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ADMINISTRATIVE PROCEDURE AND THE PUBLIC INTEREST—THE RESULTS OF DUE PROCESS

A. H. FELLER†

To any historian contemplating the intellectual history of this country for the last fifty years the story of debate on administrative law should commend itself as a most interesting chapter. It starts with Dicey's horror at the very notion of administrative law and his denial of its existence even though a widespread, if rudimentary, system of administrative legislation and adjudication had been in effect for a long period prior to his day. Then follows the gradual and progressive extension of the power of administrative bodies, accompanied sometimes with short flurries of protest but mainly with conspicuous public and even professional indifference. By the second decade of this century, the system of administrative law seemed to have gained acceptance in all quarters. It was then that an Elihu Root could say:

There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. * * * There will be no withdrawal from these experiments. * * * We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.¹

In the 1920's controversy flared up over what was conceived to be the attempts of courts to restrict unduly the powers which the legislature had conferred on administrative officers. The American literature on administrative law had its real birth during this controversy, and it was characteristically a literature which, in the main, accepted the premises laid down by legislative enactment and concerned itself with the relations of the courts to the

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1. Root, *Addresses on Citizenship and Government* (1916) 534.

administrative process.² It is noteworthy that in this period of controversy the protestants were the persons who were sympathetic to the administrative process and who felt that the courts were going too far in restricting proper and necessary administrative action. The defenders of the courts were not particularly vocal, perhaps because they were not keenly aware of the problem, or perhaps because they felt that the courts could handle the situation without outside support. The issues of that controversy were quite narrow, relating almost wholly to judicial review. What administrative determinations are reviewable by the courts? What is the extent of permissible review? What degree of finality should be accorded to this or that type of administrative fact determination?

In the early years of the New Deal the controversy flagged, as Congress and the legislatures continued to increase the area of administrative action and as the courts evinced less and less inclination to interfere with the processes of administration. Now we are again at the full tide of controversy. This time the protestants are on the other side of the fence. Their concern is with the limitation of the powers of administrative agencies and with the increase of the extent of judicial control.³ The protests are now many and loud, and the noise is so great that it is often difficult to carry on rational thought processes.

In such a situation, it is well to start by clearing the field of those considerations which appear to me ulterior to the subject and whose presence can lead only to confusion, and, on occasion, to demagoguery. First, I think we should try to isolate and eliminate the element of current political controversy. This is

2. A few examples of that literature are Dickinson, *Administrative Justice and the Supremacy of Law* (1927); Frankfurter, *The Task of Administrative Law* (1927) 75 U. of Pa. L. Rev. 614; Wiel, *Administrative Finality* (1925) 38 Harv. L. Rev. 447; Dickinson, *Crowell v. Benson—Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932) 80 U. of Pa. L. Rev. 1055; MacFarland, *Judicial Review of the Interstate Commerce Commission and Federal Trade Commission* (1933).

3. The current debate can be best studied in three symposia, (1938) 47 Yale L. J. 515-674; (1938) 12 U. of Cin. L. Rev. 117-237; (1939) 7 Geo. Wash. L. Rev. 681-790. See also Landis, *The Administrative Process* (1938); Vanderbilt, *The Place of the Administrative Tribunal in Our Legal System* (1938) 24 A. B. A. J. 267; Ballantine, *Administrative Agencies and the Law* (1938) 24 A. B. A. J. 109; Stason, *Administrative Tribunals—Organization and Reorganization* (1938) 36 Mich. L. Rev. 533; Fuchs, *Current Proposals for the Reorganization of the Federal Regulatory Agencies* (1938) 16 Tex. L. Rev. 335; Jaffe, *Invective and Investigation in Administrative Law* (1939) 52 Harv. L. Rev. 1201; McGuire, *Have We a Government of Laws or a Government of Men?* (1939) 73 U. S. L. Rev. 331.

not an issue between the New Deal and anti-New Deal forces. The New Deal did not invent the administrative process, and in fact, not a single provision of any New Deal statute has added any significant element to the machinery of that process. The combination of investigating, prosecuting, and adjudicating functions in a single agency;⁴ the finality of fact determination;⁵ the trial examiner system;⁶ the implementation of statutes by administrative rules and regulations;⁷ the cease and desist order;⁸ the short-circuiting of the district courts by centralizing review in the circuit courts of appeals;⁹ the elimination of traditional rules of evidence;¹⁰ every other element of the process that you can think of, was conceived and put into practice long before the New Deal came into being. We must beware of those who have enlisted under the anti-administrative law banner for the sole purpose of taking pot-shots at the present administration. At the recent New York Constitutional Convention an unprecedentedly severe and reactionary proposal to curtail the traditional administrative activities of the state¹¹ was loudly supported on the ground that it would constitute a slap in the face for the New Deal.¹²

4. Such a combination is exemplified in the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the old Federal Radio Commission, the Packers and Stockyards Act, and the immigration and deportation procedures of the Department of Labor.

5. The doctrine of finality of fact determination was elaborated by the Supreme Court before it became a clearly established statutory policy. For the gradual stages in the development of the doctrine with respect to the review of orders of the Interstate Commerce Commission, see *Cincinnati, New Orleans & Tex. Pacific Ry. v. Interstate Commerce Comm.* (1896) 162 U. S. 184; *Interstate Commerce Comm. v. Alabama Midland Ry.* (1897) 168 U. S. 144; *Cincinnati, Hamilton and Dayton Ry. v. Interstate Commerce Comm.* (1907) 206 U. S. 142; *Interstate Commerce Comm. v. Illinois Central R. R.* (1910) 215 U. S. 452; *Manufacturers Ry. v. United States* (1918) 146 U. S. 457.

6. For the trial examiner system of the Interstate Commerce Commission, see 4 Sharfman, *The Interstate Commerce Commission* (1937) 73 et seq.

7. This practice goes back to the earliest days of our government. Specification is hardly necessary.

8. Federal Trade Commission Act (1914) 38 Stat. 717, sec. 5, (1927) 15 U. S. C. A. sec. 45.

9. *Ibid.*

10. Stephens, *Administrative Tribunals and the Rules of Evidence* (1933) *passim*.

11. For the text of the proposed amendment to the New York State Constitution see New York State Constitutional Convention 1938, Revised Record 2041.

12. Delegate Livingston made it quite clear: "This is a little practical exercise for a whack, as we might say, at the New Deal." New York State Constitutional Convention 1938, Revised Record 2088.

A second consideration which I think we should all leave behind us when we enter this field is our sympathy or antipathy to this or that particular statute. Because you don't like the Labor Relations Act, and that Act is administered by a board is hardly reason for excoriating the whole system of board or commission administration. I venture to say that a substantial proportion of those who are now attacking the administrative process do so because they do not like the Wagner Act, and I further venture to say that most of these people would not like the Wagner Act no matter by what method it were administered. There are those who are frank enough to say that they are perfectly willing to let the Federal Trade Commission go ahead on the old lines but that the Labor Board is a different matter because it cannot be trusted. In effect, what these people are saying is that they do not mind effective administration of the Federal Trade Commission Act, but they do not want effective administration of the Labor Relations Act. If you think the Labor Relations Act is bad, you should stand up and say so when the issue is whether or not we should retain that Act. But that is a question of labor law, not of administrative law.

Thirdly, I should like to ask you to put behind you your antipathies or sympathies with regard to government regulation of business as a general problem. You may not like government regulation of railroad rates, but the question as to whether we should or should not have such regulation is not the issue here.

There is one more issue which I should like to exclude from this discussion and for this I must beg your indulgence. It is the issue of the choice between court or commission for purposes of regulation. By the very setting of this program, I think you will permit me to assume that I should not trespass on your time by dealing at length with that issue. The program before you constitutes in a sense an estoppel of anyone who would attempt to consider the possibility of sweeping away all commission regulation. And so having put aside these other considerations, I phrase the question for our discussion thus: How can administrative procedure be best adapted to the efficient dispatch of public business entrusted to an agency without the impairment of essential private rights?

If you will examine closely the question that I have put, you will note that to some extent it carries its own answer, as indeed

do most questions framed by lawyers. I have put the emphasis upon the efficient dispatch of public business for the reason that I believe that the first task of administrative agencies is to perform the job designated by the legislature. To most of you this may seem self-evident; but, if you will ponder on it for a moment, you will realize that it is not self-evident to many of the hostile critics of administration. An examination of some of the proposals for reforming administrative procedure indicates that some people seem to think that the purpose of administration is to increase litigation and furnish better and more fees for lawyers. An administrative agency is not created primarily for the purpose of providing due process to those against whom it is proceeding; it is created for the purpose of carrying out a policy of Congress within the limitations of due process. The task of administrative law is not to find the best way of making it easy for the respondents in administrative proceedings; that task is to find the best way of securing efficient enforcement of the statutory policy. After that best way has been found, then the time has come to decide what protection the interests of fairness and justice require to be given to the respondents. If the people want regulation of railroad rates, stockyards, wages and hours, trade practices, and all the other matters now subject to regulation by statute, and if they pay for public servants who are supposed to enforce those statutes, they cannot be expected to tolerate the erection of so many barriers to the carrying out of their desires that the statutes fade into mere reminders of good intentions and the public servants turn into public pensioners.

The second part of our main question, the protection of private rights, is in Mr. Biklé's domain. My job is to deal with the first, and, to my mind, more important part—how can the public interest best be protected? As I see it, there are really two separate questions implied here—what is the best machinery for enforcing the policy of the statutes, and what are the present or threatened shackles which would endanger the efficiency of that machinery beyond the point necessitated by the protection of essential private rights? It should be clear that the question of what is the best machinery cannot be answered in generalities, once the decision has been made to choose the administrative in preference to the judicial method. If the current interest in

administrative procedure has taught us any lesson at all, it is that the enforcement of each statute presents a distinct problem. Your committee has realized the wisdom of this by allotting only this one evening to general discussion and assigning all the other sessions to the more important and more fruitful business of dealing with particular statutes. I am the more content to leave the question of the improvement of particular segments of the administrative machinery unanswered here because that very problem is now in the capable hands of the Attorney General's Committee on Administrative Procedure and we can shortly expect a report which I am confident will rank as the most significant document on Administrative Law produced in our day.

I turn then to the question to which certain general answers are possible—what are the present or threatened dangers which would shackle the ability of the administrative process to function efficiently in the protection of the public interest? The essential restrictions which statutes and courts now place on administrative action of a quasi-judicial nature are quickly rehearsed—the agency must act on substantial evidence; it must make findings; it must grant a fair hearing; it must not exceed the legal powers granted by the statute. If it fails to do any of these things, its determination can be set aside by a court which has either been granted a special reviewing power by the statute or which has in some cases assumed to act as a reviewing authority under its general equity powers in the absence of an expressed statutory right of review.

In theory these restrictions leave the administrative agency considerable freedom of action. Indeed, it would be hard to find anyone who would advocate stripping any of these protections from the existing system. Nor do I find that the application of most of these restrictions by the courts at the present time is unduly shackling of administrative efficiency. There was a time not long ago when courts were quite ready to upset administrative fact determinations by substituting their own judgment of the facts for that of the agency under review. There are still more than a few cases where the same practice continues.¹³ The last few years have taught us, if we did not quite realize it be-

13. See in particular *National Labor Relations Board v. Waterman Steamship Corp.* (1940) 60 S. Ct. 493, and the cases cited in footnote 1 to the opinion.

fore, that judges are human, and that they cannot always be expected to exhibit that perfection of judicial abnegation and tolerance which the standard of administrative finality calls for. A judge who feels that the administrative agency has been wrong in its weighing of the evidence cannot but be tempted to stretch the adjective in the phrase "substantial evidence" just a bit, and to wonder whether it is not possible to call the evidence which the agency points to in support of its action a "mere scintilla." If the agency happens to be the National Labor Relations Board, which has been getting bad notices in his favorite newspaper (and that means almost any newspaper), the temptation can easily get the better of him. At the moment, however, such violations of statutory limitations by the courts are not frequent enough to constitute a serious menace to administration. Whether the problem will become more serious in the future cannot be foreseen. If it does, I see no effective remedy.¹⁴ We will have to continue to rely on the intelligence and probity of the judiciary, just as, in the last analysis, we shall have to rely on the same qualities in our administrative officers no matter how many obstacles the ingenuity of lawyers may build up about them.

The most serious existing shackles on administrative adjudication arise out of the implications of the first two *Morgan* cases.¹⁵ I shall not dwell on these famous monuments to the legal ingenuity of Messrs. John B. Gage and Frederick Wood since they will presumably be dealt with at length in the discussion of the procedure of the Department of Agriculture. There are plenty of disturbing things about these cases (including the fact that no two experts seem to be able to agree on what they mean); I shall content myself with mentioning only two. The first is the implication that the Constitution prescribes a particular type of procedure for administrative agencies. You will remember that in the second *Morgan* case the Supreme Court had held that the Secretary of Agriculture's determination was invalid because there had been no intermediate report of a trial examiner sub-

14. The best available remedy is the willingness of the Supreme Court to grant certiorari in such cases as the *Waterman Steamship* case (1940) 60 S. Ct. 493, cited supra note 13.

15. (1936) 298 U. S. 468; (1938) 304 U. S. 1. I speak of the "implications" of the *Morgan* cases rather than the holdings, because the opinions themselves do not go as far as many people, including both opponents and advocates of the cases, have believed.

mitted to the respondents, although the statute had provided no more than that there should be a "full hearing." The Supreme Court has no authority to decide what sort of procedure an administrative agency should have and nothing could be more destructive of effective administration than the assumption of such authority by the courts. In this case the Court decided to impose a particular incident of procedure which was familiar to it through its knowledge of the practice of the Interstate Commerce Commission. The Court made no attempt to investigate the organization, the tasks and the needs of the Packers and Stockyards Division of the Department of Agriculture; and, even if it wanted to make such an investigation, it had no facilities available. What is suitable for the Interstate Commerce Commission might be destructive for the Department of Agriculture, and vice versa. The courts have no way of determining this question and they should leave it where it belongs—with Congress and the administration itself. As I have said elsewhere, the attempt to read the procedural predilections of judges into the due process clause is as much to be condemned as the similar attempt to read economic predilections into the same constitutional provision.

The second serious implication of the *Morgan* cases is the open invitation to litigants to ask the courts to probe into the mental processes of the administrative officer and to lay open the files of his agency. No instrument more destructive of good government and more productive of vexation, delay and harassment has appeared in our legal system since the abolition of the old chancery practice. No one has presumed to suggest that our judges could be placed on the witness stand and examined and cross-examined as to how and why they had arrived at their opinions, how much of the records and briefs they had read, how much writing they had done independently and how much they had copied from their law-clerk's memoranda. No one has dared to subpoena the papers from a judge's desk and cabinet to impugn the validity of a judgment on appeal. Yet the attorneys in the *Morgan* case have succeeded in doing just these things with the Secretary of Agriculture. And to what end? To stretch a simple controversy over the fixing of stockyard rates into an eight year legal Calvary with the farmers bearing the cross. If this practice were to become generalized, the review of administrative action would become a nightmare of interminable law

suits with administrative officers spending most of their official lives in the witness chair.

I said earlier that these matters constitute the most serious existing shackles on administrative adjudication, but I must confess that they have not turned out to be as serious as they appeared two years ago—the reason being that by and large the courts (including the Supreme Court) have had the good sense not to follow these implications of the *Morgan* cases. In the *Mackay Radio*¹⁶ case the Supreme Court turned its back on the intermediate report requirement almost as soon as it had been enunciated, and other courts have been willing to find the most subtle distinctions in order to wriggle out of the various *Morgan* rules.¹⁷ There is no doubt in my mind that the *Morgan* cases have done a great deal of damage and that administrative procedure has been unnecessarily complicated in an effort to comply with the decisions. Nevertheless, I do not find them to be as dangerous today as they once seemed to be.

At this point I believe that I can answer the question implicit in the title of this paper—have the results of due process been to hamper the effective protection of the public interest through the administrative process? The answer is—at the present time, “No.” But when I turn to consider the future, I cannot feel quite so confident of the answer.

It would be stretching your patience to the breaking point to attempt to analyze in detail the mass of restrictive provisions which critics of administration are pressing for adoption under the guise of the necessary application of the requirements of due process. These suggested restrictions can be grouped under three main tendencies—the tendency to subject each and every administrative act to review; the tendency to assimilate administrative procedure to the procedure of the courts; the tendency to reimpose judicial review of the facts. Each of these tendencies may have its origin in a sincere desire to protect the respondents in administrative proceedings, but I hold all of them to be pernicious.

16. (1938) 304 U. S. 333.

17. See e. g., *Plapao Laboratories v. Farley* (App. D. C. 1937) 92 F. (2d) 228; *United States v. Standard Oil Co.* (D. C. S. D. Cal. 1937) 20 F. Supp. 427; *Cunard S. S. Co. v. Elting* (C. C. A. 2, 1938) 97 F. (2d) 373.

I do not deny that there have been inconsistencies in the rules governing the review of administrative determinations. The "negative order" doctrine was illogical and confusing, and its abolition by the Supreme Court in the *Rochester Telephone case*²² was welcomed by nearly all students of the subject. Perhaps the tests laid down by the Court in that case are not as free from confusion as they might be. Perhaps changes in the law are needed here and there with respect to the reviewability of particular types of orders. But a wholesale overturning of established practice can lead only to more confusion, irritating delays and intolerable expense to the taxpayers. If we think that certifications of elections by the National Labor Relations Board should be made reviewable by the courts, let us deal with that particular problem and not attempt to deal with the whole range of administrative action at one swoop.

The tendency to assimilate administrative procedure to the procedure of the courts is again a natural one. A lawyer likes to do business under a single set of rules. He is accustomed to the rules of the courts and he frequently believes that these represent the only way in which business can be done by tribunals. But administrative agencies are not courts. They were created because experience showed that courts were inadequate for the tasks demanded. Their needs and their functions are different. They grew out of different conditions, and they will of necessity have to pursue different paths of development. The particular type of procedure to which we are accustomed in our courts is not the ideal of justice. Centuries of experience have taught us that there is much which is wrong with our judicial procedure and that reforms are not easily attained. Administrative procedure is not bad merely because it is different, any more than the equity procedure was bad merely because it differed from that of the common law courts. The trenchant words of Mr. Justice Frankfurter in his recent opinion in *Federal Communications Commission v. Pottsville Broadcasting Co.*²³ should be read carefully by every critic of administration. He said:

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts inter se—a relationship defined largely

22. (1939) 307 U. S. 125.

23. (1940) 60 S. Ct. 437.

The tendency to increase the sphere of judicial review is exhibited in its most extreme form in the Logan Bill, more particularly in some of its earlier drafts which gave a right to review, first, by an administrative board of review, and then by a court, to every act or omission to act of any federal officer or employee.¹⁸ It has been pointed out that such a provision would give a right to review the refusal of a building guard to admit you to the building after hours, or the refusal of a federal officer to grant an appointment to an applicant for a job.¹⁹ But even eliminating these absurd situations, the Logan Bill still constitutes a dangerous extension of the area of review.²⁰ It is only natural for a lawyer to feel that every time he is aggrieved through contact with the government there should be some remedy in the courts. He is apt to forget the truism that only a small part of the mass of human relationships can be made the subject of legal process. When a large private corporation refuses to deal with a contractor because the purchasing agent decides he is unreliable, no one dreams of asking for the protection of the courts; when government purchasing agents do the same, there is a widespread cry for court review and all the paraphernalia of a lawsuit. For generations, the internal household arrangements of the government were supposed to be free from judicial interference. But now we see the Court of Appeals of the District of Columbia permitting prospective bidders for government contracts to invoke the aid of the courts to upset the determinations of the Secretary of Labor under the Walsh-Healey Act as to amount of wages government contractors must pay in order to do business with the government.²¹

18. See the earliest published draft of the bill which later became S. 915, in Reports of American Bar Association (1937) 62 A. B. A. R. 846.

19. The latest draft of S. 915 as reported out by the Senate Judiciary Committee on May 17, 1939, impliedly admits the extreme scope of the earlier drafts by specifically exempting any case where the aggrieved party "has failed to receive appointment or employment by any agency or independent agency."

20. As reported out by the Senate Judiciary Committee, the bill provides for review of any "final decision or order" of any agency or independent agency. "Decision" is defined to mean "any affirmative or negative decision, order, or action in specific controversies which determines the issue therein involved." "Controversy" is defined to mean "any dispute or disagreement concerning any claim, right or obligation for or against the United States and any refusal to grant any license, permit, or other privilege."

21. *Lukens Steel Co. v. Perkins* (App. D. C. 1939) 107 F. (2d) 627, cert. granted (1940) 60 S. Ct. 513.

by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of “judicial power” conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable was a quarter century ago the opinion of eminent spokesmen of the law. Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.²⁴

24. 60 S. Ct. at 440-441.

Of the third tendency, to revert to the practice of permitting courts to review the weight of the evidence, there is little to say that has not already been said many times over. The finality of administrative fact determination if supported by substantial evidence is the heart of the existing administrative law system. It took many years of travail and controversy to arrive at this standard. The burden of proof is on those who wish to turn the clock back. I have yet to see any demonstration that the existing standard is an evil. The best its opponents can do is to point to a few isolated cases where administrators have gone astray. For each one of these, a dozen cases of error by the courts can be cited. We have had a long and wearying experience of judicial review of the weight of the evidence in utility cases where the claim of confiscation is involved. As a result, commission regulation of utility rates has been almost completely discredited. By holding back efficient and rapid adjudication of rate controversies, the utilities have brought on themselves the T. V. A., governmental "yardstick" plants, and the drastic reorganization of public utility systems.

Above all let me again emphasize the fact that we have been too much preoccupied with these matters of judicial review. Sharfman found that out of some 15,500 cases decided by the Interstate Commerce Commission only 155 reached the courts.²⁵ Most of the writing and controversy has been about the one case out of a hundred that undergoes judicial scrutiny. The other ninety-nine cases have received little attention. It is time now to study them, to find out what each administrative agency does, what its problems are, and how they can best be solved. There is no royal road to administrative reform any more than to any other problem of government. The administrative system has plenty of faults, but these faults cannot be cured by wrapping each and every agency in a uniform bundle of red tape. The result of multiplying ill-considered general restrictions on administrative agencies can only be intolerable delay in the disposition of controversies, the hamstringing of the discharge of public business, and a vast increase in the cost of government.

25. 2 Sharfman, *The Interstate Commerce Commission* (1931) 452, n. 198.