Should Rules of Evidence Govern Fact-Finding Boards?

Charles A. Riedl

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol23/iss1/3

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
SHOULD RULES OF EVIDENCE GOVERN FACT-FINDING BOARDS?
CHARLES A. RIEDL

FACT-FINDING boards are Twentieth Century America's answer to the challenge of the application of the method of science to the problems of government. In the short span of a single generation they have multiplied with such amazing rapidity that they have changed the very face of our government. Regardless of the causes which brought them into existence, and irrespective of their desirability or non-desirability as organs of government, they are with us, and with us to stay. A decade ago it might have been in order to indulge in diatribes against government by boards and to cry "bureaucracy." Today such an attitude is childish. The completely adult response to the situation that confronts us is to accept these boards and turn our best efforts to the task of directing their growth and moulding their development in such a way as to make them conform as closely as possible to the ideals on which our system of government is based, to make them fitting agencies of a democracy.

The term fact-finding board includes in its scope a wide variety of governmental agencies. They are called variously boards, bureaus, and commissions without any apparent distinction being implied. They are associated primarily with those aspects of governmental activity which are called administrative. They are the result of the broad legislative policy of delegating power to an official or board belonging to the executive branch of the government or to an independent official or board. It is possible to distinguish among them on the basis of their function. Some are purely executive in character, and others combine with their executive power functions of a legislative or judicial nature or both. These administrative agencies with mixed powers are com-

2 "The only difference between what is admittedly the exercise of judicial power and the exercise of so-called quasi-judicial power is the subject matter with which the power deals ... Why should legislatures and courts in dealing with administrative law be hampered because they are obliged to start their consideration with an unsound premise?" Rosenberry, Administrative Law and the Constitution. 23 Am. Pol. Sci. Rev. 32, 37-8.

The terms "quasi-legislative" and "quasi-judicial" commonly used to describe these functions, are just a clumsy subterfuge which could well be abandoned. Nothing is to be gained and much harm may be done by refusing to recognize the true nature of the functions exercised by administrative agencies. Cf. 59 A. B. A. Rep. 539, 541. (1934).
monly referred to as administrative tribunals. A further classification is possible on the basis of the subject-matter dealt with by the various boards. It would be impossible to attempt an enumeration on this basis, so many and varied are the fields of regulation.

The number of these composite agencies of government is so large that it is not an exaggeration to say that America today is practically governed by administrative tribunals. They make more laws than our legislatures, they try more cases than our courts. If it were solely a question of the volume of the work done by these administrative tribunals, we might be able to afford to maintain an attitude of unconcern as to their functioning. If their rules and decisions touched our lives only in unimportant aspects and trifling matters, we could perhaps disregard them altogether. But this is not the case. Important issues and affairs of vital moment, both to the individual and to the nation as a whole, are determined by these boards. In the determination of rates by the Interstate Commerce Commission the financial stakes involved often mount into the millions. In deportation cases which are settled by the Bureau of Investigation, is it too much to say that a man's whole

---

4 The 1934 report of the special committee on Administrative Law defines an administrative tribunal as "an agency, either part of the executive branch or independent of all three branches, authorized to exercise legislative or judicial powers." 59 A. B. A. REP. 539, 541 (1934).

4 The proflixity of invention of the makers of boards is astonishing. The length to which some of them have gone to discover new fields to regulate suggests that statistics can be humorous indeed when they concern themselves with the administrative branch of the government. Some of the more recent ludicrous development in the field of governmental regulation are set forth in an article by Hoyt, Shaping Judicial Review of Administrative Tribunals.

"In Wisconsin the latest discovery, by the legislature of 1937, is that the peace and prosperity of the state will be conserved by examining and licensing watchmakers, and so a commission has been created for that purpose. Here in North Carolina you have covered all the usual subjects of regulation from accountants and architects through electrical contractors and embalmers to realtors and surveyors. You have found some businesses needing regulation that I blush to admit we have not yet thought of in the progressive state of Wisconsin for instance, dry cleaners, tile layers and photographers." (1937) 16 N. C. L. REV. 1.

6 The extent of administrative legislation may be gathered from the fact noted by O. R. McGuire in a recent article, "A Bill to Provide for the More Expeditions Settlement of Disputes With the United States," published in 22 A. B. A. J. 609, 610 (n), that the executive orders, rules and regulations from March 12 to December 31, 1935 consisted of 2411 pages in the Federal Register. The special committee on Administrative Law in its 1934 report stated that "it should not be difficult to demonstrate that the total volume of administrative legislation now in force greatly exceeds the total output of Congress since 1789." Cf. 59 A. B. A. REP. 539, 555 (1934).

A similar situation exists in the field of administrative adjudication. During the fiscal year ending June 30, 1936 one department of the federal government decided far more federal civil cases than all the federal courts combined. Statistics are not available as to the number of cases decided by all of the 130 odd administrative agencies of the federal government during the year ending 1936, but a total of 603,246 are reported to have arisen in one department. Cf. McGuire, Reform Needed in the Teaching of Administrative Law (1938) 6 GEO. WASH. L. REV. 172, 173.
right to liberty and the pursuit of happiness is affected by an adverse ruling of a bureau chief which bans him forever from his promised land? In all cases, however trifling the amount involved, however insignificant the right curtailed, a principle is at stake and an ideal of government is concerned, which can never be a matter of indifference. The future of democratic institutions is dependent upon the proper conduct of these administrative tribunals, for, it can not be denied that they constitute a threat to democracy. They embody in their very nature, mingling as they do in a single body all the powers of government, a direct violation of the famous doctrine of the "separation of powers," which has been considered for centuries vital to the preservation of liberty. They threaten too, with their "executive justice" the ideal of "supremacy of law" which has been regarded as an indispensable safeguard of constitutional democracy. We can not but agree with the thesis proposed by Lord Chief Justice Hewart of England in his book The New Despotism, in which he says that it would be too bad to lose "through inadvertence rights and liberties that were won at great cost, and only after centuries of struggle." There is point too in the warning of our own Justice Brandeis that "experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

One of the features of fact-finding boards which causes considerable disquietude to their critics, is their practice of dispensing with the rules of evidence. Thus a recent discussion of administrative tribunals contains the comment that "the exemption from judicial rules or laws of evidence and procedure is the feature of administrative courts which has attracted the greatest discussion in public comment." While it is true, that there are numerous references in the literature on administrative law to the fact that administrative tribunals are not bound by the technical or common law rules of evidence, and while it is commonly asserted in treatises on these agencies that their freedom from technical rules is one of their characteristic notes, it is still true

---

9 Pillsbury, Administrative Tribunals (1922) 36 Harv. L. Rev. 405, 583, 585.
10 Dickinson, Administrative Justice and Supremacy of Law, p. 35. "Administrative tribunals are not bound by the procedural safeguards which mold the outcome of an action at law; more specifically, they are, in the first place, not bound by the common law rules of evidence."
11 Freund, Administrative Powers Over Persons and Property, p. 169. "There is some tendency to relax the strictness of judicial procedure . . . in the admissibility of evidence."
that most of these statements are mere passing references. To date the scientific literature on the subject is very limited. One or two significant studies have appeared recently. The most important and most comprehensive contribution to the study of this aspect of fact-finding boards is the monograph of Harold M. Stephens on *Administrative Tribunals and the Rules of Evidence* which appeared as volume three of the Harvard Studies in Administrative Law. Stephens based his investigation on a comparative study of a number of federal and state commissions, namely the Interstate Commerce Commission, Federal Trade Commission, state public service commissions, Tax Boards and Immigration Boards. Several important studies have appeared in legal periodicals. It seems to be quite definitely established that, in the absence of specific statutory provision to the contrary, administrative tribunals need not be bound by the common law rules of evidence. Thus Wigmore states: "In general theory it may be asserted that at common law the body of jury trial rules of evidence does not as such control the inquiries made by administrative officials." The legal aspect of this exemption is further clarified in that legislatures themselves in the statutes creating these fact-finding boards frequently make provision as to the procedure to be followed as regards evidence. Many of the typical statutory provisions come under the following classification: (1) those which provide that the board is empowered to make its own rules of procedure, and (2) those which provide that the board need not be bound by the technical or common law rules of evidence. A number of statutes are also found which provide either in addition to one or the other of the above provisions or as the sole rule to be followed, that the hearing shall be conducted in such a way that substantial justice be done. This is the language used in a majority of statutes. An express declaration of this sort, as Wigmore points out, "removes any possible common law doubt."

While there is some similarity in the statutory provisions in regard to evidence, this uniformity is of a negative nature, that is to say, it consists in stating what need not be done, rather than in providing rules.

---


13 Stason, *The Law of Administrative Tribunals*, 410, for some typical statutes.

14 Wigmore, *supra* note 11.
of procedure. Consequently, there is very little uniformity in the actual practice and procedure of the various fact-finding boards. This lack of uniformity among federal boards is noted in the 1936 report of the special committee on Administrative Law of the American Bar Association as follows: "The distressing and kaleidoscopic variety in practice and procedure (including rules of evidence) exhibited by federal administrative agencies is notorious." Needless to say, the lack of uniformity is even greater among state boards. Stephens attempts to introduce order into the mass of board and commission rules relating to the matter of taking evidence. He finds that it is possible to divide them into five classes: (1) "Those making no provision except that it is apparently intended that evidence taken shall be relevant and material, (2) Rules providing that the commission shall not be bound by the 'technical rules of evidence,' (3) Rules providing for disregard of errors which shall not affect the substantial rights of the parties, (4) Rules permitting the commission to take such evidence as it may think pertinent, admissible and material or appropriate, (5) Rules providing expressly that the rules of evidence shall be the same as in civil actions in court."

The recurrence in many of the statutes creating fact-finding boards, as well as in the rules of the boards themselves of the words "common law," "jury trial," "technical" and "essential" as applied to the rules of evidence calls perhaps for a word of explanation. The term "common law" rules of evidence embraces that body of rules which determine the admissibility of evidence; that is to say prescribe procedural rules as to what facts may be introduced as evidence and the form in which they must be presented. These rules are often referred to as the "jury trial" rules of evidence, because they originated in the need "for a preliminary purification of the evidence," before it could be submitted to a jury unskilled in the science of proof. The term "technical" as employed in the statutes and rules referred to above, is not so easily defined. It seems at times to be intended as synonymous with "common law" or "jury trial" rules of evidence. Thus the expression "technical or common law" rules is often used. The courts, however,
have shown a disposition to employ the word "technical" not as connoting the whole body of rules of evidence, but in opposition to what they commonly refer to as the "essential" rules. This distinction seems to be similar to the one made by Stephens, when he divides the rules into "procedural" and "evidential," the first of which relate "to the quantum, or to the source or to the duty of first producing evidence" whereas the "evidential" rules have to do with the dependability of the evidence. When Wigmore differentiates the science of proof from the rules of admissibility of evidence, his thought seems to be running along the same line. This distinction may prove helpful in measuring the extent to which fact-finding boards should be bound by the rules of evidence.

The vast majority of fact-finding boards, as we have seen, do not observe the common law rules of evidence. It may throw some light upon the subject to note which rules the boards most frequently violate. While there is no available data that covers the whole field, the findings of Stephens on this point, based as they are on a survey of a large number of boards of varying types, should be true of the general run of boards. Stephens found that the rules which the commissions refused to apply are "the hearsay rule, the best-evidence rule, the opinion rule, the rules with reference to impeachment, the rule forbidding testimony of spouse against spouse, the rule against the admission of one act or crime to prove another, the rules confining testimony to that which has been demonstrated, by connection with the subject matter of the case, to be material, and the rule forbidding the admission of judgments in one proceeding as evidence of facts in issue in another." Recent comparative studies of the practices of boards, other than those studied by Stephens, show much the same trend in the relaxation of particular rules of evidence.

It would be impossible to attempt to evaluate individual rules and to examine their applicability to individual boards within the limits of

---

20 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION PART IV, 201-4. This distinction was made very early in the history of administrative law in the first decision by the United States Supreme Court affecting the Interstate Commerce Commission. The decision in this case set a precedent for subsequent decisions. The court said, "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof." Interstate Commerce Commission v. Baird, 194 U.S. 25, 24 S.C. 563, 48 L.ed. 860 (1903) . . . "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended." Interstate Commerce Commission v. Louisville and Nashville Railway Co., 227 U.S. 88, 33 S.C. 185, 57 L.ed. 431 (1914).

21 STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULE OF EVIDENCE, 5-6.

22 WIGMORE, THE SCIENCE OF JUDICIAL PROOF, 3.

23 STEPHENS, supra note 21, p. 92.

24 DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, 225.

FACT-FINDING BOARDS

a study such as this. The most that we can hope to accomplish is to formulate principles and on the basis of these principles to construct a tentative plan, suggesting which rules, if any, should be applied by fact-finding boards and what variations, if any, should be allowed to particular boards. The wisdom of a course such as this, is attested to by the warning of Frankfurter and Davison against premature generalization in the field of administrative law; "Administrative Law is groping, it necessarily is still crudely empirical. It is dealing with new problems, calling for new social inventions or fresh adaptations of old experiences. . . . In a field as vast and unruly as is contemporary Administrative Law, we must be wary against premature generalization and merely formal system. . . . One cannot, then, stress too much the tentative stages of hypothesis and generalization in Administrative Law."25

In this tentative stage of hypothesis and generalization, it may help to clarify the problem, if we consider and evaluate some of the reasons commonly advanced to justify the present practice of relaxing the rules of evidence in fact-finding boards. The same reasons seem to recur with significant frequency in the majority of statements in favor of the relaxation of the rules. The reasons can be classified under two main headings—the first are those based on the nature and function of fact-finding boards, the second on the characteristics and shortcomings of the rules of evidence. In the first group we meet such reasons as follow: (1) the type of work entrusted to these boards, involving as it does largely social and economic questions, does not require and would be hampered indeed by the formal rules of evidence26 and (2) the expertness of administrative officials, trained specialists in their various fields, enables them to determine the facts without benefit of formal rules.27 From the point of view of the rules of evidence, it is contended: (1) these rules were devised to meet the exigencies of

25 FRANKFURTER & DAVISON, CASES ON ADMINISTRATIVE LAW (Second Edition) vi.
26 "The human interests and legal rights protected remain the same; but the old legal procedure has been superseded by direct governmental action on the plea of prevention, or greater speed and effectiveness of the remedy." DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, 7.
27 "The Commission has declared: 'It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if . . . bound by the rules of evidence applying to introduction of testimony in courts.' SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 200 (n).
28 "The members of compensation commissions or boards devote their entire time to the one field of law and so presumably become experts in its problems and more able to pass upon controversial questions in connection therewith than the judges of a court whose duties are not usually confined to one branch of law. Why hamper the administrative tribunal, then with the rules of procedure and evidence which it has been created to avoid?" DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, 225.
jury trials, and have no place in tribunals manned by experts, the rules slow up procedure, and obstruct, rather than further, the ends of justice.

One of the strongest statements against introducing the common-law rules of evidence into administrative tribunals has been made by the eminent authority on evidence, John Wigmore, who says:

"In short, the jury-trial rules of evidence, as today enforced in courts of law, are in the position of parties throwing stones from glass houses, when they cast doubt upon the more informal evidence-methods of administrative boards. The former have no reason for setting themselves up over the latter as a cynosure of efficiency. If this is the fact, courts should not approach this question as though the cause of truth was being jeopardized by the proposal to relax the rigid system of jury-trial rules before administrative boards. And if there is any part of administrative activity to which this independence of formal rules can most readily be conceded, it is the task of weighing evidence and deciding on facts. For there do not yet exist any known rules for controlling the correctness of that mental process. The jury trial rules merely determine what evidence may be considered; they tell us nothing as to the mental process of weighing it. The great ultimate process of reaching of conviction is not one for which we can offer the administrator any sure guide. Why not trust his expert intelligence and good faith? Let us remember that the greatest part of the community's industrial, commercial and financial activity already functions on a solid basis of fact without any formal rules of proof. Let us, here too, put our trust in men and minds rather than in rules."

To speak of the reasons for exempting fact-finding boards from the rules of evidence is apt to give rise to an erroneous impression. Historically speaking, the practice regarding the rules of evidence in fact-finding boards can not be said to have been the result of a reasoned policy. These boards are not an integrated part of a planned political economy. Even economic planning on a large scale is an innovation. Governmental institution for the most part, and fact-finding boards

---

28 These rules of evidence "are the method of aiding an untrained and inexperienced body of triers, newly selected 'ad hoc' for each trial and functioning in all kinds of litigation of infinite variety. Presumably, therefore, the rules are inept for a permanent officer or board sitting without a jury and skilled by long habit in the investigation of a special kind of controversy." Wigmore, supra note 11.

29 "The favorable result (of exemption from judicial rules of laws of evidence and procedure) is that the proceedings of the tribunal are not harassed and delayed by arguments upon technical rules of evidence, objections to admissibility, appeal upon point of evidence, etc." Pillsbury, Administrative Tribunals (1922) 36 Harv. L. Rev. 405, 583, 585.

"Only too frequently the technical rules of evidence result in concealing the truth instead of permitting it to be developed." Thelen, The Railroad Commission as a Model for Judicial Reform (1918) 2 Minn. L. Rev. 479, 486.

30 1 Wigmore, Evidence (2d ed. 1923) § 32.
are no exception to the rule, come into existence in response to a need. The need which gave birth to our modern system of administrative agencies on the present large scale, was a sudden and overwhelming one and could not wait upon nice questions of etiquette and procedural forms. Necessity, it is said, is the mother of invention and it might be added, the offspring is not always legitimate. The true explanation of how fact-finding boards came to be exempt from the rules of evidence is quite probably that, like Topsy "they just grewed that way." A contributing factor to their having been allowed to grow in the haphazard fashion in which they did has undoubtedly been the refusal to recognize and admit that these fact-finding boards performed truly legislative and truly judicial functions. This wilful blindness to the true nature of the functions of these tribunals has been responsible for much of the present anarchy and "administrative lawlessness." A complete explanation of the causes underlying the practices of administrative tribunals would have to recognize the influence of current philosophical thought. The positivism of today rejects metaphysical concepts as the superstitions of an outworn age and emphasizes the individual fact as the proper basis for generalization and procedure. The disintegrating effects of current philosophical ideas upon the field of law are forcefully brought to our attention by Dean Pound in a recent article. "Philosophy has been a guide to law and law-making since the contact of Roman lawyers and Greek philosophers some two thousand years ago. But a school of philosophers has arisen which refuses to guide and denies that there is anything to guide by. Phenomenalism teaches us that there is no reality behind phenomena. The only significant things are the single phenomena themselves. There is no necessary connection or underlying significance. Each phenomenon stands self-sufficient by itself. Applied to jurisprudence this gives us a theory of each decision and each administrative determination as an item of official behavior to be considered by itself."31 Rules of any kind are not apt to flourish in the atmosphere of individualism. The revolt against reason and distrust of formal logic, characteristic of the prevailing sceptical outlook as regards truth and conduct,32 also play their part in discrediting a system based on permanent standards, such as the traditional rules of evidence.

If the above analysis is correct, the reasons commonly advanced for the rejection of the rules of evidence are, for the most part, rationaliza-

32 e.g. The views of Bertrand Russell in his Marriage and Morals; Max Carl Otto in his Things and Ideals; John Dewey in his Democracy and Education, and others too numerous to mention.
tion of existing conditions, a justification after the fact. They merit, however, careful consideration. The weight of the individual arguments varies, but, if we are to accept these reasons at full value, they constitute a powerful argument against tampering with the practices of the boards. For it is contended in substance, not only that the system of common law rules of evidence is superfluous, but that it would strike at the very existence of them. Since it is the proper regulation, and not destruction of these boards that is the object of our consideration, it is important to meet this charge. All of these reasons advanced for leaving things in "status quo" would be valid if it were intended to foist the whole body of the rules of evidence on administrative boards. Even the most ardent champions of the rules would not, we are sure, care to go that far. Rules have a tendency to be rigid, and do not readily adapt themselves to changing circumstances. We are unquestionably today in an era of change, in which the rigidity of rules is bound to work a hardship, if something is not done to adapt them. When members of the bar themselves are dissatisfied with the working of the rules of evidence resulting in cases being decided "upon points of practice, which are the mere etiquette of justice," surely it would be arbitrary to insist upon the adoption of these rules, including objectionable features, by administrative boards.

Unquestionably many of the rules would hamper investigations along social and economic lines, but this does not mean that such investigations should be "individualized" to the extent of being wholly subjective. Sufficient allowance for individual differences is made by the broad use of discretion in such cases. An expert in a particular field does not require the same certification of the value of evidence that a layman would. To hold that he should be beyond the need of any rules is to credit him with powers of clairvoyance. The jury trial origin of the rules of evidence does not make all rules superfluous and useless for any other type of proceeding. It may be that the observance of rules of evidence would tend to prolong some hearings. Although oddly enough the very reason assigned for the existence of rules of evidence is that "there must be some limit to the facts which may be given in


Stephens very ably sums up the implications of the argument from the expertness of administrative officials. Some of the things commissioners are presumed to be able to do are: "To know the worth of hearsay, the probable authenticity of unidentified signatures; . . . to understand how far to give credence to matter not within a witness' knowledge; to sense the accuracy of commercial ratings, investor's manuals, recitals in deeds, interviews, newspaper clippings; to know the worth of common knowledge; to understand the statistical reports of carriers, and the scientific reports of engineers without examination of the makers; to give proper weight to the affidavits of prostitutes and the ex parte statements of their customers . . ." Stephens, Administrative Tribunals and the Rule of Evidence, 93-4.
evidence as there must be an end of litigation.”\textsuperscript{25} Cases might even be found in which rigid adherence to a system of rules would work injustice to a particular individual. The point at issue here is to consider whether the rejection of all rules is not apt to work greater injustice and to more individuals.

In much of the discussion of rules of evidence, there seems to be a tendency to overlook the fact that these rules are intended as aids in the discovery of truth. Whether the rules in their present development have ceased to be effective aids in the sifting of truth from error is beside the point. It still remains true that in principle rules of evidence are helpful. They are formulations of the procedures which assist the human mind in the intricate process whereby it passes from ignorance through doubt and uncertainty to that final repose in one of two alternatives, which we call certitude. There is such a thing as a science of proof, even though it falls far short of qualifying as an exact science, due to the variable element in human behavior. Rules can be devised which will make it at least less probable that error, rather than truth will be the result of an investigation. The common experience of men is proof of this. The human mind in its effort to arrive at truth instinctively grasps certain types of facts as sign posts on the road to certitude, and rejects others as misleading. Whole epochs have been discredited by the epithet “authoritarian.” An apology for the rules of evidence is presented by Stephens as follows: “For courts, the rules of evidence have been not a fetish nor an empty ceremony but, tested by experience, a handy scalpel to dissect within the field of operation defined by the pleadings, and an aseptic against influences disturbing the mind.”\textsuperscript{35} If there is any value at all in rules of evidence, and it seems that there is, there would surely be a proper place for them in fact-finding boards.

What are we to say to the exhortation of Wigmore that we should “put our trust in men and minds, rather than in rules”?\textsuperscript{27} We presume that the advocates of rules would retort that men are not always trustworthy, and that minds have a way of being subjective and variable, and that history shows by many examples that the tyranny of men is more oppressive than the tyranny of rules. Aristotle long ago in his \textit{Politics} allied himself with the advocates of rules, when he said, “he who bids the law rule may be deemed to bid God and reason alone rule, but he who bids men rule adds an element of the beast.”\textsuperscript{38}

No one can question the fact that opportunity for arbitrary action for the infringement of rights and liberties is afforded fact-finding

\textsuperscript{25} JONES, THE LAW OF EVIDENCE IN CIVIL CASES (3rd ed. 1924) 1.
\textsuperscript{26} STEPHENS, supra note 34.
\textsuperscript{27} 1 WIGMORE, EVIDENCE (2d ed. 1923) § 35.
\textsuperscript{28} ARISTOTLE, POLICS, III, 16.
boards. The full import of discretionary powers as to findings of facts is shown in a statement attributed to Chief Justice Hughes that: "an unscrupulous administrator might be tempted to say 'let me find the facts for the people of my country, and I care little who lays down the general principle.'" We would not care to insinuate that any considerable amount of commissioners are unscrupulous in the discharge of their trust. This would undoubtedly be a gross injustice. The point we wish to make is that as a people, we are inclined to be extremely sensitive on matters that concern rights and liberties, and might not wish to leave even the opportunity for arbitrary and capricious action in the hands of any body of men, however expert, well meaning and benevolent they may be.

Furthermore, the distinctive features which characterize the exercise of the judicial function by fact-finding boards furnish more than usual opportunities for miscarriages of justice. All the traditional safeguards which hedge in the administration of justice in its ordinary channels are missing. They mete out justice not according to law, but on the basis of their subjective interpretation of broad standards. Their proceedings are for the most part conducted secretly, and thus lack another spur to impartiality. The lack of legal training on the part of administrative officials, and the fact that they are not bred in the traditions of the profession of law, must be considered another potential hazard. The political nature of most of their appointments, coupled with insecurity of tenure, give point to the warning of Dean Pound that "Selden's equity of which the measure was the length of the chancellor's foot, may yet have its counterpart in administrative application of legal standard of which the sole measure is the ability of the commissioner to keep his ear to the ground." Finally, that their findings of fact are not subject to judicial review makes it all the

"It is not often that an astute administrator is unable to find somewhere in the evidence a bit of testimony on which to hang a finding, however greatly the evidence may preponderate against it."


41 Dodd, Bureaucracy and Representative Government (1937) 189 Ann. Cong. 167. "Except for posts in which technical qualifications are obviously indispensable, we adhere even today pretty closely to the Jacksonian doctrine, paraphrased by John Stuart Mill, that any man not fit to be hanged is fit for any office he can get."

42 The American Bar Association has been agitating for a number of years a reform in the methods of selection of administrative officials, 61 A. B. A. Rep. 720, 736-7 (1936).

43 Pound, supra, note 40.

44 Pound, supra, note 40.

Hoyt, Shaping Judicial Review of Administrative Tribunals, 16 N. C. L. Rev. 1-2, discusses the current proposal of the special committee on Administra-
more imperative to insure the correctness of these findings by every possible means.

In view of the potential dangers to liberty which administrative fact-finding boards present, efforts to restrict them in the one matter of the quality of evidence would seem not to be unreasonable. But while it is comparatively easy to see why it is desirable to prescribe rules of evidence for fact-finding boards, it is not at all an easy matter to say what rules should be prescribed and for what boards. The major difficulty arises from the fact of the wide variations in function. At the outset it would seem to be proper to withdraw from our consideration the legislative aspects of the work of these tribunals. Hearings to gather facts for legislative action have been traditionally exempt from rules of evidence. Thus we are concerned with proposing a plan of rules of evidence for administrative tribunals in the exercise of judicial powers. Even thus limited we must consider a great number of boards dealing with widely dissimilar fields of regulation. Can general rules be applied to all these boards? The present practice is not one of uniformity, but there would be no intrinsic unreasonableness in a proposal to prescribe uniform rules for all boards. The process of fact-finding is much the same regardless of the purpose for which the facts are being gathered. We do not wish to suggest that there is not any difference between investigating a workman's claim for compensation, and an alien's objection to deportation, but the essential reasoning processes involved in both cases are the same. We cannot help but feel that there has been in the past too great a tendency to emphasize dissimilar elements to the neglect of the common. We are of the opinion that it would work no hardship on any fact-finding board, indeed that it would greatly increase its efficiency in the cause of truth, and of justice which is inseparably associated with truth, to conform to certain minimal canons of proof.

Our proposal is not to introduce the whole body of common law rules into administrative tribunals, but only the so-called "evidential" rules, rules which affect the dependability of the evidence. The neces-


46 The report of special committee on Administrative Law points out that there is no justification for the variety in rules on many points of procedure, and notes the evil results of this tendency. "The present tendency is toward encouragement of specialization in matters that do not call for specialization, and of esoteric learning on the part of as many different groups in the profession as there are administrative agencies." 61 A. B. A. REP. 720, 742 (1936).

46a Stevens, Administrative Tribunals and the Rule of Evidence, 5-6.
sity of a hearing is the first requirement. This might almost appear superfluous, in view of the fact that “the due process” clause in the federal constitution has been interpreted to include as one of its essentials, the right to a hearing, but in point of fact this right has not always been accorded under existing conditions. The requirements of a hearing have also been set forth in a general way under due process that it must be fair and impartial. The testimony taken at the hearing should have at least the basic legal guarantees of truth. Thus the hearing should include oral testimony, given under oath, with right of cross-examination, reduced to writing and made part of the record. The insistence upon a hearing does not preclude any method of informal settlement of dispute, nor does it prevent parties from stipulating facts into the record upon which there is no dispute. Judicial or administrative notice can be taken if facts noted and their sources are incorporated in the record. The hearsay and best evidence rules may be modified to the extent that there is still a sufficient guarantee of the truth of the facts obtained thereby.

The specific rules which have been singled out for special consideration are the ones that represent the most striking departure from common law practice. We have shown that a measure of leeway can be allowed in their application, without sacrificing the principle of the need for rules. Further studies along comparative lines may disclose the need for additional exceptions. The pursuance of this course need entail no sacrifice of the efficiency of these boards, and it has at the same time the merit of providing what we must look upon as an essential safeguard of rights and liberty under a democracy.

46 Stevens, Administrative Tribunals and the Rule of Evidence, 5-6.
48 Stevens, supra, note 46, at 97.
49 Equity Rules of the Supreme Court of the District of Columbia, Rule 55.
51 Faris, Judicial Notice by Administrative Bodies (1928) 4 Ind. L. J. 167.
STUDENT EDITORIAL BOARD
Kearney W. Hemp, Editor
George A. Eggers, Note Editor
Daniel C. Shea, Recent Decision Editor

William R. Curran
Frank De Lorenzo
Gerard A. Desmond
John B. Frisch
Herman J. Glinski
James F. Hackett
Stephen J. Hajduch
June C. Healy
Ruth E. Johnson
Robert D. Jones
John D. Kaiser
William P. Kingston
John C. Kleczyka, Jr.

EDMUND J. Krzykowski
Carl A. Luther
EDMUND R. Mietus
Chester J. Niebler
Charles D. O'Brien
Roy C. Packler
Alfred I. Rozran
John H. Russell
Edward J. Setlock
Walter J. Steininger
William E. Taay
Howard Tilg
Edward F. Zappen

BUSINESS STAFF
Melvin M. Biehl, Business Manager
Sydney M. Eisenberg, Advertising Manager
John D. Farnsworth, Circulation Manager

CONTRIBUTORS TO THIS ISSUE
Charles A. Riedl is a member of the Wisconsin bar. He is a graduate of the Marquette University Law School and was formerly a member of the staff of the MARQUETTE LAW REVIEW.

Marvin B. Rosenberry is chief justice of the Wisconsin Supreme Court. He was appointed associate justice in 1916 and since 1929 has been chief justice. He is a graduate of the University of Michigan Law School and hold honorary LL.D. degrees from three universities: Marquette University, the University of Michigan, and the University of Wisconsin.

Unless the LAW REVIEW receives notice to the effect that a subscriber wishes his subscription discontinued, it is assumed that a continuation is desired.
An earnest attempt is made to print only authoritative matter. The articles and comments, whenever possible, are accompanied by the name or initials of the writer; the Editorial Board assumes no responsibility for statements appearing in the Review.
Published December, February, April and June by the faculty and students of Marquette University School of Law. $2.00 per annum. 60 cents per current number.