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Nathaniel L. Nathanson

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NATHANIEL L. NATHANSON*

When I saw the general title of this program—Close Encounters with the Twenty-First Century—my first inclination was to announce that, like my astronomy colleague at Northwestern, Professor Hynek, I was much more interested in UFO's than in institutional due process and so I proposed to talk about them instead. After fighting down that inspiration and concentrating more directly on the subject prescribed, it occurred to me that the occasional flowerings of procedural due process are really legal manifestations of the deep concerns that are troubling and dividing our society at any particular time. In the 1930s, for example, the great drama was the struggle for effectuation of the New Deal. At first the battle was fought on the constitutional law front and the issue of federal power was dominant; but when the forces of free enterprise or reaction—whichever you prefer to call them—were defeated there, their spokesmen quickly shifted to the administrative law battle line. Chief Justice Hughes himself—speaking in an informal address somewhat above the battle—described the watchword of the omnivorous bureaucrat epigrammatically as: "I care not who makes my country's laws, so long as I can find the facts." In those days, the anathema of the regulatee was the institutional decision; its great defender, our

* Distinguished Visiting Professor of Law, University of San Diego School of Law; Emeritus Frederic P. Vose Professor of Law, Northwestern University School of Law. B.A., 1929; LL.B., Yale University, 1932; S.J.D., Harvard Law School, 1933.

own Professor Davis. The heartstrings of administrative law were the four *Morgan* cases,[1] now hardly mentioned in contemporary casebooks. The great issues of that time were eventually compromised and all but forgotten in the ambiguous phrases of the Administrative Procedure Act.

The next great flowering of administrative due process was in the 1950s during the McCarthy era—the halcyon days of the House Un-American Activities Committee's search for subversives, the loyalty or security programs, the Attorney General's list of subversive organizations, and the entertainment industry's blacklists. For lawyers engaged in the fight against these all-pervasive phenomena, the principal target was the anonymous informer: the FBI's secret agent whose identity could not be disclosed even to members of the loyalty boards lest our security network be dismembered. Against this elusive enemy, our knight errants' principal weapon—almost as potent as King Arthur's Excalibur—was the sacred right of cross-examination. In those days we won some and we lost some. There were notable victories, like Justice Frankfurter's concurring opinion in the *Joint Anti-Fascist Refugee* case[2] and Chief Justice Warren's opinion for the Court in *Greene v. McElroy*.[3] There were also some setbacks, like Justice Stewart's majority opinion in the *Cafeteria Workers* case.[4] Gradually, however, the miasma of suspected subversion subsided, and the undisclosed informant ceased to create such a burning issue.

Now we are engaged in another great civil war on the field of administrative due process. Here too I am inclined to search for the underlying causes of the battle; but they are not so easy to identify, perhaps because we are ourselves so deeply immersed in them. Vaguely I feel it is all part of the perhaps hopeless struggle of the individual against the system, each one of us—like the hapless fly in the spider's web—engaged in battle with his own particular system, be it the welfare system, the school system, the prison system, the mental health system, or even the medicare system. With respect to this last system, at least, I can speak with indignation born of personal experience. But whenever I tell my tale of exasperation to a friend or even to a passing acquaintance, I am apt to get a similar tale in response, but worse. The burden

1. United States v. Morgan, 313 U.S. 409 (1941); United States v. Morgan, 307 U.S. 183 (1939); Morgan v. United States, 304 U.S. 1 (1938); Morgan v. United States, 298 U.S. 468 (1936).

2. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring).

3. 360 U.S. 474 (1959).

4. Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

of the song is always the same: how to break through the endless, repetitive clatter of the computer and get a sensible human response instead. If I could but live to see the birth of the twenty-first century, what I would fear most would not be inflation, the energy shortage, or even nuclear war, but the complete and irreversible triumph of the computer. Perhaps the computer is only the mechanical personification of what others have called the system of mass justice.[5] Perhaps too this is partly what Judge Friendly had in mind, in his great essay entitled *Some Kind of Hearing*,[6] when he suggested that one crucial element in assuring a fair hearing that might compensate for the lack of many other safeguards might be the right of appeal to some private and impartial individual entirely outside the system responsible for administering the program. Query whether we could recruit enough such private and qualified individuals and whether we could prevail upon the systems to entrust such individuals with that much responsibility.

Another query is whether the distinction between procedural due process and substantive due process is not breaking down in the course of the expansion and application of the due process hearing to almost every type of governmental activity significantly affecting private interests. The most recent example I have in mind is the Supreme Court's decision just a few weeks ago in *Board of Curators of the University of Missouri v. Horowitz*,[7] in which a senior medical student was not permitted to graduate and was eventually dismissed from the school. This was a difficult case because the student's purely academic record in the school was excellent, but her clinical performance was regarded as abysmal. She was warned about her shortcomings some time before the final decision, and after the first tentative decision denying graduation she was given special oral examinations by seven practicing physicians. Two of these physicians recommended that she be allowed to graduate, two that she be dropped from school, and three that she be denied graduation with her

5. *See* D. BAUM, THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE (1974); R. DIXON, SOCIAL SECURITY, DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADMINISTRATION (1973); Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

6. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

7. 435 U.S. 78 (1978).

class but be permitted to continue in school. After receiving these reports the duly constituted authorities of the school decided to deny both graduation and permission to continue in school. The student's complaint attacked the decision on both procedural and substantive due process grounds. The district court, after trial, dismissed the complaint, apparently on both grounds. The court of appeals reversed on the procedural due process issue without reaching the substantive due process issue.

The Supreme Court reversed the judgment of the court of appeals and reinstated the judgment of the district court. Justices Marshall, Brennan, and Blackmun agreed with the majority's procedural due process decision but partially dissented on the ground that the case should have been remanded to the court of appeals for consideration of the substantive due process claim. Justice Rehnquist, speaking for the Court, assumed without deciding that the plaintiff's dismissal deprived her of liberty or property sufficiently to trigger the requirements of procedural due process; he concluded, however, that those requirements had been satisfied by the academic procedures used. Furthermore, the decision was based not on disciplinary considerations, as in *Goss v. Lopez*,[8] but rather on academic performance and qualifications, albeit in a clinical context. In this connection it was immaterial that part of the dissatisfaction was based on lack of punctuality and lack of personal cleanliness. "[P]ersonal hygiene and timeliness," said Justice Rehnquist, "may be as important factors in a school's determination of whether a student will make a good medical doctor as the student's ability to take a case history or diagnose an illness."[9] Any additional hearing requirements would "risk deterioration of many beneficial aspects of the faculty-student relationship" because as the Massachusetts Supreme Judicial Court said "over 60 years ago . . . a hearing may be 'useless or harmful in finding out the truth as to scholarship.' "[10]

In dismissing the substantive due process claim Justice Rehnquist was even more cryptic, saying: "Courts are particularly ill-equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking."[11] The conclusion seems to be that if the school procedures are reasonably designed to achieve a correct

8. 419 U.S. 565 (1975).
9. 435 U.S. at 91 n.6.
10. *Id.* at 90 (quoting Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 23, 102 N.E. 1095, 1097 (1913)).
11. *Id.* at 92.

academic decision, and if these procedures are faithfully observed, neither substantive nor procedural due process requires more.

Doubtless most of us faculty members would prefer that conclusion to be the rule so far as our own academic decisions are concerned. Maybe *Horowitz* was the proverbial hard case that decided any other way would have made bad law. Nevertheless, I cannot quite escape the uneasy feeling that there might have been a better solution. Maybe Ms. Horowitz gave no promise of becoming properly qualified to practice medicine, but that career was the farthest thing from her desires. She wanted to do medical research for which she apparently was superbly qualified and in which she had already been promised a position. Yet the requisite qualifications for the job included a medical degree. Somewhere the system seems to have gone askew. Either the job's qualifications should be changed, or she should get a degree that would qualify her for medical research but not for medical practice. I keep wondering whether that solution will be the eventual resolution of Ms. Horowitz's problem.

I cannot leave the *Horowitz* case without recalling that *Dr. Bonham's Case*,[12] the seventeenth century fountainhead of procedural due process, involved a plaintiff who had received his degree as Doctor of Physic from the University of Cambridge. The President and Censors of the London Faculty of Physic imprisoned him for having practiced in London without their license and for having refused to pay their fine. Apparently, Bonham too was revolting against the system of his time.

I have a final query, suggested by the moderator as the principal subject of my contribution. What if anything do these cases of informal individual adjudication—stretching from *Goldberg*[13] to *Horowitz*—have to do with contemporary cases of economic regulation under modern statutes allowing "informal" or "notice and comment," or "hybrid" rulemaking? The most interesting examples of such cases are those from the Court of Appeals for the District of Columbia, like the *International Harvester* case[14] involving standards for automobile emissions, the *Ethyl Corp.* case[15] involving standards for lead content of ethyl gasoline, and

12. 77 Eng. Rep. 646 (1610).
13. Goldberg v. Kelly, 397 U.S. 254 (1970).
14. International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).
15. Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

most recently the *Vermont Yankee Nuclear Power* case,[16] pending before the Supreme Court and involving the disposition of nuclear wastes. Obviously these environmental problems are tremendously important and concern issues of infinite scientific and technical complexity. For the most part the Court of Appeals for the District of Columbia has handled these cases with great intellectual competence. Nevertheless, that court has been deeply divided, sometimes in results but more often in articulating how it has reached its results. Some members of the court tend to think that they must formulate their results entirely in procedural terms, shrinking from any judgment on the merits as obviously beyond their abilities. Others are more inclined to grasp the nettle of substantive rationality, insisting that this is the responsibility that Congress has placed upon them and that even scientific and technical issues of the greatest complexity can be subjected to this basic standard of judicial review.[17] Some people think that the ultimate solution must be either to get the courts out of this business entirely or to create a special supreme court composed of scientists as well as lawyers. For the present, at least, we must manage with the institutions we have. Conceivably, before the Term is over we will have some hint from the Supreme Court in its *Vermont Yankee* opinion on how it views these problems.[18] How such issues will be handled in the twenty-first century is almost as fascinating and perplexing as the problems of the UFO's themselves.

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16. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

17. This difference in attitude first surfaced in the opinions in the *International Harvester* case, particularly in the concurring opinion of Chief Judge Bazelon emphasizing the procedural aspects of the decision, 478 F.2d at 650, rather than the substantive aspects emphasized in Judge Leventhal's opinion for the court, *id.* at 622. The difference appears again in the concurring opinions of Chief Judge Bazelon and Judge Leventhal in the *Ethyl Corp.* case, 541 F.2d at 66, 68, and finally in Judge Tamm's concurring opinion in the *Vermont Yankee* case taking exception to Chief Judge Bazelon's opinion in so far as it emphasizes procedural deficiencies, 547 F.2d at 658, and in Chief Judge Bazelon's separate statement in reply in *Vermont Yankee*, *id.* at 655.

18. After these remarks were delivered the Supreme Court in *Vermont Yankee* reversed the court of appeals. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). The opinion by Justice Rehnquist for a unanimous Court emphatically rejects Chief Judge Bazelon's view on the ground that it is inconsistent with the Administrative Procedure Act, *id.* at 545-48, and remands for further consideration of the substantive grounds urged by Judge Tamm for setting aside the administrative decision, *id.* at 549.

Editors' note: For an elaboration of Professor Nathanson's views on the Supreme Court's opinion in *Vermont Yankee*, see Nathanson, *The* Vermont Yankee Nuclear Power *Opinion: A Masterpiece of Statutory Misinterpretation*, 16 SAN DIEGO L. REV. 183 (1979).