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## ADMINISTRATIVE LAW AND THE LEGACY OF HENRY J. FRIENDLY

A. RAYMOND RANDOLPH\*

Winston Churchill once told a friend, "I never say, 'It gives me great pleasure,' to speak to any audience because there are only a few activities from which I derive intense pleasure and speaking is not one of them."

I do not share Churchill's sentiments today. I gladly confess—it does indeed give me great pleasure to speak to you about Judge Henry J. Friendly and administrative law. Judge Friendly remains my judicial hero. When Ed Huddleson suggested this topic, I could hardly resist. The subject he proposed is fitting. For I know personally that Judge Friendly was very much an admirer of Judge Leventhal's work on the D.C. Circuit.

Since I have been on the court, thoughts of Henry Friendly have never been far from my mind. His photograph looks back at me when I am working in chambers. Scarcely a week goes by when I do not come across something he has written, some reference to his writings, on the bench and off. He has been gone now for more than a decade. Yet the Supreme Court and the lower federal courts still frequently cite his opinions, adding a parenthetical to signal his authorship. And his books, speeches, and scholarly articles continue to exert a powerful influence and to impress.

A few days ago I was catching up on *United States Law Week*. There, in a habeas corpus case decided this May, I noticed the

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\* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. B.S., 1966, Drexel University; J.D., 1969, University of Pennsylvania. This is the revised text of an address before the District of Columbia Bar at its Harold Leventhal Lecture Series, held in Washington, D.C., on June 23, 1998.

Supreme Court quoting once again from Judge Friendly's article in the *University of Chicago Law Review* entitled "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments."<sup>1</sup> Memories rose in my mind. The judge published the article in 1970, while I was serving as his law clerk. Not that I had a great deal to do with the preparation. My main contribution was to persuade him to change the title, which he originally had as "Is Guilt Relevant?" My alternative—"Is Innocence Irrelevant?"—was, I thought, catchier. After the article appeared, I happened to mention the title change to Herbert Wechsler of "Hart & Wechsler" fame. Professor Wechsler told me point blank, "Henry had it right the first time."

Indeed so. He always seemed to have it right the first time. His 1970 *Chicago* article, despite its title, literally transformed the law of habeas corpus, so much so that today one finds the Supreme Court debating what exactly is needed to satisfy the "actual innocence" standard Judge Friendly proposed nearly thirty years ago.<sup>2</sup>

But I am not here to talk about the Great Writ, nor the many other legal areas—such as federal jurisdiction, trademarks, criminal procedure, securities law, corporate law, and so on—in which Judge Friendly changed the course of legal development. Administrative law was, I think, his first love, doubtless because of the early influence of his law school professor, Felix Frankfurter.

To acquaint you with Henry Friendly, I could tell you that he was born in Elmira, New York, in 1903; that he graduated summa cum laude from Harvard College in 1923; that he then attended Harvard Law School; that he practiced law for thirty years in New York City; that President Eisenhower, at the urging of Learned Hand and Felix Frankfurter, appointed him to the Second Circuit in 1959; and that he served for twenty-seven years. But my meager outline would not even come close to giving you a measure of the man. Judge Pierre Leval, also a former Friendly clerk, painted this more vivid picture:

Throughout Henry Friendly's life he astonished those who observed him. At Harvard College he was considered a historian of rare brilliance and was eagerly recruited for the faculty. At Harvard Law School, he achieved what some believe to be the outstanding record in the school's history and again was courted (by Frankfurter) for a career of scholarship. He equally impressed his audience of one during his clerkship with Justice Brandeis. In private practice he achieved an extraordinary reputation, founded a

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<sup>1</sup> See *Bousley v. United States*, 118 S.Ct. 1604, 1611 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970))).

<sup>2</sup> See, e.g., *Schlup*, 513 U.S. at 321-32.

great firm [Cleary, Gottlieb, Friendly & Cox<sup>3</sup>] and did two fulltime jobs—doubling as general counsel of Pan American World Airways.<sup>4</sup>

Although while practicing law Henry Friendly doubtless “gave little attention to the judicial process, the relationship of state law to federal judicial power or the problems of institutional neglect of the sources of American law,” his ascension to the bench in 1959 at age fifty-six “touched off a volcanic eruption of profound scholarly writing.”<sup>5</sup> In the space of just five years, “from 1960-1965, he produced no fewer than fourteen deeply reflective, scholarly articles on those and many other subjects.”<sup>6</sup> Through these works and his many later writings, and through hundreds of judicial opinions, Judge Friendly “built one of the great masterpieces of American jurisprudence.”<sup>7</sup> I share Judge Leval’s confidence that “when the history of the entire century comes to be written, Henry Friendly will join” Holmes, Brandeis, Cardozo, and Learned Hand as the towering judges of the age.<sup>8</sup>

What made Judge Friendly such an extraordinary judge? There was first, of course, his genius. Over the years, I have encountered extremely bright people. But none could hold a candle to Henry Friendly. As my friend, Judge Michael Boudin of the First Circuit—another former Friendly clerk—is fond of saying, after a year of clerking for the judge, it was impossible to be intellectually intimidated by anyone. Judge Friendly combined his brilliance with unfailing modesty and grace, and with drive and speed—blazing speed. To use William James’s phrase, he always “energized” at his “maximum.”<sup>9</sup> During my year of clerking I never saw the judge spend more than a day writing an opinion (and write them all he did).

Yet even these extraordinary qualities do not necessarily make a great judge. Something more is needed—wisdom. “And what is wisdom[?],” Learned Hand once asked in his essay on Cardozo.<sup>10</sup> Hand answered his question: “I do not know; like you, I know it when I see it, but I cannot tell of what it is composed. One ingredient I think I do

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<sup>3</sup> See Lyman M. Tondel, Jr., *Henry J. Friendly: Practicing Lawyer 1928-1959*, 1978 *Ann. Surv. Am. L.* xxv, xxvi (describing Friendly’s role in founding firm).

<sup>4</sup> Pierre N. Leval, *Henry J. Friendly: In Memory of a Great Man*, 52 *Brook. L. Rev.* 571, 571 (1986).

<sup>5</sup> *Id.* at 572.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 571.

<sup>8</sup> *Id.* at 571-72.

<sup>9</sup> William James, *The Energies of Men* (1907), reprinted in *Memories and Studies*, 229, 233 (Greenwood Press 1968) (1911).

<sup>10</sup> Learned Hand, *Mr. Justice Cardozo*, 48 *Yale L.J.* 379, 380 (1939).

know: the wise man is the detached man.”<sup>11</sup> So it was with Judge Friendly.

Henry Friendly came to the bench with vast practical experience in the workings of administrative agencies. Consider the introduction to his Holmes Lecture, delivered at Harvard in 1962, three years after he became a judge.<sup>12</sup> The judge entitled his lecture “The Federal Administrative Agencies: The Need for Better Definition of Standards” and began this way:

For my topic I have turned to a field in which I took my first steps some thirty-five years ago under the guidance of those same two great men, Professor Frankfurter, as he then was, and Mr. Justice Brandeis—that part of administrative law relating to the regulation of business by [agencies of] the federal government. Fate willed that many of my years at the bar should be spent in that widening pasture—some would liken it rather to “that Serbonian bog . . . where armies whole have sunk”—and I have continued to be concerned with it on the bench, although the Second Circuit’s poor score in reversing administrative findings appears to have caused practitioners with a choice of forum to steer their petitions for review toward more hospitable harbors.<sup>13</sup>

When Judge Friendly spoke of “administrative law” he knew, of course, precisely what he meant by the terms. He once mentioned a seminar he had conducted in Salzburg. He started the seminar

by congratulating the young men and women on their wisdom in choosing so interesting a subject as administrative law. That brought forth the gleam usually aroused in lawyers by a compliment, especially one from a judge. The gleam was short-lived, for I then asked, “What is administrative law?” There followed two days of discussion in which the young Europeans got their first taste of the Socratic method of American law schools. One statement after another was knocked down. Ultimately we agreed that administrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law, and those left to private civil litigation where the government’s only participation is in furnishing an impartial tribunal with the power of enforcement.<sup>14</sup>

Professor Kenneth Culp Davis, in the introduction to the second edition of his multivolume treatise on administrative law, sets forth

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<sup>11</sup> *Id.*

<sup>12</sup> Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 *Harv. L. Rev.* 863 (1962).

<sup>13</sup> *Id.* at 864.

<sup>14</sup> Henry J. Friendly, *New Trends in Administrative Law*, *Md. B.J.*, Apr. 1974, at 9, 9.

the quotation I have just read to you.<sup>15</sup> Professor Davis then adds: "Probably no one can speak with more authority than Judge Friendly on this subject, and his conclusion is persuasive on its merits. The only doubt is whether 'matters dealt with by the criminal law' should be excluded."<sup>16</sup>

Professor Davis's point about the intersection of administrative law and criminal law brings to mind the first case the judge assigned to me in my clerkship, a case involving administrative law.

It was early fall, 1969. I had spent a leisurely summer in California. To arrive on time at Foley Square, I had to set a cross-country speed record in a beat-up Volkswagen Beetle. I made it, just barely, and was still recovering when the case of *United States v. McGee*<sup>17</sup> was argued. Vincent Francis McGee, a divinity student, had been tried and convicted of failing to report for induction.<sup>18</sup> He had defended on the ground that he was exempt from the draft because he was a conscientious objector.<sup>19</sup> Trouble was, McGee never asked the Selective Service System to review the local draft board's refusal to give him that classification.<sup>20</sup>

As was his custom, after oral argument Judge Friendly discussed the case with his law clerk. "What did you think?," he asked. I began by saying that application of the exhaustion doctrine in this criminal prosecution struck me as exceedingly harsh. "Harsh!," he exclaimed, "don't tell me about harsh. You're here to give me your legal analysis, not your feelings."

I should have paid closer attention to Judge Friendly's philosophy of judging, expressed in the preface to his book *Benchmarks*<sup>21</sup>:

[T]he decider should celebrate rather than emote about what he is deciding; . . . he should endeavor to provide a principle that can be applied not simply to the parties before him but to all having similar problems; . . . he should tell what he is doing in language that can be understood rather than indulge in flights of rhetoric; and . . . if he finds a principle is not working properly, he should qualify or overrule it candidly and openly rather than continue to profess adherence while reaching inexplicable results.<sup>22</sup>

Judge Friendly assigned the *McGee* opinion to Judge Wilfred Feinberg. Weeks passed and then months. I had almost forgotten

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<sup>15</sup> See 1 Kenneth Culp Davis, *Administrative Law Treatise* § 1:1, at 2 (2d ed. 1978).

<sup>16</sup> *Id.*

<sup>17</sup> 426 F.2d 691 (2d Cir. 1970).

<sup>18</sup> See *id.* at 692-93.

<sup>19</sup> See *id.* at 693.

<sup>20</sup> See *id.* at 693-94.

<sup>21</sup> Henry J. Friendly, *Benchmarks* (1967).

<sup>22</sup> *Id.* at viii.

about the case, when one day in early spring a memorandum from Judge Feinberg arrived. Judge Feinberg wrote that he had been struggling over the case, and now had changed his vote from affirmance to reversal because he had concluded that applying the exhaustion doctrine would be "too harsh." I felt redeemed. But not for long.

Judge Friendly took the majority opinion, stuck to his original position, and affirmed.<sup>23</sup> Judge Feinberg began his dissent: "This case shows how harsh [exhaustion of remedies] can be . . . ."<sup>24</sup>

My year of clerking ended in the summer of 1970. Off I went to the Solicitor General's Office under Dean Erwin Griswold, only to discover that the Supreme Court had granted certiorari in *McGee*.<sup>25</sup> Justice Marshall wound up writing the opinion, following closely Judge Friendly's analysis of the exhaustion doctrine and agreeing that McGee's failure to exhaust precluded his conscientious objector defense.<sup>26</sup> Conviction affirmed.<sup>27</sup>

A few months later, Judge Friendly called me in Washington. It seemed that Mr. McGee had moved for a reduction of sentence, that the district court had denied it, and that McGee had now appealed. At the time there was a doctrine of no appellate review of sentencing decisions. Judge Friendly told me McGee's case threatened to make inroads on the no-review doctrine because the two-year sentence McGee received was so "harsh." (He must have had a twinkle in his eye when he said this.) Would I please tell Dean Griswold as much. I did. The parole commission convened the next day, and McGee was released.

Permit me a brief digression about exhaustion of remedies. It might be thought that *Darby v. Cisneros*,<sup>28</sup> decided by the Supreme Court five years ago, ended all notions of a common law of exhaustion of administrative remedies, at least in cases governed by the Administrative Procedure Act<sup>29</sup> (APA). That, I believe, would be a misreading of the *Darby* opinion. The Supreme Court there interpreted Section 10(c) of the APA to mean that an intra-agency appeal—an appeal to a superior authority within the agency—is a prerequisite to judicial review only when a statute or an agency rule makes this so, and the agency action is made inoperative pending the review.<sup>30</sup> But

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<sup>23</sup> See *McGee*, 426 F.2d at 700.

<sup>24</sup> *Id.* (Feinberg, J., dissenting).

<sup>25</sup> See *McGee v. United States*, 400 U.S. 864 (1970) (granting certiorari).

<sup>26</sup> See *McGee v. United States*, 402 U.S. 479, 489-91 (1971).

<sup>27</sup> See *id.* at 491.

<sup>28</sup> 509 U.S. 137 (1993).

<sup>29</sup> 5 U.S.C. §§ 701-706 (1994).

<sup>30</sup> See *Darby*, 509 U.S. at 154.

intra-agency appeals are only one aspect of the exhaustion doctrine. Another aspect, not governed by the APA but sometimes by the agency's organic statute, is that a court will not consider claims the party failed to raise before the agency. If the agency's statute is silent about this matter, the common law of exhaustion fills the gap. That is the point of the *McGee* decision.<sup>31</sup>

I should not leave you with the impression that the Second Circuit back then was a hotbed for administrative law. It most certainly was not. Apart from *McGee* and a few other Selective Service cases, my year of clerking saw a couple NLRB cases and one Civil Aeronautics Board case, which Judge Friendly dispatched in a per curiam opinion written in about five minutes. My colleague Judge Merrick Garland, who clerked for Judge Friendly from 1977 to 1978, can recall working on only one significant administrative law case during his tenure. If your taste ran to that branch of federal jurisprudence, the D.C. Circuit was then and still is the place to be. For that reason, Judge Friendly always viewed our court with some envy. Throughout my year of clerking he frequently complained that the D.C. Circuit got all the good cases. And in one speech he described the D.C. Circuit as

a court of special importance for administrative law because, in addition to its exclusive jurisdiction over FCC licensing decisions and actions of the Environmental Protection Agency as to emission standards under the Clean Air Act, it is an optional venue under a flock of regulatory statutes and has attracted—doubtless to the delight of the other circuits—the largest share of environmental litigation and review of orders of the Federal Power Commission fixing natural gas rates.<sup>32</sup>

And, he added, the D.C. Circuit had “savored its role.”<sup>33</sup>

There is a touch of irony in these remarks. The judge was quite happy that the D.C. Circuit had—and to this day still has—exclusive jurisdiction over the review of FCC licensing decisions. Judge Friendly would not have relished the caseload. When he wrote his article, later a book, about the need for more definite administrative standards, he singled out comparative licensing as an area where rational standards might be impossible and where it might therefore be preferable to proceed by auction, with the radio or television license

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<sup>31</sup> See *McGee*, 402 U.S. at 483 n.6 (rejecting claim that exhaustion doctrine “is inappropriate when fashioned by judicial decision rather than specific congressional command”).

<sup>32</sup> Henry J. Friendly, “Some Kind of Hearing,” 123 U. Pa. L. Rev. 1267, 1310-11 (1975) (footnote omitted).

<sup>33</sup> *Id.* at 1311.

going to the highest bidder.<sup>34</sup> That was thirty-two years ago. Only recently have we seen developments along these lines.<sup>35</sup>

Despite the paucity of administrative law cases on the Second Circuit's docket, Judge Friendly was able to make the most of what came before him. His opinion in *National Nutritional Foods Ass'n v. FDA*,<sup>36</sup> for instance, still stands as the leading case explaining the extent to which, after *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>37</sup> litigants may probe the mental processes of administrative decisionmakers. His opinion in *Ellis v. Blum*<sup>38</sup> remains a brilliant and thorough exposition on mandamus jurisdiction in the agency context. He wrote more than a thousand opinions, and many others could be mentioned. But one in particular stands out because it has had such a profound and lasting impact, especially in the D.C. Circuit.

In 1967, three Supreme Court cases, decided in tandem, revolutionized judicial review of agency rulemaking. I refer to *Abbott Laboratories v. Gardner*,<sup>39</sup> *Toilet Goods Ass'n v. Gardner*,<sup>40</sup> and *Gardner v. Toilet Goods Ass'n*.<sup>41</sup> The cases dealt with the then novel question of when, if ever, there could be pre-enforcement judicial review of agency regulations. "Before *Abbott Laboratories* the courts typically reviewed the lawfulness of an agency's rule, not when it was promulgated, but when it was enforced. After *Abbott Laboratories* reviewing practice changed radically."<sup>42</sup>

The Supreme Court had granted certiorari in *Abbott Laboratories*, which came out of the Third Circuit, while *Toilet Goods* was still pending in the Second Circuit. Judge Friendly wrote the opinion for

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<sup>34</sup> See Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 54-58, 71 (1962); see also Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & Econ. 529 (1998); R.H. Coase, *Comment on Thomas W. Hazlett*, 41 J.L. & Econ. 577 (1998).

<sup>35</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, FCC Docket No. 98-194, 13 Communications Reg. (P&F) 279 (Aug. 18, 1998) (first report and order) (setting forth procedures governing auctions of broadcast service licenses).

<sup>36</sup> 491 F.2d 1141 (2d Cir. 1974).

<sup>37</sup> 401 U.S. 402, 420 (1971) (holding that, while "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," such inquiry may be required if it is "the only way there can be effective judicial review").

<sup>38</sup> 643 F.2d 68 (2d Cir. 1981).

<sup>39</sup> 387 U.S. 136 (1967).

<sup>40</sup> 387 U.S. 158 (1967).

<sup>41</sup> 387 U.S. 167 (1967).

<sup>42</sup> Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy* 1136 (2d ed. 1985).



his court. He devised a new test for reviewability in the following terms:

The question whether a plaintiff may obtain judicial relief in cases like this has been variously phrased as whether he has "standing" to challenge the administrative action as a person "suffering legal wrong" or "aggrieved" within the meaning of § 10 of the APA, whether the dispute is an "actual controversy" within the Declaratory Judgment Act, or whether it is sufficiently "ripe" for resolution by the courts. In fact, the critical issue is apt to be less a matter of standing or of actual controversy than of the advisability of reviewing an administrative rule prior to its application in a specific factual situation. The current healthy trend toward implementing agency policy by rulemaking cuts both ways with respect to declaratory relief—increasing the need for this sort of assistance on the part of those subjected to such rules, but also creating a danger that, unless the courts are circumspect, administration may be improperly halted, at least temporarily, before it has gotten the slightest start. The problem is not to be solved, as the parties suggest, by applying some readily procurable litmus paper which will determine whether a controversy is "justiciable"; what is required, as in the case of challenge to the constitutionality of a statute, is a reasoned evaluation of "both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."<sup>43</sup>

To those conversant with the Supreme Court's *Abbott Laboratories* opinion, this language from Judge Friendly's opinion will sound very familiar. The Supreme Court adopted it nearly word-for-word—mostly without attribution<sup>44</sup>—and it has become part of the fabric of administrative law ever since. It is noteworthy that Judge Friendly's analysis was not suggested by either of the parties. Another curious fact is that although Judge Friendly quoted from Justice Frankfurter's concurrence in the blacklisting case *Joint Anti-Fascist Refugee Committee* for the standard—appropriateness of the issues for decision by courts and the hardship of denying judicial relief—Justice Harlan's opinion in *Abbott Laboratories* used the same language for the standard without giving Frankfurter (or Friendly) credit.<sup>45</sup>

Before we leave *Abbott Laboratories* I would like to comment on the current state of affairs regarding pre-enforcement review of agency regulations. There is, I believe, a serious question whether, since 1967, the pendulum has swung too far in favor of permitting such review. Increasingly, our court is confronted with regulations of the

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<sup>43</sup> *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 684 (2d Cir. 1966) (footnote omitted) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951)).

<sup>44</sup> Compare *id.* with *Abbott Labs.*, 387 U.S. at 148-49.

<sup>45</sup> See *Abbott Labs.*, 387 U.S. at 149.

most abstract nature, often dealing with complex technological subjects. The challenges present us with the duty of deciding although we have only the vaguest notion of the settings in which the rules will apply or of their practical consequences. Petitioners can hardly be faulted for bringing such cases to us. If they do not seek review as soon as the Federal Register hits the stands, they may be precluded from challenging the rules later, after their true effects are felt. For their part, I suspect the agencies are not too unhappy about putting an entire rulemaking to the judicial test in one fell swoop. The abstract nature of the judicial review under such circumstances heightens the chances of having the rules sustained, and immediate review facilitates swift implementation of the regulatory scheme. Still, I am more than a little uncomfortable with the system as it has evolved since *Abbott Laboratories*, which imposes on courts the burden of deciding the validity of rules in the absence of a concrete factual setting. I think the time has come for us to be more discriminating and to recognize that on that fateful day in 1967, the Supreme Court handed down not just one decision dealing with this subject, but three. In the second of these rulings, *Toilet Goods v. Gardner*, the Court, following Judge Friendly's lead, held that a portion of the FDA's regulation was not ripe for judicial review,<sup>46</sup> although in the third ruling, *Gardner v. Toilet Goods*, the Court held that another aspect of the same rulemaking was ripe.<sup>47</sup> Now is not the time to go into the analysis. But it is worth saying that this sort of discriminating treatment among various provisions generated in the same rulemaking needs to be given more attention. Simply because one section of a complicated and comprehensive regulation happens to be ripe for pre-enforcement review does not mean that every other part of the regulation is justiciable. As Judge Friendly recognized, and the Supreme Court confirmed in its two *Toilet Goods* opinions, there is no such thing as pendent jurisdiction in this context.

Two recent D.C. Circuit decisions reflect such judicial caution. *Clean Air Implementation Project v. EPA*<sup>48</sup> presented a pre-enforcement challenge by industry groups to a new EPA rule permitting the use of "credible evidence" to prove or disprove a violation of the

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<sup>46</sup> See *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 160-61 (1967) (holding that validity of regulation under Color Additives Amendments of 1960 to Food, Drug, and Cosmetic Act that required manufacturers to give FDA investigators access to their facilities was not ripe for review).

<sup>47</sup> See *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170-71 (1967) (holding that validity of regulations specifying which ingredients fall under coverage of Color Additive Amendments was ripe for review).

<sup>48</sup> 150 F.3d 1200 (D.C. Cir. 1998).

Clean Air Act.<sup>49</sup> *Association of American Railroads v. Surface Transportation Board*<sup>50</sup> presented a pre-enforcement challenge by railroads to new guidelines assessing the reasonableness of railroad rates.<sup>51</sup> Both cases raised many imponderables, and, in both cases, our court opted to postpone review of the agency action.<sup>52</sup> Whether these recent D.C. Circuit decisions presage a more discriminating approach by the judiciary to pre-enforcement challenges remains to be seen.<sup>53</sup> What is clear is that the ripeness doctrine Judge Friendly set forth more than thirty years ago has stood the test of time.

Judge Friendly's *Toilet Goods* opinion merits mention for another reason. In his 1966 opinion, Judge Friendly identified a "current healthy trend toward implementing agency policy by rulemaking."<sup>54</sup> "Healthy," he must have thought, because four years earlier, in his Holmes Lecture at Harvard, he had urged agencies to start using their rulemaking power more frequently.<sup>55</sup> Shortly after he decided *Toilet Goods*, he wrote a followup article entitled "Watchman, What of the Night?,"<sup>56</sup> a title taken from Isaiah 21:11. There he also reported a trend among the agencies "toward greater reliance on policy statements and rules in contrast to adjudication,"<sup>57</sup> a practice very much evident today. Whether and to what extent the movement in this direction began as a result of the judge's urgings I do not know. But I would guess his efforts had a significant effect—except at the NLRB, which continued to rely exclusively on adjudication.

In the early 1970s, the opportunity to rectify the situation at the NLRB presented itself and Judge Friendly seized the chance. The NLRB had directed an election at Bell Aerospace in a unit consisting of buyers for the company. Bell protested that these were managerial employees and that the Board, by treating them otherwise, had completely reversed its long-standing policy laid down in many prior Board decisions. Judge Friendly, speaking for the Second Circuit, ruled that in a "proper proceeding" the Board could determine that

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<sup>49</sup> See *id.* at 1201-02.

<sup>50</sup> 146 F.3d 942 (D.C. Cir. 1998).

<sup>51</sup> See *id.* at 943.

<sup>52</sup> See *id.* at 948; *Clean Air*, 150 F.3d at 1208.

<sup>53</sup> One recent Supreme Court decision is also noteworthy in this regard. See *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665 (1998) (holding unripe, and barring judicial review of, pre-enforcement challenge to United States Forest Service plan to permit logging of federally-owned land).

<sup>54</sup> *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 684 (2d Cir. 1966).

<sup>55</sup> See Friendly, *supra* note 12, at 874 (arguing that when statutes provide only general initial standards it is "imperative" that administrative agencies take steps to "define and clarify" those standards).

<sup>56</sup> Henry J. Friendly, *Watchman, What of the Night?*, in Friendly, *supra* note 21, at 135.

<sup>57</sup> *Id.* at 143.

some types of buyers were not true managerial employees and thus could be unionized.<sup>58</sup> "There must be," he wrote, "tens of thousands of manufacturing, wholesale, and retail units which employ buyers, and hundreds of thousands of the latter. Yet the Board did not even attempt to inform industry and labor organizations . . . of its proposed new policy and to invite comment thereon . . . ."<sup>59</sup> And then came the zinger:

To be sure, the change of policy here in question did not expose an employer to new and unexpected liability, as it would have done in *NLRB v. Majestic Weaving Co., Inc.*, 355 F.2d 854, 859-861 (2 Cir. 1966). The point rather is that when the Board has so long been committed to a position, it should be particularly sure that it has all available information before adopting another, in a setting where nothing stands in the way of a rule-making proceeding except the Board's congenital disinclination to follow a procedure which, as said in *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3 Cir. 1969), "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated," despite the Court's pointed admonitions.<sup>60</sup>

This attempt to nudge the Labor Board into rulemaking failed, however, when the Supreme Court granted certiorari and ruled that whether the Board proceeded by way of adjudication or rulemaking in changing its policy was a matter of agency discretion.<sup>61</sup> Still, I agree with Professor Rakoff of Harvard that, in terms of craftsmanship, Judge Friendly's opinion far surpassed that of the Supreme Court.<sup>62</sup>

Chief Judge Richard Posner recently wrote that for many decades the "dominant voices in administrative law" in the judiciary were Justice Frankfurter and Judge Friendly.<sup>63</sup> Applied to Judge Friendly, the accolade is surely deserved, and it derives not simply from his judicial opinions, but more so from his scholarly writings off the bench. I have already mentioned the Holmes Lecture and his followup essay.<sup>64</sup> Other writings dealing with administrative law are contained in his compilation *Benchmarks*,<sup>65</sup> published in 1967, and in his book *Federal*

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<sup>58</sup> *Bell Aerospace Co. v. NLRB*, 475 F.2d 485, 494 (2d Cir. 1973).

<sup>59</sup> *Id.* at 496.

<sup>60</sup> *Id.* at 497.

<sup>61</sup> See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

<sup>62</sup> See Todd Rakoff, In Memoriam: Henry J. Friendly, 99 Harv. L. Rev. 1725, 1727 (1986).

<sup>63</sup> Richard A. Posner, The Rise and Fall of Administrative Law, 72 Chi.-Kent L. Rev. 953, 954-55 (1997).

<sup>64</sup> See *supra* notes 55-55 and accompanying text.

<sup>65</sup> Friendly, *supra* note 21.

*Jurisdiction*,<sup>66</sup> published in 1973. Two later works also deserve mention because of their wide influence.

The first, and most well known, is the judge's article "Some Kind of Hearing,"<sup>67</sup> printed in the *University of Pennsylvania Law Review* in 1975. The genesis of this piece is familiar to me.

In the spring of 1970, nearing the end of my clerkship, the Supreme Court—as Judge Friendly put it—"exploded a bombshell in *Goldberg v. Kelly*."<sup>68</sup> The Due Process Clause of the "Constitution, the Court held, prohibited termination of welfare payments except after a hearing which, although it need not 'take the form of a judicial or quasi-judicial trial,' must include the rights of personal appearance, of confrontation and cross-examination, and to retain an attorney."<sup>69</sup> Judge Friendly immediately recognized the enormous implications of the decision and said as much to me at the time. First, there was the effect on the welfare system: "In New York City alone about 240,000 AFDC cases [were] terminated each year; in about the same number AFDC benefits [were] reduced."<sup>70</sup> The judge was also deeply concerned about how far the hearing requirement would spread. Would it apply, for instance, to social security cases, to disability and unemployment claims, to discipline in prisons and public schools, and so on? These concerns led directly to "Some Kind of Hearing."

I traveled to Philadelphia to hear the judge deliver this paper in 1975. Since *Goldberg*, he began, "we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another . . . ."<sup>71</sup> He then cleverly avoided taking on *Goldberg* directly. "Perhaps," he wrote, "there is more profit in the inquiry, if a hearing, what kind of hearing . . . ."<sup>72</sup>

The design of his ensuing argument was ingenious. He constructed a matrix, with one list consisting of factors considered to be the elements of a fair hearing in order of importance, and another list consisting of the types of governmental action said to call for a hearing, in order of seriousness.<sup>73</sup> I do not have time even to summarize the lists, but you should know that the judge popped more than a few bubbles along the way. One example will suffice.

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<sup>66</sup> Henry J. Friendly, *Federal Jurisdiction* (1973).

<sup>67</sup> Friendly, *supra* note 32.

<sup>68</sup> Friendly, *supra* note 14, at 10 (discussing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

<sup>69</sup> *Id.* (quoting *Goldberg*, 397 U.S. at 266).

<sup>70</sup> *Id.*

<sup>71</sup> Friendly, *supra* note 32, at 1268.

<sup>72</sup> *Id.* at 1277.

<sup>73</sup> See *id.* at 1279-1304.

In the list dealing with what constitutes a fair hearing, one of the most frequently touted elements was the right to cross-examine witnesses. Judge Friendly pointed out that "[l]ofty sentiments" about this were often accompanied with a quotation from Wigmore stating that cross-examination is the "greatest legal engine ever invented" for discovering the truth, "ignoring"—in the judge's words—"that most of the world's legal systems, which are equally intent on discovering the truth, have not seen fit to import the engine."<sup>74</sup> He continued: "One wonders how" a claimant for "Social Security disability benefits" could "effectively subject[ ] specialists in neurosurgery, neurology, psychiatry, orthopedics, and physical medicine to the 'ordeal of cross-examination' . . . —a task shunned by most lawyers without special experience and often regarded as unproductive even by them."<sup>75</sup>

On the side of the ledger dealing with the seriousness of government action, he began this way: "Even a beginner in mathematics knows that the distance between two points on the vertical axis is the same whether one measures down or up."<sup>76</sup> But "whatever the mathematics, there is a human difference between losing what one has and not getting what one wants."<sup>77</sup> Hence revocation of a license is far more serious than the denial of one. The same with parole—revocation, he believed, is more serious than a refusal to grant.<sup>78</sup>

In all of this Judge Friendly reminded his readers, in a passage often quoted,

that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.<sup>79</sup>

In constructing his matrix, the judge's basic theme was that the more serious the governmental action, the more elements of a fair hearing should attach—and vice versa. You may find this an obvious truth today. Many great ideas, once developed, are met with an "of course." But Judge Friendly's article altered what was then the usual mode of analysis, reflected in *Goldberg v. Kelly*, which drew analogies between vastly different settings and reasoned that if all these elements of a hearing were required in that case, why not in this one?

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<sup>74</sup> Id. at 1283.

<sup>75</sup> Id. at 1285.

<sup>76</sup> Id. at 1295.

<sup>77</sup> Id. at 1296.

<sup>78</sup> See id. (citing *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972)).

<sup>79</sup> Id. at 1276.

"Some Kind of Hearing" had an immediate impact. Less than a year after its publication, the Supreme Court adopted Judge Friendly's approach in *Mathews v. Eldridge*,<sup>80</sup> holding that the procedures of the Social Security Administration for determining eligibility for disability benefits did not violate the Constitution even though no evidentiary hearing was provided.<sup>81</sup> Since then, the judge's proposals have served as the framework for analysis of hearing claims, in prisoner cases, in entitlements cases, in public employment, and elsewhere. His article is considered authoritative and has been cited and relied upon in more than a hundred judicial opinions.

As for *Goldberg v. Kelly* itself, Chief Judge Posner believes that Judge Friendly's prediction may have come true: "Judicial tinkering with the welfare system ([including] the imposition of due process safeguards in *Goldberg v. Kelly*)," he wrote recently, "may have accelerated the system's demise by making it more costly . . . ."<sup>82</sup>

You may have gathered from "Some Kind of Hearing" and from the other extra-judicial writings I have mentioned that few of Judge Friendly's articles were of the familiar pie-in-the-sky variety. Theory abounded, but his were, and are, practical pieces. His article in the *Duke Law Journal* entitled "*Chenery* Revisited"<sup>83</sup> is an illustration; the subtitle reveals as much—"Reflections on Reversal and Remand of Administrative Orders." Although it has not achieved the same prominence as "Some Kind of Hearing," the *Chenery* article remains notable for its penetrating analysis and its insights about the interplay of courts and agencies. The article, I should mention, was spurred by issues Judge Friendly had encountered during his long service on the Special Court under the Regional Rail Reorganization Act,<sup>84</sup> a three-judge district court whose decisions eventually led to the creation of Conrail.<sup>85</sup> To describe the work of that court and its many important opinions would take me far beyond my time limits today.

I leave to the last mention of the Supreme Court's *Chevron* decision.<sup>86</sup> Whether Judge Friendly influenced the Court's deference formula seems to me doubtful. But several points are worth a brief

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<sup>80</sup> 424 U.S. 319 (1976).

<sup>81</sup> See *id.* at 349.

<sup>82</sup> Richard A. Posner, In Memoriam: William J. Brennan, Jr., 111 Harv. L. Rev. 9, 13 (1997) (footnotes omitted).

<sup>83</sup> Henry J. Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199.

<sup>84</sup> 45 U.S.C. §§ 701-797 (1994).

<sup>85</sup> See Henry J. Friendly, From a Fellow Worker on the Railroads, 60 Tul. L. Rev. 244 (1985) (discussing his work with Judge John Minor Wisdom on Special Court).

<sup>86</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

comment. Although the *Chevron* Court purported to be applying—in its words—“well-settled principles” in its 1984 opinion,<sup>87</sup> Judge Friendly had a few years earlier identified a significant disarray among the Court’s “deference” decisions. He put the matter this way:

We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support[ ] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis. . . . However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.<sup>88</sup>

*Chevron* came down near the end of the judge’s career. We cannot be certain what he would have thought of it. My guess is that he would have been somewhat critical. From what I can gather, the judge would have preferred not to dole out deference in such a large dose. To him deference had to be earned. He said as much in the opinion from which I have just quoted. There he refused to defer to the statutory interpretation of the Benefits Review Board. Among other reasons, he wrote that the Board was

not a policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have some flexibility, free from judicial intrusion, in interpreting the Congressional grant. A second factor is the way in which the agency has gone about its job. . . . [W]e would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. . . . Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history—subjects on which a court has a greater competence than the BRB.<sup>89</sup>

It is, I think, not too much to suppose that someday the Supreme Court might come around to Judge Friendly’s way of treating the deference question.

I will conclude by borrowing from Justice Cardozo’s classic, *The Nature of the Judicial Process*.<sup>90</sup> Cardozo wrote:

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<sup>87</sup> Id. at 845.

<sup>88</sup> *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976).

<sup>89</sup> Id. at 49-50 (citations omitted).

<sup>90</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921).



The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.<sup>91</sup>

So it is today. Judge Friendly laid the foundation and mapped the course for many of the modern doctrines of administrative law. In retrospect, we can say with assurance that he has made the resulting landscape all the better.

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<sup>91</sup> *Id.* at 178.