

3-15-2000

Administrative Law: Review of A Century

David Frohnmayer

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#)

Recommended Citation

David Frohnmayer, *Administrative Law: Review of A Century*, 20 J. Nat'l Ass'n Admin. L. Judges. (2000)
available at <https://digitalcommons.pepperdine.edu/naalj/vol20/iss1/3>

This Speech is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

ADMINISTRATIVE LAW: REVIEW OF A CENTURY

David Frohnmayer*

Thank you all for the invitation to join you today. If my remarks are timely and courageously brief, we will have an opportunity for questions, answers or dialogue. Touching nerves is a piece of my function. But I'd also be remiss if I did not bring my own words of warm welcome, not only to those of you who were colleagues when I served as Oregon's Attorney General, the state's chief legal officer. Some of you have come from great distances. I welcome you to Oregon, and assure you that it does not rain all the time. It usually only rains in the evening. But as I understand it, our rain permits scrutiny of this two inch book of Conference materials that I know you're studying on an intensified basis.

It's entirely appropriate that I am here amongst a group of people who are attempting to bring law to the bureaucracy, because of course, I am a bureaucrat, I head a state agency; I've been an attorney for all state agencies, and I'm continuously reminded that there are shortcomings in bureaucracy that need to be cured by someone. A bureaucrat was once defined as "a person who knows all the rules without understanding any of their purposes." Then I was reminded that Parker Brothers--who brought us Monopoly and swept the world with the power of that game way back in the 1930's,--has brought us a new game, a new game called "Bureaucracy." In Bureaucracy the first person to make a move loses.

I address a topic which suffers from hopeless overbreadth and indeed, enormous pretension. At the same time, I submit that it is at least a nice placeholder in the appropriate sense that it allows us to examine our roots. That is to say, how did we get here, in this place in the administrative process, and how do we see the future? The significance of that question is best exemplified in one of the great justices of all time in our history, Oliver Wendell Holmes, who as you

*President University of Oregon, former Dean and Professor of Oregon University School of Law, and Oregon Attorney General.

know was a Civil War hero, wounded four times, wrote still path finding works on the common law, was elevated to the U.S. Supreme Court and served well into his 90's as one of the most distinguished members of our highest tribunal. It is said, that in his twilight years, Holmes found himself on a train. The conductor came up to him and asked him for his ticket. Holmes looked in both of his pockets and with increasing irritation couldn't find it, but by then the conductor recognized him. "Oh, that's alright, Mr. Justice Holmes," he said you don't need to give me your ticket now, you can just mail it in when you get home." Holmes looked back up at him with real annoyance, and proclaimed, "The problem is not where my ticket is, the problem is where am I going?" And if that problem hasn't occurred to all of us as we reach the end of the century and the millennium, in this strange and interesting field called administrative law, then we are not asking the right questions.

Your two-inch thick binder tells me that you are looking at where you are and undoubtedly where you're going. But historically, when you think about administrative law, it really is a creation almost exclusively of the 20th century. So, one subtheme running through my remarks will be this: it is a question rather than an assertion, "have we gone in just one century from gestation to fossilization?" Think through what we consider to be our administrative process, and ask yourself, at least as you listen to some of the themes on which I'll try to touch, whether there is a more unhappy, glimmer of truth to that question than we would like to acknowledge.

In case you wonder, I'm not taking my thoughts from any single source. I've freely adapted my ideas from many other people, bearing in mind the admonition in academia that if you take from a single source it's plagiarism; if you take from more than one source it's scholarship. Actually, taking from at least two sources, I recently reread something I wrote back in 1980 on the regulatory process.² And in an odd acknowledgement of a desire to have some sense of personal growth, I wish I could disagree with some of the things that I wrote in 1980. Yet the striking aspect in rereading that essay for purposes of this dialogue with you today, is how many of the concerns that I had, as a

²Frohmayer, "Regulatory Reform: A Slogan in Search of Substance," 66 A.B.A.J. 871 (1980) (First Prize, ABA Ross Essay Competition).

legislator, public official, administrative law scholar and teacher in 1980, remain to me as serious concerns today, as we address the issue of how agencies accomplish the business of administering our law in a time of mass justice.

Let me begin with a brief review of the roots of our administrative law doctrine. This is in some respects a trip down the Constitution's memory lane. Even with hopeless oversimplification, it gets us a start. Before the 20th Century, the entire body of administrative remedies was an obscure series of common law writs against various executive or administrative bodies. There was no coherent body of law until, in 1908, when the U. S. Supreme Court decided *Londoner v. Denver*, 210 U.S. 373, 28 S.Ct 708 52 L.Ed. 1103 (1908) and a companion case a few years later called *Bimetallic Investment Co. v. Colorado State Board of Equalization* 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915). That two-case couplet determined that some minimal due process hearing rights might have to be granted to individual plaintiffs who were uniquely affected by administrative actions. However, Justice Oliver Wendell Holmes in those cases identified and asserted the notion that, nonetheless, "the business of government must go on." So, right at the beginning, at least, we see the glimmer of the notion that the due process clause held out for individuals subject to administrative action some kind of opportunity for a hearing. At the same time, that was counterweighed by the explicit assertion that there is a notion of governmental efficiency and timeliness in decision making into which the notion of deciding individual rights should not be allowed to intrude too far.

By late in the century an interest-weighting calculus became codified constitutionally for the states in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). *Goldberg* was followed almost immediately by a substantial retreat in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) which held that there ought to be a balancing test to decide not only whether process is due, but how much process is due. And in 1972, these emerged a new and still viable couplet concerning the 14th Amendment's due process commands, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972), and *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972) (companion cases decided on same day). These cases, arose from the academic world and

were pursued by probationary employees who wished to have tenure, or at least renewal of their contracts. The court in its 14th Amendment jurisprudence determined how one might go about defining the words “liberty” and “property” as the triggering conditions for one’s right to an adjudicatory hearing by the state.

I’m sure you remember Sinderman’s case, a really wonderful case where the common law of academia asserted itself and actually gave Sinderman a property right. He was an untenured professor, quite controversial, at Southwest Texas Teachers College, in Odessa. He had a faculty handbook in his possession that said, to paraphrase, “we have no formal tenure system at this college but we like people to feel as though they have tenure as long as they’re happy in their work.” Well, Sinderman argued that he was happy, and sure enough, it was held that the creation of objective expectations in the faculty handbook, the common law of the campus, was sufficient to give a reasonable expectation that Professor Sinderman indeed enjoyed a property right.

That fork of the administrative process is one to which I will return in a moment. Once one triggers constitutional due process, in states that follow the Model State APA a whole panoply of procedural protections follow in a very long train with a very elaborate caboose. This is something that would not happen at the federal level if one simply applied the *Mathews v. Eldridge* calculus as to the quantum of process that’s due after a determination that due process protections are triggered.

The second series of events came with the reformation of federal law respecting the delegation of legislative and judicial authority to agencies. For lack of better terms, and in language clearly showing the discomfort of courts and commentators of that time, this was the legitimizing process for the exercise of “quasi-legislative” and “quasi-judicial” activities. It became increasingly apparent that the raw architecture of the U. S. Constitution itself was not sufficient to confer upon government all those powers which quickly became understood to be necessary, in the late 19th century, as the bureaucratic structures for administrative agencies to implement law as instruments of law making and judging authority.

This conceptual territory was an uneasy place for the U.S. Supreme Court, literally for decades. First, it upheld delegations of authority only if they “filled in the details” or only if they provided

“standards” or all those other kinds of temporizing rationalizations that were necessary in order to justify rate regulation for railroads, consumer protection and a wide variety of federal regulatory activities. In other words, the early growth of the administrative state emerged to cure some of the problems or attempt to cure some of the problems of the overreaching of the market economy and its failures in the late 19th and early 20th century.

Those developments, of course, came to a screeching but very brief halt, with the so called “hot oil” and “sick chicken” cases of the New Deal era. In *Panama Refining Co. v. Ryan*, 293 U.S. 388; 55 S.Ct. 241, 79 L.Ed. 446 (1935), the court decided a case in which administrative penalties were criminal, but the regulations could be found only in the desk drawers of the administrator. In the *Schechter Poultry Company* case, delegation to private groups regulating industry prices was so flagrant that the court said congressional power cannot be delegated under those circumstances.

But these decisions, you remember from your basic Constitutional Law 101 if not American History 101, were the high water mark of the anti-delegation doctrine. They were quickly to be replaced by some of those extraordinary judicial acknowledgments of the legitimacy of delegation of authority for quasi-judicial and quasi legislative activities that could be imagined. *United States v. Yakus* 321 U.S. 414 (1944) during World War II is one example. The last and most sweeping was a D.C. circuit case involving Amalgamated Meat Cutters in the early 70's, which upheld the wage and price controls imposed by President Nixon in 1971 and 1972.

At the same time State courts were by no means as charitable as the federal government in recognizing delegation of legislative authority to executive branch agencies to make rules, (that is to say, pass laws) and to make judgments, (that is to say, adjudicate cases). A state such as Florida for example is exemplary in its insistence that all legislation be very specific and prohibits agencies from making rules or laws unless they are given the most explicit authority to do so. Oregon, I think, is on the entirely opposite pole, a state where, since at least the 1960's and following a case called *Warren v. Marion County*, 222 Or. 307, 353 P. 2d 257 (1960), the “procedural safe-guards” model of the delegation of legislative authority has been taken to be the condition under which delegation of the most extraordinary legislative

power to agencies, to make rules or to adjudicate cases, has been upheld.

A major effort during all this time, of course, was an attempt to provide methods of judicial review for the consequences of these legislative actions, either those which judged the individual rights that arose from due process, adjudications by agencies, or those that came from an attempt to see how agencies were carrying out their delegated legislative authority. These actions by the courts were necessary because most delegation law and most adjudicatory law, up to that point, had been political and pragmatic. It filled in the gaps or even the gaping holes of this raw three branch constitutional structure. As a consequence, they created what, to me, commentators and political analysts really defined as the fourth branch of government. When it was identified as the fourth branch of government, the administrative branch, questions of accountability, especially judicial accountability, became primary.

That development of course, was accompanied by a fourth major trend that I hope fills in the balance of my constitutional discussion this morning, Statutory enactments attempted to fill in these gaps that courts could accomplish only episodically. That trend was principally heralded by the passage of the Federal Administrative Procedure Act, the efforts for which began in the early 1940's but which culminated in its passage in 1946. That act, which as you remember again from your Administrative Law 101, developed a very rigid distinction between formal and informal rule making. One could have, or was required to have, a formal process of rule making that began to look like judging, only when a specific triggering statute explicitly said make the rules on the record. When federal courts said they didn't really believe that was true, the United States Supreme Court in two cases, the *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), case and the *Florida East Coast Railway* 410 U.S. 224 (1973), case said, and very sarcastically so, yes we mean it. There must be a statute that says you must make rules on the record; otherwise, an informal quasi-legislative notice and comment system of rule-making is sufficient. And a second branch of the Federal Administrative Procedure Act (other than a number of things that have become very important since such as the Federal Freedom of Information Act), established a process for formal agency

adjudication and established the core of independent federal administrative law judges. But, again, this level of adjudicative formality was required only under very limited circumstances--only where another statute required that those judgements be particularly and specifically provided for by a statute "on the record." And after it decided that, and after one could find that triggering mechanism for a formal federal adjudication, then the statute went to very explicit extremes. It called for an independent cadre of hearing officers; it established very rigid and clear prohibitions against *ex parte* communications; it provided for the separation of investigative and prosecutorial functions, at least in some cases. So the federal APA, then, set a formal adjudication model, but applied it to a relatively small number of administrative actions at the federal level.

Contrast this trend with parallel developments in the states. The Model State Administrative Procedure Act, followed, as you know, by a revised Model State Administrative Procedure Act, was more or less copied by about 30 American jurisdictions. It began by covering a vastly larger group of activities of agencies than did its federal counterpart. In rule making, for example, it included, for the most part "interpretive" rules as requiring formal rule making. It did not limit rule making in a formalized sense to those activities where an independent statute specified that there be a rule made. Rather, it defined "rule" in a very broad way that even an agency guide book or field manual, if it affected the rights of the public, could be construed to fall under the definition of a rule and therefore trigger the state's rule making requirements. So for the states, the river ran very deeply. On the other hand, it ran for the most part very shallowly, because there was, in that act, and in most states since, no analogue to the notion of making rules "on the record" which invokes the quasi adjudicatory model of decision process.

At the same time, the model state APA also identified the conditions that would give rise to an adjudication under state law. This milestone is where rivers really diverge. Here also is really a major question which I ask you thoughtfully to ponder. The Model State APA, and Oregon faithfully mirrors it, identified a series of circumstances that would trigger the right to a "contested case" adjudication. One of them is where the "constitution" requires there to be a hearing. What that means is that if the constitution, under the *Roth*

and *Sindermann* jurisprudence, or the *Mathews v. Eldridge* balancing tests, suggests that an individual confronting his/her government is entitled to some kind of hearing, the person doesn't get a balancing test that says "well, we'll give you an opportunity to explain yourself." you get a full blown contested case, highly judicialized, and a very elaborate model of administrative adjudication. So in that respect in those Model APA states, if you get a hearing, its all or nothing. There isn't a balancing process that says this is a case that requires some sort of minimal notion of confronting one's accusers. This is one where you get an agency trial. If findings of fact and conclusions of law are not written with the exactitude to that we would do in revoking an occupational license, then no matter how trivial the consequence, that means that a reviewing court will find that you have failed to give an adequate remedy at law, even though you might otherwise have complied with the commands of due process.

Consider where this takes us. I'll give you an extreme example just to make my point, and I'll stop there. This case just happens to come out of a state university, and was cited by Robert O'Neill, the former President of the University of Virginia, one of America's leading administrative and constitutional scholars. In this case, a court found that the removal of one member of the faculty string quartet constituted a violation of that person's due process "property" rights. Can you imagine an administrative law judge in a "contested case" trying to determine whether or not the second violin belongs in the string quartet? And how one might set up an adversary process by which to test that? And what might the battle of experts really show? How does one go behind the exercise of professional judgement and discretion by people who are artistic? But that's nonetheless the conclusion to which our present structure of the statutory codification of the minimal constitution requirement may take us.

Now, it's puzzling to me that a range of graduated procedures in state adjudications, as suggested by the revised Model State Administrative Procedure Act, has not been adopted by virtually any American jurisdiction. The all or nothing choice between when one adjudicates and when one does not seems to me to entail imposition of an enormous amount of expense. Yet it's clear to me that we haven't fully faced up to the intricacies as constitutional or administrative law scholars. Having looked through the table of contents of your

conference materials, there ought to be some things that we could learn in terms of stipulated dispositions of cases, of alternative dispute resolution, of consent trials and of non-opinion oriented jurisprudence.

We still could do justice in these cases where there ought to be some minimal right to be heard without triggering a full blown judicially-modeled notion of the rights of due process.

There are yet two other major developments. With the identification of these developments, I'll close the first part of my remarks. We have had federal and state judicial glosses on all these statutory requirements. At the federal level, there emerged what's been called the "hard look doctrine" of formalized rule-making. This development was soundly rejected by the United States Supreme Court. In the states a "hard look" doctrine also emerged and may be best exemplified in *Megdal v. Board of Dental Examiners*, 288 Or. 293, 605 P. 2d 293 (1988). The case arose here in the state of Oregon, and was much hailed by one of the leading lights of state administrative law scholarship, Arthur Bonfield. It can be argued that subsequent cases following *Megdal* in other jurisdictions have backed off from its seemingly rigid requirement, that before you're going to enforce a broad statute, the agency has to make rules about its interpretation and enforcement. In that respect, the progeny of *Megdal* seemed to give to administrative law judges or referees a greater means of fleshing out a rule than requiring the agency to go back and to make rules.

On the other hand, as an analytical alternative the Oregon Court of Appeals and the Supreme Court have seemed to be relentless in their insistence that the admonition of the Oregon Administrative Procedure Act be followed in minute detail. This holds true especially for the statutory requirement that the agency decision be supported by exquisitely detailed findings of fact and conclusions of law.

The famous case in Oregon, after repeated failures of the Employment Appeals Board which, in those days judged unemployment compensation requests, lay a board of people vastly overworked and not so careful in their administrative decisions, one of our appellate courts actually wrote an opinion which was subtitled by that court as a judicial "primal scream" at agencies' failure to obey the law. And that has led in this state, unabated to this day, to a microscopic insistence, upon judicial review, that the findings of fact and evidentiary findings of credibility be detailed in the hearing

officer's record with great specificity.

I said there was one final administrative law development. It probably won't surprise any one in this room. It is the populist revolt against the whole process, which is now in full flower--a revolt against the administrative state; a revolt against the perceived delegation of excessive authority to those unelected bureaucrats who are making rules that go beyond intentions of the legislature; a revolt against people who don't have the formal authority of circuit court judges who are nonetheless judging what individuals do in their confrontations against their government. The irony of all this revolt is that it may result in further replication in bureaucratic detail of administrative requirements, rather than a fundamental rethinking of the administrative process itself. One can find this most strikingly in the "economic impact" or the "regulatory impact" statements that are now commonly drafted by legislatures onto legislation, and required of federal and state administrative agencies before they enact or promulgate any kind of rule.

Edify me, how many of you do not live in Oregon? That's about half of you. We have pending on our ballot, a measure which has been enormously well financed and has little opposition except for Dean Ackerman, who introduced me, and me, which has this characteristic. On the petition of 2% of the Oregon electorate, who object to an administrative rule or rules allegedly promulgated contrary to the will of the public or of the legislature, the President of the Senate must introduce a bill to the next legislature either continuing that administrative rule in existence or repealing it or modifying it. If that measure does not effectively pass the next legislature, and survive the Governor's vetoes, then the administrative rule goes out of existence.

Now think about that one for a minute, it made our heads hurt for a while. We thought it was strange, but take it on a straightforward basis, doesn't it mean that 2% of the people get to make a law? Does that bother you? If you read *Reynolds v. Sims* (377 U.S. 533, 84 S.Ct 1362, 12 L.Ed. 2d 506 (1964)) and assume that everyone's vote is supposed to count for something approximating equality, isn't there a 14th amendment issue here? If you believe that there needs to be some notion of representativeness in the construction of the state government in order to meet the Guarantee Clause requirement of the republican form of government isn't there something monstrous about the notion

that a non-law can make a law? You don't have to form a political majority around anything. In fact, it's the failure to form a political majority, and 2% of the peoples' right to force others to form a political majority, that makes a law. And if the legislature doesn't act by a majority, then 2% of the people can repeal a rule, that is to say, make a law. I've said (and I've been called to task politically for saying it), that that's somewhat monstrous. But it's certainly emblematic of a disquiet about the administrative process that has gone so far from the heyday of the administrative state in the 1930's we have a call to wake up and take notice, and to ask whether or not this isn't the revolt against administrative legal formality that calls us to do some very serious re-thinking.

I actually make this next assertion in, I hope you will understand, a political and value free way. If you want to see the state of the present malaise in the administrative process, and even at the national level our failure to sort out clearly what we think are the appropriate functions of government, think about what the Congress itself has done in setting up special prosecutors. The Congress of the United States has written a law, and the law was approved by the present President, that allows the appointment of a special prosecutor when there's a finding by a presidentially confirmed cabinet officer, of a potential prosecutorial or political conflict. It then requires the appointment, by a panel of Article III appointed and confirmed federal judges, of a person to take administrative agency action in pursuing a prosecutorial function. It gives that person very broad powers of inquisition. Then it gives that person, not only the power, but some would say the legal duty, to report to an Article I Congress about its extraordinary responsibilities. This law can be construed to include recommendations concerning impeachment, and to seek the authority of a court to release grand jury information, which would only be used ordinarily before an Article III court or judge, or a Article I appointee to the Article III responsibilities. It allows that grand jury information to be given to the Congress of the United States and to be used for something other than to report out an indictment. So much, then, for the clear, clean separation of constitutional functions.

How did we get here? How can our administrative state and our administrative functions survive without popular or even expert understanding of these functions? Have we made the administrative

process, even as we perfected it, increasingly inaccessible, both to the imperatives of timely decisions and understandable processes, and the ability of those who need to make government work to try to make it work? How did we get here? Well, I have a theory or a set of theories that I would like to share with you again in the spirit of this conference.

Part of our problem, part of our malaise is that there's not one, but there are at least five models of what an administrative process ought to do, what administrative law is, that are at work, hidden underneath all these statutory complications and these judicial doctrines. We haven't really made them explicit. Our failure to make them explicit has led to the kinds of clashes that I've tried, at least, to describe in outline. The retreat from this always tentative support for the administrative state, is an overt revolt, not only against the failure to make these models clear, but a revolt fueled by some other things. We might as well put these other considerations on the table too because this revolt is political. Administrative law is or can be political and we see these overtones generated in what I call the political retreat from the administrative process.

The first of them is the universal finding by anyone whom you care to poll, that government is increasingly distant. You can't touch it, you can't feel it, all you can do is see its tentacles approaching you. A second, is an overt revolt and we may call it a selfish one, but it's nonetheless quite clear, against the entitlement mentality. Bear in mind that it was the expansion of entitlements and the issues with respect to who is qualified for them, that has given rise to so much of our modern administrative law: entitlements with respect to welfare, entitlements with respect to immigration; entitlements with respect to affirmative action. All of these entitlements, of course, are on the national political agenda of at least one of the political parties, and all of them, I think, contribute to an attack on any administrative process that attempts to adjudicate rights for these entitlements in an appropriate way. The third contributor, of course, is official misconduct and official misbehavior which only further estranges individuals from government and tars all of us with the same bush.

A fourth development is an intriguing one. A friend whom I greatly trust, is one of the smartest people I know, has served state government. He is now on Wall street and making millions of dollars and thinking a lot about why people act as they do. He is a student of

polls and a student of longitudinal polls. And one of the things that my friend told me was a wake up call. He said, "Why do people distrust government? It's because they don't trust each other, and they're afraid that the other guys will capture government and use it against them." So government, and distrust of government, is really a surrogate for our failure to trust each other with the kind of common national bond that we may have experienced in the past. If anyone's use of the instruments of government is automatically perceived as the other's guys use of them against me, then of course, it makes your job of pushing rocks uphill, and of bringing legitimacy to administrative judgments, only that much harder.

Let's now look at the models through which we've attempted to deal with all these currents and cross-currents. Bear in mind, if they're still valid, the twin objectives, the often competing objectives, of allowing for government efficiency in the performance of duties, while according to individuals procedural fairness when they're entitled to it. Consider some of these models. The first of them is what I call the "expertise model" and its probably really the earliest of the models and maybe best exemplified in the New Deal. We are going to create administrative agencies to deal with catastrophic national problems, especially those in the economic arena; we are going to achieve that agenda by bringing down the best and the brightest and turning them loose. Agencies really are going to save us from ourselves and from the market. To a surprisingly strong degree, the New Deal did bring in the best and the brightest, to help us and the law was constructed to reflect that. Think, for example, of what might accompany an expertise model of administrative adjudication. You would obviously have to include a provision for official notice. It would give deference to the expertise of evaluators of evidence in terms of their evaluation according to their own expertise. That is, by the way, written into the Oregon APA and that of many states. It would account speed as a premium, and so it wouldn't adjudicate very many kinds of cases in a formal judicial model. It would allow an agency to construe its own rules and then provide a judicial system that gave substantial deference to the agency's construction of those rules. It would prohibit parties generally from probing the mind of the administrator. "How far did you really go into that case, what were you thinking about, Mr. Cabinet Officer, or Ms. Cabinet Officer, when you made that decision?" That's

*United States v. Morgan*³ which effectively precluded substantive litigation or appellate review of very much of what went on in the mind of the administrator who made the decision, because it really wouldn't really be proper, especially since we know that they are experts or that they employ and rely upon the experts. The expertise model would thrive under a substantial evidence rule. That is to say if there's something in there that looks like it would support a rational conclusion, reviewing courts shouldn't go very much farther. The rule is designed to make the administrative law judge not so much a separate entity or group of entities but really part of the executive branch itself and an adjunct to helping the executive branch make up its mind about national policy. So here is not really the fourth branch of government, there are three and one-half. If you need to proceed sometimes under special adjudicatory notions, you do it because that may be an efficient way for allowing executives to make decisions under special circumstances.

This may sound all well and good. You can recall, can't you, how many of the artifacts of the expertise model still remain? Some people think that expertise is relatively easily assembled. It reminds me a little bit of the guy who thought skydiving was going to be easy, so he read a book about it went out to the local airport, he rented a couple of parachutes and asked the pilot to take him up, and of course, signed the assumption of risk waiver. The pilot took him up to 5000 feet and he fell out and he started going toward the ground. He reached in back for the halyard and he yanked it out, and a piece of rope about twelve inches long came out in his hand, and he said, "Well that was on page seven and let's see, on page 32, I think it says there's a reserve chute." Sure enough it's in front and he rips that one, and a piece of silk about the size of a handkerchief comes out in his hand. That's all there is. Now he's falling faster and faster and there's nothing left in the book to tell him what to do, and all of the sudden he sees this guy coming up from ground toward him and when he gets close enough he shouts, "Hey, you know anything about parachutes?" the other guy yells, "No, you know anything about propane stoves?"

It may be that there are limitations to expertise and painting by

³304 U.S. 1 (1938 (Morgan II)).

the numbers. Of course those are the issues respecting the expertise model, aren't they? First of all, where are the experts? Are we satisfied that they're always there? Second, much of administrative law is involved with making trade off judgments. Not all judgments we make are ones of scientific or technical expertise, they contain questions of relative valuation of competing goals. Especially when the statutes are not clear because their goals conflict, that may present a much more difficult job for the expertise model. Said the other way, the expertise model may really only work very well when there are broad areas of agreement amongst administrators and amongst the larger public about what regulatory goals are. And finally, the expertise model may largely depend upon the notion that most of the administrative process is in fact technical, rather than arranging the accommodation of conflicting regulatory goals.

Superimposed on this model, then, is the second one, which I call the "legislative control model." That can be politics in its proper sense, it could be money politics in its improper sense, and it can be legislative courage in its declining sense. This model, really does depend upon legislative action. It is found in models of administrative procedure that require legislative review of rules; it's also found in models that suggest that there needs to be budget control over regulatory activities; it's further found in legislative activity that establishes a legislative veto, perhaps not as extreme as Measure 65 on our current Oregon ballot, but certainly some notion of legislative control over that runaway bureaucracy. Some states, again Florida is most notable, specifically requires the existence of legislative standards before there can be administrative rulemaking action. But the true "cop out" in the administrative state, as I think we increasingly know, is that legislatures have failed utterly in many cases, to identify specific regulatory goals. They've only specified in the broader sense regulatory "objectives." Of course, the ultimate problem is that then they lateral the policy ball to you. Political conflicts that have not been resolved at the level of elected representatives for the people, become fatefully mired in clashes in the administrative process. That migration of unresolved issues is a major cause of the kind of malaise that we see in the American administrative law system.

The third model, still superimposed perhaps on these other two, is that of “democratic participation,” a model that suggests that we have conflict of interest legislation; we have lobby disclosure legislation; that we have, (and the Oregon law again is emblematic in many of them), interest group consultation. We allow limited party intervention now, not only in rulemaking but at least in some proposals, in contested cases; we have citizen representatives; we have required consultation of advisory groups and appointment of them; and even proposals to have elected agencies. Of course, they aren’t just proposals in some states. The Colorado State Board of Higher Education and the governing boards of a number of states of great distinction are politically elected. These reflect the notion that accountability to the public for agency action comes through democratic participation.

Then there is the fourth model, which requires enormous detail as agencies specify the reasoning process by which one enacts agency rules, and the reasoning process through which an administrative law judge or hearings officers or referee--pick your name--makes and decides a case. That particular model, the “comprehensive rationality” model, was part of a hybrid procedure that the United States Court Supreme Court rejected in the *Vermont Yankee* and the *Florida East Coast Railway* cases (*United States v. Florida East Coast Co.* That model, of course, has its shortcomings as well, and there are several of them. I don’t have sufficient time to talk to you about them fully, but in rule-making, for example, the new Model Act would require rule-makers to identify the reasons why they are enacting a rule, and thereafter they could rely, upon judicial review only on the reasons they thought of at the time. That standard for a rule certainly wouldn’t prevail under United States constitutional standards for legislation. And a rule almost assuredly will get lawyers, not in the business of post-hoc rationalization, but in drafting the most broad and common denominator reasons in order to protect the validity of the agency’s rules.

Transferring those same issues to adjudication, what the courts and the legislatures have done is to elevate the administrative judicial process to something far beyond what the process is even at civil justice. Can you imagine a jury accepting the most complicated case of comparative negligence requiring the degree of specificity of “findings of fact” that are routinely required in administrative law cases

of administrative judicial officers? Why do they do that? Is it coming to the point where its almost humanly impossible to comply with the specificity that the statutes now require? It clearly is making it impossible for lay agencies, except in the most extraordinary situations, to have hearings other than through legally trained people, a tradeoff that is not one of small consequences. It's one that I run into in my own institution where, by statute, the faculty has control over student disciplinary proceedings. Any serious disciplinary process involves a contested case hearing, a process with which even the most brilliant faculty have enormous difficulty.

Finally, I suggest to you there's a fifth model, and with that, I'll conclude my remarks. Its the "nominalist" model, a notion that perhaps we ought to be humble enough to recognize that one size does not fit all. We have agencies that are regulating a wide variety of issues and human activities. It is important to distinguish types of regulations, and the judicial models appropriate to them, before we develop an elaborate system of single-minded adjudication that assumes that one set of adjudicators, and one procedure for adjudication, is all that there ought to be. In other words, setting telecommunications rates is probably very different than expelling a public university student. Maybe our law ought to be humble enough to recognize that those are major kinds of differences. But who are the culprits in all of this? I suggest, and I usually get into trouble with this, that the culprits aren't administrators and faceless bureaucrats, they're legislators and the people. A fundamental source of our malaise if that is what it is, or at least of the rigidity with which we're criticized, comes from the failure of those who have responsibility to make policy, to make it clear, to make the tradeoff judgments, to do those things which a representative government is supposed to do, if one follows the Federalist Papers.

I've shared some initial thoughts about administrative law and the constitution in a century of development. I actually had a list of ten hot topics in administrative law, but I think you might be interested in knowing that I will cease my remarks before your patience is exhausted. Let me just conclude with this one thought. The creation of all of these extraordinary instruments of government, both strengthening the reach and increasing the grasp of government institutions in this last century, has given us a formidable subsidiary task. That is, how do we ensure that these instruments of government

behave lawfully, if we are to have a government under law? That is the question and it is actually a very old question. It was once posed by the Roman poet, Juvenal in the year 54 A.D. He said, "Quis custodiet ipsos custodes" or, if we all remember, of course, our school Latin, "Who will watch the watchers? Who will guard the guardians?" That is still, at the end of this century, as it was at the beginning, the fundamental question of American law. The answer has to rest with us, because if we are in a representative government there is no magic watcher of the watchers other than we ourselves. You are a very proud part of that cadre and of that tradition. I salute you for it and wish you well, Thank you very much