THE ROLE OF DISCRETION IN ADMINISTRATIVE LAW AND ITS RELATIONSHIP TO THE RULE OF LAW

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The following notes will serve as the basis of discussion of the above subject in the Chicago Colloquium on the *Rule of Law Understood in the West.*

1. THE SOURCE AND NATURE OF ADMINISTRATIVE DISCRETION

Discretion is a slippery word. There is no single established definition Webster's Dictionary gives, among several other variant meanings: (1) "unrestrained exercise of will; (2) quality of being discreet — circumspection, judiciousness." Different writers use the term *discretion* with widely variant connotations and implications.

For purposes of the present discussion, the term *discretion* will be taken to mean that more or less limited range within which officials or agencies may choose freely between alternative courses of action, basing decision on *ad hoc* considerations. It might be said that *discretion* is that sort of power which is vested in an agency when the legislature feels there ought to be a law to deal with some current problem, but cannot decide in detail just what the law should provide, and accordingly adopts a statute declaring the general objectives which should be accomplished, and granting to an administrative agency (within limits fixed by the statutory language) the duty of working out the best ways to accomplish those objectives.

More specifically, the sources of administrative discretion are fourfold:

(1) The official or agency may be granted the power to adopt substantive rules, having the force of law, and compelling or prohibiting certain action on the part of those persons subject to the agency's jurisdiction. For example, they may be empowered to decide what minimum wages must be paid, what information must be given to the public in connection with a sale of corporate stock, what safety devices must be put on steam engines, etc. In these cases, an administrative official or agency acts like a "little legislature" and, within the limits of the authority delegated to it, exercises the same sort of discretionary powers as those exercised by the legislature.

(2) Discretionary power also is found where an official or agency is given a vague, indefinite standard to apply in the adjudication of individual cases. For example, the Renegotiation Act of 1942 (56 Stat. 982) authorized an agency to review the profits made by government contractors, and to order the contractor to refund such part of the profits as the agency found to be "excessive." In applying so vague and loose a standard in its adjudication of individual cases, the agency obviously enjoyed a broad measure of discretion.

The two foregoing illustrations cover the chief sources of administrative discretion, and illustrate the two types of discretionary power with which we are principally concerned. However, for the sake of a more nearly complete analysis, two other sources of discretionary power should also be mentioned.

(3) Sub-delegation of authority within an administrative agency sometimes results in the vesting of broad discretionary powers in a single individual. When a statute is adopted, delegating to a five member Board, let us say, the power to determine in each case what particular portion of a company's employees should be grouped together as an "appropriate unit" for purposes of collective bargaining, it is often assumed that the combined wisdom and judgment of the five distinguished citizens are made. In practice, however, such a Board may have to decide such issues in

several hundred cases each year. This may necessitate the Board's delegating to each of its five separate members the power to consider cases individually and to "recommend" to the other four members what decision should be made. The Board members may find themselves too busy to study the cases assigned to them, and ask their staff assistants to make the detailed study and recommend to the individual Board member what decision should be made, so that he may pass the recommendation along to the other members of the Board for their approval. Sub-delegation of authority may thus lead to the vesting or substantial discretionary powers in staff assistants, whose decisions in individual cases will in part reflect their personal ideas and judgments, rather than the combined group judgment of the principal officers to the agency.

(4) The discretionary powers above described may on occasion be extended further by virtue of the tendency of administrative officials and agencies to give broad construction to their statutory grants of power, to the end of extending their jurisdiction and at times, perhaps, giving effect to policies beyond those of the statute creating the agency.

2. WHY ADMINISTRATIVE DISCRETION CREATES A PROBLEM IN CONNECTION WITH THE RULE OF LAW

The granting of appropriate discretionary powers to officials and agencies is necessary to the effective performance of their tasks. Indeed one of the principal reasons for their existence was the circumstance that in the development of social control of private affairs situations are encountered where the precise rule of action to be enforced is not apparent, and where, accordingly, the matter in hand cannot effectively be regulated by general rules, but only by the exercise of administrative discretion in particular cases. Granting too little discretionary power would prohibit the achievement of the very purpose sought to be accomplished in creating the agency.

On the other hand, granting a larger measure of discretionary power than is required by the nature of the case, results *pro tanto* in the establishment of a government by men, rather than rule of law

(ie., government according to the discretion of administrative officers, instead of government according to the language of the statute). When broad, effective discretionary power is vested in an administrative agency, to a large extent that agency displaces the legislature in the ordinary day-to-day control of that segment of governmental activity included within the jurisdiction of the agency[1]. *Pro tanto* this is the antithesis of the Rule of Law.

Similarly, the vesting of broad discretionary powers in an agency results in a corresponding diminution of the controlling powers of judicial review by the judiciary, in the areas committed to agency control. To the extent that room is left for administrative discretion in applying the law to specific cases as they arise, to that extent is the power of judicial review suppressed. An act of true discretion, referable to no fixed standard except governmental desire, is not appropriate for judicial review. Indeed such review is expressly precluded by the provisions of Section 10 of the Federal Administrative Procedure Act. Control of discretion is not a typically judicial function, nor is there promise of any assured gain to be derived from the super imposing the dicretion of the judge upon that of the administrator. The most the courts can do is to ascertain whether the administrative action has exceeded the limits of the delegated discretion. In short, the judicial control of administrative discretion[2]. This, too, runs counter to our conception of the Rule of Law.

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1) It has been argued that the conferring of discretion upon administrative officers should be deemed a mere temporary expedient, and that as soon as experience points out the proper rule to apply, the legislature should by amendment sharpen the standars guiding administrative action to the end that administrative discretion shall be kept at a minimum, and the body of law shall at all times be kept as certain as possible.

However, there is a growing tendency to regard resort to administrative discretion as an essential concomitant of modern governmental regulation. Certain it is that the more recent statutes conferring administrative powers employ discretion with a generous hand. For example, it is doubtful whether any statute of comparable importance has conferred anything like so much discretionary administrative power as the provisions of the Atomic Energy Act of 1954, granting to the Atomic Energy Commision broad powers over the production and utilization of fissionable materials.

Fundamentally in other words, the problem of discretion is that of determining the appropriate division of governmental authority between the legislature, the courts and the agencies.

3. STATUTORY STANDARDS AND THE BREADTH OF DISCRETION

Only in rare cases has a legislature seen fit to vest in an administrative agency complete and uncontrolled discretionary powers. Usually, the statute creating an agency limits its discretion by setting up standards to which the agency must conform, in carrying out its functions.

Between these maximum and minimum limits there lies a whole range of possible degrees of discretion, depending upon the particular language used in drafting the "standard" which guides the hands of the administrative officers. To the extent that the standard employed is not susceptible of exact objective proof discretionary power is conferred upon the officers.

Some of the words commonly employed in formulating standards for administrative action have, by constant use and by judicial interpretation, acquired a precision of meaning. In this class, for example, are such expressions as "reasonable rates," "unreasonable preferences," "discrimination," "monopoly" and "reasonable rate of speed." These are fairly well defined standars, and the degree of administrative discretion conferred under them, while considerable, is nevertheless limited to a great extent by accepted use and interpretation.

However, other frequently used terms refer to much vaguer concepts, and corespondingly give a wider play to administrative discretion. For example, we find in common use such terms as "adequate," "advisable," "appropriate," "benefical," "competent,"

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2) "As the field of discretion of the council in regard to circumstances which dictate granting of consent is enlarged, opportunity for the intervention of the courts becomes restricted. Into the field of legislative or administrative discretion the courts may not enter." Larkin Co., Inc. v. Schwab, 242 N. Y. 330, 151 N. E. 637 (1926).

"convenient," "detrimental," "expedient," "equitable," "fair," "fit," "indispensable," "necessary," "practicable," "proper," "reputable," etc. These terms are only by the greatest stretch of the imaginations susceptible of proof or disproof by objective testimony, and hence their discretionary content is high.

Still again, one frequently sees direct reliance upon the "beliefs," "judgment" or "discretion" of administrative officers, and in such cases the discretionary power is to all appearances as broad as the limits within which reasonable men may honestly entertain views. For example, in Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230, 59 L. Ed. 552, 35 S. Ct. 387 (1915), the court was asked to pass upon a film-censoring statute which provided that "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board." Against the contention that it amounted to an unconstitutional delegation of legislative power, the statute was held valid, the court saying that the law may properly rely in such situations upon "the sense and experience of men." Under such language discretion would seem to be limited only by the broad consideration that it must be exercised in a non-capricious manner.

In short, the words used for the formulation of the so-called "standard" set up by the legislature to guide the administrative officer or agency have a large effect upon the quantity of administrative discretion conferred. This fact suggests one possible solution of the problem of excessive discretion.

4. SOME ILLUSTRATIVE EXAMPLES COMMONLY ENCOUNTERED IN AMERICAN LAW OF THE CONFERRING OF ADMINISTRATIVE DISCRETION AND THUS MINIMIZING THE RULE OF LAW

A. Authority in rule making. The power to make rules having the force of law is very potent indeed and, as has been indicated, unless this power is hedged about by sharply defines statutory standards the discretionary content becomes sizeable. A prime illustration is the Atomic Energy Act of 1954, some of the sections of which will be used as the basis of discussion.

B. Authority to attach "terms and conditions" to official action. For example, in approving applications, granting or amending licenses, issuing of certificates of convenience and necessity, etc., the authority to attach terms and conditions is often conferred. Consider, as an illustration, action taken by the Federal Power Commission under the Federal Power Act of 1935 and the Natural Gas Act of 1938. The Commission has attached a condition in one instance under the Natural Gas Act to the effect that the certificate "shall be cancellable if the applicant increases or proposes to increase the rate to the consumers proposed to be served above ten cents per thousand cubic feet." In other words, the Commission under the general discretionary power to attach terms and conditions is roaming far afield and fixing maximum rates. The proposed draft of a revision of the Federal Administrative Procedure Act contains language designed to restrict all such powers' Section 1008 (b) provides "terms, conditions or requirements limiting any license shall be valid only if reasonably necessary to effectuate the purposes, scope or stated terms of the statute pursuant to which the license is issued or required."

C. Administrative finding of fact. In federal practice "the substantial evidence rule" is generally accepted and this rule gives the administrative agency a substantial measure of finality. Even the Universal Camera case, 340 U.S. 474, 71 S. Ct. 456 (1951) does not materially reduce the sweep of finality of the substantial evidence rule. The power to pass finally upon facts without plenary judicial review carries with it a considerable measure of discretion. This is not necessarily objectionable, but it is a fact to be considered in evaluating the Rule of Law.

D. Administrative discretion regarding questions of law. Increasingly in recent years the practice has developed of permitting agencies to reach final decisions not subjected to judicial review upon questions involving the application of the statutes subject to their authority in cases coming up for adjudication. In administering this authority the agency is virtually permitted to interpret the terms of its own statute and thus to control what might properly be deemed a question of law. A significant and leading case

is National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 64 S. Ct. 851 (1944).

E. Administrative authority over sanctions. In this field virtually absolute discretionary authority is conferred. For example, in Jacob Siegel Company v. The Federal Trade Commission, 327 U.S. 608, 66 S. Ct. 758 (1946) uncontrolled discretionary authority was conferred upon the Commission with respect to the sanction to be imposed to prevent the respondent from engaging in something that the Commission found to be deceptive and misleading advertising.

5. SOME POSSIBLE REMEDIES TO PREVENT UNDUE DILUTION OF THE RULE OF LAW BY REASON OF THE CONFERRING OF TOO GREAT ADMINISTRATIVE DISCRETIONARY POWER

A. Consider the sharpening of standards in enabling statutes. On this matter the recommendations of the Hoover Commission Task Force on Legal Service and Procedure, p. 133, *et. seq.*, are pertinent. It was there pointed out that *undue* delegation of legislative authority is present in many federal statutes, for example, statutes involving licensing, issuance of permits, acts upon claims against the government, prosecutions, government contracting, engaging in inspection and investigation procedure, rendering governmental services, etc. It was recommended by the Task Force that Congress give careful attention to using more precise and definite language to establish appropriate standards for administrative action. This would strengthen the Rule of Law.

B. Legislative scrutiny of administrative rule making. There is considerable sentiment for the establishment of legislative scrutiny committees more or less like the Select Committee of the House of Commons in the British Parliament and the former legislative Committee on Administrative Rules in the Michigan State Legislature. See, for example, the proposal of the Administrative Law Section of the American Bar Association for the establishment of a Congressional Supervisory Committee Hearings on H. Res. 462, 84th Congress, Second Session.

C. Consider the possiblity of an Administrative Court. The establishment of a United States Administrative Court with jurisdiction to review administrative action at all levels and with authority over the review of both fact and law issues broader than that now conventionally exercised by the courts has been urged as an effective measure to strengthen the Rule of Law.

D. Consider the broadening of the review powers of the ordinary courts. The latest draft of the American Bar Association bill to revise the Federal Administrative Procedure Act, Section 1009, broadens the scope of review materially in at least the following two respects:

1. The court may reverse the agency decision if it finds "*an abuse or clearly unwarranted* exercise of discretion," and

2. It may reverse any decision "based upon findings of fact that *are clearly erroneous* on the whole record."

The second proposal would conform judicial review of administrative decisions to Supreme Court review of lower federal court decisions in trials without jury.

E. Consider also the following recommendations of the Hoover Task Force on Legislative Services and Procedure, suggestive in certain respects of the French Administrative Doctrine of "detournement de pouvoir", but in general designed to throw up safeguards against too much administrative discretion.

"Sec. 208. In the exercise of any power, authority, or discretion by any agency, or by any officer or employee thereof—

"(1) In General — No sanction shall be imposed and no substantive rule or order shall be issued except within the letter, purpose, and intent of applicable statutes and the limitations of jurisdiction, powers, and authority prescribed by statute or otherwise imposed by law. Agency action shall not be deemed to be within the statutory authority and jurisdiction of the agency merely because such action is not contrary to the specific provisions of a statute.

> "(2) Notice by Rule — No sanction shall be imposed against a person for pursuing a normal, customary, or previously acceptable course of conduct, unless such conduct shall have been proscribed or restricted by a generally applicable rule of the agency. For such purposes, every agency is authorized to make and promulgate appropriate rules."

One thing is apparent and that is that the proper control of administrative discretion in the interest of preserving a reasonable measure of the Rule of Law can be accomplished only by the use of great vigilance on many different fronts to prevent encroachment from exceeding reasonable governmental needs.