about the emerging "new era" in American administrative law to which Judge Bazelon referred?[83]

It appears probable that the period will be characterized by continued expansions of administrative power, as constitutional restrictions on delegation continue to be more ceremonial than real. At the same time, certain powers (notably the taxing power) will be considered so inherently legislative in nature that they may only be exercised by Congress itself. There will also be increasing efforts to subject delegated legislation directly to legislative supervision, which should culminate in an American counterpart of the British system of "laying" before Parliament: This will be accomplished by a general law subjecting all administrative rules and regulations to the "legislative veto" technique.

There may also be an increasing amount of judicial control by the American courts. The California rule requiring full judicial

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[81] *Supra,* footnote 77, at p. 514 (U.S.).

[82] *Bradley* v. *Fisher* (1871), 13 Wall. 335 (U.S.).

[83] *Supra,* footnote 2.

review in cases involving what the courts deem fundamental rights has the potential for substantially broadening the scope of judicial review and may set the pattern for future American administrative law.

But it is in the developing administrative judiciary that the theme of the coming administrative law era will be set. By the end of the century there may be several thousand federal administrative law judges to dispense both regulatory justice and the mass justice of the burgeoning apparatus of the Welfare State. The result will be an ever-growing administrative judiciary that will dwarf the traditional judiciary in the law courts. From a broader point of view, there may be repetition in the American system of the situation in sixteenth and seventeenth century English law. In his Rede lecture, Maitland pointed out that at the end of Queen Mary's reign, "the judges had nothing to do but 'to look about them' ".[84] The inadequacies of the common law and the expense and delay involved in lawsuits had led the bulk of the community to avoid the courts at all costs. The jursidiction of the judges was being superseded by other tribunals, notably the Star Chamber and Chancery.

When the common lawyers eventually triumphed after the final expulsion of the Stuarts, they did not attempt to turn the legal clock back to pre-Tudor times. Instead, they sought to retain what was desirable in the administrative justice of their day and to fit it into its proper place in the legal order.

Although the Star Chamber as such was abolished, the law courts realized that a large part of its work was of permanent value, and therefore much of its law passed into the common law. And the place of Chancery in the legal system was definitely confirmed. Chancery was retained as a separate tribunal, but it was wholly judicialized along common-law lines. The Lord Chancellor, who was originally the chief clerk of the King and dealt out administrative justice in the King's name, became, in time, the head of a true court with an established place in the existing legal order.[85]

The challenge of administrative justice in the sixteenth and seventeenth centuries was met by the elimination of the undesirable elements in such justice and the retention and judicialization of the rest. The arbitrary discretion exercised by the agencies was canalized within legal limits, and where such discretion was, as in the case of Star Chamber, too intimate a part of the tribunal, the tribunal itself was done away with. The common lawyers, who had earlier complained that the justice dispensed by Chancery was so uncontrol-

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[84] Maitland, English Law and the Renaissance (1901), p. 22.

[85] *Mulhearn* v. *Federal Shipbuilding Co.* (1949), 66 A.2d 726, at p. 731 (N.J.).

led by legal principles that it might just as well have depended on the size of the particular Chancellor's foot, were able to ensure that Chancery became a true court for the application of principles that, though somewhat different from those of the common law, were no less fixed.

The challenge faced by the law in Tudor and Stuart days was well stated by Chief Justice Vanderbilt: "Then, as now, the administration of the common law left much to be desired. Then, as now, what was needed was more administration in the courts of justice and more of the fundamental principles of justice in the . . . tribunals."[86] The courts reformed through an infusion of then-modern concepts of law and administration and the elimination of undesirable elements in the newer justice. The rest was judicialized and fitted into its proper place in the legal order.

The recent rise of the federal administrative judiciary indicates that American administrative law may follow the pattern of the executive tribunals of three centuries ago. The justice now dispensed by administrative agencies may become truly judicialized and administered by judges possessing solely judicial authority. American administrative law will then become as much a part of the ordinary law as has the law of equity, which was originally developed by the Court of Chancery.

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[86] Vanderbilt, The Place of the Administrative Tribunal in Our Legal System (1938), 24 A.B.A. J. 267, at p. 273.