

## Judicial Impact Statements

Daniel E. Koshland, Jr.'s, editorial recommending judicial impact statements (11 Mar., p. 1225) expresses the frustrations that many Americans feel toward a legal system engulfed by the perplexing problems of a complex society. "Administrative law," which deals with the decisions of government agencies, has grown with the development of the Anglo-American legal system. Federal agencies have been delegated sweeping powers by the Congress to establish rules, regulate activities, adjudicate disputes, and prosecute violations. Their authority transcends that of legislators, administrators, and judges. Without judicial checks and balances, an errant administrative agency's capacity to abuse power would be immense.

Such was the case before 1946, when Congress enacted the Administrative Procedures Act (APA) (1) in reaction to a history of administrative abuses where rules of evidence were ignored, ex parte proceedings excluding all but a single party were prevalent, abuses of procedure were frequent, and latitude for corruption, fraud, and favoritism were many. The APA established stringent rules that defined the legal relationship between the regulatory agencies and the reviewing courts.

The scope for judicial review of agency decisions was tightly bounded by the Congress in order to provide administrative agencies the latitude to exercise expert judgment. That judgment, however, must conform to legal and equitable norms of fair play and orderly procedures within the limits of statutory and constitutional law. It is the courts' responsibility to ensure that the agencies abide by their own rules as well as the laws of the land; thus courts cannot overrule an agency decision if supported by "substantial evidence," that is, a substantial basis of fact from which the fact at issue can be reasonably inferred, but the courts are empowered to interpret and decide all relevant questions of law. Courts can also compel agencies to take timely action when required by law; can set aside agency actions, findings, and conclusions only if found to be "arbitrary, capricious, and abuse of discretion"; and can overturn actions that are in excess of an agency's statutory jurisdiction. A court cannot retry an administrative case on the basis of different evidence, but must work from the evidence considered by the agency.

Judicial process is awkward, slow, and expensive; but the administrative process is by no means fast, inexpensive, or infallible. Our system of government and participatory democracy is clumsy in dealing with ethical, moral, and scientific problems. Failure of the political system and society's own inadequacies to deal with fast-moving trends in science and technology have placed even more reliance on the courts. Improving the public understanding of science and technology can lead to a better appreciation of their value to society, but given the current level of scientific literacy in the United States, this might take generations.

How serious is the problem addressed by Koshland's editorial? What proportion of the regulatory decisions are finally reviewed by the federal courts? How much harm has society—apart from the economic impact on an individual or a business—suffered from litigation? Have appeals from agency decisions measurably diminished our international competitiveness or eroded our economic position? How frequently do "bad" decisions on technical and scientific issues occur as a result of judicial review of agency decisions? Has the judicial review process chilled the atmosphere for advancing science, technology, and innovation? Have the courts been effective in protecting the rights, health, and safety of the public from flawed regulatory decisions? Finally, if a problem exists, does the fault lie with the courts, the agencies, or the public; or are the inefficiency and economic costs suffered the price we pay for an open society? Until we have answers to these questions and others about the relation between litigation to the advancement of science and technology in the United States, we are in danger of responding to assumptions, myths, and prejudices, rather than reason.

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## REFERENCES

1. 60 Stat. 237 (1946).

Koshland's impatience with our judicial system, as expressed in his editorial of 11 March, recalls the comments some years ago by R. H. Tawney, the noted English economist, on the comparison made by Hitler of the efficient operation of his German machine and what he regarded as the lumbering way of doing things by the British government. Tawney, in viewing the claimed efficiency of Hitler's machine, pointed out that the English, to ensure a democratic society, were prepared to sacri-

fice efficiency to attain the achievement of democracy.

The important thing is to have our judicial system strive to achieve the norms of conduct to which we are prepared to give sanction; and if in its endeavor to achieve that end some efficiency has to be sacrificed, then the sacrifice is worthwhile. Let us be guided by the wisdom of the Spanish grandee to his valet: "Dress me slowly because I am in a hurry." We need just results, not the efficiency of a laboratory experiment.

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## Retirement Policy

In his editorial of 19 February (p. 845), Daniel E. Koshland, Jr., appears to accept uncritically the current "politically correct" abandonment of mandatory retirement. As far as academics are concerned, I think he is dead wrong. I write with the moral authority of a 68+-year-old who is retiring voluntarily this June, a year before retirement would become compulsory under present California rules (which existing federal legislation will terminate in 1990, when there will be no age limits). Unless we change the legislation, I fear for the consequences, which are already visible from the legislation in place in Wisconsin.

The prospective health of academic science (and of the entire college and university enterprise) depends in the near future on the prospective normal retirement of the faculty who composed the great expansion of American higher education after World War II. If substantial numbers of them choose to stay on until they have to be carted away, the results will be stultifying to the research and teaching enterprise and sad for aspiring new entrants to the university world.

We had a better system only a few years ago: an arbitrary, rather early retirement age (65) and considerable opportunity for the able and productive elderly to negotiate new arrangements of a temporary sort either with their home institutions or elsewhere. That made sense. Under such a system, compulsory and arbitrary retirement did not constitute certification of incompetence. It was not an assault to the self-esteem of the retiree. I saw my father, an academic at Oregon State University, go through this. The fact that the axe fell with complete impartiality and arbitrariness was a kindness. He left administration, as he should have, and continued some part-time teaching for a little while, which was good all around.

Colleges and universities are well