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Improving Administrative Law

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to assist in every way possible, not only in respect to physical facilities, but as well in respect to any preliminary or administrative work which is thought advisable. To be a little more specific, it seems to me that a proper consideration of the Code would require a series of meetings of such a group or committee extending over a period of some months, during which time the Code would be considered and discussed title by title, particularly against the present law of our own state, so that everyone would be entirely clear as to the extent and significance of the changes proposed. We have been following this procedure at the law school for the last two years, in a seminar on the Code for advanced students, and the plan has worked very well. I believe that this would be a more helpful approach to the problem than an institute on the Code or a series of lectures, and I know that it would be immensely more valuable than these rather disjointed and necessarily superficial remarks of mine today.

In connection with Dean Falknor's address the Association adopted the following resolution:

"Whereas, the American Law Institute has recently prepared, and at the present time has under consideration a Code of the law of evidence, and in view of the excellent address before this association by Dean Judson F. Falknor of the University of Washington Law School, on the subject matter of this Code as the same relates to the Washington law;

"BE IT RESOLVED that it is the sense of this association that a committee of the bar representative of the several sections of the state be appointed to counsel and advise with Dean Falknor for a further study of the merits of this proposed code; and that this association recommend to the Superior Court Judges Association that said association appoint forthwith a similar committee to act with the committee of this association. It is the further sense of this association that said joint committees should be of sufficient size to reflect the thought of the courts and bars of the various counties of the state. Further, that if this joint committee deems it necessary, notice will be given to the Bench and Bar of any hearings which may be held; furthermore, that this said joint committee shall report back at the next annual meeting of this association."

Improving Administrative Law

By JOSEPH W. HENDERSON

(EDITOR'S NOTE: Mr. Henderson addressed the Association on September 17. The first part of his remarks dealt with the accomplishments of the American Bar Association. The remainder of his address was concerned with the subject of administrative law and is set out here in full.)

At the annual meeting in Chicago I said: "The time has now arrived when we must prepare with all our strength for the reforms needed to secure justice under law, before administrative tribunals, state and federal, and the enactment of necessary legislation to procure a fair

and workable administrative procedure with the right therein of an impartial review before an established court of justice."

There are those who favor administrative absolutism and unchecked administrative action. They claim that the court of public opinion will correct any abuses.

There is an article on "Implied Regulatory Powers in Administrative Law" in 28 IOWA LAW REV. 576. It was written by a graduate of law of the University of Frankfort, Germany, who is now a professor in an American university. A study of the article will show that he has continental notions about the separation of powers and considers that Congress is the only agency of the government through which the sovereign will of the people actually expresses itself, and that Congress has a superior position in our constitutional polity. This, of course, is the continental doctrine, and emphatically is not our American doctrine. He seems to think also that administrative officials have the power of construing Acts of Congress, and that it is their business to make interpretations for administrative purposes. This, of course, is exactly the notion of French administrative law, and certainly is not what has been understood as the law in this part of the world. We have many refugee professors of political science who are teaching a great deal of political science of Continental Europe in this country, as a sort of legal order of nature, and their teachings have a great deal to do with the spread of administrative absolutism through colleges in this country.

Those who object to administrative absolutism, to unchecked administrative action upon the rights of individuals without the restraints which are imposed upon all other government activities, are not at all seeking to do away with administration and administrative agencies. Everyone must recognize that a great deal of administration and a great many administrative agencies are necessary in the urban, industrial society of today. But these agencies operate without the checks by which legislative action, ordinary executive action and judicial action are restrained.

Legislatures are required to proceed in such a way that there is ample opportunity for those whose rights are liable to be adversely affected to know what is proposed, and to present their case in hearings and to organs of public opinion to which lawmakers must listen. Ordinary executive action may be challenged in the courts when sought to be carried into effect against individuals, and threatened executive action in contravention of individual rights and causing and threatening irreparable damage to individuals may be challenged in equity. The oldest agencies of executive action are not protected by legislative limitation of judicial scrutiny of their action. But we are told that "the federal courts are entrusted with the correction of administrative errors for wrongdoing only to the extent of congressional authorization." State legislation has often gone far in not authorizing or even in prohibiting judicial scrutiny. There are checks upon courts which do not obtain, or in practice are ineffective, as to administrative agencies.

In a court the judges, from their very training and long professional tradition, are impelled to conform their action to certain known standards, and to conform to settled ideals of judicial conduct. Professional habit and training lead them to hear both sides of every point scrupulously. Rules of law which have entered into their everyday habits of

action lead them to insist that everything upon which they are to base an order or judgment must be before them in such a way that no party to be affected can be cut off from full opportunity to explain or refute it or challenge its application to his case. Courts are impelled in every case to seek authoritative grounds of decision before acting and to base their action upon reasoning from such grounds.

Secondly, the decision of a court is subject to criticism by a trained profession to whose opinion the judges, as members of the profession are keenly sensitive.

Thirdly, each decision and the case on which it was based appear in full in public records. These records show exactly what the claims of the respective parties were, what disputed questions of fact and law were before the tribunal, and how the questions of fact were determined. Where causes are tried to a jury the issues appear from the pleadings or very likely from questions put by the court and specifically answered, or in the instructions given by the trial judge. Where causes are tried by a judge all this appears in the form of special findings of fact. It is apparent from public records what conclusions the court came to as to the applicable law, either in the form of instructions to the jury or of findings by the court. The judgment of the court must respond to the pleadings, to the findings of fact, and to the conclusions of law, and any lack of consistency in these respects is apparent on the face of the record.

Fourthly, every judgment of a single judge is subject to review by a bench of judges, independent of the one whose action is to be scrutinized, and constrained by no heirarchial organization or *esprit de corps* to uphold whatever he does.

Fifthly, in the case of appellate courts, all important decisions and the grounds on which they proceed and the reasons on which they proceed are published in the law reports. The opinions must be based upon the records in the cases decided, and those records are public and accessible to everyone. Thus the materials for criticism and accurate judgment with respect to judicial decisions are always available and readily accessible. Legal periodicals throughout the land comment upon the decisions of the courts on the assured basis of records and opinions.

On the other hand, those who sit in administrative determinations seldom have had experience of the deciding function. They are likely to have the layman's idea that decision is an easy task involving no acquired expertness through training and experience. They are likely to be conscientiously unconscious of what the lawyer soon learns, namely, that there are two sides to every case. Without training in grounding their action upon certain known standards, they tend to act in deciding as if every case were unique. Likewise, the number of those who are competent to criticize administrative determinations as distinguished from the general course of administrative action, if we leave lawyers out of account, is very limited. Those who might criticize are not necessarily members of a common profession with the administrative officials, and the latter are not unlikely to consider their criticism and that of lawyers negligible. Moreover, administrative determinations are not safeguarded by detailed and explicit records such as those which keep down any tendency of a court to act other-

wise than impartially and objectively, and enable lawyer and layman alike to know accurately what has been done and why.

What lawyers seek is not to do away with modern administrative agencies but to insure that they operate according to law and with due regard for individual rights guaranteed by our constitutions, federal and state. They seek to insure that the determinations of these agencies injuriously affecting individual rights be made and kept subject to effective scrutiny in the courts.

It has been said by the advocates of administrative absolutism that the demand for effective checks upon administrative agencies is based on "a few sporadic cases" of arbitrary action, and that experience of these agencies will of itself correct such abuses as exist. But examination of the law reports throughout the English-speaking world shows abundantly that it is not a matter of occasional abuse of power. There are certain marked and persistent tendencies of administrative determination which come before the courts constantly and call for effective judicial scrutiny and judicial enforcement of constitutionally guaranteed rights. Some cases from the most recently published reports, federal and state, will suffice to make this point.

In the first place, there is a tendency in all administrative agencies to go beyond or outside of the statute creating them and defining their powers; to set up and give effect to policies beyond or even at variance with the statutes or the general law governing their action. For instance, *Tri-State Tel. and Tel. Co. v. Intercounty Telephone Co.*, 211 Minn. 496, 508 (1941) illustrates a disregard of a mandatory provision of the statute, using "discretion" instead.

In cases of this sort often administrative agencies claim to develop the "policy of the statute." The courts have long had difficulty with this matter of policy.

If the courts which have long been endeavoring to systematize ideas of public policy have difficulty, lay ideas of policy are wholly at large. We know what courts will deem public policy. No one knows what a particular agency will take it to be.

Second, there is a tendency to decide without hearing or without hearing one of the parties. It is well to remember what Mr. Justice Holmes said in *United States v. Interstate Commerce Commission*, 264 U. S. 64, 78-79 (1924), referring to the Interstate Commerce Commission:

". . . Since it must grant a hearing, manifest justice requires that the railroads should know the facts that the Commission supposes to be established, and we presume that it would desire the grounds of its tentative valuation to be subjected to searching tests . . . We think that, in such way as may be found practicable, the relator should be enabled to examine and meet the preliminary data upon which the conclusions are founded and to that end should be given further information in advance of the hearing, sufficient to enable it to point out errors, if any there be."

In *Federal Communications Commission v. National Broadcasting Co.*, 63 Sup. Ct. Rep. 1035 (1943), the government actually contended that where an order was made without a hearing against one entitled to a hearing, the latter could not appeal. This was properly rejected by the majority of the court. But the dissenting justices contended that to allow the appeal "imposed a hampering restriction upon the

functioning of the administrative process." This suggests the justice of the peace who refused to hear evidence on behalf of the defendants because he found it hampered him in arriving at a judgment for the plaintiff.

Third, there is a tendency to decide on matters not before the agency, or on secret reports or evidence not produced at a hearing. Recent cases are:

Ellers v. Latimer, 44 Fed. Supp. 822, 826-28 (1943). Here the administrative agency acted on reports of investigations made by the board's employees.

In re Bognovic, 18 Calif. (2d) 160, 165 (1941). Here the administrative agency acted on "undisclosed investigation by an examiner prior to the hearing and withheld from the court."

Matter of *Guernsey Breeders Cooperative v. Noyes,* 284 N. Y. 197, 205 (1940). The court said the "petitioner was entitled to know the basis of the commissioner's order."

Also see the report of the Smith Investigating Committee of the House of Representatives of the NLRB.

Such things are not confined to American administrative agencies. In the drift toward absolutism throughout the world we find administrative agencies in other English-speaking lands concealing the real grounds of determination or misinforming the party proceeded against as to what it is that he has to meet.

An interesting example can be found in a recent English case commented on in 56 HARV. L. REV. 806, 807. In *Greene v. Secretary of State for Home Affairs,* (1942) A.C. 284, at the hearing before the advisory committee, the person proceeded against was not correctly informed of the basis of the order. The act empowered the Home Secretary to enact defense regulations. He made a regulation that if he believed anyone had hostile associations he could be detained. But Greene was mistakenly told that the ground of his detention was that he had been "recently concerned in acts prejudicial to the public safety and defense of the realm and in preparation of such acts," whereas it appeared ultimately that the ground on which the administrative agency had acted was that there was cause to believe that Greene was "a person of hostile associations." His order of detention was, nevertheless, upheld.

The remarks of Gavin Duffy, J., in *Maunsell v. Minister for Education* (1940) I.R. 213, 234, are worth quoting: "Never was the plaintiff told by or on behalf of the department that he had a case to meet on such and such evidence against him and that the department was to have his answer to that case if he had any to make before coming to a decision. The fact that all parties probably thought that the department had considerable discretion in the matter does not touch the issue here, which is simply whether or not the plaintiff had fair notice that an inquiry was to be held to determine his fate, fair notice of the case against him, and a fair opportunity to meet it. Upon that issue I must hold in the plaintiff's favor."

Fourth, there is a tendency to make determination without a basis in evidence of logical probative force.

Recent cases illustrating this tendency are:

Northwestern Yeast Co. v. Industrial Commission, 378 Ill. 195, 200 (1941)—a finding "on speculation or conjecture."

Benner v. Hall, 285 Ky. 160, 177 (1941)—it was held there was nothing to support the "assumption of the Commission."

Meyer & Co. v. Unemployment Compensation Commission, 348 Mo. 147, 164 (1941)—the court said "there is no substantial evidence to support the ruling by the Commission."

Person v. Firemen's Insurance Co., 126 N. J. Law 300, 333 (1941)—the finding of the bureau was held without support in the evidence.

Matter of *Nield v. Graves,* 284 N. Y. 560, 563 (1940)—the court held the conclusion of the Commission had "no substantial basis."

Matter of *Brown v. N. Y. State Training School,* 285 N. Y. 37, 41 (1941)—an administrative award without support in the evidence.

Union Trust Co's. Petition, 342 Pa. 456, 463-4 (1941)—a finding on "suspicion" with no substantial or credible evidence.

Baker v. Graniteville Co., 197 S. C. 21, 28-29 (1940)—the Commission disregarded the expert testimony and there being no other evidence in the record proceeded on the basis of "surmise and conjecture."

Fifth, there is a marked tendency to make an administrative proceeding one to give effect to a complaint, undifferentiating rule-making, investigation, prosecution, the advocate's function and the judge's function.

What is said by the Circuit Court of Appeals for the Fifth Circuit in a recent case is noteworthy in this connection: "On these facts the board, again as judge, making membership in the union, whose cause it had espoused as accuser, a guarantee against discharge, and again substituting its own ideas of plant discipline and subordination for those of the management, and upon no evidence whatever supporting it, found Dean's discharge discriminatory."

National Labor Relations Board v. Williamson-Dickie Mfg. Co., 130 F. (2d) 260, 267.

In a line of cases going back to the seventeenth century, courts have uniformly held that "one of the oldest and most salutary maxims of the law is that no man shall be judge in his own case." A recent case repeating this is *Wallace v. Brotherhood,* 230 Iowa 1127, 1133 (1941). Emphatic pronouncement may be found in *Railway Conductors Benefit Association v. Robinson,* 147 Ill. 138, 159.

Sixth, there is a tendency to make administrative rules exceeding the statutory authority.

In *Ellers v. Latimer,* 44 Fed. Supp. 822, 825 (1942), the court held that a regulation of the board "in effect limits and modifies the statute." Again the court says: "The board was apparently acting in the arbitrary manner of some executive agencies who seem to resent review of their decisions by the courts." The rule in question was an attempt to preclude review.

In *Brown v. University of the State of New York,* 242 App. Div. 85 (1934), the court said: "Rule 8 is more restrictive than the statute. It transcends the standard fixed in the law and enacts a standard of its own."

A recent case of an arbitrary rule is *Golden v. Bartholomew,* 140 Neb. 65 (1941).

One of the features of administrative justice which hinders effective review is want of finding of the facts upon which administrative

orders and determinations are based. A good while ago the Supreme Court of the United States pointed out the necessity of findings of fact if there is to be intelligent review and administrative agencies are to be held to conduct their determinations according to law. And Stephens, J., in *Saginaw Broadcasting Co. v. Federal Communications Comm.*, 96 F. (2d) 554, 559 (1938), said:

'The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations . . . The requirement of findings is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

Legislation requiring compliance ought to be enacted everywhere.

It is noteworthy how persistently administrative agencies resist all attempt to hold their action to the limits of the law. What was said on this point by a federal court in *Ellers v. Latimer* has been quoted above.

In *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 91, 93, the government insisted, in the face of a prior decision of the Supreme Court of the United States, that an order fixing rates was conclusive and could not be set aside even if based on no evidence. In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 300, the Commission sought to avoid the prior decisions of the court and claimed power to decide upon matters not brought to the notice of the party affected, basing its claim on extravagant assertions of a power of taking notice of the facts necessary to sustain its order. After emphatic pronouncements by the Supreme Court of the United States we find it later strenuously contended on behalf of an administrative agency that it can accept and make as its own "the findings which have been prepared by the active prosecutors for the Government after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims presented and to contest them." *Morgan v. United States*, 304 U. S. 1, 22.

In *Columbia System v. United States*, 316 U. S. 407 (1942), it was argued on behalf of the Federal Communications Commission that its rule injuriously affecting individual rights could not be challenged till sought to be enforced against the plaintiff. As to this Chief Justice Stone said:

"Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of con-

duct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. And in this case it is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant."

"Such regulations have the force of law before their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of Section 402(a) and the Urgent Deficiencies Act."

Indeed, only the other day the government sought to deny *habeas corpus* to challenge the arbitrary action of a selective service board in changing the classification of petitioner and to establish a rule that he must first submit to induction and then complain.

Ex parte Stewart, 47 Fed. Supp. 410, 414-15 (1912).

A chief argument against effective judicial review is that it hampers efficient administration. We are told that it imposes legalism upon administrative agencies. What this means, of course, is that it compels them to operate according to the law constituting them and not according to their own notions of expediency for the time being. We are told that it is characteristic of administrative tribunals that simple and non-technical hearings take the place of trials, that a common-sense resort to usual and practical sources of information takes the place of archaic and technical rules of evidence and that an informed and expert tribunal renders decisions which look forward to results rather than backward to precedents. No one urges that an administrative hearing or investigation be conducted in all respects as a trial at law. No one today objects to any reasonable informality or application of common sense to the ascertainment of facts. What is objected to is the tendency to act without a hearing or without hearing one side or upon secret investigations which retail gossip, self-serving declarations of interested parties, and pre-formed opinions and conjecture. In other words, what is objected to is the tendency to ignore what long experience has shown is fundamental in justice. To say that these elementary requirements of justice are technical "legalism" and that seeking to make available to all who are adversely affected the constitutional guarantee that a decision against them shall have a basis in evidence of rational probative force and not in prejudice, preformed opinions without hearing the other side, gossip, and made-to-order interviews under the name of investigation is insistence on "technical rules of evidence," is simply to say that all rights are to be at the mercy of administrative agencies. "Looking forward to results," if the tribunal considers itself informed without the hearing which the statute creating it requires, is a looking backward to the methods of the administrative tribunals of the Stuarts.

Requiring administrative agencies which exercise a power of adjudication to keep within the limits of the jurisdiction and powers given by the statute creating them, requiring them to take the policies they apply from the statute under which they sit and not from their own

ideas of particular causes, requiring them to apply the standard provided by statute instead of making one of their own or acting on no standard, requiring them to find the facts upon which they base their orders as all other tribunals are required to do—all this is not legalism, it is constitutionalism.

But it is said that judicial review has the effect of substituting the discretion of the court for that committed by law to the administrative agency. There was some warrant for this proposition when back-handed review of administrative action by injunctions and suits analogous to bills of peace was the only available remedy. Unfortunately in some jurisdictions and under some statutes those expensive and dilatory proceedings are the only available modes of ensuring due process of law. But the remedy is not to turn administrative agencies at large to fix their own powers, proceed in disregard of constitutional guarantees and make their own law for themselves. It is rather to require records and provide a mode of reviewing them which will reach the tendencies of such tribunals requiring checks without interfering with their legitimate discretion. It is important to notice the curious insistence of the advocates of administrative absolutism on retaining review by suit in equity, which is open to the objections which they make to judicial review. The reason is that this remedy is so costly and time consuming that it is practically available only to the most wealthy litigants where large amounts are in controversy. In other words, they call for retaining this mode of review because in practice it operates to prevent effective review in the great majority of causes.

Some have argued that the great variety of administrative agencies and the subjects committed to them require a great variety in the modes of review and consequent revision of the chaotic procedural situation which obtains so generally. But there is no variety in the characteristics of administrative determination which call for the safeguard of effective judicial review. Formerly we had separate modes of review for each different type of court or jurisdiction. We have learned that the great variety of subjects which come before the courts does not require variety in appellate procedure. A simple, uniform mode of appeal for all cases has become general throughout the English-speaking world. This experience is a sufficient refutation of the argument for retaining divers modes of review for different administrative proceedings.

As things are today, procedure to review administrative determinations takes on many forms. It has grown up haphazard by statutory additions to and judicial development of certain common law and equitable remedies. Statutes have made every sort of provision for review as to particular administrative agencies, prescribing appeal or certiorari or prohibition or suit in equity with no system, choosing one form for this statutory agency and another for that with little attempt at uniformity. Indeed, statutes have often sought more to cut off judicial review or greatly restrict it than they have to make it effective within the range of the constitutional guarantees which it requires.

Dean Stason has put the matter well, saying that the statutory remedies are "part of a statutory chaos, a heterogenous confusion of ill conceived and badly drafted provisions, grown more or less like Topsy and badly needing scientific attention." The state reports are

full of cases of doubt how to proceed. In some states the distinctions are still so technical that resort to the available remedies is discouraged. In the result, constitutional protections against arbitrary invasion of individual rights are made nugatory with respect to the most important individual business and practical activities.

Legislation is abundantly needed to correct this situation both with respect to federal administrative agencies and in most of the states. Four points should be insisted upon:

(1) That both sides and all persons to be injuriously affected must be heard fully before orders and determinations are made against them.

(2) That nothing which is to be used as the basis of an administrative determination adverse to a party's interest be withheld from his scrutiny so as to deprive him of full opportunity to explain or refute it, and nothing to be used in arriving at the determination is to be withheld from the record for review.

(3) That whenever determinations are made injuriously affecting individual interests, findings of fact be required and a record showing fully and clearly on what the findings are based, so as to make review possible and effective in order to ensure that the findings have a basis in evidence of rational probative force.

(4) That a simple procedure be provided by which orders and determinations may be reviewed to determine whether there has been a full and fair hearing of all sides, whether the facts in dispute necessary to the decision have been found, whether the findings have support in evidence of rational probative force, whether the order or determination is in accord with the statute governing it, rightly interpreted and applied, and whether the administrative agency has applied according to law the standard committed to it by statute or has applied a different one, perhaps of its own making; or has acted upon no standard.

We, as an Association, desire to assist the lawyer in conditioning himself both technically and temperamentally to the practice of administrative law. Lawyers who adjust themselves to the present-day legal world, which is now and in the future is going to be very largely administrative, are going to do very well; on the other hand, the lawyer who insists upon shutting his eyes to developments in this field and looks upon the courts as his only source of practice is not going to do so well.

It is our number one job in this field to see that we have proper tribunals with due process, because administrative regulation now reaches more people than ever before, its demands are more exacting, and in many respects it outweighs in volume and intensity the functions of other instrumentalities of justice, such as the courts.

But even now, and surely with the cessation of hostilities, much special legislation will either be up for renewal or new legislation will be proposed, and Congress, with renewed interest in the matter of administrative methods and procedure will be in a mood to attach conditions to legislation.

We must prepare a strong and comprehensive, but operative administrative law bill, which must deal in effective terms with the subject. We should then set up machinery where the bill may be publicized and detailed proposals called to the attention of legislative committees

as and when specific legislation involving administrative powers and procedure comes before them.

We must urge the judiciary committees of both houses of Congress to undertake the codification of administrative procedure provisions in the various statutes relating to the many administrative agencies. The necessary congressional groups themselves must be interested in this great problem, to the end that proper legislation is enacted.

This program must be properly and carefully handled. We have an exceptional committee that has undertaken the task. It is vital to us all, and no group is more available or fitted than the lawyers of the bar associations to take a position as various proposals arise, to see that the necessary safeguards are included and that the public is properly informed.

Government by bureaucracy is arbitrary and actually there is no place for the lawyer in it. As bureaucracy grows, in direct ratio the legal profession is destroyed. The public needs the legal profession. We have a job before us, and united, we can do it.