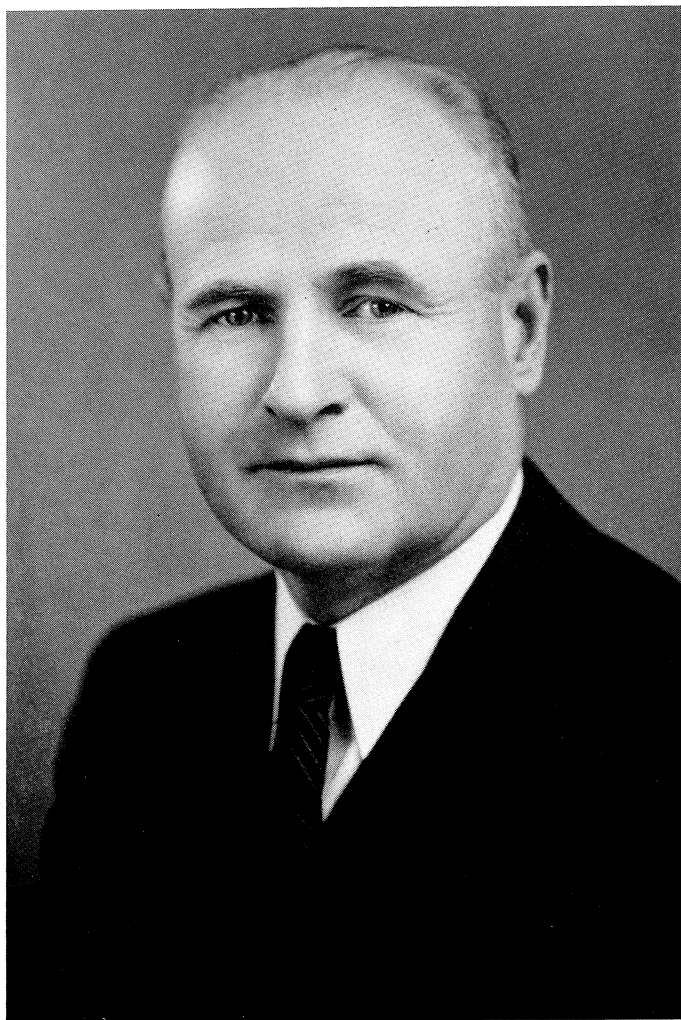


KANSAS JUDICIAL COUNCIL BULLETIN

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JAY S. PARKER
Justice, Supreme Court of Kansas

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FOREWORD

This issue of the BULLETIN contains two articles of interest and importance to the bench and bar of the state as well as to others interested in the improvement of our judicial processes.

Justice Jay S. Parker of the Supreme Court of Kansas, whose photograph is printed as the frontispiece of this BULLETIN, has in times past given much thought to our forms of government and the preservation of our fundamental rights under our governmental system, and has prepared essays for presentation to limited groups. Feeling that the views expressed by him and the questions suggested should have a wider audience, the Judicial Council requested Justice Parker to prepare an essay for publication. We are pleased to print his response to our request.

Mr. Balfour S. Jeffrey, of the Topeka Bar, who has had a wide experience before various administrative agencies of the federal and state governments, was requested to present his views on suggested reforms in administrative practices in Kansas. The occasion for the request is that a number of suggestions have been made to the Judicial Council, that in view of the fact review of or appeal from the orders and decisions of our numerous administrative bodies varies greatly in one case from another, an effort should be made to obtain uniformity in practice and procedure. The article merits your careful consideration.

The Judicial Council will greatly appreciate receiving the views of any reader upon both or either of the above articles.

The legislature will be in session the fore part of next year. Do you have in mind any particular instance wherein you believe that improvements can be made in the administration of justice in Kansas? If you do, we would like to hear from you. Some suggestions require research and early responses are requested.

Adventures in Democracy

By JAY S. PARKER, Justice of the Supreme Court

In the midst of a world-wide conflict between political ideologies in government it seems not only timely but imperative that every American citizen should devote some time and energy to familiarizing himself with matters pertaining to the history and development of democracy as a form of state and government to the end that when the day comes—as it surely will—he can intelligently and effectively participate in the momentous decision of what system is best for him, for his posterity and for his nation.

Any approach to a discussion on "Adventures in Democracy" requires a preliminary review of certain fundamental facts regarding forms of government as they have existed through the course of history. They can be classified, according to recognized books on political science, as follows:

Absolute monarchies where the head of state, irrespective of whether he was called King, or Emperor, or what not, ruled by divine right and the people had no choice in the affairs of State. Louis XIV exemplified this form when he said "I am the State."

Military dictatorships, resting upon the power and genius of great military leaders and usually passing with their death. Illustrations of this class, well known to the ancient world, are Alexander the Great of Macedonia; Cyrus the Great, founder of the Persian Empire; Karl the Great, of the Franks, better known as Charlemagne, and Genghis Khan, the Mongolian Conqueror. More recent exemplifications are Cromwell of England and Napoleon of France.

Limited monarchies, where the titular head possesses limited powers as a personal ruler but the people, through some legislative medium, have a voice in the making of laws and the conduct of government. Such was largely the situation in England from the time of the Stuart Kings to the end of the reign of the Georges.

Constitutional monarchies, where the citizenry through parliamentary and judicial processes attained sufficient ascendancy over the power of the crown to subject its will and the conduct of the state to the restraints of a written or unwritten constitution and laws enacted in accordance therewith. This is the England we have known in the last century and a half.

A Republic, where the executive and all other powers of government are derived from the people and exercised with the consent of the governed within the framework of constitutional guarantees and judicial precedents. It can be said that never in all history had there been a large scale venture in this form of government until our own experiment was launched following the American revolution.

A true democracy, where government is dependent upon the will and desires of an existing majority of the people and exercised directly by them. Otherwise stated, where all questions are settled by the meeting of men in mass. In Europe the true democracy is found in its simplest form in three Alpine cantons of Switzerland where it has existed for more than six hundred years, while in this country it is best illustrated by the old New England town meeting where all men interested in governmental affairs assembled in

mass meeting and after discussion and debate settled their problems by a show of hands.

Finally should be mentioned three other forms of government of which we hear little in early history. The first is socialism which, in its political aspect, is based on the conception that everything necessary to satisfy the wants of the people as a whole should be owned and controlled by a government operating in theory under democratic management. Second, totalitarianism, centralized under the control of a political group which allows no recognition of, or representation to, other political parties, as was the case in Fascist Italy and Nazi Germany before World War II and today is the situation in Soviet Russia and most of the ancient states of central and eastern Europe. The third is despotism, where the affairs of state are directed by a despot or tyrant such as Franco of Spain, who, having seized control, exercises absolute power over his subjects.

To the three forms of government just mentioned some would add a fourth—communism. I do not do so for the simple reason that in this age, irrespective of what its original concepts may have been, communism is totalitarianism pure and simple. According to its theory the state, controlled by a one party system without recognition of individual liberty, exactly as a totalitarianistic regime, is the supreme almighty power.

I anticipate the question I know has already arisen in the minds of some of my readers as to why the reference to so many forms of government. My answer is that I deem a résumé of that particular subject essential to any intelligent discussion on democracy because of the general inaccurate use of that term and the confusion existing in the minds of many as to its real meaning. Early the word was commonly used to denote the true democracy to which I have referred, while in more modern times, as a form of the state, it has come to mean "popular sovereignty" or "government by the people" irrespective of whether that government be carried on in mass assemblies or through the medium of duly elected representatives. Nowhere, so far as I have been able to find, does the word "democracy" appear in the Declaration of Independence, in the Constitution of the United States, in Washington's Farewell Address, in Jefferson's Inaugural, in Lincoln's Gettysburg Address, in our National Flag Salute, nor in any of the many other memorable addresses of the founders of our country. That the United States is not a democracy, but a republic, definitely appears from an examination of our constitution establishing a government of law, stabilized by constitutional guarantees and precedents under checks and balances, operating without regard to the transitory wishes and desires of a particular majority, which, after all, is the basic distinction between a true democracy and a republic. In fact, as applicable to our federal government, the term "democracy" did not come into general use until that famous pronouncement of Woodrow Wilson's "make the world safe for democracy." Since that time, and only since then, has the tendency grown until now it is common parlance to substitute the term "democracy" for every form of government possessing some, or all, of the attributes of popular sovereignty.

Since government by assembly or mass meeting is quite impossible in anything so complex as a state or nation the very title of our subject compels acceptance of the modern version of the term and we therefore proceed on

that premise. In doing so we are, of course, concerned only with limited monarchies, constitutional monarchies, republics, and democracies, irrespective of whether they be pure or representative in their character. Obviously, since they do not possess the concepts of democratic institutions, we are not concerned with the other forms of government to which we have heretofore referred.

With this background we may now turn the pages of history and refer to the happenings contemplated by the scope of our subject.

From the beginning of time mankind, consciously or otherwise, has sought to obtain and preserve the blessings of freedom, liberty and equality. Present-day anthropologists and ethnologists agree, that even though not recognized as such, democracy was prevalent in primitive society and government. However, it prevailed more as an incident to an underdeveloped prepolitical condition than the result of conscious planning on the basis of political liberalism. Briefly, it was based upon the customs and opinions of the adult members of a group whose policies were usually determined and leaders selected by such members after mass discussion and conference which continued until such time as unanimous agreement was reached. It existed because the members of the group believed it presented the safest kind of existence possible under the circumstances and conditions confronting them and its outstanding distinguishing feature, unlike a modern democracy, was that its individual members were not free to transfer allegiance from one group to another, but must remain within their own or become outcasts. So much for primitive democracies. History records little with respect to them and they merit no more attention in our discussion except, perhaps, to say in passing, that in the main they were gradually superseded during the period of barbarism by more despotic types of government.

It was ancient Greece which gave to the world the first outstanding examples of democracy in the form of free, self-governing cities or states, operating as republican institutions in an infinite variety of forms as compounded in various degrees of democratic or oligarchic elements, from about 900 B. C. to 338 B. C., when Greece was conquered by Phillip of Macedonia and ceased to be an independent nation. During a portion of this period, from 507 B. C. to 404 B. C., the government of Athens, so far as its citizens were concerned, became thoroughly democratic. Public offices of power were thrown open to all citizens and the people who were citizens, through their assembly, the Ecclesia, became well versed in public affairs, and practically, as well as legally, were supreme in the state. Even so, Athens was not then either a true democracy or a democracy in the sense we use the modern term for government was restricted to the "male citizen," who could establish Athenian descent on both sides. The free women, including the wife of a citizen, the freedman, the stranger, likewise the Greek born in the city, whose father had come, even as short a distance as eight or ten miles from its territorial limits, were excluded from rights of franchise. Thus it will be observed that in the Greek democracies, quite unlike in a modern democracy where every adult man and woman has a voice in government, even in Athens in its most liberal day, the citizens, who comprised a very small percent of the population absolutely ruled the women, the freedmen, the serfs, the slaves and the outlanders. In the strict sense of the word they were not democracies at all but

oligarchies possessing certain democratic characteristics. They perished, as some historians relate, because of Greek folly, selfishness and sloth.

The only other noteworthy example of democracy in ancient times is found in Rome. Up to 500 B.C. the Roman government had been monarchial in form. About that time the monarchy was abolished and a republic established which existed until 30 B.C. when power was again wrested from the people and thereafter, until the fall of the Roman Empire, the country was ruled by Emperors. Like Greece the Roman Republic was not democratic but oligarchic in character. The same conception of exclusiveness in the citizenship prevailed, although within the citizen body itself there was less democratic control of political activities than existed in the Grecian democracies. It is, however, in the Roman Republic we obtain our first glimpse of what today would be called political parties. Politically, the citizenship was divided into two groups—patricians and plebeians. As the names imply membership in the one group consisted for the most part of the aristocrat and the rich while in the other it was largely in the poorer classes. There, also, we hear for the first time of political machines and of the dole as a means of influencing the electorate. It is recorded with certainty that in the declining days of the Roman Republic there were machines just as efficient and just as corrupt as those which have existed in our big cities of today. Also, that persons in power not only saw to it that the dole and other persuasive handouts were given to the people along about election time but made certain that only those who voted as they directed were recipients.

But more interesting to us in this day and age than any account of the activities of the Roman Republic are the causes attributed to its decline and fall. I know of no better or more accurate statement than the one found in Well's Outline of History, where it is said:

"The essence of its failure was that it could not sustain unity. In its early stages its citizens, both patrician and plebian, had a certain tradition of justice and good faith, and of the loyalty of all citizens to the law, and of the goodness of the law for all citizens; it clung to this idea of the importance of the law and of law-abidingness nearly into the first century, B.C. But the unforeseen invention and development of money, the temptations and disruptions of imperial expansion, the entanglement of electoral methods, weakened and swamped this tradition by presenting old issues in new disguises under which the judgment did not recognize them, and enabled men to be loyal to the profession of citizenship and disloyal to its spirit. The bond of the Roman people had always been a moral rather than a religious bond; their religion was sacrificial and superstitious; it embodied no such great ideas of a divine leader and of a sacred mission as Judaism was developing. As the idea of citizenship failed and faded before the new occasions, there remained no inner, that is to say no real, unity in the system to all. Every man tended more and more to do what was right in his own eyes, and every man sought to attain for himself rights and privileges regardless of whether their attainment took from another that which he had rightfully attained and possessed as a result of his own enterprise and initiative.

"Under such conditions there was no choice between chaos and a return to monarchy, to the acceptance of some chosen individual as the one unifying will in the state."

With the collapse of the Roman Empire in 473 A.D., democracy did not again raise its head for considerably more than a thousand years. There was little chance for the development of its theoretical concepts and still less oppor-

tunity for achievements in the field of its practices during the Dark Ages (5th to end of 11th century) or under the Feudal System (5th to 15th century). Nevertheless the fires of liberty still smouldered within the hearts of men and were kept alive notwithstanding the passing of the centuries. From the close of the thirteenth century to the end of the fifteenth century, except for a few isolated instances in the medieval Free Towns of Europe, the flames merely flickered. But commencing with the sixteenth century they burst forth in conflagrations that could be seen around the world. What mankind had lost by its folly and greed it found again after paying the penalty for ages in slavery, serfdom and untold misery.

In passing it should perhaps be noted there are some who point to 1215 A. D. and the activities which led to the signing of Magna Charta by King John of England at Runnymede as the date of the kindling of the fires, but that theory has been thoroughly disproved by historical research. Magna Charta did not mark a movement looking toward modern political liberalism, but was merely a reactionary manifesto of feudal lords who were incited to action by recent extension of royal power and at most can only be regarded as a definite indication of dissatisfaction and unrest under the then existing system of government.

Definitely the rebirth of the ideals of democracy can be traced to the beginning of the sixteenth century and just as definitely in the two succeeding centuries occurred the great transformation which marks the dawn of the formation of modern democratic forms of government.

There is not room in this article for a discussion of the fundamentals responsible for the change. It will suffice to say they were of such character as to make easily possible the subsequent overthrow of many governments then in existence and substitute in their stead ones which offered more hope to the common man, who, although always in the majority, had for centuries been denied rights and privileges accorded to those who had been recognized as his superiors because of birth or some other circumstances of fortune. The ultimate result was that with the advent of the eighteenth and nineteenth centuries, except in Asia and Africa where for some inexplicable reason democratic ideals have never become sufficiently rooted to result in concerted popular demand, governments possessing some or all of the attributes of democracy sprang up like mushrooms over the rest of the entire world. Strange as it may be, however, practically all notable and worthwhile accomplishments in that direction originated either in Europe or in countries where European influences, social, religious, economic or political, were predominant. Neither time nor space will permit a listing of all those nations which, by revolution or otherwise, indulged in the great experiment. To do so would verge on monotony. Besides we are more interested at this point in those surviving than we are in the ones—and there were many—which made the effort and failed.

In Europe, at sometime or other during the period to which I have referred, practically every country, including Russia which for our purposes can be classified as European, attempted to operate under the guise of democracy. Today only England and little Switzerland—which according to many authorities on the subject has developed the nearest and most perfect type of democratic government the world has ever known—adhere to its principles. Even England, although still within the classifications, is fast becoming socialistic.

Aside from the Americas the only other live examples are South Africa, one

of the more outstanding at the moment, and perhaps, New Zealand and Australia, although these two are already definitely committed to state socialism. China, of course, is known as a Republic but is democratic in name only and not in principle.

In the Americas only the United States and Canada survive. Some point to the so-called Republics of Central and South America and include them, but to do so is error. Without exception their forms of government are autocratic in character and will not stand the test.

So to summarize, I repeat, that in all the world today only the United States, Canada, South Africa, Switzerland and perhaps England, New Zealand and Australia, have not succumbed to some form of arbitrary central government in which the individual has lost his freedom and his importance.

Quite naturally the questions arise: Why is it that so many democracies have risen and prospered for a time only to sink into oblivion? What is there about the human race which prompts it to struggle so valiantly to attain the benefits of liberty, even to the extent of loss of life itself, and then in a space of generation or so relinquish those privileges without so much as a struggle?

Both questions and answers, although always intriguing are not new but ancient as the ages which have preceded them. Three hundred years before the coming of Christ, Aristotle gave one answer which down through the years, even to the present moment, must be regarded as fairly accurate when he wrote:

"The insolence of demagogues is generally the cause of ruin in democracies. First, they calumniate the wealthy, and rouse them against the government, thus causing opposite parties to unite against a common danger. Next, they produce the same result by stirring up the populace and creating a sense of insecurity. Nearly all the tyrants of old began with being demagogues. In well-balanced commonwealths, besides strict observance of established laws, it is especially necessary to keep close watch upon little matters. For a great change in the laws may creep on gradually, just as a small expense often incurred ruins a large fortune. Next, let men be on their guard against those who flatter and mislead the multitude; their actions prove what sort of men they are. Of the tyrant, spies and informers are the principal instruments. War is his favorite occupation, for the sake of engrossing the attention of the people, and making himself necessary to them as their leader. An unbridled democracy is exactly similar to a tyranny. Its objects and instruments are the worst, and both are equally served by the tamest of mankind. It is always anxious to lord it as a sovereign; it therefore has its flatterers in the shape of demagogues. Ancient customs must be done away with; ancient ties, civil and sacred, must be broken; everything must be changed according to new and false theories; and the result is an assimilation of democratic to tyrannical government, in its habits and modes of action."

More than 2,100 years later (1835) Alexis De Tocqueville in his great work "Democracy in America" portrayed the reasons in the matchless sentences with which he closed his remarkable work. He said:

"Providence has not created mankind entirely independent or entirely free. It is true that around every man a fatal circle is traced, beyond which he cannot pass; but within the wide verge of that circle he is powerful and free; as it is with man, so with communities. The nations of our time cannot prevent the conditions of men from becoming equal; but it depends upon themselves whether the principle of equality is to lead them to servitude or to freedom, to knowledge or barbarism, to prosperity or to wretchedness."

James A. Garfield once touched on the subject in a public address when he said:

"We are apt to be deluded into false security by political catchwords, devised to flatter rather than to instruct. We have happily escaped the dogma of the divine right of Kings Our faith in the democratic principles rests upon the belief that intelligent men will see that their highest political good is in liberty, regulated by just and equal laws"

To me the simple answer to both questions—embodied, of course, in each of the preceding quotations—is that man has always been the slave of his own passions and ignorance. He has always been amenable to appeals to self interest, cupidity and sentiment. So long as he remains so, so long as he regards his own selfish personal interests as paramount to the public weal, just that long will democracies pass into oblivion. Otherwise stated, no democracy can hope to survive permanently until the true spirit of democracy dwells in the hearts and minds of all the people and, as individuals, the great majority are willing to accept not only its benefits but its attending responsibilities as well. To insure its survival the entire citizenry must not only be trained in the knowledge and art of self government, but prepared to participate in the affairs of government with patriotic rather than selfish ends in view.

Heretofore I have purposely refrained from referring to our own form of government except when necessary to mention it in connection with other matters and then only in a general way. It seems, however, that a paper of this character would not be complete unless some thought and attention is given it specifically for the American experiment inaugurated in 1776, and which has prospered for more than 170 years, is conceded—so far as democracy is concerned—to be the Greatest Adventure of them all.

Our forefathers in embarking upon that adventure were fully and completely cognizant of the fact that the examples of democracies preceding their efforts had almost without exception degenerated into tyrannies as a result of action on the part of temporary majorities. They understood that tyranny or a totalitarianism on the part of a majority acting by force or numbers could be just as unreasonable, self willed, vicious, and destructive of individual freedom and action as absolutism at its very worst. They well knew the effect of centralized and bureaucratic power upon the progress of a free people and sought in some manner to avoid it. It was for that reason they created a republic rather than a pure democracy and deliberately established a government of checks and balances within the guarantees and framework of a constitution. Their purpose in so doing was not to render the machinery of government complicated or make it possible to thwart the ultimate will of the majority but to provide a method whereby the majority itself in times of public hysteria and political, economic and social unrest could not impose upon the people as a whole fundamental changes in their form of government without first going through, what for our purposes may be termed, a cooling off period to permit ample opportunity for calm reflection and consideration as to whether those changes were ultimately advisable and desired.

Their conception of a democratically organized and administered government is definitely set forth in the Declaration of Independence and in our Federal Constitution with its Bill of Rights.

To comprehend the depth of their sincerity and the extent of their purpose we need only to refer to the Declaration, where it is said:

"We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness."

Or to the Preamble of the Constitution which clearly and unequivocally discloses their expressed determination to "form," "establish," "insure," "provide," "promote," and "secure" a governmental system whereby each and every one of the objectives mentioned was directed to the supreme aim of securing the blessings of liberty to themselves and to their posterity.

How well they succeeded in their effort is now a matter of history. The fact the United States of America is conceded by all to be the greatest democratic nation on the face of the earth obviates all necessity of further comment. But how we are to continue—whether we progress or decline—is another matter. A problem, if you please, of the future which must be determined by the collective thinking of each and every citizen.

No one will gainsay that since the days of our Revolutionary fathers our form of government has undergone fundamental changes, not only prior to and in our own lifetime but also within the short space of a few years. Consideration of these changes or those to be made in the future should not be, nor is it, a partisan matter. If we are desirous of carrying on, if we are anxious to secure the blessings of liberty to ourselves and our posterity, we must honestly recognize what has been occurring in the past with respect to our form of government, anticipate as best we can what those changes have meant and may mean to us in the future, and do our part in seeing to it that that which is good for democracy is retained and that which is bad is discarded. In no other way can we insure the perpetuation of our democracy for, as we have seen, under such a form of government the affairs of state are the concern of each and every citizen, whose duty it is to actively participate in their determination.

To me these are days of crisis. I am perfectly willing to concede that all loyal Americans share in common a deep-rooted desire to preserve in our system of government the fundamental principles of democracy although they may differ as to proper methods of insuring their retention. The thing that alarms me is the apparent unconcern with which the individual citizen views the changes made, contemplated and suggested and his seeming lack of interest in their whys, their wherefores and their results. One of the things, Mr. Individual Citizen, I seek to do by this article is to stir up your interest in those matters so that now and henceforth you will make them your business and concern, not only for the purpose of acquiring such information and knowledge as will enable you to *correctly decide* them for yourself but for the additional purpose of disseminating that information and knowledge to others who might not otherwise comprehend their significance and import.

I cannot believe the framers of our Constitution visualized the time, which because of our rapid growth in population and modern methods of transportation and communication is here, when the mere profession of public spirit, properly advertised by any group in quest of political power, might easily dominate public judgment or control public decisions. Neither do I believe they contemplated an economic period when those groups could lead us into

a definite trend toward a paternalistic type of government based upon subsidization of business, education, health, and even self government itself, which, unless checked, is bound to result eventually in deprivation of the free and unrestricted exercise of states rights within the limitations originally prescribed in the Constitution.

All fair-minded men must concede that in today's social, economic and political order there is ever present strife between free and untrammelled public opinion and the public will on the one hand and highly organized self-seeking pressure groups on the other. They must concede also that nothing could more certainly or completely undermine democracy than if it were to become possible to displace the power of public opinion and substitute in its stead, either directly or indirectly, the influence and power of such groups.

Because these conditions are definite possibilities, if in fact some of them do not already exist, it seems to me the passing of every day makes it of increasing importance that the rank and file—the individual citizen—take steps to insure that government be guided and controlled by the voice of the entire people whose government it is. We can, in my opinion, as I have heretofore indicated, accomplish such a result only by reviving public interest in affairs of state through the medium of personal discussion and public debate. And by discussion and debate I do not mean the mere arbitrary expression of one's personal views with eyes blinded to the opinion of others but an approach to our present day governmental problems with minds open and a common desire to reach their solution in the true spirit of democracy. We must let the other fellow have his say, we must be tolerant of his opinions however violently we may disagree therewith, we must be prepared to yield to his viewpoint if after sober thought and consideration we become convinced his ideas are more in accord with fundamental democratic ideals than our own but he too must be prepared to do likewise.

With the finger of doubt pointed at democracy as a form of government this seems to me to be an opportune time for citizens to indulge in collective introspection of the democracy under which they live. Therefore, in the spirit to which I have referred, I propose to suggest a few of its ever present problems which will afford ample opportunity for discussion and debate on the subject in the form of a few questions limited to domestic problems, the proper determination of which appears to me to be of vital importance to our future status as a nation. In doing so I want it distinctly understood I am not minimizing the many worthwhile changes that have taken place in our system of government from the date of its inception down to the recent and immediate past. I simply recognize that time and space will not permit a discussion of their merits in this article and restrict my reference to a few impending matters on which there is much diversity of opinion as to whether they are good or bad for a government which professes to intend to continue to operate under the fundamental principles of democracy.

What, then, in the light of history must our answers as citizens be to the following questions:

1. Will a democracy survive if all power and authority is centralized in the national government?
2. Does the tendency to increase bureaucracy under our present governmental system by continued operation of bureaus, boards and commissions

tend to break down and eventually do away with the fundamental principles under which it must operate to be successful?

3. What is the ultimate effect of a planned and controlled economy on democracy as a form of government?

4. How long can a democracy exist without limiting its expenditures to a point where it can maintain a balanced budget?

5. Can it substitute national paternalism for private initiative and enterprise and hope for continued existence?

6. Is a governmental program of subsidies for business, agriculture, education, health and other activities conducive to its welfare?

7. Does national conscription stand in the way of the development of a democratic form of government?

8. Are efforts of the government to manage money, control prices and regulate wages justified under existing conditions or do they impinge upon the rights of a free and independent people?

Ordinarily we think of an adventure as short lived, but as we contemplate our own experiment in government we are prone to think of it as permanent and fixed in character because it has existed and prospered for more than one hundred seventy years. Not so. When measured by the eons of time the American Republic is an adventure yet in its infancy. Your ultimate response to the foregoing questions, and others which they may suggest, mean much to its future. On them, in my opinion, may hinge the answer as to whether the great American experiment will prove to be merely an adventure or a permanent reality. For that reason, I entreat all who are interested in the perpetuation of individual liberty and personal freedom to consider and decide such questions with candor, fairness, understanding and solemnity as patriots not as partisans or as selfish men, having in mind at every stage of their deliberations that the words of the immortal Webster are just as apropos today as they were during another crisis in our history when he said:

"If disastrous war should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still under a new cultivation they will grow green again and ripen to future harvest. But who shall reconstruct the fabric of demolished government? Who shall rear again the well proportioned columns of constitutional liberty? Who shall frame together the skillful architecture which unites national sovereignty with state rights, individual security, and public prosperity?"

Are We Preparing for Reforms in Administrative Procedures of State Agencies?

By BALFOUR S. JEFFREY

The phenomenal growth of administrative agencies exercising executive and subordinate legislative and judicial powers has produced great confusion and concern for laymen and lawyers, not alone in matters of substantive administrative law, but in the manner of procedures both in state and federal agencies. It resulted in congressional action reforming procedure in federal administrative bodies and is certain to bring emendation to procedures of state administrative agencies.

Accepting the narrow definition given to administrative agencies by the

Attorney General's Committee on Administrative Procedure,¹ as authorities of the government which have "the power to determine, either by rule or by decision, private rights and obligations," Dean Arthur T. Vanderbilt finds² in the final report of such committee that three such agencies were created by the First Congress, "eight more coming into existence before the Civil War, six others in the ensuing period to the end of the century, nine more from 1900 to the end of World War I, and a like number from 1918 to the beginning of the great depression, and seventeen more from 1930 to 1940—fifty-one agencies in all, of which twenty-two were outside the regular executive department and twenty-nine within. World War II utilized or evoked a host of agencies, many of which came within the meaning of an administrative agency as defined by the Attorney General's Committee. Of these agencies, nine antedated 1940, fifteen were created in 1940, forty-four in 1941, forty-eight in 1942, twenty-eight in 1943, nineteen in 1944, nineteen in 1945, and twenty even in 1946—in all 202 emergency agencies in addition to the 51 peacetime tribunals."

The problems of administrative procedure increased and became more confused until, particularly during the past fifteen years, reform suggestions of every possible type were proposed, debated and argued. Attention was directed to not only the procedure of federal agencies, but also that of state tribunals. The National Conference of Commissioners on Uniform State Laws for seven years has studied and readied a model state administrative procedure act which, it is understood, is now completed, but has not been yet formally published. Reforms in judicial procedures focused even greater attention to the confusion and abuses in the administrative procedures.

The Norris bill in 1929 was the first proposal for general procedural reform in the federal agencies. Then followed the Logan Bill³ proposed in 1936 to create a federal administrative court with trial and appellate divisions. It would have had authority to review all issues both of fact and law and to take additional evidence. Its decisions were to have been subject only to review by the Supreme Court by writ of certiorari. Following the introduction of the Logan bill, there were proposed many other congressional bills. Committee studies were conducted and innumerable official and unofficial reports made. These culminated finally in the Federal Administrative Procedure Act, passed and approved in 1946.⁴

This statute was intended to establish uniform rules of procedure for federal administrative agencies. It does not deal with any matters of substantive administrative law or authority granted to such agencies and, by specific provisions, leaves untouched the organic statutes establishing each agency and its powers. In substance, the act requires that agencies issue as part of their rules certain basic information describing their organization and channels of procedure, and requires publication of such matters in the *Federal Register*. No person is required to resort to organization or procedures not so published. It states the essentials of required proceedings in rule making, adjudication, licensing and related matters and, in detail, the requirements for administrative

1. Final report of the Attorney General's Committee on Administrative Procedure (Sen. Doc. No. 8, 77th Cong., 1st Sess. 1941 at 7).

2. The Federal Administrative Procedure Act and The Administrative Agencies, New York University School of Law, 1947, page 4.

3. S. 3787, 74th Cong., 2d Sess. (1936).

4. Public Law 404, 79th Cong., 5 USC, Secs. 1001-1011.

hearings and decisions in cases in which other statutes require hearings, and defines the status and duties of trial examiners. It provides for a limited separation of functions in cases of adjudication. The law sets forth general rules for the admission and consideration of evidence and "except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion" redefines the right and authority of judicial review.

However, the act is not a specification of the details of procedure nor a codification of substantive administrative law. Its objective was really to establish a uniform skeleton of the essentials of fairness in the administrative processes. To those who have been exposed to the mysteries of administrative procedures in federal agencies, it is amazing that most of the principal agencies, after passage of the new law, proclaimed the fairness of their old rules and asserted that not much change would be required therein to meet the new standards of the act. All, however, have adopted and published new and revised general rules and regulations of procedure to conform therewith which in the main are substantial improvements.

But the task of the federal agencies to conform to the new law was not an easy one and, although their efforts appear to have been undertaken in good faith and with much study and consideration, there remain many procedural problems and questions arising under the Act which the agencies themselves candidly acknowledge.⁵ This is true, particularly because the act is very complex and technical, yet worded in language of sweeping generalities. It is replete with ambiguous phrases and exceptions. It is a specialist's law that requires for both the general practitioner and the layman careful interpretation by skilled and studious administrative lawyers. The courts already have been and will be called upon to resolve many questions of interpretation.⁶ To many who have business with federal agencies, the act seems complex and difficult of comprehension. To them it has added further mysteries. For instance, the distinctions between rule making (legislative) and adjudication (judicial) functions remain obscure and confused, although fundamental in the statute itself for different procedures attach to each. Much education in administrative law of the practitioner and the agencies is necessary. The act did not accomplish a complete separation of the investigating, prosecuting and rule making functions from adjudication. There are many loud exponents of such separation of functions, but there are obvious difficulties in such segregation in the many areas of administrative functions. Others have objected that the new law unduly restricted and interfered with the flexibility of the administrative processes and was foisted upon the people in an atmosphere of "tremendous feeling against war-time controls."⁷ Although it is an acknowledged fact that the act is a sort of compromise in ideas that is far from satisfactory to all and adds some problems itself to matters of procedure, it nevertheless represents real progress and makes substantial improve-

5. See, *The Federal Administrative Procedure Act and The Administrative Agencies*, New York University School of Law, 1947, pages 72-491.

6. *Eastern Utilities Associates v. S. E. C.*, 162 Fed. 2d 385; *National Labor Relations Board v. Thompson Products, Inc.*, 162 Fed. 2d 387; *Lincoln Electric Co. v. Commission*, 162 Fed. 2d 379; *Hearst Radio, Inc., v. Federal Communications Commission*, C. C. H., Fed. Adm. Procedure, 9071.

7. Critique of the Federal Administrative Procedure Act, Frederick F. Blachly, Federal Administrative Procedure Act and The Administrative Agencies, New York University Law School 1947, page 35.

ment in safeguarding the rights of persons subject to administrative authorities. Now as never before it is possible for the public to learn what are the rules and regulations of administrative agencies and to have some assurance that rules instead of personal whims will be followed in procedural matters.

As was to be expected, the movement for administrative reform was not confined to the federal agencies and there already have appeared in many states, including Kansas, proposals for codes of administrative procedure.⁸ Some desultory statutes covering only certain agencies and then in a limited fashion have been enacted. For example, the legislature of Kansas provided a limited type of procedure statute for the State Commission of Revenue and Taxation but pertaining only to hearings held before it under the provisions of a portion of the various tax laws coming within the jurisdiction of that commission.⁹ However, no attempt was made therein to establish even standards of essential fairness in such proceedings. The Commission was only required to "promulgate and publish uniform rules and regulations relating to pleading, notices, requests, conduct and procedure for all hearings held before it." The 1947 legislature revised a 1939 statute to require that all state agencies issuing rules and regulations file such rules with the Revisor of Statutes, where presumably they are readily available for public inspection, but no provision was made for general publication or for obtaining copies of such regulations.¹⁰ The same legislature required that attorneys of other states appearing before any administrative agency of Kansas take an oath and associate with him resident counsel upon whom service may be had in all matters connected with the proceedings.¹¹

Cursory examination of the statutes of Kansas reveals the present existence of over forty boards and commissions, exclusive of state departments and elective officers, all performing or vested with administrative matters of rule making, licensing or adjudication functions. Many are concerned with the administration of several different laws. These agencies do not include municipal, county, or township boards, all of which exercise such functions in a confused manner, usually without established or published rules and in an entirely discretionary fashion which, however, in practice usually accords interested parties the "privilege" of at least an informal hearing. The average citizen has far more contact with such local agencies than federal agencies or even state authorities.

The pressure for reform, and especially for the establishment of statutory standards of the fundamental essentials of fair procedure in state agencies and probably certain local boards, is gathering momentum. It is unlikely that such movement could or should be resisted. The problem is a complex one, and obviously to attempt a uniform system for all state agencies, including any local boards and commissions, is difficult if not impossible. Study well may establish that complete uniformity is not feasible. To adopt the theory of the federal act by superimposing an absolutely uniform procedure statute on all agencies without regard to their organic statutes under which such

8. See J. B. Smith, *An Administrative Procedure Code for Kansas*, 16, *The Journal of the Bar Association of the State of Kansas*, 157 (November, 1947).

9. L. 1943, ch. 290, sec. 12; G. S. 1947 Supp. 74-2425, 2426.

10. L. 1947, ch. 440, sec. 1-10; G. S. 1947 Supp. 77-405 to 414.

11. L. 1947, ch. 94, sec. 1; G. S. 1947 Supp. 7-104.

agencies were created and in some instances limited procedure prescribed, is a sure invitation for more, rather than less confusion.

The whole problem is one that calls for careful and immediate study, lest the pressure for procedural reform produce an ill-conceived law. This does not depreciate the need for statutory establishment of standards for administrative procedure with the guarantee of fairness therein, a requirement for adoption of adherence to rules and regulations by the agencies and certainly in all cases, publication thereof in a readily available and authoritative source. That should be the minimum objective to be accomplished in a simple statute that does not add complexity to an already confused situation. If such ends are to be obtained in reality without burdensome interference in the administrative processes, study and care must be exercised to avoid mistakes made in good faith by many not fully informed.

Because the problem is inextricably bound up with matters of civil and sometimes criminal justice, it would appear to be the proper subject for joint development by both the Judicial Council and the Legislative Council and certainly is the interest of the Bar Association in the state of Kansas.

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