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MICHIGAN LEGAL STUDIES



ADMINISTRATIVE AGENCIES AND
THE COURTS

PUBLISHED UNDER THE AUSPICES OF THE UNIVERSITY OF MICHIGAN LAW
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ADMINISTRATIVE AGENCIES AND THE COURTS

Frank E. Cooper

ADMINISTRATIVE AGENCIES AND THE COURTS

By

FRANK E. COOPER

Of the Detroit Bar

Visiting Professor of Law, University
of Michigan Law School

Foreword

by

E. BLYTHE STASON

Ann Arbor
UNIVERSITY OF MICHIGAN LAW SCHOOL
1951

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To the Memory
of
Hal H. Smith

Foreword

ON THE frontiers of the social order we can expect to find scholarship unusually prolific, and in recent years no legal frontier has invoked more intensive effort than has American administrative law. In law review articles, reports, monographs, and treatises, legal literature has teemed with discussion of every phase of the subject, both general and particular. Able legal writers—Benjamin, Dickinson, Freund, Gellhorn, Goodnow, Landis, and Sharfman, to name only a few from a very long list—have expounded the theory and embellished the practice in every nook and corner. They have given administrative law an important niche in American jurisprudence, so much so that at long last even the digest-makers now give it recognition in tables of contents and key number systems. Across the Atlantic, writings of such leaders of legal thought as Sir Cecil Carr, Lord Hewart, and Professors Robson and Wade have opened the way to understanding of English theory and practice. At the level of practical administrative operations, the President's Committee on Administrative Management and the United States Attorney General's Committee on Administrative Procedure have made available comprehensive studies of administrative organization and procedure as they are found among federal administrative agencies, studies that have been ably paralleled for state agencies by the Benjamin report, *Administrative Adjudication in the State of New York*. In the legislative branch the Federal Administrative Procedure Act of 1946 and equivalent state enactments in Wisconsin, California, Missouri, and elsewhere have instituted the practice of statutory codification of administrative procedure. These statutes are milestones in procedural law. They have evoked a wealth of periodical comment,

both pro and con. In fact, administrative agencies, though frequently the object of criticism and even distrust, are now fully accepted as an essential part of the modern social, economic, and political order. American administrative law, born in its modern aspect not more than two generations ago, has definitely come of age.

In the United States, in sharp contrast with practice in Great Britain, and, indeed, with that in most continental countries, we have committed ourselves to judicial control of administration and administrative agencies. It is an accepted part of our constitutional theory of distribution of powers. We look to the judiciary for protection of rights and liberties—for protection against the hazards of uncontrolled bureaucracy.

Judicial control is manifested in two principal ways. In the first place, we command administrative agencies to follow the usual judicial patterns of procedure in conducting their quasi-judicial processes, and to a certain extent we impose equivalent requirements in connection with quasi-legislation, the promulgation of administrative rules. Notice to interested parties, with opportunity to be heard orally and in writing, subpoenas and subpoenas *duces tecum*, rules of evidence in quasi-judicial proceedings differing not too widely from common-law standards, orders based upon written opinions setting forth conclusions of fact and law—all of these are required as part of the administrative process. In short we believe in the virtue of the “paraphernalia” of the judicial process as a means of channeling the administrative process and thereby assuring fair play. Then, in the second place, and even more importantly, we are committed to a thorough-going doctrine and practice of judicial review of administrative rules and orders. Constitutional questions, questions of interpretation, and all other legal questions the courts reserve to themselves for final judicial decision. Even with respect to fact questions, a certain measure of control is asserted and at

least a limited judicial review is made available. It is a fact that we are more trustful of courts than we are of administration, and we rely upon them and their processes to assure fair treatment for the individual. Judicial controls are definitely a part of our jurisprudence, in sharp contrast, it may be noted, to the practice in Britain, where judicial procedure is ordinarily not expected of administration and judicial review is virtually nonexistent. The British rely upon Parliamentary control of the ministerial departments. We rely upon the courts.

Notwithstanding the wealth of literature on administrative law, there is ample room for Mr. Cooper's volume, *Administrative Agencies and the Courts*, a volume which, with careful attention to practical detail, reflects our judicial attitude toward administrative agencies. The author, within reasonable confines, gives us a careful exposition of the judicial procedures that have been imposed upon administration as interpreted by judicial decision and the judicial limitations that have been evolved through the case law of judicial review, all to channel administrative agency powers and assure justice in administrative law. Both quasi-judicial and quasi-legislative processes are treated. Decisions of the agencies are used to capture the spirit of administrative law in action and to expound in concise form the details of the administrative processes themselves. The method and scope of judicial review of administrative decisions—our system of checking administrative error—are thoroughly covered. Court decisions, both federal and state, handed down in the various substantive fields in which administrative agencies play a part, are correlated. The principles generally applicable to the functioning of this new departure in American jurisprudence are presented. In this volume we have something a little different in the literature on administrative law—a systematic treatment, not too detailed for the student and the novitiate, yet sufficiently detailed to provide the

general background essential to a practical understanding of the relationship between the courts and administrative agencies in this country.

American administrative law, although a comparative newcomer in our jurisprudence, today rests on a firm juristic foundation, stemming from the prevailing statutes expounded and interpreted by some unusually high-grade, judge-made law, enlarging upon the statutes and correlating administrative practices to constitutional principles. The leading decisions are well known to all who work in the field. To name only a few, consider, for example, *Morgan v. United States*, *Prentis v. Atlantic Coast Line*, *Ohio Valley Water Company v. Ben Avon Borough*, *Crowell v. Benson*, *Rowan and Nichols Oil Company v. State Railroad Commission of Texas*, *Hearst v. National Labor Relations Board*, and only recently the important interpretation of the Federal Administrative Procedure Act expounded in *Universal Camera Corporation v. National Labor Relations Board*. All decided by the United States Supreme Court, these opinions are landmarks in the administrative law of the land. State Supreme Court decisions add to the wealth of material. For example, observe the series of great opinions of the Supreme Court of Wisconsin, *Borgnis v. Falk Company*, *State ex rel. Wisconsin Inspection Bureau v. Whitman*, *State ex rel. Madison Airport Co. v. Wrabetz*, *Tesch v. Industrial Commission*, and others. These are only illustrative of the very considerable body of valuable case law reflecting the judicial attitude toward administration—the foundation on which American administrative law rests.

Mr. Cooper's book serves to correlate these and many other judicial pronouncements in a volume which portrays well the relationship in American jurisprudence between the courts and administrative agencies. Statutes enacted by legislative bodies reveal occasional glimpses of statesmanship;

administrative pronouncements, made by men "appointed by law and informed by experience," sometimes reach a high level; but by and large in American administrative law we encounter most of our finest contributions to jurisprudence in the opinions of our courts. Mr. Cooper's volume is devoted primarily to those contributions.

E. BLYTHE STASON

Ann Arbor, Michigan
April 14, 1951

Preface

THE limits which courts place on the powers of administrative tribunals have particular significance to practicing attorneys and law students. It is largely to the extent that such limits are imposed, that our government remains a government of laws and not a government of men.

The following pages have been written to describe the standards which the courts impose upon administrative agencies, thereby controlling and limiting their powers. More particularly, the writer has sought: (1) to bring together the leading cases in which the courts have laid down the principles that govern frequently litigated questions in contests between the agencies and the parties with whom they deal; (2) to describe the criteria and techniques of administrative adjudication—what may be termed the jurisprudence of administrative tribunals—within these court-imposed standards.

No attempt has been made to discuss the problems of administrative organization and agency management, which are of particular interest to the political scientist and specialist in government. The purpose of this volume is more modest. It is an examination of the relationship between administrative agencies and the courts, with particular reference to judicial doctrines concerning: (1) constitutional limitations on the delegation of powers to administrative agencies; (2) procedural requirements in cases where agencies exercise judicial powers; (3) procedural and substantive requirements imposed in connection with rule-making activities; (4) methods and scope of judicial review.

It is a pleasurable duty to acknowledge my indebtedness to E. Blythe Stason, Dean of the University of Michigan Law School, whose kindly encouragement led to the writing

of this study, and whose scholarly case book has been relied on repeatedly throughout the following pages. The views expressed, however, are those of the writer.

FRANK E. COOPER

Detroit, Michigan

February, 1951

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PART ONE

THE PLACE OF ADMINISTRATIVE AGENCIES IN THE JUDICIAL SYSTEM

CHAPTER 1

Development of Administrative Agencies

FOR many years, both federal and state courts tacitly refused to admit the existence of administrative law as a distinctive part of our legal system. It was considered a Continental concept, alien to our common law, and something to be shunned.¹ While the development of administrative law is now recognized as an outstanding characteristic of twentieth-century jurisprudence, the effects of this long-continued and persistent disregard are still felt. It has affected judicial doctrine, and the attitudes of the administrative agencies themselves. It has increased the difficulties of the lawyer's task. The law digests and encyclopedias, for example, until very recently failed to recognize the subject as one worthy of its own index heading. It has increased the difficulties of any systematic study of this branch of the law. Indeed, there is not even to be found any generally accepted definition of the term "administrative law." Defining the term thus becomes the first element of any discussion of the subject.

¹ Cf. A. V. Dicey, *LAW OF THE CONSTITUTION* (1886) for an English statement of this view. It is interesting to note that thirty years later, viewing with alarm the decisions in *Board of Education v. Rice*, [1911] A. C. 179, and *Local Government Board v. Arlidge*, [1915] A. C. 120, Mr. Dicey recognized the existence of this new system of jurisprudence (which he still considered to be in derogation of the Rule of Law) by entitling a review of these decisions, "The Development of Administrative Law in England," 31 L. Q. R. 148 (1915). In this article, he acknowledges with misgivings that "a considerable step" had been taken toward the introduction of "something like the *droit administratif* in France"; and cf. Mr. Dicey's introduction to the 8th edition of *LAW OF THE CONSTITUTION* (1915) xxxviii.

1. Definitions of Administrative Law

In the broadest sense, administrative law may be defined as including all those branches of public law which relate to the organization of governmental administration.² In this sense, it covers many of the principles and doctrines comprising the fields usually described as constitutional law, legislation, public corporations, public officers, civil service, and taxation, and includes, in fact, all branches of the law affecting the executive activities of the government.

At the opposite extreme, the subject is sometimes viewed as involving little more than the doctrine of separation of powers and its application to the creation and operation of administrative agencies.

In most discussions of the subject, however, it is deemed to involve somewhat more than the doctrine of separation of powers, but somewhat less than would be included in the definition first suggested. The subject is generally thought to embrace the activities of those administrative agencies which, either by adjudicating judicial questions or by prescribing general rules and standards of conduct, act as little courts or little legislatures in regulating individual activities. It includes those aspects of constitutional law which pertain to limitations on the powers of such agencies, and embraces as well questions of practice and procedure before such agencies, and also questions relating to judicial review of the determinations and orders of such agencies.

It is these three questions—constitutional power, practice and procedure, and judicial review—which are at the nub of all discussions of the subject. It is these three questions, in variant applications, which beset the lawyer in the conduct of every case tried before an administrative agency. To an exam-

² Cf. M. E. Dimock, "The Development of American Administrative Law," 15 J. COMP. LEG. & INT. LAW (3d series) 35 *et seq.* (1933).

ination of these three topics, therefore, the following pages will be devoted.

2. Administrative Agencies and the Administration of Law

There is a constantly accelerating trend toward the adoption of administrative techniques for disposition of legal matters that have been traditionally handled by the courts. In every field of practice, this tendency may be observed. In the tax field, for example, it is a rare case that justifies an appeal to the courts; and the recent indication by the United States Supreme Court that it will not always concern itself even with asserted errors of law committed by the administrative agencies,³ only emphasizes the importance of the agencies' role in this field. In corporation law, those issues which are most vital in the conduct of corporate affairs are ordinarily committed to such administrative agencies as the state corporation commissions, the Federal Securities and Exchange Commission, and state and federal utility commissions. The field of labor law, which in recent years has assumed unique social importance, is almost completely a creature of administrative tribunals. Even in the private law realm of contracts, administrative agencies are important. They effectively prescribe, by imposition of conditions and provisos which must be included or excluded, the general form and content of the most significant clauses of many types of private contracts, including agreements of employment, some contracts of sale, and various types of obligation relating to trade and finance. Furthermore, such agencies frequently are concerned with reviewing the performance of such contracts, and imposing sanctions for breach of the re-

³ *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 64 S. Ct. 239 (1943). Despite apparent Congressional disapproval of the Dobson rule, so-called (I.R.C. 1141(a), 1948), the general trend of the courts is still to reverse only for gross error.

quired conditions. A substantial segment of the law of torts is now a matter of administrative adjudication: workmen's compensation, many forms of unfair competition cases, and the granting of reparations for various statutory offenses are all matters of administrative competence. Suggestions are frequently made that automobile accident cases should be taken from the courts and entrusted to the assertedly more expert handling of a commission or agency. Even in the field of criminal law, much is now being left to the psychiatrist and the parole board, and it is often suggested that there should be still more of this. In the field of domestic relations there has been a similar movement. Issues of alimony and custody in divorce cases are quite likely to be decided by a Friend of the Court or some similar agency. Likewise there should be mentioned the insurance commissions, the banking commissions, the trade commissions, and all the other like agencies that police their designated fields.

Perhaps more significant than the infiltration of administrative elements into the traditional fields of judicial activity is the gravitation of law practice into matters of purely administrative concern. A great part of the practice of law today does not take the lawyer or his client into the courts, but involves matters handled and concluded solely by administrative agencies.

Almost all of the social legislation of recent years has been implemented by the creation of new administrative agencies, some of them passing on many thousands of justiciable cases annually. It is in his dealings with these agencies that the citizen most frequently requires the aid of counsel. Many men can avoid "court trouble" but few indeed can avoid the administrative agencies. Like death and taxes (both of which, incidentally, are now the concern of administrative agencies) the agencies reach everyone.

All this is not to deprecate the position of the courts and legislatures. With them remains the power of superintending control. While tendencies toward self-abnegation by the judicial and legislative organs may sometimes be noted, it is with the courts and the legislatures that there rests the sole power to correct widely noted defects of administrative action.

It must be conceded, nonetheless, that with the developments in administrative law, the center of balance has been shifting. The implications of these developments are portentous both to those professionally concerned and to the general public.

3. Historical Development of Administrative Agencies

(a) *In general.* Administrative law is no modern phenomenon. It is, on the contrary, much older than the common law—older even than judicial systems or democratic legislation. In the earlier periods of history, when the law was little more than custom, it was administered only through despotically controlled administrative processes. The development of the philosophy that government should be by law, and not by men (which originated at least as early as the time of Aristotle),⁴ represented a trend away from administrative law.

At various periods of legal history, trends toward and away from administrative law have produced governmental upheavals. Many revolutions have been premised on dissatisfaction with administrative processes. The barons at Runnymede were protesting King John's administrative law.

⁴The classic phrase found in Part I, Section XXX of the Massachusetts Constitution, 1780, was borrowed from Harrington (*OCEANA* (1656) 2-29), who acknowledged his indebtedness to Aristotle. See Aristotle's *POLITICS*, III, xvi, 4, 5, "He who bids the law rule, bids God and reason rule, but he who bids man rule adds an element of the beast; for desire is a beast, and passion perverts rulers, even though they be the best of men."

The American Declaration of Independence charged many abuses against the administrative agencies comprising the British Government's colonial establishment. It declared, among other charges, that the King had created a multitude of new offices and had sent hither swarms of officers to harass the American people; that the King had invested his agencies with power to legislate for the colonies in all cases whatsoever, superseding the colonial legislatures; that the King had altered fundamentally American forms of government and deprived Americans, in many cases, of the benefits of trial by jury. The revolution that led to the downfall of the Russian monarchy was in large measure a protest against the czarist system of administrative law.

While no close parallel can be drawn between the *droit administratif* of France or the administrative law systems of other Continental countries and our American legal system, yet a most intriguing comparison does exist between the developments in the United States during the fourth and fifth decades of the twentieth century, and the experience of England some four hundred years earlier. In the middle of the sixteenth century, English lawyers were heard complaining that the common law was being set aside and that scarcely any business of importance came to the King's law courts. Legal matters were being handled instead by administrative tribunals—the Star Chamber, the Court of Requests, Chancery, and the Great Councils. Each of these agencies was staffed with a permanent clerical establishment, which (the bar complained) undertook the duties performed by attorneys in the law courts, so that the members of the bar had but little place in these new agencies. There remained only, as Professor Plucknett says, “numerous duties of a quasi-legal character which had to be done, and litigants soon found it convenient to have a sort of law agent who would set the complicated machinery in motion by engaging and conferring

with the various branches of the profession as occasion required, and doing other duties, sometimes of a legal and sometimes of a business character." It was thought for a time that the professional courts, with their judges and trained lawyers, would be discarded and that the Crown would place all judicial powers in laymen as exponents of a new technique of law and government. But in the end a compromise was worked out. The common-law courts survived and ultimately regained their former importance.⁵

While the underlying causes and conditions are of course different now than in sixteenth-century England, yet the striking similarity between that ancient development and the current situation compels attention. A host of new agencies are set up. They take over the conduct of many of the most significant aspects of the legal matters that had formerly been handled in the courts. These matters are handled on a nonlegal basis. The agencies in charge are staffed with large clerical establishments who perform many of the functions which in the judicial courts are assigned to attorneys. The function of lawyers, in some of the agencies at least, is pretty well limited to setting the wheels in motion and to conferring informally with the administrative staff, as the occasion requires.

The final outcome of the English crisis of four hundred years ago was characterized principally by the assimilation of the equity courts as a special branch of the judicial system. Does this bit of history carry any hint as to the future course in the United States? The possibility is worthy of conjecture. In emphasizing the importance of granting respect and deference to the determinations of administrative agencies, the Supreme Court not long ago remarked that the twentieth-century judicial system should not "repeat in

⁵ Pound, *ADMINISTRATIVE LAW* (1942) 36; Simmons, "Law and Administrative Government," 28 *J. AM. JUD. SOC.* 133 (1945); Plucknett, *CONCISE HISTORY OF THE COMMON LAW*, 2d ed. (1936).

this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice.”⁶

(b) *In the United States.* The development of administrative agencies in the United States reflects the social history of the country, and can be roughly divided into three general periods. As above noted, the birth of this country was prompted by the abuses of the administrative agencies of the Tudors and Stuarts, who (at least so far as the American colonies were concerned) had waged unremitting war against the supremacy of law. The long-standing and bitter conflict between the colonists and the Crown agencies set up to govern the colonies had served to establish a firm conviction in American minds that broad grants of discretionary power to governmental agencies must be avoided; governmental powers must be strictly limited and effectively separated between the different branches of government; the government must be one of law. This philosophy of course left little room for the development of administrative tribunals. In addition to this hatred for the things that English administrative government had stood for in the colonies, other factors also militated against the development of administrative government in early America. These were the economic condition and the social philosophy of the country. The relatively simple course of trade and commerce in a sparsely settled, agricultural country created no need for close governmental supervision, and the highly individualistic spirit of the times rebelled against bureaucratic control.

For these reasons, very few administrative agencies were created during the first century of this nation's existence, except those which were clearly necessary to carry on the

⁶ *United States v. Morgan*, 307 U. S. 183, 191, 59 S. Ct. 795 (1939).

public business, such as the collection of customs and taxes,⁷ the disposition of public lands,⁸ the distribution of veterans' pensions,⁹ and the conduct of Indian affairs.¹⁰

A reaction occurred, however, in the years following the Civil War. As Dean Pound expresses it,¹¹ the country had become "law ridden," and a counterswing was inevitable because the lines had been drawn so rigidly. The long-standing opposition to administrative control was replaced by a willingness to experiment with what was looked on as a new device. This new spirit inaugurated a second period—the beginning of modern administrative agencies. The demands of an expanding law of public utilities, and the birth of so-called social legislation, imposing stricter and more thoroughgoing public supervision over the conduct of certain types of business, united to produce a need for a greater measure of administrative control. The rapid increase in population, the expansion of industrial organization, and the growing complexity of national affairs, all contributed to this new desire for a more detailed and adaptable method of governmental regulation than could be afforded by legislatures and the courts alone.

The creation of the Interstate Commerce Commission in 1887 signaled the change. This was the first federal agency

⁷ Among the laws enacted at the first session of Congress were two granting administrative powers in connection with customs collections: Act of July 31, 1789, 1 Stat. 29; Act of Sept. 1, 1789, 1 Stat. 55. Similarly, local assessors operated under state statutes since an early date; but it is interesting that while federal tax laws had been more or less continuous from 1789, the office of Commissioner of Internal Revenue was not created until 1862.

⁸ The General Land Office was established in 1812.

⁹ But the Act of Sept. 29, 1789, 1 Stat. 95, granting certain administrative powers in connection with the payment of pensions to soldiers of the Revolutionary War, bore little resemblance to the statutes of more recent years vesting broad powers in the Veteran's Administration.

¹⁰ The Act of April 18, 1796, 1 Stat. 452, authorized the President to prescribe rules in connection with the establishment of trading houses dealing with the Indians.

¹¹ Pound, *ADMINISTRATIVE LAW* (1942) 27.

with broad regulatory powers over private affairs.¹² Some ten other agencies with significant regulatory powers were created between the turn of the century and the New Deal of 1932. These included the Food and Drug Administration (1906), Federal Reserve System (1913), Federal Trade Commission (1914), National Advisory Commission for Aeronautics (1915), United States Tariff Commission (1916), the Shipping Board (1916), Federal Power Commission (1920), Board of Tax Appeals (1924), Railroad Adjustment Board (1926), and Federal Radio Commission (1926).

The flood-tide, of course, came in the decade following 1932, with the adoption of the policy of revamping the social and economic structure of the country through administrative action. During this third period, not only did the number of federal agencies exercising important regulatory functions increase tremendously, but there was a growing tendency to vest in such agencies an even greater measure of uncontrolled discretionary power. This decade, further, saw a vast expansion of administrative agencies among the state governments. It was during this period that administrative law in America became of age. Characteristic of the development were such agencies as the Securities and Exchange Commission, the National Labor Relations Board, the Wage and Hour Division of the Department of Labor, the Social Security Board, the Bituminous Coal Division, as well as numerous state price-fixing agencies, labor boards, unemployment commissions, and the like.

While not precisely paralleling these three periods in the development of the administrative agency as a new governmental technique in this country, a roughly similar evolution

¹² A somewhat detailed history of the origin of the various agencies, compiled by the Attorney General's Committee on Administrative Procedure, discloses that some comparatively minor regulatory powers were granted to administrative agencies somewhat earlier. "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 8, 9.

has been exhibited in the attitude of the bench and bar of the country toward these agencies. The earliest attitude viewed with alarm the introduction of this alien concept. The principal questions examined and discussed were those concerning the validity of the statutes creating the agencies, and the extent of the powers that could be delegated to them.

Then (starting shortly after World War I and continuing for some twenty years—indeed, the problem is still far from solved) attention was turned to the availability and utility of judicial review as a method of checking or controlling the activities of the agencies.

But as experience has demonstrated the limited effectiveness of judicial review in cases where broad discretion is conferred on the agency and its findings of fact are ordinarily unassailable, legal thought has turned to matters of procedure within the agencies themselves. Recognizing administrative tribunals as co-ordinate agencies in the disposition of significant segments of judicial and legislative business, the more recent point of view is concerned chiefly with improving the level of performance attained by the agencies.

CHAPTER 2

Functions and Character of Administrative Agencies

ADMINISTRATIVE agencies serve certain governmental purposes more efficiently than do the traditional judicial and legislative organs. Where the government's purpose is that of policing the minutiae of conduct in some designated field, with a view to forestalling any deviations from the prescribed course of conduct rather than merely enforcing penalties for noncompliance, such an objective can be best achieved by an administrative agency. As legislative programs have tended more and more to adopt such a purpose, resort to the administrative agency as an enforcement device has become correspondingly more common.

1. Execution of Preventive Legislation

The traditional technique of legislation, depending largely on court action to compel enforcement of the law, has not been effective to prevent anticipated evils from arising. It has been limited, primarily, to correcting evils after they have occurred. Criminal proceedings, of course, are instituted only after the crime has been committed. Most civil actions similarly operate after the event, embracing a claim for damages for violation of one's rights. Injunctive remedies, it is true, are essentially preventive in nature, and thus operate to some extent to eliminate the occurrence of a threatened wrong, but even here there are certain obvious limitations. It is patent that if the enforcement of the Securities and Exchange Act, for example, were premised upon the bringing of judicial actions to enjoin the issuance of any securities suspected to be fraudulent, the investment banking business would be less

effectively policed than can be done under the various administrative processes which have been developed by the Securities and Exchange Commission.

Many administrative agencies serve primarily the function of accomplishing what ordinary legal remedies cannot normally achieve—avoiding the occurrence of an injury, which, of course, is usually far more satisfactory to the party concerned than to suffer the injury and subsequently obtain a judgment for money damages as at least partial compensation for the injury. Thus, the Interstate Commerce Commission, in determining in advance what freight rates are reasonable, saves the shipper the trouble and expense of shipping his goods and paying an unreasonably excessive tariff, and of suing later for reparations. Similarly, the Securities and Exchange Commission aims to prevent the occurrence of a situation wherein a defrauded purchaser of securities must bring a suit for damages. The state public utilities commissions, and the state and federal trade commissions, and of course the various agencies and boards which license those who engage in various types of activities (from the practice of chiropractic to the operation of radio stations) all serve a similar preventive purpose. In any field where the execution of a preventive program necessitates constant supervision and inspection, administrative devices are much better adapted to the successful operation of the program than are the traditional judicial remedies.

Since most preventive legislation has broad social purposes, reliance on the administrative agency as an enforcement device is prompted not only because administrative devices are more effective to assure compliance than are ordinary legal remedies, but also because more effective enforcement can be attained through this device than where dependence is placed on private initiative in instituting action. Administrative agencies will take action in many cases where the individuals

directly affected, for one reason or another, would be unwilling to appeal to the courts to seek protection of their rights.

Where the legislative purpose is to achieve what are commonly called social ends, it is desirable not only that effective preventive remedies be made available, but also that such remedies be availed of in every case. It is deemed desirable, for example, not only that a method be provided for preventing the commission of unfair trade practices, but also to make sure that appropriate action be taken in every case where any unfair trade practice may be committed. Accordingly, administrative agencies have been created to protect both private parties and the public interest by assuming direct control over business management and social relations, in a wide variety of fields.¹

2. Conducting Social Experiments

As the assertion of social control over private affairs extends into new fields of governmental activity, many situations are encountered where it is uncertain just what type or degree of control is desirable. It is clear that something should be done, but nobody knows exactly what. There ought to be a law, it is agreed; but just what the law should be is uncertain. In situations of this type, the administrative agency is conveniently available as a means of coping with problems of recognized public concern on an experimental basis. This is obviously not a function of the courts, and the legislatures cannot achieve this method of control except through the awkward and impractical expedient of repeated repeals, amendments, and re-enactments. Legislative procedures do not ordinarily permit this to be done, at least not on anything like the scale that is feasible in administrative agencies. When

¹ Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) ix.

Congress adopted the wage stabilization law,² for example, it appreciated that there would exist a practical necessity for permitting certain normal, minor wage adjustments to be made freely despite the general prohibition against voluntary wage increases during World War II. But it was impracticable for Congress to define the standards or tests to be employed in determining what types of wage increases were to be permissible as voluntary adjustments that could be put into effect without seeking prior governmental approval. The National War Labor Board, to which was delegated the task of administration, very shortly after its creation issued a "general order" which specified the types of cases in which wage increases could be made without prior approval. But as experience was obtained, the need for revisions in this "general order" became apparent; and during the ensuing two years numerous amendments were issued. Some of the amendments were quite plainly experimental in nature—an idea would be tried to see how well it would work out, and if early results were not encouraging, a change would promptly be made. Similarly, much of the work of the Federal Communications Commission has been experimental in character. Many similar examples could be named.

As an agency gains experience, the need for continued experimentation diminishes, but almost every important agency at the time of its creation faces a necessity of picking out a path on an uncharted sea, and it must, on some of its excursions at least, adopt a trial and error method.

Where the necessity of experimentation thus exists, the obvious need of flexibility and discretion dictates the desirability of reposing powers in an administrative agency. In this type of case the administrative agency can perform val-

² Act of October 2, 1942, as amended; 56 Stat. 765; 50 U.S.C. App. § 901 at 198.

uable functions for which the traditional judicial and legislative organizations are unsuited.

3. Other Reasons for Utilization of Administrative Agencies

It is sometimes said that the traditional legislative and judicial systems broke down in the face of modern necessities; that they were not effective to cope with important problems of recognized public concern; and that accordingly, resort to some more modern device was necessitated. But this unfairly belittles the importance of the legislatures and the courts. It is fairer to say that administrative tribunals have been availed of as a valuable assistance to hard-pressed and overburdened legislatures and judiciaries. Supervising control has been retained—the effectiveness and extent of which remains subject to the desires of the legislatures and courts themselves—and there have been delegated only subsidiary functions which are adaptable to administrative handling.

The ever-broadening delegation of legislative power has come about not only because the legislature may lack time and technique to prescribe detailed rules, but equally because the delegation of certain rule-making powers to administrative agencies is desirable to relieve the legislature of a burden of detail so that its essential policy-making work may go forward more effectively. It is not only the fact that courts may be inexpert in making factual determinations in certain highly technical and complex fields, which has led to the delegation of judicial powers to administrative agencies, but it is equally a purpose of such delegation to avoid burdening the judiciary with a myriad of small cases, the consideration of which would interfere with the most effective disposition of the courts' more important duties in laying down fundamental principles.

In certain types of cases, however, some definite advantages are inherent in the administrative process. It makes

available a continuity of attention which, particularly in fields where expert knowledge of changing conditions is an aid to effective social control, enables regulation to keep pace with new events. This would appear to be true in the case of the regulation of the television industry. Again, reliance on administrative agencies makes possible the application of uniform national policies in fields where reliance on ordinary judicial procedure would lead to a conflict of decision on many points. If, for example, it were left exclusively to the courts to determine what were unfair trade practices, or unfair labor practices, it seems clear that it would be much less certain what was permitted, and what forbidden. Further, utilization of the administrative process satisfies the need of an organization equipped to dispose of a great volume of business. For example, the courts would obviously be flooded if called upon to decide the hundreds of thousands of cases arising yearly under workmen's compensation and social security and unemployment insurance legislation. Similarly, creation of administrative agencies avoids dangers of unfairness which might be present in some fields if reliance were placed on purely executive action. For example, while the distribution of public improvement funds for the use of municipalities may safely be left to ordinary executive action, yet when it comes to the allowance of benefit claims of the sort handled by the Veterans' Administration, it is plain that some orderly procedure and provision for assuring equal treatment is highly desirable. Finally, administrative procedure achieves a speed which cannot be attained through the ordinary processes of legislation and adjudication.

Thus, there is a plain need for the administrative tribunal. It serves its own particular functions; and it is capable of serving them well. The administrative process is needed as a supplement to the legislative and judicial processes. It is needed as a directing process in an industrialized, urban

society which requires that social controls be administered with a greater degree of adjustment to unique situations and with a greater degree of preventive control than ordinary judicial processes, looking at controversies after the event, can afford.³

4. Administrative and Judicial Procedures Contrasted

But despite the plain need for administrative agencies, and their inherent ability to serve certain functions more effectively than can either courts or legislatures acting alone, yet there have developed in many administrative agencies, within both the state and the federal governments, certain characteristics of attitude and procedure which are detrimental to their most effective fulfillment of their particular functions. These characteristics often color every step of administrative procedure, and affect the task of the attorney who conducts cases before such agencies. They underly the mistrust harbored by large segments both of the bar and of the public as to the fairness and justice of many administrative agencies.

(a) *Interest in result.* Perhaps the outstanding trait of administrative tribunals is their interest in the result of the cases pending before them. As later pointed out, this interest may affect all the processes of pleading, hearing, and decision. It is, of course, inevitable that administrative agencies should have such an interest in the result of pending administrative proceedings. Most agencies are created for the purpose of administering certain broad policies of social or economic reform. They are naturally interested in attaining such reforms. So long as this interest in the general course of decision does not affect the fairness and impartiality with which each contested case is decided, there are but scant grounds for objection to its existence. It is inherent in the purpose for which such agencies are created, and the absence of such interest

³ Cf. Pound, *ADMINISTRATIVE LAW* (1942) 26.

would interfere with their most effective functioning. But overconcern with the desirability of achieving appointed ends leads sometimes to an excess of zeal. For example, it has produced in some agencies an antipathy toward participation by counsel in agency proceedings. The diligent efforts of counsel on behalf of the party respondent are sometimes resented, as tending undesirably to hamper the expeditious execution of the agency's work. There is a feeling on the part of the agency that its expertness as to both the law and the facts renders the assistance of counsel superfluous. Similarly, a pronounced antagonism toward judicial review has sometimes developed. Some agencies put every obstacle in the path of a party who seeks to obtain a court decision as to the validity of an administrative determination. These, of course, are extreme examples, but they indicate the fundamental differences between administrative and judicial procedures which are a necessary concomitant of the fact that administrative agencies are normally parties in interest to the proceedings they conduct.

(b) *Role of discretion.* A second outstanding characteristic of the administrative process is the broad scope and effectiveness of administrative discretion. Authorized in increasingly frequent instances to make decision on the basis of what is "fair" or "reasonable" (and being ordinarily the sole judges of the reasonableness or fairness of the measure involved) administrative agencies tend to substitute a rule of discretion for the rule of law. This is what is sometimes called administrative absolutism. Indeed, it may well be that delegation of power to administrative agencies is often resorted to because the matter in hand cannot be regulated by general rules but only by the exercise of discretion in the decision of particular cases.⁴

⁴ Cf. Hayek, *THE ROAD TO SERFDOM* (1944) 65, 66, 78.

There can be no argument but that the vesting of discretionary powers in administrative agencies is necessary to the most effective performance of their appointed tasks. At the same time, there can be little question but that these discretionary powers have had an important effect on all the processes of administrative adjudication. The possession of discretionary power has engendered in many agencies an impatience to proceed along the tiresome, detailed, plodding path of deciding each case on the basis of careful and painstaking consideration of all the evidence produced in the slow-moving process of a contested hearing. Discretion can be more freely exercised when cases are decided without a hearing, or without hearing both parties.⁵ This tendency of many agencies to minimize the importance of hearings, as may be noted in the common practice of basing the decision not on the record of the hearing itself but rather on abstracts or reports prepared by staff assistants, has had far-reaching effects on the course of administrative decision.

The same tendency to rely on discretion is largely responsible for the willingness evidenced by many agencies to set up policies going beyond or even at variance with the standards of the statutes which the agencies administer. The tendency is to decide cases, not on the basis of interpreting the governing statutes—as courts would—to discover the apparent legislative intent, but rather to decide on the basis of broader policies which it is thought may be, within the broad discretionary powers of the agency, superimposed on the stated legislative purpose.

Again, reliance on the role of discretion has disinclined many agencies to make available for the use of interested parties any clear statements either of the exact practice and procedure of the agency or the criteria relied on by the

⁵ Cf. Reports of American Bar Association's Special Committee on Administrative Law, 63 A.B.A. REP. 331, 346 (1938); 64 A.B.A. REP. 575 (1939); Pound, ADMINISTRATIVE LAW (1942) 68-73.

agency in deciding cases.⁶ Discretion can be more freely exercised if procedural matters can be settled in accordance with the agency's convenience in each case. Similarly, discretion has a broader range if the agency has not committed itself to any stated bases or principles of decision comparable to common-law rules of decision, but has reserved the privilege of deciding each case on its "merits," permitting such departures from prior criteria of decision as may seem expedient in any particular case. Hence, the party appearing before the agency may be in the position of not having the assurance, commonly available in court proceedings, that established procedures and rules of decision will govern the disposition of his particular case.

5. The Lawyer and Administrative Agencies

The task of the lawyer in conducting cases before administrative agencies is a difficult one.⁷

Even the preliminary step of discovering the court-made case law on the particular issues with which he may be concerned is no easy one. The historic reluctance of the courts to recognize administrative law as a distinct topic is reflected by the absence of any such heading, until very recently, in most law digests and encyclopedias. The search for the law applicable to questions of administrative procedure, or governing the validity of administrative action in certain types of cases, leads the researcher through almost every topic in the digests. Decisions involving a single point of law, uniformly applicable to any agency, may be scattered through such diverse headings as Aliens, Agriculture, Carriers, Commerce, Constitutional Law, Gas, Electricity, Mandamus,

⁶ Sec. 3 of the Federal Administrative Procedure Act of 1946, Ch. 324, 60 Stat. 237; 5 U.S.C. § 1001, imposes certain requirements for the publication of such information. See Davis, "Separation of Functions in Administrative Agencies," 61 HARV. L. REV. 389 (1948).

⁷ See Dulles, "Administrative Law: A Practical Attitude for Lawyers," 25 A.B.A. J. 275 (1939).

Internal Revenue, Licenses, Master and Servant, Mines and Minerals, Post Office, Public Lands, Public Service Commissions, Radio, Railroads, Rate Regulation, War, and Workmen's Compensation. In the following pages, an attempt is made to correlate the decisions, handed down in various substantive fields and involving various federal and state agencies, which lay down principles generally applicable to the functioning of all administrative agencies.

But the problems of administrative law cannot be properly understood without going beyond the decisions of the courts to the decisions of the agencies themselves and to the processes of administration.⁸ Accordingly, the following discussion will attempt to capture the spirit of administrative law in action. An appreciation of the philosophy of administrative adjudication is essential to the most effective participation of the bar in the administrative processes. The lawyer appearing at an administrative agency must accommodate himself to the difference between administrative and judicial proceedings. In many respects, greater skill in advocacy is required in the administrative than in the judicial hearing. In court proceedings, the attorney need not be concerned with convincing his opponent of the merits of his case; but in an administrative proceeding, it is the opponent's reaction which is paramount, for the agency which decides the case often appears as the opponent of the respondent. Effective presentation of the respondent's case requires not only knowledge of the applicable rules of law, but an adaptation to principles of procedure and decision which are based on somewhat different considerations than those which control judicial proceedings.

⁸ Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) xi.

PART TWO

**UNDERLYING CONSTITUTIONAL
QUESTIONS**

CHAPTER 3

Delegation and Combination of Powers

A. EFFECT OF SEPARATION OF POWERS DOCTRINE ON DELEGATION TO ADMINISTRATIVE AGENCIES OF LEGISLATIVE AND JUDICIAL POWERS

THE vitality of the nineteenth-century belief in the principle of separation of powers accounts for much of the bitterness with which the development of administrative tribunals has been assailed. An offshoot of the theory that governmental powers must be separated is the rule against delegation of powers. Since the creation of each new administrative tribunal vested with regulatory powers involves a delegation of some measure of legislative power or judicial power (or both) and with it a further encroachment on the principle that the powers of government must be separated and channeled in the three constitutionally created departments of government, it was inevitable that the law of administrative tribunals should involve at the outset a collision with these time-honored shibboleths.¹

Much of the difficulty is today of little more than historical interest. But since the doctrine still retains some vitality, in modified form, and for the further reason that the ghosts of many old decisions (long overruled *sub silen-*

¹ There is no fixed or unvarying constitutional requirement prescribing the separation of the powers of government or proscribing delegations of power. The Federal Constitution does not require the several states to observe in their internal organization the limitations imposed by the separation of powers doctrine. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 552, 28 S. Ct. 178 (1908). Neither the provision of Article IV, Section 4, of the Constitution, providing that the United States shall guarantee to every state a republican form of government, nor the provisions of the Fourteenth Amendment, have been held to necessitate a rigid separation of powers. *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U. S. 74, 79-80, 50 S. Ct. 228 (1930); *Reetz v. Michigan*, 188 U. S. 505, 507, 23 S. Ct. 390 (1903). As to agencies created by state law, the question is primarily whether a delega-

tio) still haunt the books, a brief examination of the problem is essential.

1. Validity of Delegations

If judicial power be conceived of as the sort of power which a court exercises (for example, applying the general rule of a statute to particular factual situations), and similarly if legislative power be conceived as the sort of power which a legislature exercises (for example, determining what types of conduct shall be prohibited), then it must be conceded that both judicial and legislative powers may be delegated to administrative tribunals. There is no generical distinction between the function of a workmen's compensation commission in adjudicating a claim of an injured employee and that of a court in adjudicating a claim under some other statute imposing liability without fault. There was no change of function when the Board of Tax Appeals became the Tax Court.² Similarly, the policy-framing functions of the legislature in determining, for example, that switchboard operators employed in a public telephone exchange which has less than five hundred stations³ should be exempted from the overtime provisions of the Fair Labor Standards Act⁴ are not of a different genre than the policy-framing responsibility of the administrator who determined

tion of power is improper under the terms of the state constitution; and this is a question of state law. *Neblett v. Carpenter*, 305 U. S. 297, 59 S. Ct. 170 (1938); *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 186, 56 S. Ct. 159 (1935). The federal courts will, however, sometimes inquire as to whether a delegation of power under a state statute is so vague and general as to permit the agency to exercise an untrammelled discretion in a manner that might be discriminatory or oppressive. See *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064 (1886). And see Jaffe, "An Essay on Delegation of Legislative Power: 1," 47 *COL. L. REV.* 359 (1947); Jefferson, *The Supreme Court and State Separation and Delegation of Powers*, 44 *COL. L. REV.* 1 (1944).

² 56 Stat. 957, 26 U.S.C. § 1100.

³ Act of June 25, 1938, 29 U.S.C. §§ 201-219.

⁴ This specific exemption in Section 13 of the Fair Labor Standards Act was added by the amendment of August 9, 1939, 29 U.S.C. § 213 (53 Stat. 1266).

that professional workers who earned over \$325 monthly⁵ should be exempted from the same statute.

Yet many courts have avoided candid recognition of the nature of such delegated powers. This has been accomplished by the convenient formula of describing such delegated powers as being only "quasi-judicial," or "quasi-legislative"—the "quasi" meaning, apparently, "not quite." These distinctions between "judicial" and "quasi-judicial," between "legislative" and "quasi-legislative" should be considered convenient fictions.

Refusal to recognize the fiction and insistence on the making of some logical distinction based on the nature of the delegable powers leads to inextricable difficulties. For example, the Wisconsin Court in an early case⁶ held that the function of a workmen's compensation commission was only quasi-judicial, since the commission merely "found the facts" on which the law operated; but when a few years later the state legislature bestowed upon another administrative agency the responsibility for finding as a fact whether or not illegal stock sales were made in bad faith, the court found that here the proposed function was purely judicial, and that the statute was hence void.⁷ Again, the New York Court in 1908⁸ said that the power to fix utility rates was only quasi-legislative, and for the reason that such powers had historically been delegated by the legislatures in various instances. But the next year it was argued before the same court that since a commission fixing rates was exercising only quasi-legislative powers, the courts could not on writ of

⁵ Sec. 13 of the act created an exemption for such individuals as might be defined as "professional" employees by the Administrator, and thus empowered the Administrator to decide what the exemption should be. Earlier, the regulations had fixed \$200 as the monthly salary requirement.

⁶ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911).

⁷ *Klein v. Barry*, 182 Wis. 255, 196 N. W. 457 (1923).

⁸ *Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908).

certiorari review the commission's determination. And then the court, refusing to follow the logical implications of its earlier decision, decided that the power of the commission was not quasi-legislative but rather quasi-judicial, and hence reviewable.⁹ In some types of cases, the courts disagreed as to whether certain types of function were "purely" judicial or only "quasi" judicial. For example, the grant of a power to remove a public officer was held by some courts to be purely judicial¹⁰ and by others to be only quasi-judicial.¹¹ In other instances, powers which were originally held to be purely judicial and hence nondelegable were later held to be only quasi-judicial, and a proper subject for delegation to administrative tribunals.¹² Logic has retreated in the face of practical necessities. Not infrequently, the members of a court have been in disagreement as to whether a given power was "purely" or only "quasi" legislative or judicial.¹³ Demonstration that the distinction cannot be predicated on logical grounds can be found in the many cases discussing delegation of the power to punish for contempt.¹⁴

But the fact that the appellative "quasi" affords no logical distinction between those governmental powers which may be delegated to administrative tribunals and those which

⁹ *People ex rel. Central Park, North & East River R. Co. v. Willcox*, 194 N. Y. 383, 87 N. E. 517 (1909).

¹⁰ *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112 (1884).

¹¹ *State ex rel. Attorney-General v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228 (1886).

¹² Pound, *ADMINISTRATIVE LAW* (1942) 32, discussing the statutes which empowered administrative boards to apportion the use of the water rights in a stream between conflicting claimants. In 1870, a pioneer statute of this character was declared unconstitutional as a delegation of purely judicial powers customarily exercised by courts of equity in suits to "adjudicate a stream." Two or three decades later, when such statutes became more common, the courts agreed that such power was only quasi-judicial.

¹³ For example, compare the majority and dissenting opinions in *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495 (1892). See also *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394, 48 S. Ct. 348 (1928).

¹⁴ See 35 COL. L. REV. 578 (1935).

must be reserved to the legislatures and the courts, does not of course mean that any or all of such legislative and judicial powers may be delegated. Rather, it points out merely the simple truth that "The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."¹⁵ The principles against delegability of essential powers still retain vitality at least to the extent of invalidating delegations which would render one department of government subject to the control of another department or which would confer uncontrolled discretion on administrative agencies in matters affecting substantial property rights or rights of personal liberty.

2. Preserving Essential Independence of the Departments of Government

Essentially, the doctrine of separation of powers concerns little more than the "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others."¹⁶ The exercise of powers by one agency or department of government which logically should be exercised by another is accordingly countenanced as a matter of practical necessity;¹⁷ and administrative agencies are permitted to exercise powers which logically belong to the courts, or to the legislature, so long as the independence of the courts or of the legislature is not impaired. But

¹⁵ *United States v. Grimaud*, 220 U. S. 506, 517, 31 S. Ct. 480 (1911).

¹⁶ *Humphrey's Executor v. United States*, 295 U. S. 602, 629, 55 S. Ct. 869 (1935).

¹⁷ Cf. Dean Henry M. Bates, "Trends in American Government," *Proceedings Annual Meeting*, 5 CALIFORNIA STATE BAR, 58, 67-68 (1932).

when an attempt is made to vest in an administrative agency, or when an administrative agency or executive officer claims, powers which could be exercised in such a way as to deprive the legislature or the courts of their constitutional prerogatives, then there has been a violation of the essential constitutional precept. The rule is well illustrated by the decisions in *Myers v. United States*^{17a} and in *Humphrey's Executor v. United States*.^{17b} In the former case, an attempt by Congress to deprive the President of his power of summary removal of a local postmaster was held unconstitutional. In the latter case, it was held that Congress could properly restrict the powers of the President in removing members of the Federal Trade Commission. Is not the reason for this distinction based upon the test suggested above? The local postmaster is a ministerial employee of the executive department of government. He performs few, if any, functions of a legislative or judicial character. Hence the purpose of Congress in seeking to limit the exclusive power of the chief executive officer to remove an executive assistant amounted to an attempt by the legislature to control the independence of the executive branch of the government; and this could not be sustained. The converse was true in the *Humphrey's* case. There, the Federal Trade Commission was charged with important responsibilities in formulating legislative policy in the field of unfair trade practices, and was charged with important responsibilities in adjudicating asserted violations of the law. As the court pointed out, in order to perform its duties properly, the commission was required to be free of executive control. In that case, therefore, an assertion by the chief executive of a power of arbitrary removal of a member of the commission, if sustained, would have vested in the executive department control over a crea-

^{17a} *Myers v. United States*, 272 U. S. 52, 47 S. Ct. 21 (1926).

^{17b} *Humphrey's Executor v. United States*, 295 U. S. 602, 55 S. Ct. 869 (1935).

ture of the legislative department, which was at the same time, and for certain purposes, a judicial agency.

The same type of situation exists in other cases where the separation-of-powers philosophy has been relied upon in invalidating legislation. In *Springer v. Government of the Philippine Islands*,^{17c} for example, the statute which was held invalid was designed so as to give the legislature control over a government corporation which had been chartered to perform purely executive functions.

To the extent suggested by such decisions, the doctrine of separation of powers retains vitality in the field of administrative law. An administrative agency, it seems safe to say, may not validly be granted powers which would permit it to displace the courts, or the legislature, or the executive, in matters constitutionally committed to these departments. Nor may an agency controlled by one department be given powers which would permit that department to control the others.¹⁸

3. Precluding the Vesting of Administrative Duties in the Courts

The doctrine of separation of powers still retains vitality, in at least a negative aspect, in connection with the rule that courts (at least, the federal constitutional courts) will not undertake the discharge of any nonjudicial duties. This rule has been applied not only in cases where courts have refused to revise determinations of administrative tribunals on the grounds that such revisory duties, though sanctioned or im-

^{17c} *Springer v. Government of the Philippine Islands*, 277 U. S. 189, 48 S. Ct. 480 (1928).

¹⁸ An interesting application of this principle is found in *Kreutz v. Durning* (C.C.A. 2d 1934), 69 F. (2d) 802. There, the court reviewed a statute which vested in a legislative court the power to make a final and nonreviewable decision on certain questions of law concerning the imposition of import duties. In sustaining the statute, the court relied upon the fact that the legislative court was independent of the executive.

posed by statute, would impose nonjudicial powers on the courts,¹⁹ but also in cases where the court's refusal to review an agency's determination is based on the principle that the agency is exercising essentially administrative functions.²⁰ In cases involving technical competence, where the courts may feel that an administrative agency possesses superior qualifications to pass upon questions of interpretation and implementation of policies expressed generally in statutory law, the courts display some readiness to characterize as administrative, and hence beyond judicial review, functions which might on purely logical tests be deemed judicial. The doctrine of separation of powers can thus be relied upon occasionally as strengthening rather than weakening the powers of an administrative agency to dispose with finality of the problem at hand.

4. Preventing Uncontrolled Administrative Discretion

If it be conceded that legislative powers and judicial powers may be delegated to administrative tribunals—subject in some jurisdictions at least to the condition of attaching the pious appellative “quasi”—the problem of formulating a guide for determining the limits to be placed on the extent of permissible delegation is at once apparent. There can be no doubt that the Commissioner of Internal Revenue, for example, could not be vested with power to rewrite the federal tax laws, imposing such types of levies and at such rates as appeared to him best. But what distinction is to be drawn between this and the valid delegation of the power to determine whether or not an applicant shall be given

¹⁹ *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445 (1923). This problem is discussed more fully *infra*, Ch. 16, ns. 12 and 13, in connection with the discussion of review of administrative determinations, where it is noted that the state courts have been more willing to extend their powers in this direction than have the federal courts.

²⁰ *United States v. Los Angeles & Salt Lake R. R.*, 273 U. S. 299, 47 S. Ct. 413 (1927).

relief from the harshness, as applied to his situation, of the provisions of a statute imposing taxes on excess profits? ²¹ Similarly, it is inconceivable that the Tax Court could be given power to determine with finality the validity of a tax statute, but the Supreme Court has made it clear that it will not concern itself with the correctness of the decision of the Tax Court on certain "minor" issues of law said to have been improperly determined by that tribunal.²² Here again the question is presented of finding a basis for predicting the outer periphery of the delegable powers. It is of course quite possible to say, as many courts have observed during the last half century, that the one involves "pure" legislative or judicial power, which may not be entrusted to an administrative agency, while the other involves only "quasi" legislative or judicial power, which may be freely delegated.

But resort to this convenient fiction does not simplify the problem. The twin considerations of sound logic and mental honesty recommend saying, rather, that the *kind* of power which the Interstate Commerce Commission (to cite another example) exercised when it decided whether or not it should regulate the hours and working conditions of drivers employed by private carriers ²³ was the same kind of legislative power that Congress exercised when it decided whether or not there should be regulation of the hours and working conditions of drivers employed by common or contract carriers.²⁴ Similarly, the function of a workmen's compensation

²¹ Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 48 S. Ct. 587 (1928).

²² Dobson v. Commissioner of Internal Revenue, 321 U. S. 231, 64 S. Ct. 495 (1944). See Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944).

²³ Sec. 204 (a) (3) of the Motor Carrier Act of 1935, 49 Stat. 543; 49 U.S.C. § 304 placed upon the Commission the duty "To establish for private carriers of property by motor vehicle, *if need therefor is found* [italics inserted], reasonable requirements to promote safety of operation." In a proceeding entitled "Ex Parte No. MC-4," 1 I.C.C. Motor Carrier Cases 1 (1936), the Commission determined that such need existed.

²⁴ Motor Carrier Act of 1935, 49 Stat. 543, 49 U.S.C. § 304.

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commission in determining whether an applicant for benefits was injured as a result of his wanton and willful negligence, is indistinguishable on logical grounds from the function exercised by a court in determining whether a guest passenger in an automobile was injured as a result of the wanton and willful negligence of the driver.

The true situation would appear to be that legislative and judicial powers may be delegated in certain instances, but not in others. Determination of the category into which a particular situation falls depends, apparently, in part on the subject matter involved and in part on the degree of control delegated. In some fields, administrative agencies may be vested with absolute and unreviewable legislative and judicial powers. In such cases, the agency is free to exercise uncontrolled discretion. In other fields, where rights of personal liberty or private property are more significantly involved, delegation is permitted only if reasonable limits and controls are imposed on the agency's discretion. Such control is ordinarily exercised by the creation of statutory standards to which the activities of the agency must conform. Thus, the question of determining the extent to which legislative and judicial powers may be delegated to administrative bodies resolves itself into a question as to what sort of standard the legislature must set up to limit administrative discretion. If not appropriately limited, the statute is invalid.²⁵

(a) *Various "tests" suggested by courts for determining sufficiency of standards devised to limit administrative discretion.* Implicitly recognizing that the principle against delegation of judicial or legislative powers to administrative agencies is nothing more than a proscription of the grant of

²⁵ Except of course in cases where constitutional limitations are nonexistent, and where legislative and judicial powers may be delegated to the uncontrolled discretion of the agency. These are separately discussed, *infra*.

unlimited discretionary powers to administrative agencies whose determinations affect substantial rights of person or property, the courts at various times have suggested a number of "tests" by which to determine whether the delegated discretionary powers have been sufficiently limited.

Thus, it is sometimes said that an administrative tribunal may not be given power to make the law, but may be given discretion as to the execution of the law. This criterion has in certain case situations the advantage of glib plausibility. Apparently originating in Justice Ranney's opinion in *Cincinnati, W. & Z. R. R. Co. v. Clinton Co. Commissioners*,^{25a} this phrase has been repeated in a very large number of cases.²⁶ But it cannot be accepted as an actual basis for decision. Thus, when Congress "made the law" by prohibiting interstate transportation of "hot" oil, but gave to an administrative officer discretion as to executing the law, the grant of unlimited discretion was invalidated, although it could well have been supported on the basis of this "test."²⁷

An alternative "true test" suggested in many decisions is that an administrative agency may not be vested with discretionary power to determine policies, but may be em-

^{25a} *Cincinnati, W. & Z. R. R. Co. v. Clinton Co. Commissioners*, 1 Ohio St. 88 (1852).

²⁶ It was frequently relied upon in decisions invalidating the delegation to an insurance commission of the power to prescribe a standard form of policy. E.g., *King v. Concordia Fire-Insurance Co.*, 140 Mich. 258, 103 N. W. 616 (1905); *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738 (1896). The latter case was in effect overruled in *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928), in an excellent opinion by Justice Rosenberry. A comment on administrative control of insurance policy forms by Professor Edwin W. Patterson appears in 25 COL. L. REV. 253 (1925). The cases on this particular point present an interesting history. Many early decisions invalidating delegation of administrative discretion to insurance commissioners cast a long shadow, both in the direction of legislative hesitancy to grant such powers and in the direction of judicial tendency to invalidate the delegation of discretionary powers in this particular field, by strong reliance on *stare decisis*, even though in other fields comparable grants of delegated discretion had been upheld.

²⁷ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935).

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powered only to determine the facts to which the legislative policy will apply.²⁸ But this test is obviously fallacious. Thus, to say that a public utility commission is merely finding a fact in determining what rate is reasonable, is to overlook entirely the fact that in such a field the commission has the same breadth of discretion as does the legislature. Where a statute²⁹ in terms provides that no employees engaged on certain contracts shall be employed more than eight hours a day, and an administrative agency can determine by regulation that such employees may legally be employed more than eight hours a day, providing they are compensated for overtime at rates to be prescribed by the head of the administrative agency,³⁰ it is absurd to say that the agency is performing only fact-finding functions, without policy-making responsibility.

In safer, less precise language, it is sometimes declared that the true general test is that administrative tribunals may validly be empowered only to fill in the details by making subordinate rules within prescribed limits. This suggestion has the security of vague ambiguity. To what must the administrative rule be subordinate? By what standards must the limits of its discretion be prescribed? Seemingly, the rule is little more than a restatement of the problem. It has been relied upon to sustain a grant of power to exempt certain shipments of food from the labeling and branding requirements of the Food and Drug Act,³¹ where the legislative principle to which the rule was subordinate was a mandatory requirement of labeling (and the rule was subordinate only

²⁸ This is mentioned in many cases sustaining the delegation to public utility commissions of power to fix rates. The "test" is referred to in some federal court decisions. See *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495 (1892); *Buttfield v. Stranahan*, 192 U. S. 470, 24 S. Ct. 349 (1904).

²⁹ The Walsh-Healey Public Contracts Act, 49 Stat. 2036, 41 U.S.C. §§ 35-46.

³⁰ Article 103 of Regulations 504, prescribed by the Secretary of Labor under the Walsh-Healey Public Contracts Act.

³¹ 34 Stat. 768, 21 U.S.C. § 2.

in that it eliminated the statutory requirement) and where the prescribed limit was "reasonable variations . . . tolerances and also exemptions as to small packages."³² It is elastic enough to permit the delegation of power to fix prices, subject to a "standard" empowering the administrative agency to fix such prices as are deemed by it to be "generally fair and equitable," in any situation where there "threatens" a rise in prices "inconsistent with the purposes of the Act," those purposes being stated in terms of broadest generality.³³ Administrative rules setting up a system whereby permits to graze sheep within government forest preserves might be obtained on certain conditions, including the payment of various fees, was deemed properly subordinate to a legislative purpose to "improve and protect" the forest preserves, and within the limits prescribed by a statutory grant of power to make regulations to insure the effectuation of "the objects of such reservation [the forest reserves], namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction."³⁴

Applying this last-mentioned rule to specific case situations, then, it appears that the "detail" which may be left to the agency may include such broad questions of legislative policy as whether there shall or shall not be regulation; that the "subordination" to the statute means only that the administrative law must not be directly contradictory to the statute; that the "limits" need be no tighter than those of "fairness" or "equity," which as is well known varies with the length of the chancellor's foot.

This is but another way of saying that there has been devised no general rule by which it is possible to determine

³² *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 78, 53 S. Ct. 42 (1932).

³³ *Yakus v. United States*, 321 U. S. 414, 64 S. Ct. 660 (1944); *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641 (1944).

³⁴ *United States v. Grimaud*, 220 U. S. 506, 507, 509, 31 S. Ct. 480 (1911).

the validity of any given proposed delegation of power. Any of the suggested rules aptly describe the results in certain cases; but none of them can be applied in all cases.³⁵ In no case do any of the rules account for the result; at best they are a description of results reached in certain cases. The considerations which actually motivate decision are less precise, and less legalistic.

(b) *Factors that motivate decision.* But what are the innominate, imponderable factors which do, in fact, motivate decision? They perhaps cannot be catalogued. Their nature and relative importance vary from one case to another. The basic reasoning of a decision vesting broad discretion in an agency to revoke, say, the charter of a bank, will be rejected by the court (even though it might logically be applied) where the charter to be revoked is a professional license to practice law or medicine. In the case of a revocation of a license to operate a saloon, still other factors will be involved. These subtle distinctions between logically analogous case situations must be kept in mind.

It must likewise be recognized that in this field judgment is somewhat temporal, reflecting to a degree contemporaneous economic and political thinking.³⁶ Then, too, courts must necessarily be concerned with matters of practical necessity.

Likewise, the attitude of the particular court must be taken into consideration. The admonitions found in some opinions, that these statutory tribunals must be recognized as coordinate agencies in the administration of law and justice, are not accorded universal acquiescence. Courts are not

³⁵ In cases involving the delegation of judicial power, the various general rules are all quite inappropriate.

³⁶ Cf. *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855 (1936), invalidating the delegation of power to a majority of producers and mine workers to fix prices; and *Currin v. Wallace*, 306 U. S. 1, 59 S. Ct. 379 (1939), and *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 59 S. Ct. 993 (1939)—upholding a delegation of power to milk producers to decide whether an order should be put into effect.

equally receptive to this philosophy. By and large, state courts probably remain less willing to permit delegation of comparatively free discretionary powers than the federal courts.

Despite all these difficulties, it seems possible to describe the most important factors that influence the decision by the courts as to the adequacy of standards employed to limit administrative discretion, in fields where such a limit is constitutionally necessary.

1. In cases where delegation of broad discretionary powers is traditional, almost any standard will be accepted as sufficient. It is enough if the legislature, either expressly or by implication—and silence is sufficient implication—sets up a general standard of reasonableness. This, of course, is the same standard by which the legislature itself is controlled. Thus, the delegation of power to fix utility rates requires no standard more specific than the implied common-law requirement that the rates fixed must be reasonable.³⁷ Similarly, in the field of censorship, delegations are customarily sustained which place no definable limits on the discretion of the censors.³⁸ Again, in a recent case sustaining the delegation to an agency controlling certain lending activities of banks, the court pointed out that a less rigid standard was permissible in a field which is “one of the longest regulated and most closely supervised of public callings.”³⁹

2. A standard which is seemingly vague may always be shown to be, in fact, quite well defined when related to an established legal concept. Thus, the Federal Trade Commission may be granted considerable powers in determining

³⁷ *Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693 (1908); *cf. Rohrer v. Milk Control Board*, 322 Pa. 257, 186 Atl. 336 (1936).

³⁸ *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 35 S. Ct. 387 (1915).

³⁹ *Fahey v. Mallonee*, 332 U. S. 245, 67 S. Ct. 1552 (1947).

what are unfair trade practices within a statutory prohibition; ⁴⁰ but the granting of a similar power to identify fair trade practices is invalid.⁴¹ The meaning of the former phrase is fairly deducible from a long line of cases, and the standard is therefore more restrictive than might appear. But in the latter case, the agency was in fact left at large to exercise a roving commission.

3. The degree of definiteness required in the standard varies with the extent to which the agency's determinations impinge importantly on rights of personal liberty, or substantial property rights. This general principle has many facets. In cases where the agency is the dispenser of favors which the government is free to grant or refuse, a very broad standard is sufficient; if, indeed, any is required.⁴² Where violations of an agency's rules may involve the imposition of criminal sanctions, *per contra*, an explicit standard is usually required.⁴³ In license cases, much less discretion may be delegated as to revocation of licenses to engage in a profession (where the revocation would presumably carry intensely disastrous personal consequences⁴⁴), or to carry on a substantial business,⁴⁵ than in cases where the license revoked permits one to engage in activity of a type which the legislature might entirely prohibit (such as running a

⁴⁰ *Sears, Roebuck & Co. v. Federal Trade Commission* (C.C.A. 7th 1919), 258 Fed. 307.

⁴¹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837 (1935).

⁴² *Cf.* Cases involving traffic regulations: *Smallwood v. District of Columbia* (App. D. C. 1927), 17 F. (2d) 210; *Wilson v. Eureka City*, 173 U. S. 32, 19 S. Ct. 317 (1899); tolls for the use of roads: *Rogge v. United States* (C.C.A. 9th 1942), 128 F. (2d) 800.

⁴³ *People v. Grant*, 242 App. Div. 310, 275 N. Y. S. 74 (1934); *United States v. Eaton*, 144 U. S. 677, 12 S. Ct. 764 (1892), where the statute was sustained by decision that violation of the administrative regulations was not subject to the criminal penalties that attended other violations of the statute; *cf. In re Kollock*, 165 U. S. 526, 17 S. Ct. 444 (1897).

⁴⁴ See 5 A. L. R. 94.

⁴⁵ *State ex rel. Makris v. Superior Court for Pierce County*, 113 Wash. 296, 193 Pac. 845 (1920); see 12 A. L. R. 1435.

poolroom⁴⁶ or a business which so immediately affects the general public welfare that close and continuous supervision is generally deemed desirable).⁴⁷

4. The extent to which the court conceives that there is a genuine need for *expertise* is probably a factor. In the case of the Interstate Commerce Commission, for example, the courts quite readily concede their incapacities to handle in a satisfactory manner the highly technical problems involved,⁴⁸ and in sustaining a broad grant of power to the Securities and Exchange Commission to order divestiture of holding companies, the court pointed out that its approval constituted "a reflection of the necessities of modern legislation dealing with complex economic and social problems."⁴⁹ But where the agency regulates the traffic on city streets⁵⁰ or determines the "area of production" of agricultural processing,⁵¹ the court may feel there is much less need for technical competence, and therefore less need of sustaining broad standards. The court may accordingly well insist on a fairly explicit standard, and in the absence thereof either invalidate the statute or disregard the agency's rulings.

5. Where there is ample provision for notice, hearing, and argument, and where it is thought these sufficiently guarantee a fair and intelligent disposition of the case by informed and impartial administrative action, broad standards are likely to be upheld.⁵²

⁴⁶ *State of Kansas v. Sherow*, 87 Kan. 235, 123 Pac. 866 (1912); *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N. W. 882 (1914).

⁴⁷ *Engel v. O'Malley*, 219 U. S. 128, 31 S. Ct. 190 (1911); *People of State of New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 26 S. Ct. 144 (1905).

⁴⁸ *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938).

⁴⁹ *American Power & Light Co. v. Securities & Exchange Commission*, 329 U. S. 90, 105, 67 S. Ct. 133 (1946).

⁵⁰ *City of Shreveport v. Herndon*, 159 La. 113, 105 So. 244 (1925).

⁵¹ *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215 (1944).

⁵² *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor*, 312 U. S. 126, 61 S. Ct. 524 (1941).

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6. Where provisions for judicial review permit the court to exercise a large measure of superintending control over the agency, this reasoning is even more effective in persuading the courts to sustain statutes setting up a very vague standard.⁵³

7. In cases involving the exercise of judicial power by administrative agencies, the courts on the whole insist on a stricter standard than in cases where the agency's powers are principally legislative in nature. Since the judicial process is primarily one of applying a standard, it is natural that this requirement exists. Just as a court refuses to treat as a justiciable matter a controversy which cannot be determined by application of the so-called rules of law, so it insists that some rule or standard must be set up to guide the adjudicatory functions of an agency exercising judicial powers.⁵⁴ Then, too, the delegation of judicial powers to administrative agencies is always subject to attack on the grounds that the due process guaranties of the Constitution have been violated. In past years, courts have been by no means reluctant to discover a violation of due process, where judicial powers were delegated.

It is these considerations that form the basis of decision, and rightly so. The law of administrative tribunals could not live and grow upon a logical extension of philosophical doctrine. Its growth must be empiric, based on experience. Judicial recognition of practical necessities, indeed, is the most typical characteristic of this branch of the law.

Courts will therefore be little persuaded by an argument that a statute must be invalidated because it grants an administrative tribunal power to make law, rather than merely to

⁵³ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911).

⁵⁴ Many of the cases holding the statutory standard to be unconstitutionally broad are cases involving the issuance and revocation of licenses, where the agency's powers are in many respects judicial in nature. Seemingly, a much more explicit standard is insisted on in such cases than in those where the agency promulgates legislative rules.

exercise discretion in its enforcement, or because there are no definitely specified limits to which administrative discretion is subordinate. Nor will the language employed by a court in striking down a statute giving a board unbridled discretion in deciding whether or not to issue a building permit be accepted as persuasive when it is sought to be applied to a statute giving a similar measure of discretion to another board which issues or revokes saloon and dance-hall licenses.

Not only is the decision in each case to be limited to the facts of the case, but the reasoning employed in one case will not be extended to another case where considerations of statesmanship recommended a different judgment.

(c) *Cases where constitutional limitations are nonexistent.* In some types of cases, the considerations above discussed recommend that delegation of virtually unlimited discretionary powers be sustained. Typically these are cases where the activities of the tribunal will not directly impinge on constitutionally recognized rights of property. Thus, where the administrative discretion is directed to such matters as granting licenses to dredge for rocks in state-owned waters,⁵⁵ or prohibiting fishing in certain areas,⁵⁶ or regulating the nontraffic uses of city streets,⁵⁷ there is no difficulty in sustaining unlimited grants of power. In such cases the result can easily be described by saying that there can be no invasion of private rights of person or property as a result of the rulings of the agencies.

But it would seem that the true principle of such cases goes further. In some types of cases, unlimited discretionary powers may be delegated even though the activities of the agency may impinge directly on private rights. In such cases, a broader explanation is required. The true reason is sug-

⁵⁵ *State ex rel. Port Royal Mining Co. v. Hagood*, 30 S. C. 519, 9 S. E. 686 (1889).

⁵⁶ *McMillan v. Sims*, 132 Wash. 265, 231 Pac. 943 (1925).

⁵⁷ *Wilson v. Eureka City*, 173 U. S. 32, 19 S. Ct. 317 (1899).

gested in the opinion of the Supreme Court in *United States v. Curtiss-Wright Export Corp.*^{57a} In that case the Court sustained the delegation to the President of unfettered discretion to prohibit shipment of munitions to certain foreign countries, conditioned upon his judgment as to whether such prohibition would contribute to the re-establishment of peace. The Court assigned as the reason for its decision, not that such prohibitions would not affect private rights—for of course they would—but rather that to avoid “perhaps serious embarrassment,” such legislation “must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” The Court pointed out that such delegations of power were traditional in matters pertaining to foreign relations, that the President possessed more expert knowledge than did Congress, and that practical necessities could not be met by a more restricted delegation.

Similarly, virtually unlimited discretion is frequently bestowed upon municipal corporations to adopt local ordinances. This cannot be explained on the theory that such ordinances will not substantially affect important private rights. It must be explained, if at all, on the basis that such delegations have been traditional and have proved expedient.⁵⁸

(d) *Problems of draftsmanship in formulating standards.* Obviously, effective administrative action may be expedited or hampered by the language adopted in the controlling statute as the standard by which its actions must be guided. Sometimes, as Dean Landis points out,⁵⁹ legislative draftsmen formulate too elaborate standards, under a misappre-

^{57a} *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 57 S. Ct. 216 (1936).

⁵⁸ See *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 S. Ct. 256 (1889); *Brodine v. Inhabitants of Revere*, 182 Mass. 598, 66 N. E. 607 (1903); cf. 1 McQuillin on MUNICIPAL CORPORATIONS (1940) 422; Willis on CONSTITUTIONAL LAW (1936) 137-138.

⁵⁹ Landis, *THE ADMINISTRATIVE PROCESS* (1938) 55 *et seq.*

hension as to the clarity of the outlines of the problem at hand, and condition administrative action in such detail as to make it difficult to dispose effectively of pressing problems. On the other hand, the legislature may sometimes be tempted to evade responsibility by an ill-defined transfer to an administrative agency of the duty to provide, by such regulations "as the public interest may require," a determination of fundamental policy in a highly controversial field.⁶⁰

A standard which attempts to anticipate every possible situation is likely to defeat the whole purpose of delegation. On the other hand, one which reflects the empty generalities of "reasonableness" or "public interest"—criteria which would be supplied by implication in any event—tends to substitute a government by men for one of laws.

The tendency of the courts to sustain the delegation, however the standard be phrased, emphasizes the importance of wisely drafting the statutory standards. Relief from unsatisfactory administrative action must often come through the legislature, rather than the courts. It may be necessary, upon venturing into a new field of governmental regulation, to grant the agency wide powers. It must, perhaps, have some authority to experiment. But as experience defines the contours of the problem involved, opportunities may be afforded to redefine the standards which guide administrative action, terminating the agency's authority to perpetuate unsuccessful experiments.⁶¹ To the extent that it proves practicable or desirable for the legislature to specify standards that are

⁶⁰ E.g., at one stage the House of Representatives' version of the bill which later became the Public Utility Holding Company Act of 1935, after requiring the Securities and Exchange Commission to take action to confine each holding company to a single integrated system, at the same time authorized the Commission to exempt any holding company from this requirement if such exemption was found to be consistent with the public interest.

⁶¹ E.g., the discretion vested in the National Labor Relations Board by the Wagner Act of 1935 (49 Stat. 449, 29 U.S.C. § 151) to include any combination of employees in a single collective bargaining unit was drastically curtailed by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. Supp. § 141).

definite and capable of objective proof, the courts are enabled to assert a greater power of review over administrative action than they possess where the standards are cast in vague, subjective terminology.

5. Delegation of Powers by an Agency to Its Employees

The statute usually bestows authority upon a commission or the head of an agency, but these individuals cannot often perform personally the multifarious duties delegated to them. The Secretary of Agriculture, for example, is charged with the administration of more than seventy statutes. In this task, he is aided by a staff of several hundred assistants. There arises by clear necessity, in all the larger agencies, delegation of discretionary power within the personnel of the agency.

The governing statutes often recognize this situation, and make appropriate provision therefor. Failure to do so has sometimes produced untoward results. The courts have been quite ready to invalidate unauthorized attempts of agency heads to delegate to their subordinates powers vested by statute in the heads of the agency.⁶² Sometimes, to be sure, the problem is avoided by reliance on the presumption of regularity that attends official action, which as here applied means merely that it is hard to prove that the responsible official did not personally perform his duty.⁶³ And in many cases, the courts, appreciating the necessity of a limited degree

⁶² This problem is discussed more fully *infra*, in connection particularly with the use of assistants in formulating decisions in judicial determinations. Examples in other fields include: *Cudahy Packing Co., Ltd. v. Holland*, 315 U. S. 357, 62 S. Ct. 651 (1942)—denying the power of the Administrator of the Wage and Hour Division to delegate power to issue subpoenas; *State v. The Mayor and Common Council of Jersey City*, 24 N. J. L. 662 (1855)—commissioners appointed to assess cost of improvement could not delegate this duty to the city surveyor; *Dunn v. United States* (C.C.A. 5th 1917), 238 Fed. 508—denying the power of a court clerk to delegate the duty of selecting names for grand jury service; *School Dist. No. 4, Town of Sigel, Wood County v. Industrial Commission*, 194 Wis. 342, 216 N. W. 844 (1927)—school district could not delegate power to employ part-time janitor.

⁶³ *Hackley-Phelps-Bonnell Co. v. Cooley*, 173 Wis. 128, 179 N. W. 590 (1921). *United States ex rel. Petach v. Phelps* (C.C.A. 2d 1930), 40 F. (2d)

of such delegation, find authority therefor implicit in the statutory language.⁶⁴ Decision in each case depends on the court's judgment as to whether the nature of the particular power exercised is so important, requiring the exercise of judgment on matters of policy, as to preclude the likelihood that the legislature would have been willing to have the particular power exercised by any one other than the ultimate authority within the agency.

Regardless of the limits on delegation to agency employees to pass finally upon matters of importance, the fact remains that power to recommend the decision in any matter can be and ordinarily is so delegated. The distinction is more technical than practical. The higher officers are so little inclined to reverse the determination of their subordinates that the latter's recommendation often carries the weight to sway and determine final agency action in any close case, especially where the determination relates not to a general policy but to the decision of a particular individual case.⁶⁵

A great danger resulting from this necessary practice of delegating within the agency the powers of the agency heads is that decision is often made by an employee whose compelling personal interest is to make such a determination as he thinks will please his employer, in the hope of obtaining promotion. If the employee is impressed with a belief that the agency likes decisions which find an employer guilty of unfair labor practices, or a commercial concern guilty of unfair trade practices, or an employee entitled to receive workmen's compensation, then great strength of mind and

500. Sometimes, particularly where questions of jurisdiction are involved, the presumption will not be extended to administrative agencies: see e.g., *Blount v. Forbes*, 250 App. Div. 15, 293 N. Y. S. 319 (1937).

⁶⁴ *United States ex rel. French v. Weeks*, 259 U. S. 326, 42 S. Ct. 505 (1922); *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 31 S. Ct. 603 (1911); *Plapao Laboratories, Inc. v. Farley* (App. D. C. 1937) 92 F. (2d) 228. For an analysis of the general problem, see Grundstein, "Subdelegation of Administrative Authority," 13 GEO. WASH. L. REV. 144 (1945).

⁶⁵ The Federal Administrative Procedure Act of 1946 recognizes this situation by setting up provisions whereby the decision of the hearing officer may stand (in the absence of an appeal) as the decision of the agency.

character is required to avoid the making of decisions which it is thought will please the officials who will pass upon the employee's personal advancement. The Federal Administrative Procedure Act, creating an independent status for many hearing officers, goes far toward alleviating this problem in many of the federal agencies.

Agency heads have the difficult problem of making free delegation as to matters where there is little need for close supervision by the agency heads—such as matters of internal management, disposition of routine matters, initiation of proceedings, disposition of matters by consent, executing binding stipulations of fact, et cetera—in order that they may devote more time and attention to reviewing the work of subordinates in matters affecting the rights of parties appearing before the agency. In the latter connection, while it is admittedly infeasible to attempt a review of every case, much might be accomplished by (1) careful formulation, for the guidance of agency employees, of instructions for the application of those policies which have been crystallized; (2) consideration by the agency heads of cases where the application of established policies is difficult or where policies have not been definitely formulated (with encouragement for the referral by agency employees of cases thought to fall within this category); and (3) the requirement of periodic and informative reports by those employees entrusted with power to make decisions.

B. EFFECT OF SEPARATION OF POWERS DOCTRINE ON COMBINATION OF LEGISLATIVE, JUDICIAL, AND EXECUTIVE FUNCTIONS WITHIN A SINGLE AGENCY

To the extent that the Constitution permits the delegation of judicial and legislative powers, there appears to be little impediment to the granting of both such powers to a single agency. Thus it occurs that frequently a single agency will

exercise legislative, executive, and judicial powers. It becomes lawmaker, prosecutor, and judge. The same agency legislates the rules that implement a general statute, then looks for violations of such rules, and (if it discovers a suspected violation) prosecutes a hearing at which it sits as judge to determine whether it has proved its allegations to its own satisfaction. Contrary though this may be to the ancient maxim that no man should be judge in his own cause, there seems to be (in the federal courts, at least) no constitutional impediment to such combination of powers within a single agency.

Yet it is this delegation of combinations of power, rather than the delegation of either legislative or judicial power alone to a single agency, which is at the bottom of much of the criticism to which the administrative agencies are subject.

Many of the agencies, and exponents of administrative absolutism, argue that such combination of functions is desirable, if not essential to the attainment of the best results.

They argue that if the prosecuting functions were divorced from the judicial, those charged with instituting prosecutions could be expected to inaugurate formal proceedings in every case where there might be the slightest suspicion of some infraction of rules. To this it can properly be replied that while theoretically such a possibility cannot be eliminated, yet no untoward results have been observed in cases where the prosecuting body is without adjudicatory functions, as in the case of the Wage and Hour Division of the Department of Labor, or in the Internal Revenue Department.

The argument has also been made that any separation of powers would interfere with informal settlement of cases and make it more difficult to achieve voluntary settlements. But experience has not indicated this to be the case. In many instances, the Department of Justice must appear before the courts to press its charges of violations of laws or regula-

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tions, but it has experienced no great difficulty in reaching settlements.

The same advocates further point out—and it cannot be denied—that an agency is not a single person, and that the staff member who prosecutes a case is not usually the same staff member who decides whether a case has been proved. But this overlooks the friendly luncheon contacts between prosecutor and judge, whose offices may be in adjacent rooms, and likewise the *esprit de corps* which is so markedly a factor among employees of an administrative agency of this type. This argument also overlooks the fact that the administrative judge who adjudicates an issue must sometimes depend for promotion upon the agency heads who have decided that a prosecution should be instituted, and who may have supervised the prosecution of the case.

It is undoubtedly true that in some types of proceedings, administrative efficiency would be grossly impaired, without compensating advantages, by insistence on a rigid separation of functions. In some types of cases, adjudicatory functions are so closely related to other phases of the tribunal's work that separation of functions is not practical, nor indeed desirable. An example may be found in the field of rate making. A rate-making investigation ordinarily culminates in a hearing which has many of the characteristics of a judicial proceeding. Yet the prime purpose of such a hearing is not to determine justiciable questions of fact or law, but rather to gather information which will furnish a basis for the exercise of an informed judgment on matters which are fundamentally those of legislative policy.⁶⁶ Other types of agencies act through the exercise of a number of interrelated powers, and

⁶⁶ This is recognized in § 5 (c) of the Federal Administrative Procedure Act of 1946, excepting from the general requirements for separation of functions various rate-fixing proceedings. Cf. R. M. Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 67, 68.

complete isolation of all adjudicatory functions would not present compensatory advantages.⁶⁷

The problem is not one which can be solved by any general formula. Distinctions must be made between agencies, and between different functions of the same agency. Where the element of administrative discretion is properly dominant—as in many cases of passing on license applications, or applications for benefits—fairness can ordinarily be achieved by an internal separation of functions within the agency. In license cases, for example, so long as the staff employees charged with discovering and presenting objections to the allowance of the application have nothing to do with the making of the ultimate decision, little harm is done. But on the other hand, in cases where the prime function of an agency is to police an important segment of business activity—as in the case of the Federal Trade Commission or the National Labor Relations Board, where the agency devotes all its energies to preventing a certain type of activity and where the judicial question to be determined by agency employees is whether the agency is justified in its suspicions that a particular person has engaged in such activity—then it is doubtful whether any internal separation of functions can be sufficient to assure the fairness and, equally important, the manifestations of fairness, which the public can properly demand. In such cases, the adjudicatory authority should not be subject to the direct or indirect control of the heads of the agency which initiates prosecutions.

Agencies are ordinarily created to meet an emergency situation, one presenting new problems which may at the outset require an experimental approach—where, perhaps, rules must be formulated only on the basis of experience

⁶⁷ See "Administrative Procedure in Government Agencies"—Report of the Attorney General's Committee on Administrative Procedure (1941) 58 *et seq.*

gained as a result of deciding cases for a while on an *ad hoc* basis. But in many cases where agencies were originally created to meet such emergency situations, and accordingly granted not only executive and legislative but judicial power as well, later experience has suggested a refinement of the early approach to the problem. On the basis of further studies, and in the light of experience, it has proved wise to create a special tribunal to exercise adjudicatory powers. Thus, adjudicatory functions of the Customs Bureau came after a time to be vested in a Customs Court. Similarly, the responsibilities of the Bureau of Internal Revenue in passing administratively on claims for refunds or objections to tax assessments were in later years vested in a separate Board of Tax Appeals which in due course became a Tax Court. The Court of Claims had similar origins.

These lessons of history teach that, in fields where administrative tribunals engage contentiously with the private parties appearing before them, it is in the interest of good government to eliminate combinations of prosecuting and judicial powers. The process is gradual. Change does not come overnight. But the highway of past experience points the way into the uncharted future.⁶⁸

⁶⁸ See statement of "Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt" in "Administrative Procedure in Government Agencies"—Report of Attorney General's Committee on Administrative Procedure (1941) 203 *et seq.*

CHAPTER 4

Notice and Hearing in Administrative Proceedings

A. NECESSITY OF GIVING NOTICE TO INTERESTED PARTIES

1. Historical Development

THE question as to the necessity of affording interested parties some advance notice of contemplated administrative action, and an opportunity to be heard as to the propriety thereof, is one which has been considered frequently both by the courts and the legislatures. Much of the difficulty revolves around the fact that administrative agencies often treat cases individually, as do courts, but dispose of them on the basis of considerations of policy, acting as legislative agents. The affected party, looking at the ruling as an individual disposition of his particular case, demands a right to be heard fully; he feels he should have his "day in court." The agency, treating the ruling as only an incidental step in the development of a general policy, which it must determine on the basis of broad considerations that would be but little affected by the testimony of the individual as to the facts of his own case, often prefers to act legislatively on the basis of its own information and judgment, without granting a hearing.

In cases where an agency acts judicially, deciding the asserted rights of claimants on the basis of an ascertainable rule, there is usually but little difficulty, since legislative requirements or established practices usually provide for ample notice and opportunity to be heard. The problem

becomes more acute in cases where the agency exercises a greater measure of executive or legislative discretion.¹

The fundamental legal problem involved in each case is one as to the requirements of due process of law: and the historical development of this broad constitutional requirement has been reflected in changing theories as to the requirements to be imposed on administrative agencies. In the eighteenth century, English courts were strongly inclined to insist on notice and hearing in all administrative proceedings.² But as experience showed this requirement to be too strict for general application, various theories were evolved to permit such modification of the underlying rule as practical necessities required.

In part, this evolution took the form of devising substitutes effective to accomplish the underlying purpose. Thus, for example, the rule was early evolved in tax cases that constitutional requirements were satisfied if a hearing was given at any stage of the proceedings prior to the final non-reviewable determination and collection of the tax. Similarly, in certain types of rate cases, the courts took it upon themselves to give hearings subsequent to the administrative determination, on the basis of determining whether the administrative determination had been reasonable. In other types of cases, where it seemed desirable to permit summary action on the part of administrative officers, it was deemed sufficient if the offended party were given an opportunity to bring a subsequent damage action against the officer.

¹ But other factors may incline agencies to a denial of hearings. Sometimes an agency considers the suppression of individual hearings an effective procedural short cut, enabling an agency to dispose of a heavy case load of pending matters. The problem of giving hearings is often acute in cases where a particular administrative determination affects parties not immediately before it. The same problem arises in cases where the agency is concerned fundamentally with formulating new rules, to be applied either generally or to a specific case.

² Mott, *DUE PROCESS OF LAW* (1926) 216-240.

But by and large, the courts until the last few years have overlooked the development of efficient substitutes for formal notice and hearing, and have on the whole been inclined to hold either that notice and hearing could be entirely dispensed with, or that a formal courtlike procedure would be required. Instead of treating administrative proceedings as a distinctive genre, the courts have been inclined to view each agency as either a little court or a little legislature, and to determine on such basis the necessity of notice and hearing in each particular case.

That the courts departed from the original path (which led toward the goal of devising in each type of case such procedure as fairly suited the problems of the particular agency) for a more arbitrary approach, is probably accounted for in large measure by the preoccupation of nineteenth-century American courts with the problem of separation of powers. In reviewing administrative action, the courts would seek to catalogue the agency's activities as being either quasi-legislative or quasi-judicial. This feat accomplished, certain results thought to stem from such classification were applied more or less automatically (except where the result seemed plainly undesirable, in which case the path of logic would be forsaken).

2. Necessity of Notice as Depending on Legislative or Judicial Nature of Agency's Activity

A natural consequence of this formalistic approach was the development of the frequently suggested rule that a hearing is required where the agency is exercising judicial functions, and is not required where the agency is exercising legislative functions.

But these labels play a much smaller part in judicial motivation than in opinion writing.⁸ In fact, hearings have

⁸ Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 YALE L. J. 1093 (1942).

been quite uniformly required in some types of cases where the agency's function is essentially rule making, or legislative, and conversely, hearings have been held unnecessary in some types of cases where the agency's role is essentially judicial. The difficulties encountered in attempting to apply this test are illustrated by the case where the determination to be made is that of identifying the boundaries of an "improvement district" over which there is to be prorated the cost of a public improvement. If such determination is made by certain types of agencies, it is said to be a legislative act that does not require advance notice to the affected parties;⁴ but if the same determination is made by different agencies, it is described as "judicial" in character, and notice is required.⁵

Determination of whether a hearing will be required cannot be made by deciding whether the agency's function is primarily legislative or primarily judicial. In the first place, the functions of many agencies defy attempts at any such neat classification. In the second place, even where the classification can fairly be made, the postulated result does not uniformly follow.

Rather, decision depends primarily upon (1) the accepted traditions in the particular field;⁶ and (2) certain underlying considerations of policy. The latter can be discussed most

⁴ This seems to be the case where the determination is made by the legislature or the governing board of a municipality or other established governmental agency. See *Chesebro v. Los Angeles County Flood Control Dist.*, 306 U. S. 459, 59 S. Ct. 622 (1939); *St. Louis & S. W. Ry. Co. v. Nattin*, 277 U. S. 157, 48 S. Ct. 438 (1928); *Myles Salt Co. Ltd. v. Board of Com'rs Iberia & St. Mary Drain. Dist.*, 239 U. S. 478, 36 S. Ct. 204 (1916).

⁵ *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 S. Ct. 56 (1896); *Embree v. Kansas City & Liberty Boulevard Road Dist.*, 240 U. S. 242, 36 S. Ct. 317 (1916); *cf.*, *Browning v. Hooper*, 269 U. S. 396, 46 S. Ct. 141 (1926).

⁶ While the courts have been quite willing to permit the continuance of administrative practices which eliminate notice and hearing in cases where such procedure has become time-honored, they have been reluctant to dispense with the requirement in analogous but less familiar cases.

readily in terms of typical case situations. Such a discussion follows.

3. Tax Cases

There is obviously an opportunity for a direct and substantial deprivation of property rights if the administrative process for assessing and collecting taxes is permitted to proceed without notice and hearing. At the same time, there is an equally obvious need that the collection of public revenues be permitted to proceed expeditiously, without the interruptions and delays that might be caused by elaborate procedure of individual notice and lengthy hearings on questions of valuation. For these reasons, and as well the reason that it is one of the most ancient spheres of administrative action, the tax field is an interesting one in which to observe the interplay of competing policies.

In favor of requiring notice and an opportunity to be heard are the factors: (1) the private property of an individual is singled out for specific action; (2) the pecuniary interest of the taxpayer is ordinarily substantial; and (3) the administrative authorities have but little occasion to exercise expert discretion in fixing policies, for it is rather their duty to apply reasonably objective standards which are on the whole adaptable to judicial review. On the other hand, even more potent factors require that the assessors and tax collecting authorities be relieved of the burdens that would attend the giving of individual notice and a full hearing in each case: (1) there is the overpowering necessity for prompt collection of the necessary public revenues; (2) the large number of cases to be disposed of requires the use of summary procedures; (3) many of the issues involved, such as the question of valuation of property, can better be determined by inspection, investigation, and the exercise of the assessor's

informed judgment, than by a judicial hearing at which the contradictory estimates of opposing expert witnesses on the question of valuation would be of little practical help; and (4) the fact that judicial review is usually available for issues affecting jurisdiction, construction of the statute, uniformity of the levy, and claims of fraud—that there may thus be a hearing after the event—is often thought to excuse a failure to give notice and hearing at the administrative stage.

The result has been that requirements of notice and hearing in the tax field are rather attenuated. While many decisions declare that an owner is entitled to notice of a proceeding against his property, and has a right to be heard,⁷ yet it has become well settled that the requirements of due process are satisfied if there is an opportunity for the owner to present his objections before a competent tribunal at any stage of the proceedings before the command to pay becomes final and irrevocable.⁸

“In general, . . . the protection accorded the taxpayer against arbitrary assessment is sporadic and uncertain.”⁹ The tendency of the courts is to sustain whatever form of procedure has been adopted.¹⁰

In cases where there seems to be but little practical need for notice and hearing, where the measure of the tax is fixed by mechanical standards, as in the case of a poll tax, or an

⁷ See collection of cases, L. R. A. 1916 E, p. 5, and see 33 ILL. L. REV. 575 (1939) Comment.

⁸ *Nickey v. Mississippi*, 292 U. S. 393, 54 S. Ct. 743 (1934). See 3 Cooley on TAXATION, 4th ed. (1924) 2269, § 1120.

⁹ Dickinson, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 272.

¹⁰ See *Dows v. City of Chicago*, 11 Wall. (78 U. S.) 108, 110 (1870): “it is of the utmost importance . . . that the modes adopted to enforce the taxes levied should be interfered with as little as possible.” *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, at 708, 4 S. Ct. 663 (1884), holding that “where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal” than where life, liberty, or the title or possession of property are involved.

assessment measured by the size of the property, notice and hearing can apparently be dispensed with.¹¹

Notice need not be formal. It is enough if a statute gives general notice that taxes will be levied,¹² or if there is published a general notice of a meeting of the tax board.¹³

The taxpayer need not be heard by the administrative officials who make the assessment; he may be compelled to wait. Nor need he be granted hearings at all of the successive stages of administrative activity which precede the final levy of the tax. One hearing is sufficient to constitute due process.¹⁴ It is sufficient if there is a right to a hearing before the assessing officers, or in connection with administrative appeals, or before a court (either in a suit by the government to collect the tax or a suit by the taxpayer to enjoin collection thereof or to recover sums paid over to the collector). The right to a hearing does not involve the right to be heard before a court.¹⁵

The extent to which the courts will go in finding compliance with the requirements of procedural due process in tax cases is indicated by the decision in *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*.^{15a} In that case, a state board of equalization had raised all the assessments in the city of Denver by 40 per cent, to equalize the assessments in that city with those made elsewhere in the state. It was asserted that the property owners had no oppor-

¹¹ *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 18 How. (59 U. S.) 272 (1855); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671 (1909); 3 *Cooley on TAXATION*, 4th ed. (1924), 2259, § 1114; 56 A. L. R. 950.

¹² *Merchants' & Manufacturers' Nat. Bank v. Pennsylvania*, 167 U. S. 461, 17 S. Ct. 829 (1897).

¹³ *Wight v. Davidson*, 181 U. S. 371, 21 S. Ct. 616 (1901).

¹⁴ *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 26 S. Ct. 459 (1906); *Pittsburgh, C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114 (1894).

¹⁵ 3 *Cooley on TAXATION*, 4th ed. (1924), 2263, § 1118.

^{15a} *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U. S. 441, 36 S. Ct. 141 (1915).

tunity to be heard on the question as to whether such increase was truly necessary to equalize the assessments. The court said hearing would not be required. While suggesting that the situation was no different than it would have been had the state doubled the rate of taxation, in which event there would plainly be no hearing required,¹⁶ the court quite plainly put its decision on the ground that where the administrative determination "applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. . . . There must be a limit to individual argument in such matters if government is to go on." The court's opinion distinguished *Londoner v. Denver*^{16a} on the ground that in the cited case "A relatively small number of persons was concerned" in the question as to the correctness of the assessment.

Of course, the court would not accept in other fields the suggestion that notice and hearing could be dispensed with because the large number of persons concerned made it inconvenient. But in the tax field, the courts have been accustomed for centuries to summary procedures—which no doubt were in existence when the concept of notice as an element of due process first developed—and the customary procedures are sustained, even though they would not be recognized as valid in newer fields of administrative activity. In the tax field, too, administrative activity is in many cases largely executive or ministerial, involving little judicial or legislative responsibility. This circumstance likewise has contributed to the attenuated requirements as to notice and hearing which exist in the tax field.

¹⁶ This suggestion is unsound. An increase in tax rate would be borne by all taxpayers in the state on the basis of the assessments as fixed locally; there would be a state-wide increase, shared equally. But the result of changing the assessments in one city alone was that taxpayers there bore a bigger proportion of the total tax than they would have if the assessments had not been changed.

^{16a} *Londoner v. Denver*, 210 U. S. 373, 28 S. Ct. 708 (1907).

4. Other Cases Involving Conduct of Public Business

In other fields where, as in the case of tax collections, the expeditious conduct of the public business requires speedy decision, with a minimum of time for individual argument, the normal requirements of notice in advance of hearing have been widely relaxed.

Alien cases—exclusion and deportation. While holding that some semblance of notice and hearing must be afforded the immigrant whose entry into this country is challenged by immigration authorities, the courts (particularly in exclusion cases) have not insisted upon any formal notice or judicial-type hearings.¹⁷ All that is insisted upon is that there be observance of the rudimentary requirements of fair play.¹⁸ It is not necessary that the opportunity to be heard should be "according to the forms of judicial procedure"; the sufficiency of the hearing is judged rather according to its aptness to "secure the prompt, vigorous action contemplated by Congress."¹⁹

These cases may depend in part on doubts as to whether the due process clause can be invoked on behalf of a person who is seeking entrance to the country. In cases where the question arises in connection with proceedings to deport an individual who had originally been admitted, hearings more

¹⁷ *Nishimura Ekiu v. United States*, 142 U. S. 651, 12 S. Ct. 336 (1892)—permitting the immigration officer to decide the question as to the right of the immigrant to land on the basis of his own inspection and examination, without taking testimony. *Yamataya v. Fisher*, 189 U. S. 86, 23 S. Ct. 611 (1903)—where the fact that the petitioner was ignorant of the English language, and at the time of the investigation did not know that it had reference to her deportation, was considered to be simply "her misfortune."

¹⁸ Relief has been granted where it was alleged that the immigration officials had prevented the offering of relevant testimony of named witnesses: *Chin Yow v. United States*, 208 U. S. 8, 28 S. Ct. 201 (1908). Similarly, where it was asserted that important testimony was arbitrarily excluded from the formal record on the basis of which the determination was made, it was held that such action was improper. *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566 (1920).

¹⁹ *Yamataya v. Fisher*, 189 U. S. 86, 101, 23 S. Ct. 611 (1903).

closely in accordance with the standards of a judicial trial are insisted upon.²⁰

Removal of public officers. Despite the substantial nature of the personal rights involved, and the fact that the issue presented often calls for a judicial-type determination, the overwhelming authority supports the power of the state to remove officers from office without notice or hearing.²¹ These decisions are sometimes explained by saying that the right to hold office is not a property right but a mere public trust.²² But this cliché is misleading. It cannot be reconciled with the results obtained in the cases where courts of equity protect the property rights of an officeholder in his office. The true explanation lies in frank recognition that where the public interest in summary action—here, the interest in prompt elimination of suspected corruption in government—clearly outbalances the individual property interest involved, then, at least in cases where the accepted traditions in the particular field permit it, notice may be dispensed with.

Eminent domain proceedings. On the question as to the existence of a public necessity for taking land (under statutory provisions authorizing condemnation only where there exists a public necessity therefor), it is held quite uniformly that no notice or opportunity to be heard need precede the making of a final, nonreviewable administrative determination that such necessity exists.²³ Many factors relied upon in other types of cases as requiring a hearing are here present: a particular individual's property is singled out for specific action; substantial property interests are involved; the number of persons affected is comparatively small; a public hearing might well be better calculated to ascertain the truth; and there is

²⁰ *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492 (1922).

²¹ See 99 A. L. R. 336.

²² This is suggested in many opinions; e.g., *Attorney General ex rel. Rich v. Jochim*, 99 Mich. 358, 58 N. W. 611 (1894).

²³ *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 45 S. Ct. 491 (1925); *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 43 S. Ct. 689 (1923).

but seldom any crying public need for summary action. The type of action is well suited for judicial determination; indeed, in many states, the question is reserved for the condemnation court, by state constitution or statutory provision. Nevertheless, it seems plain that notice and hearing may be dispensed with. The result must apparently be explained on the basis of judicial recognition that in conducting those matters of public business which are primarily of executive concern, a degree of summary action should be permitted.

Undoubtedly the result in the eminent domain cases is accounted for in part by the fact that "just compensation" must be paid for the taking. There has not been an absolute deprivation of property where that of which one has been deprived is paid for. Where this guaranty of prompt and full restitution is lacking, notice is more likely to be required. In cases, for example, where the issue is not the taking of land for public improvement but rather the allocation among affected property owners of the cost of a public improvement (and where a property owner would have no relief if an administrative determination compelled him to pay for an improvement that did not benefit him), notice is often required.²⁴

Postal system. Generally, in dealing with administrative determinations made in connection with the execution of the postal laws, the courts have emphasized not the private rights affected but rather the necessities and convenience of carrying on the public business.²⁵

It has been suggested that the use of the postal system is a mere privilege or public beneficence which the government is free to grant or withhold on its own terms.²⁶ Grant or denial of second-class mailing privileges is commonly

²⁴ Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 S. Ct. 56 (1896); Browning v. Hooper, 269 U. S. 396, 46 S. Ct. 141 (1926).

²⁵ Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789 (1904); Smith v. Hitchcock, 226 U. S. 53, 33 S. Ct. 6 (1912).

²⁶ See dissent of Justice Holmes in Leach v. Carlile, 258 U. S. 138, 42 S. Ct. 227 (1922).

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made as a result of *ex parte* determination on the basis of a written application, rather than on the basis of a hearing.²⁷ It has been held that the denial of mailing privileges by the issuance of a fraud order is not "judicial" in character and is therefore not reviewable by certiorari proceedings.²⁸

All of these decisions suggested that hearings would not be required in connection with administrative revocation of mailing privileges (and this conclusion was stoutly defended by the postal authorities). However, when this particular issue was finally raised in the courts, it was held that a hearing was required. The severity of the penalty that follows deprivation of the right to free use of the mails²⁹ persuaded the courts that considerations of the expeditious conduct of the public postal business were less important than the desiderata of assuring that any denial of such privileges has been based on a fair hearing. Accordingly, in *Pike v. Walker*^{29a} it was determined that fraud order proceedings must be conducted upon notice and hearing. The logic of past decisions was abandoned because the court, relying on the dissents voiced in earlier cases, was impressed with the arguments that otherwise substantial property interests might be imperiled, there was no need for free administrative discretion, and there was no assurance that private investigation was better calculated to determine the truth than was an open hearing.

Similarly, in *Boeing Air Transport, Inc. v. Farley*,^{29b} a determination of the Postmaster General, annulling air mail

²⁷ Monograph of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3rd Sess. (1940).

²⁸ *Degge v. Hitchcock*, 229 U. S. 162, 33 S. Ct. 639 (1913).

²⁹ Most periodicals could not survive if denied second-class mailing privilege. See *Lewis Publishing Co. v. Wyman* (C. C. Mo. 1907), 152 Fed. 787, 793; Kadin, "Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting," 19 B. U. L. REV. 533, 538 (1939).

^{29a} *Pike v. Walker* (App. D. C. 1941), 121 F. (2d) 37.

^{29b} *Boeing Air Transport, Inc. v. Farley* (App. D. C. 1935), 75 F. (2d)

contracts previously awarded, was held invalid where made without notice and hearing. While the determination could logically have been described as purely administrative or executive, and thus of a type where no notice need be given, yet the court was persuaded by the fact that a hearing was necessary to a fully informed determination, and the fact that clear deprivation of substantial property rights was involved, and the fact that no governmental need for summary action could be shown.

5. Necessity of Notice Where the Agency Exercises Rule-Making Powers

Legislative character of determination not controlling. In connection with cases where an agency exercises rule-making powers, the suggestion is frequently encountered that since such procedure is essentially legislative in character, rather than judicial, no notice need be given. As a rule of general application, this suggestion is too broad, and is shown by the cases to be unsound. The idea behind it is similarly unsound. The rule-making activities of an administrative agency should not be put on a parity with the law-making activities of a legislature. An agency does not represent a heterogeneous constituency, as does a legislature, but rather represents ordinarily a special interest group. An agency does not, as a legislature is generally thought to do, represent a cross section of prevailing public opinion. None of the safeguards which legislative procedure interpose against hasty, ill-considered action are present where an administrative agency formulates rules of general application and substantive content without giving affected parties an opportunity to be heard. The fact that an agency is usually formulating more detailed rules than those adopted by the legislature—rules

designed to control minutiae of conduct—only emphasizes the importance of this distinction.³⁰

General recognition of the fact that the best guaranty of wise and informed administrative action lies in making ample provision for notice, hearing, and full discussion of proposed rules prior to their promulgation, as well as a general realization that in this field there is no pressing public need for speedy action, has led to frequent statutory enactments requiring that notice and hearing should precede the issuance of many types of rules. The legislature frequently inserts an express requirement of hearings in the controlling statute.³¹

³⁰ No case is known where a legislature has so far overlooked controlling factual situations in formulating a rule of conduct as did the Bureau of Marine Inspection and Navigation in publishing regulations governing oil-tankers. There, after the regulations had been promulgated, it was discovered that no provisions had been made for certain small oil-tankers, constructed partly of wood, that had been in operation for years in Southern bays and inlets. See report of Attorney General's Committee on Administrative Procedure (1941) p. 114. The agency did not know of the existence of this fleet; and the operators of the fleet did not know of the forthcoming issuance of rules. Perhaps part of the responsibility for this contretemps lies with a committee of representatives of certain oil companies which is said to have assisted in the preparation of the regulations.

³¹ Legislative provision may be of varied types. The simplest is a general requirement that a hearing be held. Going beyond this, provision may be made for investigation, publication of proposed rules, giving of such notice as to assure that the affected parties will be made generally aware of the content of the proposed rule, et cetera. The Federal Administrative Procedure Act (§ 4) requires general notice (by publication) as to the time and place of hearing, and requires that the notice either state the terms of the proposed rule or at least describe the subjects and issues involved. In some instances, such as the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. §§ 208, 210), the Bituminous Coal Act (50 Stat. 73, 15 U.S.C. § 829) and the Food, Drug, and Cosmetic Act (52 Stat. 1055, 21 U.S.C. § 371 (e)), Congress has gone still further and required that the administrative regulations be supported by findings of fact which in turn must rest on evidence duly taken in a formal hearing before the agency. Such requirement is perhaps too rigorous. It has the advantage of imposing a healthy discipline on the mental processes of the administrators, who must in operating under such a statute reason closely and clearly in formulating their rules. But it fails perhaps sufficiently to take into account the fact that the issues in a rule-making proceeding are complex and numerous, and the fact that the parties are diverse and not always alignable into classes, and the fact that the final product represents not so much a determination based on existing facts as a judgment as to the future consequences of proposed rules. For a general discussion of the problem of notice and hearing in rule-making proceedings, see Fuchs, "Procedure in Administrative Rule-Making," 52 HARV. L. REV. 259 (1938). The particular problems that

In cases where the statute is silent, it is common practice for the agencies to give some notice and an opportunity at least for discussion and informal exchange of views, before adopting any far-reaching rule of substantive effect.

It is only in cases where the statute is silent and the agency prefers not to hold a hearing that the constitutional question arises. In such cases, decision depends essentially on the nature of the rule. Some courts have camouflaged the distinction by calling the rule-making procedure judicial in nature in those cases where fairness seems to require a hearing, and thus squaring the result with the formula that a hearing is required in the case of quasi-judicial proceedings, but not in the case of quasi-legislative proceedings.³²

arise under the Federal Administrative Procedure Act are discussed in Ginnane, "Rule Making," 'Adjudication' and Exemptions Under the Administrative Procedure Act," 95 U. PA. L. REV. 621 (1947).

³² An illustration of the difficulties encountered by a court enmeshed in the quagmire of distinctions between the quasi-legislative and the quasi-judicial is afforded by a series of early decisions in Massachusetts. In *Ela v. Smith*, 5 Gray (71 Mass.) 121 (1855), the court had said that the action of a mayor in calling out the militia to prevent a riot was quasi-judicial. Apparently, the reason for this rather startling description of an executive act was the fear that unless so described, there might be a personal liability on the part of the mayor if it could be established that he had committed an error of judgment in calling out the militia. A little later, in *City of Salem v. Eastern R. Co.*, 98 Mass. 431 (1868), the court upheld the action of a board of health which (pursuant to a statute) had without notice or hearing ordered a person who had blocked a pond, to provide proper drainage. In so holding, the court incidentally referred to the act of the board as a "quasi-judicial" act. The opinion suggested—in a neat reversal of the usual cliché—that notice was necessary in case of quasi-legislative proceedings; but not in case of quasi-judicial proceedings. However, when a litigant sought to take advantage of this theory in *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693 (1904), the court changed its terminology. In holding that notice and hearing need not precede the adoption of a health regulation forbidding swimming in a small lake which was the source of a city's water supply, the court said that notice *was* necessary in case of quasi-judicial proceedings involving the determination as to the existence of a nuisance in a particular case, but was *not* necessary in case of quasi-legislative proceedings involving the issuance of general regulations. The suggestion of the prior decision was thus nicely reversed. But the court soon encountered further difficulties. In *Commonwealth v. Sisson*, 189 Mass. 247, 75 N. E. 619 (1905), it appeared that the board of health, without a hearing, had found that certain activities did constitute a nuisance in a particular case, and had ordered an individual to take certain steps to abate it. This was, apparently, within the rule of the *Nelson* case, a quasi-judicial act, and one which required notice. But since (for various reasons discussed in

Procedural rules. In cases where the rule adopted by the agency is primarily procedural in nature, setting up rules of practice in proceedings before the agency, prescribing forms, setting a schedule of fees, et cetera, it would seem that no notice is required. The same result follows in cases where the agency's "rules" are in effect no more than legal opinions as to the proper interpretation of the governing statute, announcing the construction which, on the advice of its counsel, the agency will follow unless and until the courts should construe the statute otherwise. In neither of these types of cases is there any substantial need for a hearing.

Substantive rules. Where the agency rule in effect comprises a substantive rule of law, the situation is less clear cut. Where the class to be affected is large, and the question to be resolved rests primarily on broad considerations of policy as to which a wide discretion has been committed to the rule-making agency, there is no necessity of giving advance individual notice to those affected. Nor is there necessity, in such cases, of giving an opportunity for a formal judicial-type hearing. Whatever degree of investigation and consultation the agency may have engaged in prior to the issuance of the rule will ordinarily be deemed to have satisfied the requirements of due process.³³

Where, however, the rule or order is directed specifically to a party or a compact group, and where the agency exercises only a limited degree of discretion, actual notice and opportunity for hearing are ordinarily required.³⁴

the opinion) it seemed clearly undesirable to upset the order there involved because of the denial of a hearing, the court was constrained to further differentiate between quasi-judicial and quasi-legislative proceedings, and did so in a most confusing way, with an apparent result of excusing notice in many types of cases where under previous decisions, notice would be necessary. See discussion in 20 HARV. L. REV. 116 (1906).

³³ *Guiseppi v. Walling* (C.C.A. 2d 1944), 144 F. (2d) 608; cf., *Gemsco Inc. v. Walling*, 324 U. S. 244, 65 S. Ct. 605 (1945).

³⁴ *Western U. Tel. Co. v. Industrial Commission of Minnesota* (D. C. Minn. 1938), 24 F. Supp. 370, where a three-judge court was of the opinion that a minimum-wage order would be invalid if made without notice and an adequate

Character of hearing. Even in those cases where notice and hearing are required as conditions precedent to the exercise by an agency of its rule-making powers, the requirements as to the form of notice and scope of the hearing are far less rigorous than in cases where the agency exercises judicial powers. The agency, in exercising its rule-making powers, is not required "to conduct a quasi-judicial proceeding."³⁵ It is enough if the hearing is "of the same order as had been given by congressional committees when the legislative process was in the hands of Congress."³⁶ It need not be shown, in the absence of a specific statutory requirement, that the rule or order is supported by evidence taken at the hearing.³⁷

6. Necessity of Notice in Fixing Rates and Commodity Prices

The fixing of utility rates is one of the most common forms of the exercise of rule-making powers by administrative agencies. Such activity has in comparatively recent years been broadened to include the fixing of prices in case of certain commodity sales. In considering the necessity of notice and hearing in such cases, however, the courts have not considered them simply as instances to be governed by a general rule applicable to all rule-making activities. Nor have the courts applied, in this instance, the suggestion that rule-making activities are legislative in character and that therefore notice is not required. Rather, the courts have required or excused

opportunity to be heard. *Chicago, M. & St. P. Ry. Co. v. Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162 (1926), holding unconstitutional a statute empowering an agency to order a railroad to erect a spur track, without notice or hearing.

³⁵ *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor*, 312 U. S. 126, 128, 61 S. Ct. 524 (1941).

³⁶ *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 305, 53 S. Ct. 350 (1933).

³⁷ *The Assigned Car Cases*, 274 U. S. 564, 47 S. Ct. 727 (1927).

notice and hearing on the basis of far more practical considerations.

It seems fairly clear that in a case of fixing utility rates, there exists a right to a hearing, at least before the enforcement of the rates.³⁸ On the other hand, the Office of Price Administration in fixing rents and commodity price ceilings under war emergency powers was not required to give a hearing before fixing prices, and it was held that there was no denial of due process in the circumstance that the order became effective without the parties affected having an opportunity to be heard.³⁹ State courts have reached similar results.⁴⁰

Here again, it is futile to explain the difference in result on the basis that one type of hearing is legislative and the other judicial in nature.⁴¹ A better explanation of the result is that afforded by the Supreme Court, which (in the rent-fixing case above cited) quoted the language of Justice Holmes in *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*^{41a} that "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption." Not only is it impracticable to give every landlord in a large area an opportunity to be heard, but there is grave doubt as to

³⁸ *United States v. Illinois Cent. R. Co.*, 291 U. S. 457, 54 S. Ct. 471 (1934); *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U. S. 388, 58 S. Ct. 334 (1938); *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462, 702 (1890).

³⁹ *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641 (1944). For a general discussion, see Bandy, "Notice and Opportunity to be Heard in Price Control Proceedings," 20 TEX. L. REV. 577 (1942).

⁴⁰ *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920)—fixing wages; *State ex rel. State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 179 Atl. 116 (1935)—milk prices.

⁴¹ The Supreme Court has called rate making both judicial and legislative, and the federal courts now characterize it as a legislative function. See 34 COL. L. REV. 332 (1934) and discussion in Freund, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928) 15.

^{41a} *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U. S. 441 at 445, 36 S. Ct. 141 (1915).

the utility of such a hearing. In fixing utility rates, on the other hand, the principal facts to be considered relate to the valuation of one company's property and its cost of operation. The best source of information on this question is found in the reports of the company and analyses of its accountants. The nature of the issue is such as to make the judicial-type hearing the most efficient way of discovering the truth. *Per contra*, in the rent-fixing case, the order depends not upon disputed facts which particularly concern individual parties but rather upon broad economic postulates best susceptible to investigation by the methods of skilled economists and statisticians. A judicial-type hearing would not be the best available method of assuring informed administrative action.⁴²

Type of hearing. In the price-fixing field, statutes frequently require that a hearing be held even in cases where it would not be constitutionally necessary. In such instances, it would seem that a hearing which did no more than give interested parties an opportunity to present their general views (as in the typical case of a hearing before a legislative committee) should be sufficient. Some courts have so held.⁴³ But other courts, believing that the legislative purpose in providing for a hearing contemplated that the order must be based on evidence taken at the hearing, have reached a contrary result, requiring that the hearing must follow generally the course of a judicial trial.⁴⁴

In utility rate-fixing cases, where a hearing is required as a matter of constitutional right, the rule of the federal courts is that the determination must be based on evidence

⁴² *Cf.*, DAVIS, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 YALE L. J. 1093 (1942).

⁴³ *Ray v. Parker*, 15 Cal. (2d) 275, 101 P. (2d) 665 (1940); *Highland Farms Dairy, Inc. v. Agnew* (D. C. Va. 1936), 16 F. Supp. 575.

⁴⁴ *Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania*, 332 Pa. 15, 1 A. (2d) 775 (1938); *McGrew v. Industrial Commission*, 96 Utah 203, 85 P. (2d) 608 (1938).

taken at the hearing; the tribunal is prohibited from relying on its own asserted knowledge of facts not proved at the hearing.⁴⁵ It would follow that in such cases, the hearing must be of a type conforming generally to basic requirements of a judicial hearing, involving opportunity to examine and cross-examine witnesses.

7. Necessity of Notice and Hearing in Public Safety Cases

In many types of cases, administrative or executive authorities, acting under statutes passed in the exercise of the legislature's police power, proceed summarily to seize or confiscate property, order nuisances abated, order the installation of safety appliances, and sometimes require the hospitalization or incarceration of persons, all without notice or opportunity to be heard. In these "public safety" cases, the underlying policy factors that motivate decisions come clearly to light.

Immediacy of public danger. In such cases as the destruction of putrid food⁴⁶ or the quarantining of persons suffering from vile and contagious diseases,⁴⁷ most courts agree that the administrative agency may proceed summarily, finding satisfaction of due process in the opportunity to bring a subsequent damage suit against the offending official. Where, on the other hand, it can be plainly shown that no overwhelming public interest justifies such an arbitrary course, and where pursuit thereof would affect substantial property rights, advance notice and opportunity to be heard before the administrative action becomes final is usually required.⁴⁸

⁴⁵ This question is discussed more fully, *infra*, pp. 207, 208.

⁴⁶ *North American Cold Storage Co. v. City of Chicago*, 211 U. S. 306, 29 S. Ct. 101 (1908).

⁴⁷ *Ex parte Lewis*, 328 Mo. 843, 42 S. W. (2d) 21 (1931); *cf.*, *Rock v. Carney*, 216 Mich. 280, 185 N. W. 798 (1921), citing many cases.

⁴⁸ *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 S. Ct. 148 (1933), invalidating an authorization to an agency to order a railroad, without notice or hearing, to construct an overhead crossing; *cf.*, *Lacey v. Lemmons*, 22 N. M. 54, 159 Pac. 949 (1916). See comments, 43 YALE L. J. 840 (1934); 82 U. PA. L. REV. 400 (1934).

Substantiality of property interest involved. Summary action is more often permitted where the dollar value of the seized property is small. The distinction made possesses advantages of empiricism rather than logic. This has been frankly recognized by the courts. In *Lawton v. Steele*,^{48a} for example, the court in upholding summary destruction of fish nets maintained in alleged violation of a state statute, remarked that it would be "belittling the dignity of the judiciary" to require the destruction of "property . . . of trifling value" to be "preceded by a solemn condemnation in a court of justice." Where the fisherman's boats rather than his nets were the subject of the statute, it was held that notice and a formal hearing were required before a seizure could be made, the court pointing out that the property involved might reach in value many thousands of dollars.⁴⁹ On the closely related theory that property—such as slot machines—which is incapable of being put to any lawful use does not deserve protection, the courts have similarly sustained summary seizure of gambling equipment.⁵⁰ As a result of a conceptualistic application of this theory, courts have often sustained summary proceedings as to property legislatively declared to be a nuisance, even though there might be doubt as to whether the particular property seized under the statute was in fact being so used as to constitute a nuisance.⁵¹ The result in such cases seems unfortunate. Summary proceedings should be justified only in cases of an overruling necessity.⁵² Several cases have been decided on this basis.⁵³

^{48a} *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499 (1894).

⁴⁹ *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302 (1897).

⁵⁰ *Police Commissioners for City of Baltimore v. Wagner*, 93 Md. 182, 48 Atl. 455 (1901); and see Powell, "Administrative Exercise of the Police Power," 24 HARV. L. REV. 333 (1911).

⁵¹ *People ex rel. Copcutt v. Board of Health of City of Yonkers*, 140 N. Y. 1, 35 N. E. 320 (1893); *King v. Davenport*, 98 Ill. 305 (1881).

⁵² See Dickinson, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 261.

⁵³ *City of Paducah v. Hook Amusement Co., Inc.*, 257 Ky. 19, 77 S. W. (2d) 383 (1934); *McConnell v. McKillip*, 71 Neb. 712, 99 N. W. 505 (1904).

In some types of cases to be sure, where the facts can be ascertained by an objective standard, inspection by an expert offers a more reliable method than does a trial to determine the truth; and in such cases summary seizure is quite properly sustained, where there is any substantial public interest to justify it.⁵⁴

8. Necessity of Notice and Hearing in Granting and Revoking Licenses

(a) *Granting licenses.* When application is made to an administrative agency for the issuance of a license, there is of course no problem of notice, and ordinarily no question is presented as to the necessity of affording a hearing. The informal procedural technique of the administrative agencies is well adapted to the investigation of applications for licenses. The judicial technique of a hearing is displaced by the administrative mechanics of the questionnaire and written statement. Frequently, the license is allowed on the basis of the application as filed. If the application is deemed insufficient to present all the desired information, or if the agency wishes to demand additional assurances from the applicant, he may be informally advised of what must be added to his application to obtain favorable action. This is the common practice, for example, with the Securities and Exchange Commission. Usually, the only purpose of a hearing is to assure that the agency obtains the information and assurances that it insists upon as a prerequisite to the issuance of a license; and ordinarily the license seeker, approaching the agency in propitiatory mood, willingly suits his convenience to the agency's desires.⁵⁵

⁵⁴ E.g., the conformity of food to certain standards; the conformity of a structure to building-code requirements, et cetera.

⁵⁵ These psychological factors, making for an attitude of deferential obedience to the agency's will, account no doubt in large part for the great favor with which the agencies view licensing systems as a *modus operandi*.

Often, where the issuance of a license depends upon compliance with certain standards or passing certain tests, a hearing would indeed be less suitable than an inspection as a means of ascertaining the truth. In such cases as the inspection of grain by the Department of Agriculture, the approval of radio equipment by the Federal Communications Commission, or the determination by the Civil Aeronautics Authority of the skill of an aviator or of the safety of an airplane, it is clear that a hearing technique would be inappropriate.

In cases where the statute sets up an objective standard that controls the granting of licenses, such as a license to keep a dog, the administrative activity in granting licenses is merely ministerial. Nonaction can ordinarily be remedied by mandamus, or similar procedural devices.

Where the statute vests a measure of discretion in the agency as to the granting or denial of a license, the question as to the necessity of a hearing arises only where an agency has denied an applicant's request for a license and denied his request for a hearing. The situation is substantially the same as that where a license is revoked, and although decisions are few, it is believed that the determination would be governed by the same considerations as those discussed in the next section with respect to the revocation of licenses. Of course, if the agency's discretion is untrammelled, there is little reason for seeking a hearing, and probably no constitutional right to one. But where the agency's discretion is limited by fairly ascertainable standards, there is apparently a right to a hearing.⁵⁶

⁵⁶ *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117, 46 S. Ct. 215 (1926); *Gage v. Censors of New Hampshire Eclectic Medical Society*, 63 N. H. 92 (1884). For a general discussion, see Stratton, "The Necessity of Notice, Hearing, and Judicial Review of Licensing by Administrative Bodies," 14 MISS. L. J. 510 (1942); Black, "Does Due Process of Law Require an Advance Notice and Hearing Before a License Is Issued Under the Agricultural Adjustment Act?" 2 U. CHI. L. REV. 270 (1935).

(b) *Revocation of licenses.* Since the revocation of a license is ordinarily upon the ground that the licensee has failed to conform to prescribed standards of conduct, and hence involves a judicial inquiry, it could logically be argued that revocation must be preceded by notice and hearing. But in this field the principle that judicial determinations must be based upon a hearing (a principle that has been ignored as often as it has been stated) has been abandoned in favor of a terminology borrowed from the field of property law. The conveyancer's distinction between the grant of a mere terminable license, conveying no rights but only a revocable privilege to make temporary use of another's lands (as contrasted with the grant of a more substantial interest, capable of judicial protection as a property right) has deviously affected the law of administrative tribunals. Courts have suggested that some licenses grant mere privileges, which may be revoked at the whim of the licensor, without notice or hearing, and that in other cases the grantee has a property right, of which he cannot be deprived except in accordance with the course of judicial proceedings. Obviously, there is no connection between a license to walk across another's lands and a license to conduct a business, but failure to emphasize this clear distinction has led to much confusion of language and perhaps some confusion of thinking.

Licenses as conferring privilege. The doctrine that some licenses to engage in business or professional activity grant to the licensee only a revocable privilege, short of the status of a right, is unsound. While this suggestion is found in many cases, few can be found where this is the real basis of decision. It appears usually as a dictum, and close examination ordinarily shows the dictum to be a poor description of the result in the particular case.⁵⁷ In principle and policy,

⁵⁷ E.g., *People ex rel. Lodes v. Department of Health of City of New York*, 189 N. Y. 187, 82 N. E. 187 (1907), where it appeared there had been a full

the suggestion is unsound, as has been pointed out repeatedly.⁵⁸ It has not motivated judicial decision and cannot be adopted as a test.

Rather, the factors that determine whether a license may be revoked without hearing are the same as those that control in other fields where the question is presented as to the necessity of a hearing in advance of definitive administrative action.

Hearing normally required. Normally, notice and an opportunity to be heard is required as a condition precedent to the revocation of a license. Inasmuch as the basis for the revocation is ordinarily asserted misconduct on the part of the licensee, the situation is one where a hearing is normally the most appropriate method for ascertaining the truth. Recognizing this, the courts have been inclined to insist that opportunity for a hearing be afforded. This predilection in favor of a requirement that there be a hearing is further supported by the fact that in revoking licenses, an agency usually is vested with but little discretion; normally, revocation must be supported by a determination of misconduct. More important still is the fact that a revocation of a license involves specific action directed toward a particular individual, and the effect upon that individual is often catastrophic.

Recognition of these factors can be found in many of the decisions which require a hearing in case of license revocations. In cases where the licensee has invested a substantial sum of money in the licensed activity, reluctance to permit revocation of the license without a hearing is particularly

hearing, *de novo*, on an application to compel reinstatement of the license; State *ex rel.* Nowotny v. City of Milwaukee, 140 Wis. 38, 121 N. W. 658 (1909); other cases discussed in Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 YALE L. J. 1093 (1942); and Hale, "Hearings: The Right to a Trial, with Special Reference to Administrative Powers," 42 ILL. L. REV. 749 (1948).

⁵⁸ See Gellhorn, ADMINISTRATIVE LAW (1940) 378.

marked.⁵⁹ To some extent, the right to a hearing seems to depend upon the amount of investment in the undertaking which has been licensed. The courts have quite uniformly (but not unanimously) insisted upon a hearing in connection with revocation of a license to practice a profession. In these cases, revocation is normally a major personal catastrophe.⁶⁰ The fact that fear of precipitate and ill-advised administrative action is a factor sometimes affecting the decision is indicated by the great reluctance of courts to permit revocation without a hearing in case of activities which have but recently come into the sphere of licensed activities. The legislatures often share this fear, and require the revocation to be based upon findings of fact supported by substantial evidence taken at a public hearing. Section 9 (b) of the Federal Administrative Procedure Act of 1946 goes somewhat further, providing that the licensee shall be accorded an opportunity "to demonstrate or achieve" compliance with all lawful requirements, prior to the revocation of a license. Sometimes statutes are construed as implying a requirement of hearing, and decision sometimes rests upon an interpretation of legislative intent. If the statute is ambiguous, it is usually construed in favor of a notice and hearing.⁶¹

Revocation permitted without hearing. But in some types of cases, revocation of a license without a hearing is per-

⁵⁹ Compare *City of Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29 (1895), indicating that hearing prior to revocation of a license as a junk dealer would be required in the absence at least of the express reservation of a power to revoke; and *Vernakes v. City of South Haven*, 186 Mich. 595, 152 N. W. 919 (1915), where hearing was not required in connection with the revocation of a license to run a popcorn stand.

⁶⁰ E.g., disbarment of an attorney (or disciplinary suspension of the right to practice): *In re Noell* (C.C.A. 8th 1937), 93 F. (2d) 5; *Garfield v. United States ex rel. Spalding*, 32 App. D. C. 153 (1908); revocation of a doctor's license: *People v. McCoy*, 125 Ill. 289, 17 N. E. 786 (1888); *State v. Schultz*, 11 Mont. 429, 28 Pac. 643 (1892); dentist's license: *Kalman v. Walsh*, 355 Ill. 341, 189 N. E. 315 (1934); *Abrams v. Jones*, 35 Idaho 532, 207 Pac. 724 (1922). See also Tuttrup, "Necessity of Notice and Hearing in the Revocation of Occupational Licenses," 4 WIS. L. REV. 180 (1927).

⁶¹ *Tanguay v. State Board of Public Roads*, 46 R. I. 134, 125 Atl. 293 (1924).

mitted. To a large degree, these cases simply reflect judicial deference to accepted traditions in a particular field. Where the carrying on of particular types of enterprises was historically permitted only by the special indulgence of the sovereign, the exercise of free executive discretion in granting or revoking a license to conduct such enterprise long ago became an accustomed part of our mores, and no deprivation of due process is perceived in permitting the revocation of such licenses without a hearing. The result is often explained by saying that the conduct of such enterprises involves a high degree of risk to public morality, and that because of the general undesirability of such activities as the conduct of saloons, poolrooms, public dance halls, and the like, it is proper to give administrative officials a free executive power to control the conduct of licensees engaged in such activities, embracing even the power to put them speedily out of business.⁶² But the lack of respectability of the business is not the controlling test, for similar results obtain in other fields where there is no such moral question involved but where there is an accepted tradition of discretionary revocation of licenses.⁶³

In cases where a clear need of speedy action to protect the public health is shown, summary revocation of licenses is sometimes permitted on the same grounds as in other cases involving action to preserve the public safety. Typical of this sort of case is a license to peddle milk.⁶⁴ This principle has been pressed far, even to permitting the revocation of

⁶² *Commonwealth v. Kinsley*, 133 Mass. 578 (1882); *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N. W. 882 (1914); *People ex rel. Ritter v. Wallace*, 160 App. Div. 787, 145 N. Y. S. 1041 (1914); *Bungalow Amusement Co. v. City of Seattle*, 148 Wash. 485, 269 Pac. 1043 (1928).

⁶³ *Child v. Bemus*, 17 R. I. 230, 21 Atl. 539 (1891)—hackney license.

⁶⁴ *State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N. W. 658 (1909); *People ex rel. Lodes v. Department of Health of City of New York*, 189 N. Y. 187, 82 N. E. 187 (1907)—both these cases containing dicta, as above noted, going beyond the actual decision and suggesting improperly that the right conferred upon the licensee was not a property right but a mere revocable license.

a license to operate a motion picture theater where inspectors found the structure to be in dangerous condition.⁶⁵

The courts are more ready to permit deprivation of a hearing in license revocation cases where the amount invested by the licensee is small, because little harm will be caused even if administrative action is based on mistake.

In some types of cases, of course, a license is issued on an express or clearly implied condition that it is subject to revocation at the whim of the licensing sovereign—for example, a license to fish commercially in state-owned waters, or a license to conduct a business on city-owned property. And in these cases there is no difficulty in revoking a license in accordance with the reserved power. Such cases fall beyond the ambit of the problem.

Likewise there must be distinguished cases where there is a wholesale revocation of licenses as a method of effectuating a proper legislative determination that henceforward a certain type of business shall be prohibited—for example, if a state validly prohibits the sale of intoxicating liquor, saloonkeepers are not entitled to a hearing on the question as to the revocation of their licenses.⁶⁶

Suspension of licenses. Revocation of a license to carry on any type of business, without giving the licensee an opportunity to be heard as to his innocence of the charge on which the revocation proceedings are based, is unfortunate. The public interest could be adequately preserved, and a much wider assurance of individual justice obtained, by adopting a device of permitting temporary suspension of a license without a hearing, at the same time prohibiting actual revocation except after a trial of the licensee on the charges which have been preferred. This device is sometimes pro-

⁶⁵ *Genesee Recreation Co. of Rochester v. Edgerton*, 172 App. Div. 464, 158 N. Y. S. 421 (1916).

⁶⁶ *Burgess v. Mayor and Aldermen of City of Brockton*, 235 Mass. 95, 126 N. E. 456 (1920), where an ordinance was adopted putting an end to the jitney business as a means of public transportation in that city.

vided for in recent statutes.⁶⁷ Some agencies are developing this technique, independently of statutory provisions, as a means of meeting the difficult license revocation problem. It offers wide opportunities.

9. Effect of Statutes

Statutory requirement frequent. Frequently, statutes require notice and hearing in cases where such requirement would not be implied from the due process clause.⁶⁸ In many cases, such statutory requirement appears to reflect legislative disapprobation of the result of judicial decision that, independent of statute, no hearing was required.⁶⁹ In other cases, the statutes are apparently aimed chiefly at assuring the adequacy of notice and an opportunity for full hearing. There is frequently a requirement (which in the absence of statute would not in all cases be implied) that the agency's action must be based on and fully supported by the evidence taken at the hearing.

⁶⁷ Civil Aeronautics Act of 1938, 52 Stat. 973, Ch. 601, § 609; 49 U.S.C. § 401; Packers and Stockyards Act, 42 Stat. 164 (1921) Ch. 64, § 306; 7 U.S.C. § 181; Cotton Standards Act, 42 Stat. 1517 (1923) Ch. 288, § 3; 7 U.S.C. § 51; Grain Standards Act, 39 Stat. 484 (1916) Ch. 313, § 7; 7 U.S.C. § 71; United States Warehouse Act, 46 Stat. 1464 (1931) Ch. 366, §§ 7 and 8; 7 U.S.C. § 241. *Cf.*, § 9 (b) of the Federal Administrative Procedure Act of 1946.

⁶⁸ E.g., the Model State Administrative Procedure Act, promulgated by the National Conference of Commissioners on Uniform State Laws, requires "reasonable notice" and an "opportunity for hearing" in "any contested case."

⁶⁹ Thus, in many states the landowner is given a right to a hearing on the question as to the necessity of taking his property for a public use, although it seems well settled that otherwise no hearing is required. The effect of the decision in *Commonwealth v. Sisson*, 189 Mass. 247, 75 N. E. 619 (1905) (note 32, *supra*), was obliterated the following year by an amendment to the statute there involved, the amendment requiring that the health commissioners give notice and an opportunity to be heard before making an order forbidding the discharge of sawdust into streams—exactly what the court had held was not necessary, in the absence of statutory requirement. Ch. 356, Mass. Acts, 1906. Many states by statute impose requirements as to hearings in connection with executive proceedings to remove public officers. As above noted, a hearing is not required in such case, in the absence of statute. See 99 A. L. R. 336. Amendments to the federal immigration laws have broadened the immigrant's right to a hearing. See Dickinson, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 295; and Act of 1907, 34 Stat. 906, Ch. 1134, § 25.

The multiplicity of these legislative admonitions suggests clearly a general realization that as a matter of sound administrative practice, there should be afforded, wherever practicable and regardless of constitutional requirements, adequate notice to all interested parties and an opportunity to be heard fully as to contemplated administrative actions. Many agencies, sharing this view, regularly consult with interested parties on problems of general concern, and make it almost a rule never to take final action directly affecting any particular party or group without first inviting the party or parties to discuss the matter.⁷⁰

Failure of statute to require notice. Sometimes a statute, authorizing administrative activities in a particular field, fails to impose any affirmative requirement as to notice and hearing, even in a type of case where these are constitutionally required. May the statute be declared void because of such omission? As the result of a dictum in *Stuart v. Palmer*,^{70a} declaring that the validity of a statute must depend not on what is in fact done as to giving notice, but on what *may* be done under the statute, a number of courts have held that even though an administrative agency has "by chance" given notice and a hearing to a respondent, nevertheless its action may be set aside because the statute under which it was operating did not in terms require the giving of such notice.⁷¹ The much sounder ruling, supported by the clear weight of authority, holds that there is no deprivation of due process if notice and hearing were in fact afforded by the administrative authorities, even though the statutes do not specifically require such procedure. This result

⁷⁰ The Federal Administrative Procedure Act of 1946 provides a general broadening of the legislative requirements for hearings in cases involving the exercise of rule-making powers.

^{70a} *Stuart v. Palmer*, 74 N. Y. 183 (1878).

⁷¹ E.g., *Lacy v. Lemmons*, 22 N. M. 54, 159 Pac. 949 (1916); *Central of Georgia Ry. v. Georgia R.R. Commission* (D. C. Ga. 1914), 215 Fed. 421; *People v. Marquis*, 291 Ill. 121, 125 N. E. 757 (1920); *Northern Cedar Co. v. French*, 131 Wash. 394, 230 Pac. 837 (1924).

is achieved frequently by construing statutes as "implying" a requirement of notice and hearing where the constitution so requires; sometimes, the result is explained on the presumption that official action has been taken legally. But the soundest basis appears to be that one who has in fact received notice and has been heard has not been deprived of notice and hearing. Nor is there any good reason for enjoining administrative action under a statute which is silent as to the requirement of notice, upon a party's speculative or conjectural fear that the agency might take some action against him without giving prior notice.⁷²

10. Hearing by Judicial Review

In some cases, where an agency acts without giving notice and an opportunity to be heard, in situations where a hearing is required, it is possible to obtain a subsequent hearing by appealing the administrative determination to the courts. Is it sufficient if relief is forthcoming via this circuitous route? In cases where personal liberty is involved, the answer would seem plainly to be *no*. But where only property rights are at stake, it is quite generally held that "mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."⁷³ Where, however, the court is

⁷² *People v. McCoy*, 125 Ill. 289, 17 N. E. 786 (1888); *Armory Realty Co. v. Olsen*, 210 Wis. 281, 246 N. W. 513 (1933); *Toombs v. Citizens' Bank of Waynesboro*, 281 U. S. 643, 50 S. Ct. 434 (1930); *State ex rel. Powell v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238 (1884); *Railroad Commissioners v. Columbia, N. & L. R. Co.*, 82 S. C. 418, 64 S. E. 240 (1909); *Abrams v. Daugherty*, 60 Cal. App. 297, 212 Pac. 942 (1922); *City of San Jose v. Railroad Commission of State of California*, 175 Cal. 284, 165 Pac. 967 (1917); *Corcoran v. Board of Aldermen of Cambridge*, 199 Mass. 5, 85 N. E. 155 (1908); *Tyler v. Judges of the Court of Registration*, 179 U. S. 405, 21 S. Ct. 206 (1900). Other cases are collected in Stason, *THE LAW OF ADMINISTRATIVE TRIBUNALS*, 2d ed. (1947) 187.

⁷³ *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 596-597, 51 S. Ct. 608 (1931); and see *Bowles v. Willingham*, 321 U. S. 503, 64 S. Ct. 641 (1944); *Springer v. United States*, 102 U. S. 586 (1880); *Scottish Union & National Ins. Co. v. Bowland*, 196 U. S. 611, 25 S. Ct. 345 (1905).

not satisfied that the remedies available in the courts are adequate, the opposite result is reached.⁷⁴

In many of the cases where an opportunity to obtain an *ex post facto* hearing, through judicial review, has been held sufficient, there has been no showing of particular harm to the respondent as a result of being compelled to go into the courts to obtain relief. In a tax case involving disputed liability for a sum of money, for example, it can fairly be expected that a determination on the question would ultimately be a matter for the courts in any event; and, further, in such cases the courts are swayed by imponderable considerations as to the public desirability of assuring speedy and efficient operation of the tax-collection procedure. But if the rule established in such decisions were to be applied in case situations (like workmen's compensation) where the party affected could not normally afford to carry his case into court, or in situations where the private injury (e. g., deprivation of a license to do business) that would result from the immediate effectiveness of the administrative order outweighs the public necessity for prompt administrative action, this doctrine could produce most untoward results. The doctrine has not been applied in such cases; and the doctrine should not be so extended. The constantly increasing sphere of administrative actability, and the continuing withdrawal of the courts from detailed examination of administrative rulings, are further reasons for the conclusion that in many types of cases the theoretical availability of judicial review should not be deemed a ground for permitting agencies to deny private parties the privilege of notice and hearing at the early stages of the proceeding.

⁷⁴ *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 S. Ct. 148 (1933); *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938).

11. Effect of Failure to Demand Notice and Hearing

Where notice is required, by constitution or statute, to precede administrative action, and no notice is given, the proceedings are of course defective, unless the error is waived by the party's appearance before the agency.⁷⁵ Similarly, the respondent may waive his right of a hearing, and waiver is readily inferred from failure to make a prompt and insistent demand therefor. Especially is this true in such fields as taxation.⁷⁶

12. Conclusions

No general formula can be relied upon to determine whether or not, in a given situation, notice and hearing must precede administrative action. The line has not been drawn according to a distinction between judicial and legislative activities. Although there is some tendency to require notice in the former type of case and not in the latter, yet this tendency has frequently been overcome by extraneous considerations deemed to be controlling in a particular case.

Nor can statements of principle made in a case involving one administrative function safely be applied in predicting what result will be reached in a case involving a different agency performing its work in a different field. The courts tend not only to follow the accepted tradition in a particular field, they tend also to restrict their rulings to the particular field in which the ruling was made. Factual distinctions assume great importance. The doctrine permitting summary

⁷⁵ *Brahv v. Federal Radio Commission* (App. D. C. 1932), 59 F. (2d) 879; *Harris v. Hoage* (App. D. C. 1933), 66 F. (2d) 801. But there is some disagreement as to this. See *Stiles v. Municipal Council of Lowell*, 229 Mass. 208, 118 N. E. 347 (1918). There is no waiver where the objection is based on failure to give notice to other interested parties. *City of Los Angeles v. Glassell*, 203 Cal. 44, 262 Pac. 1084 (1928); *cf.*, *Romeo v. Campbell* (C.C.A. 2d 1929), 35 F. (2d) 704.

⁷⁶ *McGregor v. Hogan*, 263 U. S. 234, 44 S. Ct. 50 (1923); *cf.*, *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127, 28 S. Ct. 47 (1907).

confiscation of a net used illegally by a fisherman does not permit similar seizure of a fleet of ships which he uses to conduct his illegal fishing operations, for example. More important, the fact that the requirements of notice and hearing may have become attenuated in a particular field, by a gradual process of judicial erosion, does not mean that the same flexibility of procedure will be tolerated in an analogous field where administrative supervision is an unaccustomed innovation.

But the divergent traditions obtaining in various fields of administrative activities can be rationalized, and the warp and woof of seemingly conflicting decisions spun into whole cloth, by reference to the underlying policy factors which motivate decisions more frequently than judicial opinions indicate. The essential problem in every case is that of weighing the relative merits of a public interest in prompt action against the respondent's private interest that the hand of the law be stayed until he has fully argued the equities of his particular position. Sometimes the balance is plain—for example, the public necessity of expeditious collection of the public revenues obviously outweighs the individual taxpayer's desire to avoid payment of a contested tax until the validity thereof has been finally determined by a court of last resort. Conversely, the right of a doctor to continue the practice of his profession, pending determination of charges that he improperly advertised, clearly outweighs the public interest in curtailing such instances of asserted unethical conduct.

But in other cases the scales are more evenly balanced. Then other considerations of policy must be taken into account.

First among these, perhaps, is the extent to which the administrative agency has been vested with discretion to premise its determinations upon *ad hoc* considerations of what

is generally desirable in a particular case. If an agency has free discretion, notice and hearing could serve no controlling purpose, and may be dispensed with if the agency so desires.

But the extent of administrative freedom of action is ordinarily the result of, rather than the basis of, judicial determination. The courts ordinarily decide what degree of discretion is to be accorded the agency. In reaching this decision, the courts probe into considerations lying far beneath the surface of the readily seen.

One such consideration is the importance to the private party involved of the repercussions of a particular administrative activity, and the immediacy of the effect. Where private property of a particular person is singled out for specific action, notice and hearing are ordinarily deemed appropriate. More particularly is this the case where the property interest involved is of substantial value. Where the number of persons affected by the administrative determination is large, on the other hand, requirement of notice and hearing is less persuasively indicated. This result is prompted in part by the practical difficulties involved in hearing large numbers of parties before taking action; further, the courts sense the difficulty of aligning the interests of thousands of parties and resolving many individual complaints into clear-cut issues.

Closely related to this factor is another. As a result of judicial experience, courts know that in some inquiries, a formal hearing is less well calculated to reveal the truth than is private investigation and inspection. In such cases, notice and hearing will not ordinarily be required.

Decision is influenced somewhat by the court's confidence in the agency. A court that views with doubts and misgivings the functioning of a given agency is naturally inclined to repress that agency's freedom of discretionary action. It can often be most efficiently repressed by insistence that the

agency must proceed only on the basis of a record which is shown to contain substantial evidence to support the agency's conclusions. Coupled with this is a countertendency (particularly in cases where it is believed administrative action is not likely to be ill-advised or, even if in error, not likely to be a cause of irreparable injury) to waive insistence upon a hearing in advance of administrative action, where there is adequate opportunity for correcting administrative mistakes upon judicial review.

B. REQUIREMENTS AS TO SERVICE OF NOTICE

I. Constitutional and Statutory Questions Involved

In cases where notice is required to precede administrative action, questions arise as to who is entitled to receive notice, and what formalities must be complied with in serving notice. The problems thus presented may have both a constitutional and statutory background.

From the viewpoint of meeting constitutional requirements, there is little difficulty. The due process clause is not concerned with procedural niceties. Generally, notice need be given only those parties who will be directly and substantially affected by the administrative determination. The form of notice is immaterial, so long as it is calculated to acquaint the respondent with the necessary information as to the date and place of hearing in time to give him a reasonable opportunity to prepare and present his case, and so long as it apprises him of the nature of the claim with sufficient particularity to enable him to know what evidence he must prepare to meet it.⁷⁷

Statutes often require more of the agencies as to these matters than the Constitution demands. Frequently, notice must be given to collaterally interested parties. Sometimes,

⁷⁷ The question as to the adequacy of notice, from the viewpoint of the degree of definiteness and particularity required, is treated *infra*.

the statute specifies with particularity to whom notice must be given;⁷⁸ and sometimes, the statute requires the agency to seek out all interested parties and give them appropriate notice.⁷⁹ The latter requirement theoretically imposes a heavy burden on administrative intuition, but in practice the mere giving of a general notice of proposed administrative action is sufficient to bring the matter to the attention of interested parties, since those subject to the regulatory jurisdiction of the various agencies are generally watchful of the agencies' activities.

Similarly, the statutes frequently prescribe in some detail the contents of the required notice and the mode in which service of notice is to be perfected.

2. Who Is Entitled to Notice

Generally, except as statutes may impose broader requirements, those parties whose legal rights will be affected by the administrative determination, and who would be deemed "indispensable parties" in equitable proceedings in the courts, are entitled to notice and an opportunity to be heard thereon (assuming, of course, that the determination is of such a nature that notice and an opportunity to be heard are required).

The problem becomes troublesome as it involves the rights of those whose interests will be collaterally affected by a determination. For example, the granting to a radio station of the right to change its assigned frequency and power, or the grant of a license to erect and operate a new station, may substantially affect the value of a franchise previously granted to another station. Or an order directing an employer to discontinue an unfair labor practice which has

⁷⁸ In federal legislation regulating public utilities, it is sometimes required that notice of certain proceedings be given to the states in which the property of the utilities is located; e.g., § 214 of the Communications Act, 47 U.S.C. § 151; § 203 (a) of the Federal Power Act, 16 U.S.C. § 791.

⁷⁹ E.g., § 14 (a) of the Shipping Act, 46 U.S.C. § 801; § 19 (c) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

injured a particular union may adversely affect the rights of a competing union.

To what extent must the agency seek out and discover those whose interest may be collaterally affected? No clear-cut answer is afforded by the cases. Decision is affected in part by the language of applicable statutes and by the background of accepted practices in particular fields.⁸⁰ Generally, however, there is little duty cast upon the agency to trace down those who may be able to show that the order has some substantial but collateral effect on their legal rights. It is enough if the agency serves notice on those whose direct concern should be reasonably anticipated by one who is an expert in the particular field of activity.

No duty exists, it is believed, of notifying all those who might have a right to appeal.⁸¹ Nor should it be said that such advance notice must be served on every party who may have sufficient interest to be entitled to intervene in the administrative proceedings as an "interested party"; it may be quite impossible to determine in advance the identity of every potential intervenor.

Seeming inconsistencies in the decision of particular cases largely disappear when attention is given to the significance

⁸⁰ Compare *Saxton Coal Mining Co. v. National Bituminous Coal Commission* (App. D. C. 1938), 96 F. (2d) 517, with *Clarksburg-Columbus Short Route Bridge Co. v. Woodring* (App. D. C. 1937), 89 F. (2d) 788.

⁸¹ Thus, it seems that a rival radio station, even though not entitled to advance notice, can appeal from an order of the Federal Communications Commission. See *Federal Communications Commission v. National Broadcasting Co.*, 319 U. S. 239, 63 S. Ct. 1035 (1943), noted in 42 MICH. L. REV. 329 (1943); *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 60 S. Ct. 693 (1940), noted in 26 WASH. U. L. Q. 121 (1940); *Woodmen of World Life Ins. Soc. v. Federal Communications Commission* (App. D. C. 1939), 105 F. (2d) 75; *Journal Co. v. Federal Radio Commission* (App. D. C. 1931), 48 F. (2d) 461. Cf. *Sykes v. Jenny Wren Co.* (App. D. C. 1935), 78 F. (2d) 729. In some of these cases, it appears that the Commission had not given advance notice to the appellant of its intention to consider the application filed by another radio station. Nor does it appear that in these cases any claim was made that such advance notice was required. The present statute contains some requirements as to holding public hearings where conflicting claims appear. See 14 GEO. WASH. L. REV. 516 (1946).

of attendant factual circumstances. Thus, in certain proceedings of the National Railroad Adjustment Board, notice must be given to the individual employee whose contract of employment may be affected by the outcome of the case,⁸² while in proceedings before the National Labor Relations Board, notice need not be given those employees whose individual contracts of employment are attacked as having been consummated by the employer in violation of law.⁸³ But in the former case the administrative order might necessarily deprive the employee of his job, whereas in the latter case the Board's order could be shaped so as to preserve the rights of the individuals not before the Board—by providing that the Board's order would not preclude the employees from asserting valid individual rights conferred upon them under the contracts. In the former case, it was only reasonable to assume that the Board should have anticipated and protected the interest of the employees in danger of losing their jobs.

Similarly, a state public utilities commission presumably need not, precedent to a rate hearing, give notice to all holders of power contracts whose rates might be affected by its order;⁸⁴ this would impose too onerous a burden. But where it is obvious that proceedings to fix the tolls of one of two competing bridges will directly and substantially affect the business of the other bridge, it is not unreasonable to require that advance notice must be given both bridge companies.⁸⁵ Again, the National Labor Relations Board is required to give notice to a bona fide labor union before

⁸² *Nord v. Griffin* (C.C.A. 7th 1936), 86 F. (2d) 481; *Estes v. Union Terminal Co.* (C.C.A. 5th 1937), 89 F. (2d) 768.

⁸³ *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 60 S. Ct. 569 (1940).

⁸⁴ *Re Public Service Elec. Co.*, P.U.R. 1918 E, p. 898—*New Jersey Board of Public Utility Commissioners* (1918).

⁸⁵ *Clarksburg-Columbus Short Route Bridge Co. v. Woodring* (App. D. C. 1937), 89 F. (2d) 788.

entering an order setting aside a collective contract in which the union asserts rights,⁸⁶ but need not give such notice to a union which is incapable of acting as the bargaining representative of the employees.⁸⁷

3. Class Suits

In cases where the number of interested parties is unduly large, agencies can sometimes solve the problem of giving adequate notice by bringing what is in effect a class suit, which may be used under approximately the same conditions as in equity proceedings in the courts.⁸⁸

4. Form of Notice and Mechanics of Service

In many types of cases, notice may be served by general publication. In tax cases, indeed, it is deemed sufficient notice if the statutes provide that the assessing agencies are to meet at designated times and places to take certain actions that may affect every taxpayer on the roll.⁸⁹ In cases where publication of notice is all that is required, any form that is reasonably adopted to inform the public generally will be deemed sufficient.⁹⁰ The courts have quite generally sustained the sufficiency of notice even where the medium of publication and format of the notice was not calculated to attract the attention of numerous parties who might be interested.⁹¹

Where the statute does not authorize service by publication, and the proceedings are not in rem, it is doubtful

⁸⁶ Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938).

⁸⁷ National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 58 S. Ct. 571 (1938).

⁸⁸ Chamber of Commerce of Minneapolis v. Federal Trade Commission (C.C.A. 8th 1926), 13 F. (2d) 673. See 89 U. PA. L. REV. 808 (1941).

⁸⁹ Pittsburgh, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 14 S. Ct. 1114 (1894).

⁹⁰ Ottinger v. Arenal Realty Co., 257 N. Y. 371, 178 N. E. 665 (1931).

⁹¹ See Carusi v. Hazen (App. D. C. 1935), 76 F. (2d) 444; but compare *In re* Petition of Auditor General, 275 Mich. 462, 266 N. W. 464 (1936).

whether notice by publication would be deemed sufficient, in cases where a constitutional right to notice exists. But it would seem that any form of personal notice is sufficient. Service by mail is probably acceptable.⁹²

⁹² *Unity School of Christianity v. Federal Radio Commission* (App. D. C. 1933), 64 F. (2d) 550.

PART THREE

PROCEDURE IN ADJUDICATION OF CASES

CHAPTER 5

Parties and Pleading

A. PARTIES

1. The Agency as a Party

EVERY phase of the administrative adjudication of cases—whether by informal conference or formal hearing¹—is affected by the circumstance that the agency itself is a principal party. Unlike judges, administrative officers are almost always concerned with the outcome of the case as parties in interest.

The agency's direct interest in the outcome is obvious in cases where the proceeding is entitled in the name of the agency (or the Government) against a respondent, such as proceedings by the Federal Trade Commission or the National Labor Relations Board. Moreover, the same tendency is present in many types of cases where the agency is not

¹ As pointed out in the Report of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941), most of the activity of administrative agencies in disposing of cases judicially is concerned with informal disposition of matters, by conference and consultation, without formal hearing and often without any regularized proceedings of any kind. While this circumstance is of fundamental importance, and is the primary point to be considered in connection with legislative imposition of standards of administrative procedure; yet the very flexibility of these informal methods of disposing of cases precludes any extended discussion thereof. Since the informal cases are almost always those closed by consent, as a result of a mutual agreement between the parties, their disposition is governed by no set rules or standards but rather by the inclination of the negotiators in each particular case. It is in such cases, if any, that justification can be found for the cynical observation that practice before administrative tribunals does not involve knowing the law, but rather knowing the administrators. While no separate treatment of the informal methods of administrative procedure is here undertaken, yet frequent references thereto will be made in the following chapters. The opportunity of resorting to the informal procedure at any stage of a formally conducted case—which is simply the option of terminating the proceedings by negotiating an agreed settlement—somewhat conditions the conduct of the agencies, and their practices, in handling matters which are formally adjudicated.

formally a party. Quite generally, for example, workmen's compensation commissions feel that it is a part of their function to aid the claimant in obtaining compensation. Similarly, unemployment compensation commissions are conscious of a desire to stretch statutory interpretation to the furthest possible point, in favor of allowing claims. Many other examples could be cited.²

The simple fact that the agency is usually directly interested in the final disposition of the case is probably the chief factor differentiating administrative from judicial procedure. An agency's rules as to intervention, its rules of pleading, and its method of conducting hearings, are all likely to be affected by the desire to achieve a procedure that will most effectively aid the agency in reaching what it deems desirable results.

2. Indispensable and Permissive Parties

Traditional rules of joinder and of necessary or indispensable parties play but little part in administrative proceedings.³ Ordinarily, the only indispensable parties are those who, as a matter of due process or because of specific statutory requirements, must be given notice of contemplated action and an opportunity to be heard thereon.⁴ Parties with dissimilar or even conflicting and competing interests may be joined in a single proceeding, or the proceeding may continue without joinder of parties who might appropriately be brought into the proceeding, and parties may be dropped or new parties added, as administrative convenience suggests,

² There are some instances where probably no such tendency is present. For example, the Interstate Commerce Commission probably has no partisan interest in the disposition of the reparations cases which it decides—and incidentally, it has expressed its desire of being relieved of the duty of deciding such cases.

³ *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 60 S. Ct. 569 (1940); *cf.*, *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938)—holding that the Board could not void a contract, when one of the parties thereto had not been joined in the administrative proceedings.

⁴ See Chapter 4, *supra*, p. 91.

ordinarily subject to no restriction except occasional statutory provision or particular agency rules.

3. Intervention

Provision is frequently made, either in statutes or in the agency's rules of procedure, for intervention of interested parties. Intervention is usually permissive and is granted or denied at the discretion of the agency.⁵ Many agencies, motivated by a desire for expeditious handling of cases or sometimes perhaps by a desire to exclude potential troublemakers, exhibit a tendency to deny such petitions, thus narrowing the issues and excluding competing interests from an opportunity to play their part in shaping the course of administrative determination.⁶

Ordinarily, denial of a petition to intervene is not appealable.⁷ In cases where administrative discretion has clearly been abused, or where a clear statutory right exists, denial of a petition to intervene may sometimes be remedied in subsequent judicial proceedings.⁸ But on the whole, the courts show little disposition to interfere.

Not infrequently, administrative agencies permit limited participation in a case by one who is not allowed to intervene. Sometimes the status of such a party is substantially like that of an *amicus curiae* in judicial proceedings; sometimes he is permitted to introduce testimony, cross-examine witnesses, and even (under some statutory provisions creating a right of appeal in any aggrieved party) to seek judicial review of the order. Between these two extremes, many intermediate

⁵ *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 434, 35 S. Ct. 337 (1915); *Sunshine Broadcasting Co. v. Fly* (D. C. D. C. 1940), 33 F. Supp. 560.

⁶ E.g., *In the Matter of Matheson Radio Co., Inc.*, 8 F. C. C. 397 (1941); *In the Matter of Vail-Ballous Press, Inc.*, 15 N. L. R. B. 378 (1939); *Northwest Airlines, Inc., et al.*, 6 C. A. B. 217 (1944).

⁷ *Alston Coal Co. v. Federal Power Commission* (C.C.A. 10th 1943), 137 F. (2d) 740.

⁸ *Federal Communications Commission v. National Broadcasting Co.*, 319 U. S. 239, 63 S. Ct. 1035 (1943); *Mississippi Valley Barge Line Co. v. United States* (D. C. Pa. 1944), 56 F. Supp. 1.

solutions may be worked out as a means of enabling the agency to have the benefit of the views of collaterally interested parties.⁹

These devices offer wide opportunities in the way of permitting effective participation in administrative proceedings by collaterally interested parties, thus securing valuable contributions making for better informed administrative action, without involving difficulties that sometimes attend formal intervention, such as the prolonging of hearings, and the undue enlargement of the record, or the introduction of extraneous issues.

B. PLEADING

1. General Requirements

The mode of pleading to be adopted by an administrative agency is a matter to be settled by the agency. Save as occasional statutory provisions or agency rules may impose some requirements,¹⁰ the tribunals are permitted to conduct their proceedings in such manner as they may deem will be most conducive to the effective disposition of business.¹¹ Apparently, if an agency so desired, it could proceed to hearing without filing a complaint, relying on informal conferences to advise the other parties to the case as to the claims and contemplated action of the agency; indeed, this is substantially the practice of several agencies, which employ complaints that recite little more than the names of the parties and the language of the statute involved.¹² It has not been required, in any event, that the pleadings conform to any of the accepted common-law standards by which the sufficiency

⁹ See *In the Matter of United Light & Power Co., S.E.C. Holding Company* Act Release No. 2531 (1941).

¹⁰ E.g., the very detailed rules of the Interstate Commerce Commission.

¹¹ *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.* (C.C.A. 5th 1923), 295 Fed. 53, aff'd 269 U. S. 217, 46 S. Ct. 73 (1925).

¹² For criticism of the practice, see "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 63.

of pleadings in judicial proceedings are judged,¹³ although Section 5 of the Administrative Procedure Act of 1946 may be construed as imposing some requirements as to definiteness in pleadings. Section 5 provides that where some other statute requires the agency to act only after holding a hearing, there must be notice not only of the time and place of hearing, but also as to "the matters of fact and law asserted."

The pervasive tendency of administrative tribunals to adopt rules that are primarily defensive in character, designed to protect the agency's procedure from attack rather than to define the practice before the agency,¹⁴ has militated against the voluntary adoption of any strict requirements with reference to pleadings. If an agency adopted a rule providing for the furnishing of bills of particulars, upon cause shown, for example, it might lay itself open to attack on the ground that in denying such a motion in a particular case, it had violated its own rule. It is much the easier course for the agency to provide by rule that bills of particulars may not be required. Then the agency is free to furnish statements of particulars as often as it serves its purposes to do so; and at the same time it may with impunity deny a request for particulars whenever this appears the more convenient course.

But it is a shortsighted policy which prompts some agencies to adopt modes of pleading which neither apprise the respondent of the factual issues in dispute nor put him on notice of the real nature of the claim. Not only does this

¹³ *Pennsylvania R. Co. v. United States* (D. C. Pa. 1923), 288 Fed. 88; *Farmers' Livestock Commission Co. v. United States* (D. C. Ill. 1931), 54 F. (2d) 375. The decision in *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572 (1920), to the extent that it indicated that an administrative complaint must state a cause of action, has had but little effect. See *Chisholm v. Gilmer*, 299 U. S. 99, 57 S. Ct. 65 (1936), and *Honeyman v. Hanan*, 302 U. S. 375, 58 S. Ct. 273 (1937).

¹⁴ See Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 38.

practice make it difficult for the respondent to prepare his case, but it often results in wasting the time of the agency. The generality of a complaint, or notice of hearing, may serve to put formally in issue a host of matters on which there is really no question. On an application for issuance of a license, for example, the applicant must sometimes put in lengthy proofs on such broad issues as public convenience, interest, and necessity, although there may be but one narrow issue with which the agency is concerned.

There can be no question but that a complaint which sets out allegations of alleged wrongdoing in general form, substantially in the language of the statute, puts the respondent to unnecessary difficulty in ascertaining the gist of the actual complaint and thus renders it difficult for him adequately to prepare his defense.

Not only would the rights of the respondents be better protected, but the agencies themselves could act more efficiently, if they voluntarily adopted the suggestions as to particularity in pleading made by the Attorney General's Committee.¹⁵

Much of the difficulty could be solved by agency insistence on careful investigation and consideration prior to the institution of formal proceedings. This would have many collateral advantages. It would tend to eliminate the inauguration of proceedings in cases where the challenged party was in fact not guilty of wrong. It would facilitate the satisfactory adjustment, without contest, of cases where the respondent would, upon learning precisely what charge was made and what action was proposed, admit the facts and agree to the entry of a consent order disposing of the case. Finally, by making possible a better statement of the case in the initial pleadings, it would facilitate the trial of contested matters.

¹⁵ Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 234.

The initial notice should be the crucial one. While the requirements of due process can be satisfied in many cases by a specification of the charges during prehearing conferences or even by the device of posthearing notice of contentions and issues (coupled with an opportunity for further hearings if requested by the respondent), yet these are at best time consuming and inefficient. The entire course of administrative adjudication can proceed most efficiently, most fairly, and with greatest assurance of doing justice, if at the outset of the case the parties are advised fully and with particularity of the nature of the claims to be made and the issues to be argued.

2. Sufficiency of Complaint: Appraisal of What Is to Be Heard

Procedural due process requires that the respondent in administrative proceedings shall be duly informed of the nature of the charge made against him, in order that he shall have ample opportunity to present an appropriate defense to the case that may be made against him.

However, the courts have not generally required that such information be contained in the complaint or other moving papers which institute the administrative proceedings. In many types of cases it is enough if the respondent is apprised of the agency's claims, and the issues involved, at any stage of the proceedings, provided always that after such information becomes available an opportunity remains to the respondent to present his defense to such claims before the issuance of the final order. It has been suggested that four means, at least, may be appropriate in various types of proceedings as a means of apprising the parties of the issues: (1) a specific complaint; (2) an examiner's tentative findings, to which exceptions may be taken; (3) an issue-defining

oral argument; and (4) the filing of briefs in which definite points are stated.¹⁶

The absence of all four of these devices would invalidate the administrative procedure (in cases where its function is fundamentally judicial in nature). But it is not required that all four be utilized in every case. The absence of a specific complaint may often be remedied by the subsequent employment of alternative devices as a means of advising the respondent of the agency's claims and the issues. Whether or not an insufficiently definite complaint has been satisfactorily remedied by the subsequent proceedings is an inquiry that rests largely upon the facts of the individual case. If in fact the parties are fully acquainted with the basis of the agency's claims, for example, a formal objection to the inadequacy of the agency's complaint will be unsuccessful.¹⁷ If the hearings are held at intermittent intervals and the respondent has sufficient time, after learning the basis of the agency's claims when it is putting in its evidence, to prepare and present his defenses, then the lack of particularity in the complaint is immaterial.¹⁸ If the respondent elects to proceed with the defense, without objecting to the insufficiency of the complaint, he may be held to have waived the point.¹⁹

In cases where decision is not affected by the course of developments subsequent to the issuance of the complaint, and where the court must pass upon the sufficiency of the complaint, standing alone, the court must undertake to determine whether the respondent is in fact likely to be prejudiced by the vagueness of the complaint. To some

¹⁶ *Morgan v. United States*, 304 U. S. 1, 58 S. Ct. 773, 999 (1938).

¹⁷ *National Labor Relations Board v. Piqua Munising Wood Products Co.* (C.C.A. 6th 1940), 109 F. (2d) 552, 557.

¹⁸ *National Labor Relations Board v. Remington Rand, Inc.* (C.C.A. 2d 1938), 94 F. (2d) 862.

¹⁹ *Brahya v. Federal Radio Commission* (App. D. C. 1932), 59 F. (2d) 879.

extent, this determination is affected by the character of the administrative proceeding.

Where the scope and nature of the administrative decision which may be made at the hearing is ascertainable in advance—where it will be an order granting or denying a license, or ordering a respondent to cease and desist from particular practices—it is more frequently required, and properly so, that the initial pleadings must indicate the issues which are to be considered at the hearing. If the agency contemplates revocation of a license on particular grounds, the respondent is in fairness entitled to know in advance of the hearing what those grounds are. On the other hand, where the character of the administrative decision which may follow the hearing is not fixed and certain, it is often not practical to define the issues with great particularity in the initial pleadings, and a very general notice of the subject matter to be considered will be deemed sufficient.²⁰

²⁰ Thus, in *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 50 S. Ct. 220 (1930), where market agencies had filed proposed tariff schedules increasing their rates, and the administrative authorities, after suspending the proposed rate schedules, gave notice that at statutory hearings they would consider whether a further order should be made as to the rates, it was held that this sufficiently apprised the parties of the possibility that the administrative authorities might prescribe a new schedule of rates even lower than those under which the agencies had been operating before an increase was proposed. The court relied in part upon the circumstance that the statute was deemed to put the parties on notice as to the type of order which might ensue; and the court was impressed by the fact that there was no showing that the market agencies had been misled or that they had failed to put in evidence anything which would have been adduced had the notice stated more particularly the nature of the contemplated order. The difficulty of knowing in advance what type of order might be deemed proper was also adverted to. Similar considerations are reflected by the decision in *Pearson v. Walling* (C.C.A. 8th 1943), 138 F. (2d) 655. In that case, the administrator of the Wage and Hour Division of the U. S. Department of Labor had published general notice as to the meetings to be held by a statutory "Industry Committee," which would be charged in part with the duty of defining the "Lumber and Timber Products" industry, and establishing a minimum wage to be paid to certain employees in that industry. A definition was promulgated broad enough to include manufacturers of bows and arrows, and it was held that there was no deprivation of due process because a manufacturer engaged in that particular business had not been apprised in advance that the definition might be made broad enough to include

Despite the difficulty of giving in advance an accurate description of the issues which may arise in the course of the administrative proceeding, if the failure sufficiently to describe the issues has in fact caused actual prejudice to the respondent, relief may be afforded. The same result is sometimes reached where it seems entirely probable that such prejudice would follow.²¹

Unless it can be shown that actual prejudice has been suffered, or that it can be fairly presumed that it will inevitably result, the courts are little inclined to insist that the administrative agencies use their pleadings as a means of apprising the respondent of what is to be heard.²²

3. Bills of Particulars

One reason why administrative agencies prefer to restrict their complaints and charges to vague generalities is that at the time of the issuance of such documents, the particulars

his enterprise. There was no showing that the particular manufacturer was injured because of the very general character of the notice as to the convening of the committee. Further, it would obviously be extremely difficult to specify what particular types of enterprise might be deemed to fall within the lumber and timber products industry. The precise scope and character of the administrative order could not be foreseen.

²¹ In *Carl Zeiss, Inc. v. United States* (C.C.P.A. 1935), 76 F. (2d) 412, the Tariff Commission gave notice that it intended to investigate difference in cost of production of "optical instruments 'of a class or type used by Army, Navy or Air Forces for fire control.'" The Zeiss Company was not interested in the particular types of optical instruments then in use, but was vitally interested in related types of optical instruments which were suitable for such use. It did not participate in the hearings. At the conclusion thereof, a determination was made that applied to all types of optical instruments suitable for such use by the Army and Navy. The notice was held insufficient, the court saying that information as to an investigation of optical instruments of a class or type *used by* the Army and Navy did not suggest to interested parties the holding of an investigation relative to optical instruments *suitable to be used by* such armed forces.

Many of the state courts are more inclined to insist on definiteness and particularity in administrative pleadings (from the viewpoint of accurately apprising the parties of what is to be heard) than are the federal courts. See, e.g., *Abrams v. Daugherty*, 60 Cal. App. 297, 212 Pac. 942 (1922); *Kalman v. Walsh*, 355 Ill. 341, 189 N. E. 315 (1934).

²² *Consumers Power Co. v. National Labor Relations Board* (C.C.A. 6th 1940), 113 F. (2d) 38; *Republic Steel Corp. v. National Labor Relations Board* (C.C.A. 3d 1939), 107 F. (2d) 472; *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 111 F. (2d) 869.

of the case may not yet be known. But before the hearing is reached, or at least before it is completed, the attorney handling the case for the agency must learn such particulars; and accordingly some agencies have adopted fairly liberal practices as to the furnishing on request of further statements of details and particulars. Other agencies, unfortunately, appear to have a fixed rule against it.²³

Much would be gained by a further development of the practice of furnishing bills of particulars, wherever practical.²⁴

Such a practice would eliminate most of the vice inherent in the vagueness and incompleteness so often found in the original complaint. Needless litigation might often be avoided by providing in rule or statute for the issuance of bills of particulars on the same basis as that on which they are available in judicial proceedings.

But the granting of such relief rests largely within the discretion of the agency. Denial of a request for particulars cannot be attacked successfully unless it is clear that actual prejudice has resulted. The courts will not presume prejudice.²⁵

²³ Beer, *FEDERAL TRADE LAW AND PRACTICE BEFORE THE FEDERAL TRADE COMMISSION* (1942) 194.

²⁴ The degree of particularity which can be achieved varies, of course, in accordance with the nature of the proceeding. Where the hearing is directed to the determination of justiciable questions (as in most license revocation cases and many unfair labor practice or trade practice cases) detailed specification is ordinarily feasible. But in other types of cases, particularly where the hearing is directed primarily to the establishment of a mass of factual data which will guide the agency in reaching a decision that is largely a matter of policy—as in some cases before utility commissions—it is frequently impractical to do more at the outset than to indicate the general subject to be investigated. In this type of case, where the specification of particular issues of fact and law may be left to be developed at the hearing itself, opportunity should be given for supplementary presentation of evidence and further argument. See Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 78.

²⁵ On the contrary, it is assumed that no actual prejudice would result from a denial of particulars, where the administrative hearing was conducted at intervals. *National Labor Relations Board v. Remington Rand, Inc.* (C.C.A. 2d 1938), 94 F. (2d) 862. See also *Locomotive Finished Material Co. v. National Labor Relations Board* (C.C.A. 10th 1944), 142 F. (2d) 802; and *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 111 F. (2d) 869.

Even in cases where it is conceded that simple fairness would have required the furnishing of the requested particulars, it has been held that the respondent can have no relief other than to apply for leave to adduce additional testimony.²⁶

4. Amendments of Pleadings; Variances

No problem is presented by amendments of a formal or technical character, correcting mistaken averments as to names, dates, places, figures, or other minutiae of pleading. Such amendments can be made with little if any formality, and no prejudice results.

Nor is much difficulty encountered from the allowance of amendments, which enlarge or otherwise alter the substance of the charge, if they are made on due notice prior to the hearing. Even though such amendments may incorporate matters arising subsequent to the institution of the administrative proceedings,²⁷ yet no harm comes from the allowance thereof so long as adequate time is given the parties to prepare and meet the additional charges.

Not infrequently, amendments raising new issues are proposed at the hearing itself. Then the question is whether or not a continuance will be granted to enable the respondent

²⁶ *E. B. Muller & Co. v. Federal Trade Commission* (C.C.A. 6th 1944), 142 F. (2d) 511. Such holdings, it might be said, overlook the fact that the whole course of a hearing and the entire complexion of the case is quite different where the respondent must feel his way along in the dark than where he knows in advance exactly what claims and issues he must meet. Putting in additional evidence, after the hearing has been completed, does not correct the harm that has been done. Where this harm can be clearly demonstrated—as where the refusal of particulars has in effect deprived the respondent of a right of cross-examination—relief is sometimes granted, and the administrative proceedings set aside. *Powhatan Mining Co. v. Ickes* (C.C.A. 6th 1941), 118 F. (2d) 105.

²⁷ *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 60 S. Ct. 569 (1940); *National Labor Relations Board v. Piqua Munising Wood Products Co.* (C.C.A. 6th 1940), 109 F. (2d) 552; *Lehigh Valley R. Co. v. American Hay Co.* (C.C.A. 2d 1914), 219 Fed. 539.

to prepare his proofs on the new issue. Continuances should be freely granted, on a claim that a party requires additional time to prepare his case.²⁸ But there seems to be no clear right to such a continuance; a large measure of discretion is vested in the administrative agency.²⁹

Where a variance between the complaint and the proof is not corrected at the hearing, a question arises as to whether an order may nevertheless be entered appropriate to the factual situation disclosed at the hearing. The modern trend toward the allowance of amendments to the pleadings to conform to the proofs, even in court proceedings, is quite properly reflected in the decisions which permit at least an equal degree of flexibility in the procedure of administrative agencies.³⁰ But this liberality should not be relied upon to permit an administrative order to stand where it appears that the departure at the hearing from the issues raised in the pleadings probably prevented the parties from having a full and fair hearing.³¹ In this type of case, no clear demonstration of prejudice should be required. Because of difficulties of proof, a convincing showing of probable prejudice should

²⁸ It is incumbent upon the party seeking a continuance to demand it promptly. *Harris v. Hoage* (App. D. C. 1933), 66 F. (2d) 801.

²⁹ *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938); *Jefferson Elec. Co. v. National Labor Relations Board* (C.C.A. 7th 1939), 102 F. (2d) 949. If it is clear that the denial of a continuance is an abuse of discretion, the courts may grant relief. *Wallace v. Allen*, 115 Pa. Super. Ct. 347, 175 Atl. 878 (1934), where the complaint in a workmen's compensation case alleged physical injuries, and the claimant at the hearing sought to establish that he was suffering from traumatic hysteria.

³⁰ *Armand Co., Inc. v. Federal Trade Commission* (C.C.A. 2d 1936), 84 F. (2d) 973; *National Labor Relations Board v. Swift & Co.* (C.C.A. 7th 1940), 108 F. (2d) 988; *M. H. Ritzwoller Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 114 F. (2d) 432; *Earl W. Baker & Co. v. Maples*, 155 Okla. 105, 8 P. (2d) 46 (1932); *Sears v. Peytral*, 151 La. 971, 92 So. 561 (1922); *Felix Coal Co. v. Jones*, 254 Ky. 190, 71 S. W. (2d) 430 (1934).

³¹ *Alton & Southern Railroad v. Illinois Commerce Commission*, 316 Ill. 625, 147 N. E. 417 (1925); *Deadwyler v. Consolidated Paper Co.*, 260 Mich. 130, 244 N. W. 484 (1932); *Vaughn v. Solvay Process Co.* (La. Ct. of App.), 176 So. 241 (1937).

be sufficient. As noted from the decisions cited, the cases on this point exhibit considerable contrariety of result, reflecting in part different factual situations and, in part, differences of judicial philosophy.

5. Respondent's Answer; Subsequent Pleadings

The generality of the initial pleadings, so typical of administrative procedure, begets a like generality in the answer, in cases where an answer is filed. Often, the answer amounts to little more than a plea of the general issue, with notice of special defenses frequently appended. The transmutation from the common-law art of issue pleading to the code pleading of facts and thence to so-called notice pleading (inappropriately named, since the theory proceeds largely on the assumption that the respondent has actual knowledge or notice of the claims and accordingly need not be particularly notified thereof in the pleadings), which has largely affected the pleading practices of the administrative agencies, is thus seen to be far from an unmixed blessing. While it eliminates technicalities, it sometimes produces a situation where the pleadings serve no useful purpose—where, for example, the respondent does not know the exact claim of the agency and the agency is not aware of the respondent's defense, until a prehearing conference is held or until the matter comes on for hearing.

Administrative agencies frequently pay but little attention to the respondent's pleadings. Replications and rejoinders, or their equivalents, are uncommon in administrative procedure. A vague complaint and a general denial are typical.

Where, however, a respondent presents, by way of defense in his answer, allegations of matters which he seeks to prove but which in the opinion of the agency are irrelevant to the

issues tendered by the complaint, the agency may strike such allegations from the answer.³² This is done where the agency believes that the hearing of the proposed proofs might unnecessarily delay the case, or if it appears that the prime motive of the pleader is to confuse the issues.

³² *International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. National Labor Relations Board* (App. D. C. 1939), 110 F. (2d) 29, aff'd 311 U. S. 72, 61 S. Ct. 83 (1940).

CHAPTER 6

Prehearing Conferences and Informal Procedures

THE essential difference in character between court proceedings and the administrative process is epitomized by the contrast in the nature of the activities which follow the filing of pleadings. In a court case, after the pleadings have been filed and the case brought to issue, it is placed on the docket of cases ready for trial, and there it rests until trial day. The court has little if any concern with the case prior to the opening of the trial.¹ In the case of proceedings before an administrative agency, on the other hand, the crucial point of official action is typically reached in the interim between the filing of pleadings and the hearing. The trial procedure is, in many cases, reserved as a method of last resort for disposing of cases which cannot be otherwise terminated.

1. Purposes of Prehearing Procedure

From the viewpoint of the administrative agency, informal negotiations concerning pending cases offer many advantages. First and foremost, it is only by use of such informal procedures that the agencies can keep abreast of their heavy case loads. Many agencies dispose of nine tenths or more of all matters instituted before them without trial. In some cases,

¹ Sometimes, of course, preliminary motions must be disposed of; but these ordinarily involve only a ruling on subsidiary legal issues—they are, so to speak, “little trials.” In many jurisdictions, too, pre-trial hearings are becoming common. But even in such cases, the court’s concern is principally with such formal points as the settlement of the pleadings, the fixing of a trial date, and related matters designed to facilitate the holding of the trial, which remains the important focal point.

the percentage is even higher.² The agencies would be compelled to neglect many cases requiring attention if it were necessary to adopt the hearing-and-adjudication technique in each case. Imbued as they are by a desire to fulfill what they deem to be their broad social missions, the agencies find other reasons for preferring the informal procedure. They can sometimes persuade a party to adopt a course of action which he perhaps could not be compelled to adopt if he resisted formal proceedings directed to such end, or they can obtain agreements that something be done which it would be beyond their powers to compel. An effective means is thus afforded for reforming marketing practices, financial practices, or labor relations practices along the general lines deemed desirable by the agencies concerned. In working toward these broad ends, the agencies, so long as they restrict their activities to the informal procedures, can operate in an atmosphere of uncontrolled discretion, bound by no substantive or procedural rules.

From the viewpoint of the private parties concerned, these informal proceedings are important for other reasons. The respondent faces a practical necessity of discussing his case informally with the agency in order that he may learn exactly what is involved. It is often the only practical means of learning, in advance of the hearing, the actual claims of the agency and the true issues involved. Similarly, consultation

² In a recent ten-year period, the Interstate Commerce Commission arranged settlements in all but five of some 3,500 demurrage complaints filed with it. The National Labor Relations Board, over a period of several years, settled more than 90 per cent of all unfair labor practice complaints without issuance of formal proceedings; and of cases where formal proceedings were instituted only about 50 per cent proceeded to a final formal determination. The various bureaus and divisions of the United States Department of Labor accomplish most of their business informally. In one recent year, the Department of Agriculture, which administers twenty-odd regulatory statutes, involving thousands of cases annually, found that only some 250 went to formal hearing, and of these only about one seventh proceeded beyond the state of exceptions to the examiner's intermediate report.

and conference are frequently the only methods of ascertaining the existence and content of various unpublished rulings and general counsel opinions which may be determinative of the administrative ruling: instead of briefing judicial decisions in his library, the attorney must learn of the agency's precedents by interviews with the agency's representatives. Despite the fact that the informal procedures are primarily designed to permit the agency to avoid the trial of cases, the respondent can thus advantageously utilize such procedures as an effective means of trial preparation.

Other advantages are offered the respondent. Consultation and conference with agency representatives offer him an opportunity to convince the agency of the fairness of his position; and if this can be done his worries are very nearly at an end. Furthermore, negotiation with agency attorneys often serves to disclose alternative bases of settlement; counsel for respondent can learn of various formulas, stipulations, or agreements which the agency will sometimes consent to as a means of disposing of the case. Such alternative solutions often afford, so far as the respondent is concerned, an easy way out. Sometimes the agency will be satisfied with a concession which the respondent is entirely willing to make. These possibilities can be explored only by intelligent use of the informal procedure, for the agency rules do not ordinarily disclose these alternative possibilities, and agency representatives are likely at the outset to suggest only such modes of settlement as are most favorable to the agency, rather than those which are most favorable to the respondent.

2. Need for Rules Regulating Prehearing Procedures

The advantages inherent in the informal procedures of administrative tribunals are so important as to discourage any suggestion that they should be eliminated. They are, in fact, the very lifeblood of the administrative process, and the

problem is to discover means of minimizing certain inherent difficulties without losing the great advantages that the practice offers.

The central difficulty is that the situation offers opportunities for abuse of power. Citizens who are accustomed to consult attorneys only in connection with court matters often undertake to deal with representatives of administrative agencies without first obtaining advice as to their legal rights. They often rely on the representatives of the agency to learn what the law requires of them. This of course heightens the importance of scrupulous fairness on the part of the administrators and their assistants. Granting the existence of this, it still remains inevitable that in negotiations looking toward a possible settlement, the government agency has many advantages.³ A private party has no desire to be in the bad graces of the agency which administers a law affecting his business. There is a tendency on the part of the respondent to make the best bargain he can with the agency rather than carry the matter to a formal hearing. This tendency may be almost impelling in cases where time is of the essence—as where the applicant seeks a license to issue an offering of securities or to continue the operation of a radio station, or where the respondent's challenged course of action constitutes, if illegal, a continuing offense entailing daily increasing penalties. Then, too, the expense of conducting an action and carrying an appeal through the courts is a factor which weighs heavily with the private party and which sometimes prompts him to sacrifice his legal rights in favor of accepting a settlement offered by the government.

If an agency is so inclined, it can make use of these innominate sanctions which attend the informal administrative procedures in such a way as to nullify largely the formal

³ Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 12.

safeguards which the principles of procedural due process have erected as a shield against arbitrary administrative action.⁴

While it is impossible to eliminate this possibility of abuse, much could be done to ameliorate the situation through the adoption of definite rules that would crystallize administrative procedure. Section 4 of the Administrative Procedure Act of 1946 goes a great distance in this direction, so far as the federal agencies are concerned. While the flexibilities of the informal procedures should not be sacrificed, yet they could be regularized without serious injury to any valid administrative purpose. Adoption of adequate rules of procedure, not conceived in any narrow sense but covering the important steps to be taken, would make available to the parties affected by quasi-judicial action a guide to practice and assistance in adequate preparation for the hearing. Such rules would enable the parties to know what alternative solutions were available. They would enable the parties to know in advance the general policies which would control administrative action. They would enable the parties to know exactly what procedures were open to them, and with whom the case could be discussed. More important, they would tend to accomplish uniformity of procedure in like proceedings within an agency, so that the manner in which a proceeding was conducted, and the determination reached, would not depend on the particular administrative officer who happened to conduct it.⁵

Quite apart from the tendency to reduce the possibilities for unfairness, adoption of procedural rules would otherwise aid in developing the efficiency of the informal procedures of administrative agencies.

⁴ *Idem.*, 86.

⁵ Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 36.

3. Prehearing Narrowing of Issues

Adoption of procedural rules setting up a regular method of prehearing conferences designed to narrow the issues and explore possibilities of settlement would be of great practical aid to the agencies and the parties appearing before them.

Under conditions that prevail in most agencies, it is difficult for the parties even to ascertain with whom such possibilities may be discussed. Not infrequently, no one save the head of the agency has power to make any binding stipulations as to the facts or as to the issues; and the agency heads ordinarily are unable to take any part in informal prehearing conferences, because their whole time and attention is consumed with matters of intra-agency administration, with considering general policies, and with the decision of cases that have been fully heard. Even if no formal stipulation is sought, and the desire is only for informal discussion, this frequently necessitates a trip to the central offices of the agency, which may be hundreds of miles away from the respondent's place of business. If such a trip be undertaken, the agency representative, as likely as not, will be required to take the position that he has no authority to make any bargain and that he cannot, on behalf of the agency, agree to forego any of the formal demands which have been made, in favor of reaching a compromise agreement. Further, any such conferences must be undertaken as a matter of private negotiations, without the aid that could be given if a hearing officer presided over the conference, just as a judge presides over the pre-trial hearing of a lawsuit, at which counsel for the parties discuss just such issues—the possibility of settlement, simplification of issues, amendments to the pleadings, stipulations as to facts and documents, limitations of the number of expert witnesses, and such other matters as may aid in the efficient disposition of the case. Ordinarily, the

private parties are unable to have any contact with the hearing officer before the hearing opens. In some agencies, there is consultation in advance of the hearing between the hearing officer and the representative of the agency who is to present the agency's case at the hearing. Whether or not this results in actual prejudice to the respondent, it creates at least an appearance of unfairness which is sufficient to condemn the practice.⁶

All these difficulties could be avoided by adoption of procedural rules designed to set up a regular system of pre-trial hearings. This has been recommended by the Attorney General's Committee on Administrative Procedure.⁷ Such a device would not rob the prehearing procedures of their flexibility or informality. It would simply improve their effectiveness. Provision could be made by rule for a prehearing conference to be conducted well in advance of the hearing, at a place convenient to the parties, and before a hearing officer, who would consult with representatives of the agency and representatives of the private parties in order to ascertain exactly what issues were in dispute, and what stipulations could be made as to the facts, and what compromise agreements might be feasible. Power could be given to authorized representatives of the agency to make binding stipulations and firm commitments as to settlement.

Such procedure would go far to remove many of the justified criticisms directed toward the present unsystematized practice by parties who are caught in its meshes. It would, further, facilitate rather than hinder the effective disposition of the agency's business, as has been demonstrated by the

⁶ *Cf.*, Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 112.

⁷ Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 67.

success with which such innovation has been met in the cases where it has been tried.⁸

4. Use of Informal Procedure in Disposing of Case by Consent

The difficulty that is inherently present in the situation where an automobile driver undertakes to bargain with a traffic policeman on the question as to whether or not a ticket will be issued is also present, in greater or less degree, in most cases where negotiations are undertaken between representatives of an administrative agency and a respondent with the hope of discovering a means of disposing of the case by consent. But, as above indicated, in many types of cases there is room for bargaining, without any sacrifice to the public interest which the agency must uphold and enforce.

The central problem in practice is whether or not, in cases where a mutually satisfactory means of disposing of the case can be found, the agency will insist on an admission of guilt before the issuance of a consent order. Some agencies do so insist. For example, the Federal Trade Commission long followed the rule that, after a formal complaint was issued, the respondent must formally admit at least one of the

⁸ Stipulation procedures are used quite widely by the Interstate Commerce Commission in reparations cases, by the Civil Aeronautics Board, and in proceedings under federal workmen's compensation laws. A few agencies provide for stipulations by rule—e. g., the Bituminous Coal Division, the Federal Power Commission, the Interstate Commerce Commission, and the United States Maritime Commission. While obvious factors make it more difficult to reach settlements or compromise agreements in cases before administrative agencies than in private civil actions, yet there is often considerable basis for bargaining. For example, in case of proceedings under the Wage Stabilization Law, 56 Stat. 765, Ch. 578, the matter of agreeing on the amount of penalty to be imposed for unauthorized wage or salary adjustments was different only in emphasis from the matter of agreeing on the amount of damages to be allowed in a personal injury case. In other types of cases, it can sometimes be agreed that asserted past violations may be disregarded if the respondent adopts and agrees to adhere in the future to a course of conduct meeting the requirements and standards imposed by the agency.

charges before any consent order could be entered. Frequently, the respondent, although willing to comply with the course of action of which the Commission is desirous, feels he cannot make an insincere admission of guilt because of the prospect that it might afford a basis for a subsequent civil damage action. Other agencies have not imposed this requirement. For example, the National Labor Relations Board requires only that the respondent admit that his business substantially affects interstate commerce. Then, on a finding that the respondent is engaged in commerce, that a complaint has been issued, and that a stipulation has been made, the Board issues the order agreed on in the stipulation.⁹

There appears to be no compelling reason to require an admission of guilt as a condition precedent to the issuance of a consent order. Often, the respondent in good faith asserts his complete innocence of the charge, but is willing to submit to the entry of an order enjoining a specified course of future conduct. The latter is, often, all that the agency or the public interest requires. The rules of the agencies should permit the entry of consent orders, on stipulation, without admission of guilt.

This device of a consent order has even greater usefulness in cases where the parties informally consult with the agency before any actual formal complaint is issued. Some agencies nevertheless require the respondent to make certain admissions of fact as a condition of the entry of a consent order, even in these cases where no formal complaint has been filed.

⁹ The National War Labor Board developed an interesting practice, in connection with its duty of penalizing violations of the Wage Stabilization Law. Thereunder, the alleged offender could submit a proposed statement of facts—the truth of which he was not compelled to admit; on the contrary, he could expressly deny that the facts were such—and stipulate that if the Board fixed the penalty in a named amount, he would waive his rights to a hearing and consent to the entry of findings in accordance with the statement as submitted. If the proposed settlement was satisfactory to the Board, it would so find the facts, and issue an order imposing the agreed penalty. If it was unsatisfactory, the stipulation was rejected and could not thereafter be used for any purpose.

Surely, the better practice is that of the National Labor Relations Board, under which the agreement is reduced to writing, and the charges withdrawn.

Another important utility of the informal procedure, when availed of as a means of settling a case without resorting to formal proceedings, is the possibility of avoiding concomitant hardships that follow from the issuance of a formal complaint or order. For example, the Securities and Exchange Commission issues deficiency letters, indicating what amendments will be required in registration statements as a condition of avoiding a stop order which would formally put in contest the right of an issuer to market a security offering. Issuance of a stop order, in view of the sensitivity of market conditions, would normally (whatever the outcome of formal proceedings as to the propriety or sufficiency of the prospectus) render it impossible to market the securities—the offering would be for practical purposes an impossible venture. Similarly, the National Labor Relations Board consults with the parties while it is considering the issuance of a complaint charging unfair labor practices; and if a satisfactory adjustment is reached, the employer avoids the stigma that in some measure attaches to the issuance of a complaint. It is well known that the issuance of a complaint by many federal agencies, such as the Federal Trade Commission, to cite a typical example, is frequently a cause of substantial hardship to the accused (particularly in view of the wide publicity given the issuance of the complaint), even if the Commission subsequently finds that no illegal practices had been committed.

Statutory recognition and regulation of the practice of “informal disposition,” and development of procedural rules to facilitate the usefulness of the informal prehearing procedures (achieving the desirable end of avoiding unnecessary hardship in cases that do not involve any intentional viola-

tion), would go far toward meeting criticism of administrative absolutism. The Federal Administrative Procedure Act moves in this direction. Section 5(b) requires the giving of an opportunity to present such proposals, in cases where a hearing is required by statute. Section 4 operates to promote informal dispositions in cases of rule making. In other cases, Section 6(a) and Section 6(d), supplemented by the application of Section 9 and Section 10, indicate the general scope of informal procedures.

5. Inspections and Tests

In cases where the administrative adjudication is based on inspections or tests, informal methods afford private interests perhaps even greater protection than would formal hearing procedures. For example, when the issue involved is the fitness of food, the seaworthiness of a ship, or the ability of an individual to fly an airplane, no form of hearing would be as well calculated to reveal the truth as an actual inspection or test.

But even here a problem is involved, for ordinarily in such a proceeding no record can be made on which a party can appeal to the courts for relief from what he deems to be a clearly erroneous administrative determination. In cases where an administrative agency denies a license on the basis of an informal inspection or test, great good could be achieved by the adoption of rules providing that after such denial, the applicant could obtain an administrative redetermination of the same issue, on the basis of a formal hearing. This would render it possible for the applicant to obtain a judicial review of any claims that the administrative determination exceeded the permissible bounds of discretion and was capricious and arbitrary.

CHAPTER 7

Powers to Compel Furnishing of Information

A. AGENCY POWERS TO COMPEL FURNISHING OF INFORMATION

ADMINISTRATIVE agencies normally possess many methods of obtaining evidence which are not available to private litigants. Indeed, they possess powers in this connection not exercised by any other government officers. The fact that the agencies are often able to learn, in advance of hearing, the facts on which the respondent may rely in his defense (and as well many facts and circumstances which he might never be forced to reveal were it not for the agencies' extraordinary powers of discovery) is one of the principal reasons why the whole tone and character of judicial proceedings before administrative agencies are entirely different than in the case of proceedings in the courts.

Thus, the agencies, if they utilize the facilities commonly afforded them by statute, frequently can be better prepared on the facts of the case than are the parties appearing before them. In addition to the information which the agency has obtained from the respondent, it may have obtained a great quantity of factual data from sources not available to the respondent. While it can often compel the respondent to reveal his case in advance, it is not under any requirement to afford a reciprocal privilege to the respondent. The advantages thus inherent in the agency's position, if unfairly used, could be utilized to deprive the opposite party of much of what is intended to be assured him by the general guarantee of a fair trial. Aside from this possibility of abuse of

power, there remains an inequality of position which affects the character of the entire proceedings.

One result is that, in the case of many agencies, the hearing officer normally looks primarily to counsel for the agency for the information which he needs to decide the case. This of course is beneficial to the extent that it leads to an assumption of responsibility by the agency to make sure that all the important facts of each case are presented at the hearing. But to the extent that it may produce a predisposition on the part of the hearing officer to rely on the evidence presented by the agency more heavily than on that presented by the opposite party, the tendency may lead unfortunately to an erroneous decision.

Another result is a temptation to decide the case on the basis of the agency's private information rather than on the basis of the evidence produced at the hearing. An agency obtains information for many general purposes not specifically related to any particular case, and there is a natural tendency on the part of agency representatives to rely on the contents of secret investigational files in reaching the determination in any particular case, if the contents of such secret files may seem relevant. There is a possibility that information which the administrator has gathered for the purpose of recommending legislation may subconsciously influence him in deciding what weight should be given, or what interpretation should be placed on, evidence appearing in the record of a particular contested case.

The responsibility which the agencies assume to determine independently the true facts of the case, rather than following the traditional judicial approach which shifts that responsibility to parties independent of the tribunal that decides the case, is thus far-reaching in its implications. It colors the proceedings as well in cases where an agency is more or less a disinterested judge in a contest between opposed pri-

vate parties, as in cases where the agency is an active party in interest.

In obtaining information, the agencies normally have available at least four methods of discovery: (1) investigation and examination of books and records; (2) requiring the appearance of witnesses and the production of documents by subpoena; (3) requiring the furnishing of reports; and (4) physical inspections.

I. EXAMINATION OF BOOKS AND RECORDS

Many statutes creating administrative agencies bestow upon them broad powers to examine the books, papers, records, and other documents of the parties subject to the regulatory activities of the agency (but the agencies have no independent investigatory powers except such as may be delegated to them by statute—*cf.*, Section 6(b) of the Federal Administrative Procedure Act of 1946). Such investigations may be either for the purpose of gathering general information or for the purpose of ascertaining whether or not there exist infractions of legislative or administrative rules.

While important as establishing broad patterns of public policy, these provisions have but little mandatory effect in compelling disclosure of information, for except as power is given to compel the production of papers (by enforcement of a subpoena or proceedings in the nature of mandamus) the power to inspect is one which can be exercised only with the consent of the party whose papers are to be inspected.¹ If a party refuses to grant representatives of the agency access to the desired information, the agency must ask the court for aid in enforcing its demand.

When such application is made to the courts, the issues presented are substantially the same as in case of an appli-

¹ *Cudahy Packing Co., Ltd. v. Holland*, 315 U. S. 357, 62 S. Ct. 651 (1942).

cation to enforce a subpoena issued during the course of an administrative proceeding. The question as to judicial enforcement of requests by administrative agencies to compel disclosure of books and records for examination by the agency, therefore, will be discussed below in connection with the question as to enforcement of administrative subpoenas.

There is wide variation in respect to the breadth of powers of inspection granted the various agencies, ranging from the almost unlimited visitorial rights of some state agencies to examine into the affairs of corporations franchised by the state² to the somewhat closely circumscribed grants of investigatory powers found in some of the earlier federal statutes. The general validity of a grant of such power is established beyond question; and decisions, as to whether or not the furnishing of the requested information will be compelled in a particular case, are based generally on the construction of particular statutes, rather than on broad constitutional grounds. But in construing statutes, the courts have been influenced by considerations as to the reasonableness of the agency's demands, as will be discussed more fully below in connection with cases involving applications to enforce subpoenas.

II. ISSUANCE AND ENFORCEMENT OF SUBPOENAS

1. Right to Issue Dependent on Statute

An agency's powers as to the issuance of subpoenas are regulated by statute. In the absence of statutory authorization, an agency has no such power. Statutes granting the power are rather strictly construed. For example, it has been held that if the power is granted to the head of an agency, it may not be delegated by him to his subordinates, unless the statute also provides for delegation of such power.³

² See, for example, *State ex rel. Public Utilities Commission v. Atchison, T. & S. F. Ry. Co.*, 115 Kan. 3, 221 Pac. 259 (1923).

³ *Cudahy Packing Co., Ltd. v. Holland*, 315 U. S. 357, 62 S. Ct. 651 (1942), holding that delegation was not permitted under the Wage Hour

Granting the existence of the power, the conditions upon which subpoenas will be issued are within the control of the respective agencies, and widely variant practices have been adopted as to the showing required in an application for the issuance of a subpoena, as to the identity of the officials passing upon such applications, as to service of the papers, and as to the general availability of the device. This is another of the many situations in which the heterogeneity of agency rules causes needless confusion.⁴

2. Methods of Enforcement

The traditional and most effective method for enforcing obedience to the command of a subpoena, imprisonment for contempt, is one which the courts have been unwilling to permit administrative agencies to exercise. Occasionally, a legislature has undertaken to grant such a power to an administrative agency, but the view of most courts is that such grant of power is invalid.⁵ The reason ordinarily assigned in support of this conclusion is that the power to punish for contempt is exclusively judicial. But clearly such is not the true character of the power, for it is conceded that Congress and state legislatures, exercising no judicial powers, may punish for contempt,⁶ and in several cases it has been held

Law. Cf., *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 67 S. Ct. 1129 (1947), finding authority for such delegation in the Emergency Price Control Act. For general discussion, see note 19 TENN. L. REV. 544 (1946); 42 ILL. L. REV. 672 (1947).

⁴ See "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 414 *et seq.*

⁵ *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190 (1892), which cites several cases. See *Sherwood*, "The Enforcement of Administrative Subpoenas," 44 COL. L. REV. 531 (1944). See also 54 HARV. L. REV. 129 (1940); 35 COL. L. REV. 578 (1935). A few courts have reached a contrary result, and have upheld the constitutionality of such provisions. E.g., *In re Hayes*, 200 N. C. 133, 156 S. E. 791 (1931).

⁶ *McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319 (1927); *Journey v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375 (1935).

that such power may be conferred upon notaries public.⁷ The real reasons for the unwillingness of the courts, in the absence of express constitutional provision, to permit administrative agencies to exercise the power to punish for contempt are deeper reaching. They lie in the traditional distrust of any proposal to vest in any agency other than the legislature itself or the courts, the power to interfere with personal liberty. It is felt that the hazards of reposing such powers in the partisan hands of the agencies would exceed the advantages that might be gained thereby. Such being the underlying reasons, there is a possibility that with the further acceptance of agencies as co-ordinate judicial agencies with the courts there may in future years be a relaxation of the doctrines now generally prevailing.

Aside from occasional statutory provisions attaching penal sanctions to refusal to obey an administrative subpoena,⁸ the usual method provided for enforcement is by application to a court for an order directing obedience to the command of the subpoena.⁹ The statutes ordinarily make it discretionary with the court whether or not the requested order shall be entered. Occasionally, the statute seems to make it mandatory upon the court to issue the requested order, but such provisions are construed as granting a wide measure of discretion in the court to refuse to enforce the subpoena if it appears unreasonable.¹⁰ While somewhat cumbersome, and theoretic-

⁷ *Noell v. Bender*, 317 Mo. 392, 295 S. W. 532 (1927). The courts divide on this particular question. See 35 COL. L. REV. 578, 582 (1935).

⁸ E.g., Federal Alcohol Administration; Department of Agriculture (Packers and Stockyards Act).

⁹ *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115 (1908). The typical provision is along the lines which seemingly originated with the Interstate Commerce Commission. See 49 U.S.C. § 12.

¹⁰ *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901). But there are limits to the Court's discretion. In *Penfield Co. of California v. Securities & Exchange Commission*, 330 U. S. 585, 67 S. Ct. 918 (1947), it was held that the trial court had abused its discretion in permitting a witness, convicted of contempt for failure to obey a subpoena, to purge himself of contempt by paying a \$50 fine. Under such circumstances, it was held, an answer should have been compelled.

cally subject to the objection that it imposes a heavy burden on the agencies to satisfy the court as to reasonableness and propriety of the subpoena, still, in view of the judicial tendency to grant the agencies the benefit of any doubts on this score, the method has worked very well. Indeed, there are very few cases where administrative subpoenas are contested. Partly because of the disinclination of the party subpoenaed to suggest, by contumacious behavior, that he may have something to hide, and partly because of the readiness of the courts to enforce obedience, a subpoena issued by an administrative agency is usually as effective as a judicial subpoena. It is essentially the power to punish for contempt that is reserved to the courts.

3. Objections to Enforcement of Subpoena, or Other Demand for Revelation of Information

General requirements as to validity. The general restrictions developed in the common-law courts as to the use of subpoenas in connection with the trial of cases are ordinarily applicable to subpoenas issued by administrative agencies, subject to such modifications as are suggested by the analogy between administrative subpoenas and those of a grand jury.

The relevancy of the information sought to the matter under investigation must be shown, if a question is raised as to this,¹¹ but the rigor of this requirement is attenuated by the readiness of the courts to assume that sufficient relevancy exists, unless it can be clearly shown that it does not.

Similarly, the general requirement that the documents sought must be appropriately described, while recognized as a limitation, has not been construed in such a way as to interfere with the effective exercise by agencies of their sub-

¹¹ *Sinclair v. United States*, 279 U. S. 263, 49 S. Ct. 268 (1929); *McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319 (1927); *Kilbourn v. Thompson*, 103 U. S. 168 (1880); *Marshall v. Gordon*, 243 U. S. 521, 37 S. Ct. 448 (1917).

poena powers.¹² Subpoenas requiring the production of all documents relative to a specified inquiry have been often sustained by the courts.¹³

Privilege. The same rules as to privilege applicable to judicial proceedings ordinarily apply to efforts by administrative agencies to enforce the production of information.¹⁴ Objections based on the privilege against self-incrimination are thus recognized, although the practical effect of this is minimized in two ways: (1) by the frequency of statutory provisions eliminating this privilege upon a grant of immunity from prosecution based upon the information adduced; and (2) by the unavailability of this objection where the subpoena is directed to a corporation.¹⁵

Jurisdiction of agency. Not infrequently, an administrative agency desires to compel the furnishing of information upon the basis of which it can be determined whether or not the agency has jurisdiction to proceed further. The respondent, contending that he is not engaged in activities which the agency is authorized to supervise, may contest the subpoena on the grounds that the agency has no jurisdiction. In such cases, obviously, the agency would find itself in a dilemma if it were required to prove its jurisdiction over the case before it could get the information which would enable it to determine whether jurisdiction existed. Influenced by these practical considerations, and in part by the suggestion that decision on the jurisdictional issue is primarily for the agency, the courts have generally held that the subpoena will be enforced, despite the denial of jurisdiction, if the agency asserts that it has reasonable ground to believe that

¹² *Brown v. United States*, 276 U. S. 134, 48 S. Ct. 288 (1928).

¹³ *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 S. Ct. 178 (1908); *Consolidated Mines of California v. Securities & Exchange Commission* (C.C.A. 9th 1938), 97 F. (2d) 704; *cf.*, *Shotkin v. Nelson* (C.C.A. 10th 1944), 146 F. (2d) 402.

¹⁴ *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 35 S. Ct. 363 (1915).

¹⁵ *Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644 (1896).

the necessary jurisdictional facts are present.¹⁶ But respondent should be, and seemingly is, entitled to a hearing on the narrower issue as to whether such reasonable belief exists.¹⁷

The statutes empowering agencies to issue subpoenas or otherwise require disclosure of information are not ordinarily limited by any requirement that the agency can proceed only where it has probable cause to believe that a violation of law exists; and objections based on this ground have been unsuccessful.¹⁸

Invasion of privacy. The principal objection raised to the enforcement of agency subpoenas is that based on the ground that the particular demand is unreasonable in scope, interfering unjustifiably with the respondent's privilege of privacy, and constituting a mere fishing expedition.

At this point, a clear distinction is apparent between demands for the production of documents and demands addressed to oral testimony.

In the case of a subpoena *duces tecum*, or a demand for the production of records for examination, the guarantee of the Fourth Amendment against unreasonable searches and seizures presents difficulties which can often be avoided where

¹⁶ *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 63 S. Ct. 339 (1943), discussed in 41 MICH. L. REV. 959 (1943); 43 COL. L. REV. 254 (1943); 52 YALE L. J. 175 (1942); *National Labor Relations Board v. Northern Trust Co.* (C.C.A. 7th 1945), 148 F. (2d) 24; *Walling v. Benson* (C.C.A. 8th 1943), 137 F. (2d) 501. Somewhat stricter requirements were imposed in *General Tobacco & Grocery Co. v. Fleming* (C.C.A. 6th 1942), 125 F. (2d) 596; but see the later decision of the same court in *Walling v. La Belle S.S. Co.* (C.C.A. 6th, 1945), 148 F. (2d) 198.

¹⁷ *Securities & Exchange Commission v. Tung Corporation of America* (D. C. Ill. 1940), 32 F. Supp. 371; and see dictum in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49, 58 S. Ct. 459 (1938). But the point is not entirely clear; in *Fleming v. Montgomery Ward & Co., Inc.* (C.C.A. 7th 1940), 114 F. (2d) 384, respondent was denied the privilege of introducing evidence that the agency had no reasonable cause to believe that the respondent was subject to the act.

¹⁸ *Fleming v. Montgomery Ward & Co., Inc.* (C.C.A. 7th 1940), 114 F. (2d) 384; *National Labor Relations Board v. Barrett Co.* (C.C.A. 7th 1941), 120 F. (2d) 583; *Consolidated Mines of California v. Securities & Exchange Commission* (C.C.A. 9th 1938), 97 F. (2d) 704. See 40 MICH. L. REV. 78 (1941); 29 GEO. L. J. 328 (1940).

the demand is merely that a witness answer a particular question or furnish specified information. Further, in the case of a subpoena *duces tecum*, the courts cannot be insensitive to the practical difficulties involved in complying with a demand that a large mass of records be collected and transported to the place of the hearing, where they may remain for quite a period of time, inaccessible to individuals having occasion to use them in the normal conduct of their daily business.¹⁹ For these reasons, the considerations that sometimes persuade the courts to deny enforcement of administrative subpoenas when challenged on this ground, are given greater weight in cases involving demands for the production of voluminous records than in cases of subpoenas *ad testificandum*.

The difference, however, is essentially one of degree. The same broad considerations of public policy are relied on, whether the demand is that a party produce a certain paper or that he answer a certain question. In either case, the court in determining whether the subpoena should be enforced will take into account: (a) the nature of the proceeding; (b) the form of the particular request; and (c) the balance of interests, in terms of the particular case, between the public interest in disclosure and the private interest in suppressing public knowledge of the facts.

(a) *The nature of the proceeding.* The demand of the agency for information may be made in the course of a judicial-type proceeding, or as part of a legislative inquiry, or in connection with a general inquisitorial investigation.

Where the information is desired for use in a proceeding where the agency must pass on a judicial question affecting the party upon whom the demand is made, the courts are

¹⁹ Federal Trade Commission v. Smith (D. C. N. Y. 1929), 34 F. (2d) 323; Bank of America Nat. Trust & Savings Ass'n v. Douglas (App. D. C. 1939), 105 F. (2d) 100.

inclined to grant enforcement of the demand. In such cases—typically, where a hearing is to be had on a complaint—the issues are ordinarily defined at least in general terms, and there is but little reason why any information pertinent to such issues should be withheld.

For somewhat different reasons, the courts quite readily enforce demands for information desired in the course of a legislative inquiry, undertaken to obtain information on the basis of which a statute is to be written or amended. Where such inquiry is undertaken by a legislative committee, or by an agency pursuant to a specific request from the legislature, the courts are inclined to presume (at least in the absence of a clear contrary showing) that the inquiry is properly related to the legislative purpose. A somewhat different situation is presented, however, where an administrative agency on its own initiative undertakes a general investigation on the basis of which it contemplates making recommendations to the legislature as to possible statutory amendments. It is hard to distinguish this from the broad inquisitorial investigations which have received but little favor from the courts.

In the latter type of case, where an administrative agency is conducting a general investigation better to advise itself of conditions existing in the field wherein its regulatory activities are exercised, enforcement of the demand for information exhibits more clearly a tendency to violate the assumed right of the law-abiding citizen or corporation to be free of "officious intermeddling"; and accordingly it is in these cases that the courts have sometimes been more reluctant to enforce the administrative subpoena. Until recent years, at least, the demand for information, when made under such circumstances, has often been denied on the theory that there exists a right of privacy which cannot be invaded unless there clearly appears a compelling public interest in disclosure.

(b) *Form of demand.* The particular form of the demand—the way a question is put or the manner in which the desired documents are described—is also a factor. If the inquiry is grossly impertinent, as if the question is directed more to the personal affairs of the witness than to his business practices, the courts are somewhat reluctant to compel disclosure. Such considerations (at least equally with the argument based on a somewhat minor change in the language of the controlling statute), led the Supreme Court to deny the right of the Interstate Commerce Commission to compel the president of the Union Pacific Railroad to answer questions as to his personal investments in railroad stocks,²⁰ but to enforce the Commission's demand that the president of the Louisville and Nashville Railroad testify as to the amounts expended by his company in political activities.²¹

(c) *Public and private interest.* The courts try to prick out a line between mere scandalmongering inquiries, and cases where the requested information is necessary for the enlightened discharge of the agency's functions. For a long time, the courts felt that the rights of privacy were to be respected unless the competing public interest in disclosure was clearly the more compelling.²² Many decisions appeared to create a privilege, linked with the protective rights against compulsory self-accusation and unlawful searches and seizures, against unreasonable inquisitorial investigations. However, more recent decisions, while not denying such a privilege, indicate that it is now much more difficult than it had been in former years to convince the courts as to the

²⁰ *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115 (1908).

²¹ *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 38 S. Ct. 30 (1917).

²² *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 S. Ct. 115 (1908); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 44 S. Ct. 336 (1924); *Jones v. Securities & Exchange Commission*, 298 U. S. 1, 56 S. Ct. 654 (1936).

unreasonableness of the demand. Recently, the Supreme Court indicated that if (a) the agency is authorized by law to make the inquiry it proposes, and if (b) the information sought is relevant to that inquiry, then the subpoena should be enforced unless it is so broad and indefinite as to be plainly a case of "officious intermeddling." Only then is it to be called unreasonable, because the private interests to be protected "are not identical with those protected against invasion by actual search and seizure."²³

The real problem always is balancing the public interest against private security. The question is whether the demand for information "is out of proportion to the end sought."²⁴ Since the question is thus one of axiology, of balancing competing values, it is not surprising that the factual elements of each particular case may sway the balance in one direction or the other. A demand by an agency to examine a broker's records may be either "a violation of the natural law of privacy in one's own affairs," or "unobjectionable," depending on the court's appraisal of the general morals of the particular situation.²⁵

In drawing the dividing line between the permissible and the illicit, the courts are influenced by the apparent reasonableness of the request, its apparent relevancy to a clearly proper and important administrative purpose,²⁶ the degree to

²³ *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 213, 66 S. Ct. 494 (1946), commented on in 14 GEO. WASH. L. REV. 602 (1946); cf., *Fleming v. Montgomery Ward & Co., Inc.* (C.C.A. 7th 1940), 114 F. (2d) 384; *Securities & Exchange Commission v. Vacuum Can Co.* (C.C.A. 7th 1946), 157 F. (2d) 530. The current trend of the federal courts to grant enforcement of administrative subpoenas in almost every case is discussed in Davis, "The Administrative Power of Investigation," 56 YALE L. J. 1111 (1947).

²⁴ *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d) 377, 379.

²⁵ *Zimmerman v. Wilson* (C.C.A. 3d 1936), 81 F. (2d) 847, 849. Later, after the agency alleged that it wished to examine the records to uncover suspected fraud, the examination which had at first been denied was subsequently permitted. *Zimmerman v. Wilson* (C.C.A. 3d 1939), 105 F. (2d) 583.

²⁶ *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d) 377.

which the business in question is affected by a public interest, and the apparent intent of the legislature as to the breadth of the inquiry authorized.²⁷

4. Compelling Production of Documents in Possession of Disinterested Parties

Not infrequently, the records of a bank or a stockbroker revealing the financial dealings of a customer, or a telegraph company's copies of messages sent over its wires, may be a productive source of information for an administrative agency. May an agency, by subpoena or other demand directed to the company, require it to permit an examination of all its records which may throw some light on the activities of the company's customers?

If the company itself objects, the question of course is determinable on the same basis as in any other case where the owner of records objects that a broad demand for disclosure thereof is unreasonable. But frequently the company has no objection to producing the records in question save for a general desire to protect the customer's good will by respecting his wishes for privacy; and this is not often a sufficient incentive to compel the company to contest vigorously the demand of the agency.

In such cases, has the company's customer, whose affairs are the ultimate object of the investigation, any grounds to complain? Since the search is not directed to the customer's own records, he apparently cannot invoke the protection of the Fourth Amendment against unreasonable searches;²⁸ nor

²⁷ In addition to the cases above cited, see *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 38 S. Ct. 30 (1917); *Federal Trade Commission v. Baltimore Grain Co.* (D. C. Md. 1922), 284 Fed. 886, aff'd 267 U. S. 586, 45 S. Ct. 461 (1924); *Federal Trade Commission v. National Biscuit Co.* (D. C. N. Y. 1937), 18 F. Supp. 667; *Cudahy Packing Co. v. United States* (C.C.A. 7th 1926), 15 F. (2d) 133.

²⁸ *Newfield v. Ryan* (C.C.A. 5th 1937), 91 F. (2d) 700; *Zimmerman v. Wilson* (C.C.A. 3d 1939), 105 F. (2d) 583—this decision citing many cases; *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d)

can he ordinarily show that any privilege prohibits the disclosure of the information (as would be true in the case of communications to counsel).²⁹

He does, however, seem to be accorded a derivative right to insist that the company assert, and to assert on the company's behalf, any objection to the disclosure that could properly be urged by the company.³⁰ But this amounts to little, for ordinarily the company has no grounds for complaining that the search is unreasonable.³¹

Despite the fact that the person whose activities are the subject of the search is not immediately involved, he is nevertheless the real party in interest. Should he not have a standing to object to a procedure that would compel disclosure by a disinterested third party of its duplicate records, in cases where he could resist a similar demand directed to him personally? If his private copies of telegrams which he has sent, or his own record of his banking transactions or deposits in a stockbroker's accounts, are protected as against a general inquisitorial search, should not the protection be extended to counterparts of such records in the hands of the banker, broker, or telegraph company? Decisions in some cases, and dicta in others, recognize that the person being investigated should be regarded as the real party in interest, and should have a right to injunctive relief to prevent the opening of the records of his agent to an unreasonably broad search.³² The fact that such records are not strictly private doubtless inclines the courts to view with greater complaisance a rather broad demand. Again, the question is fundamentally one calling for the court's judgment as to the

²⁹ *McMann v. Securities & Exchange Commission* (C.C.A. 2d 1937), 87 F. (2d) 377.

³⁰ This is conceded by dicta in the *McMann* case, *supra*.

³¹ *United States v. First Nat. Bank of Mobile* (D. C. Ala. 1924), 295 Fed. 142, *aff'd sub nom. First Nat. Bank of Mobile v. United States*, 267 U. S. 576, 45 S. Ct. 231 (1925).

³² *Hearst v. Black* (App. D. C. 1936), 87 F. (2d) 68; *Newfield v. Ryan* (C.C.A. 5th 1937), 91 F. (2d) 700.

reasonableness of the demand, under all the circumstances of the case.³³

5. Remedy Against Improper Demand for Production of Information

Where a subpoena, or other demand for production of information, is improper (on the basis of any of the objections above discussed) ordinarily the only course open to the party objecting to the demand is to refuse to obey it, and challenge its validity in the course of proceedings brought by the administrative agency to enforce it. Ordinarily, motions to quash the subpoena or to enjoin the enforcement thereof are not available as a means of obtaining in advance a judicial determination of the propriety of the demand.³⁴ If violation of the subpoena entails criminal penalties, equitable remedies may be available.³⁵ Similarly, injunctive relief is available in situations where the objection is not only to the enforcement of the subpoena, but to the public disclosure of the information demanded;³⁶ and also in situations of the sort discussed in the preceding section, where the objection is addressed to compliance on the part of a disinterested third party with unreasonable requirements for disclosure of confidential information.

A judicial order directing obedience to a subpoena is appealable.³⁷

³³ Cf., *Zimmerman v. Wilson* (C.C.A. 3d 1936), 81 F. (2d) 847; and the Court's later decision in a subsequent phase of the same case in *Zimmerman v. Wilson* (C.C.A. 3d 1939), 105 F. (2d) 583.

³⁴ *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 58 S. Ct. 963 (1938); *Federal Trade Commission v. Millers' National Federation* (App. D. C. 1931), 47 F. (2d) 428; *Fleming v. Arsenal Bldg. Corp.* (D. C. N. Y. 1940), 38 F. Supp. 675.

³⁵ *Federal Trade Commission v. Millers' Nat. Federation* (App. D. C. 1927), 23 F. (2d) 968.

³⁶ *Bank of America Nat. Trust & Savings Ass'n v. Douglas* (App. D. C. 1939), 105 F. (2d) 100.

³⁷ *Brownson v. United States* (C.C.A. 8th 1929), 32 F. (2d) 844.

III. REQUIRING REPORTS

Administrative agencies are frequently granted power to require the filing of reports by those whose activities are subject to the agency's jurisdiction. In the absence of statutory authorization, it is very doubtful whether the filing of reports could be compelled; but even in the absence of such authorization, a suggestion that a report be filed in lieu of submitting to a demand, backed by a subpoena, for production of books and records, is to say the least highly persuasive.

While the preparation of such reports involves practical difficulties in connection with attempting accurately to compress voluminous information into tailor-made forms that sometimes do not well fit the situation, yet there are few legal difficulties involved. The Fourth Amendment is inapplicable.³⁸ Any invasion of asserted rights of privacy which may be involved is not likely to be embarrassing. Because of the opportunity to reconcile figures and report legal conclusions, the filing of reports does not lay open one's affairs to such soul-searching scrutiny as does the revelation of private records and correspondence.

The desire of the agencies for a wealth of information as to topics connected only collaterally with matters within the agencies' jurisdiction is sometimes met by refusal to furnish information called for in the report form. In such cases, the furnishing of the information is generally required if it has a substantial bearing on matters falling within the agency's jurisdiction.³⁹

Closely related to the power to require the filing of reports is the power to prescribe accounting systems, which by

³⁸ *Isbrandtsen-Moller Co., Inc. v. United States*, 300 U. S. 139, 57 S. Ct. 407 (1937).

³⁹ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 S. Ct. 436 (1912); *Terminal Taxi Cab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583 (1916); *United States v. Clyde S.S. Co.* (C.C.A. 2d 1929), 36 F. (2d) 691; *Federal Trade Commission v. Claire Furnace Co.* (App. D. C. 1923), 285 Fed. 936, rev'd 274 U. S. 160, 47 S. Ct. 553 (1927).

statute is vested in some agencies. Compliance with requirements as to the form of accounting prescribed has been quite consistently enforced.⁴⁰ Objections as to the soundness of the accounting system preferred by the agency will be considered only if the system adopted by the agency is so entirely at odds with fundamental principles of correct accounting as to be the expression of a whim rather than an exercise of judgment.⁴¹

IV. PHYSICAL INSPECTIONS

Whether or not the controlling statute gives such power, representatives of administrative agencies (exhibiting the layman's preference, which is in many types of cases entirely justifiable, for getting facts by firsthand investigation rather than on the basis of testimony) frequently rely on personal inspections as a means of obtaining information.

Of course, if an inspection of the premises affords an opportunity to obtain accurate firsthand knowledge of physical facts affecting the determination of a case, there is no sound reason why an administrative tribunal should not rely on information thus gained. But the question in each case is whether or not the inspection does afford such opportunity. The agency's investigators may not see all that there is to be seen. They may report inaccurately to the officers in whom resides the ultimate power of decision. The physical situation may not be the same at the time of the inspection as at the time to which the determination relates.

Reliance by an agency on such inspection of course narrows the sphere of effective judicial review, and in cases where

⁴⁰ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 32 S. Ct. 436 (1912); *Norfolk & W. R. Co. v. United States*, 287 U. S. 134, 53 S. Ct. 52 (1932).

⁴¹ *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 57 S. Ct. 170 (1936). For discussion of the general problem, see Kripke, "A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107," 57 HARV. L. REV. 433 (1944); Morehouse, "Innovations in Public Utility Accounting Regulation," 46 YALE L. J. 955 (1937).

an agency must decide on the basis of a hearing and support its conclusion by a record containing substantial evidence tending to prove the facts found, reliance by the agency on such a physical inspection may be invalid as depriving the respondent of a hearing. He may be deprived of his right of cross-examination and of the means of showing that there is no substantial evidence to support the agency's findings.⁴² On the other hand, in cases where the agency is not compelled to grant a hearing, or where there is no provision for direct judicial review of the case on the basis of the record made by the agency, the agency is free to decide a case on the basis of its own inspection.⁴³

B. RIGHT OF DEFENDANT TO COMPULSORY PROCESS

1. Where Agency Has No Power to Issue Subpoena

Many agencies have no powers to issue subpoenas. In proceedings conducted before such tribunals, counsel for both parties, the agency as well as the respondent, must rely on informal arrangements to induce witnesses to appear and testify. While the burden thus imposed may weigh more heavily on counsel for the private party than on counsel for the agency, yet the mere fact that compulsory process is not available to the respondent does not, at least in the absence of a clear showing of actual prejudice and deprivation of an opportunity for a full and fair hearing, invalidate the administrative proceedings.⁴⁴ Significantly, almost all the cases

⁴² *Farmers' Elevator Co. of Yorkville v. Chicago, R. I. & P. Ry. Co.*, 266 Ill. 567, 107 N. E. 841 (1915).

⁴³ *People ex rel. Copcutt v. Board of Health of City of Yonkers*, 140 N. Y. 1, 35 N. E. 320 (1893).

⁴⁴ *Low Wah Suey v. Backus*, 225 U. S. 460, 32 S. Ct. 734 (1912); *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 46 S. Ct. 384 (1926); *Brinkley v. Hassig*, 130 Kan. 874, 289 Pac. 64 (1930), appeal dismissed 282 U. S. 800, 51 S. Ct. 39 (1930); *In Jewell v. McCann*, 95 Ohio St. 191, 116 N. E. 42 (1917), which apparently holds the contrary, the decision was placed on the somewhat broader grounds that the statute vested in the agency none of the powers essential to the conduct of a hearing.

so holding point out that the respondent in the administrative proceedings, who was objecting to the unavailability of compulsory process, did not show that this lack actually prejudiced the presentation of his case. It would be a rare case where such a showing could be made, for ordinarily a hostile witness who refuses to testify voluntarily cannot be depended upon to give any helpful testimony, except as to matters of a formal nature which most often can be otherwise proved. But circumstances can be conceived where the inability to compel the attendance of witnesses or the production of documents would actually operate to deprive a party of an opportunity for a full and fair hearing. In such cases it is probable that appropriate relief could be obtained.

2. Conditions on Issuance of Subpoena

In cases where the agency does have power to issue a subpoena, a different question is presented. To what extent may the agency attach conditions to the issuance of subpoenas requested by a private party appearing as respondent in proceedings before the agency?

The sounder administrative practice is to place the issuance of subpoenas on a ministerial basis, making them readily available to all parties, and (this particularly) making them as easily obtainable by counsel for private parties as by counsel for the agency. This conforms with established judicial traditions, under which subpoenas are ordinarily issued in blank by the clerk of the court, to be used by counsel as occasion requires. It is, if anything, more important in administrative proceedings than in judicial proceedings that subpoenas be readily available to the private parties, for the practice of entrusting the agency—one of the parties in interest—with the responsibility to decide whether the adverse party should be aided in preparing his case for trial, creates at least a suspicion if not an appearance of unfairness.

It has been suggested that to avoid any possibility of abuse of this power, it should be transferred from the litigant agency to some independent office.⁴⁵ This may be unnecessary, but at least the agencies should take pains to avoid making their subpoenas more easily obtainable by agency counsel than by private parties.⁴⁶

However, many agencies (with laudable motives but unfortunate shortsightedness) do impose various conditions upon the issuance of subpoenas to respondents, which are not imposed where the staff of the agency seeks a subpoena. While such requirement has been criticized as "unreasonable and unfair,"⁴⁷ the federal courts have generally held that in the absence of clear showing of actual prejudice, imposition of such requirements will be sustained.⁴⁸ Since actual prejudice may be suffered in cases where its existence is not susceptible to precise demonstration, there is much to be said for the view that the burden should be on the agency to prove lack of prejudice, and at least one state court has taken this position.⁴⁹ Section 6 of the Federal Administrative Procedure Act of 1946 requires federal agencies to issue subpoenas to *any party* upon a statement showing the general relevance and reasonable scope of the evidence, and further

⁴⁵ Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 25.

⁴⁶ See comments of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 124; and further statement of concurring members, *idem.*, 221.

⁴⁷ *Inland Steel Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 109 F. (2d) 9, 20, where the court held that in view of this and other matters respondent had been denied a fair trial.

⁴⁸ *North Whittier Heights Citrus Ass'n v. National Labor Relations Board* (C.C.A. 9th 1940), 109 F. (2d) 76; *National Labor Relations Board v. Dahlstrom Metallic Door Co.* (C.C.A. 2d 1940), 112 F. (2d) 756; *National Labor Relations Board v. Blackstone Mfg. Co.* (C.C.A. 2d 1941), 123 F. (2d) 633.

⁴⁹ *Coney Island Dairy Products Corp. v. Baldwin*, 243 App. Div. 178, 276 N. Y. S. 682 (1935), setting aside an order revoking a milk dealer's license because of the refusal of the commissioner to furnish subpoenas to a respondent who refused to state whom he wished to subpoena. As to the general problem of the respondent's statutory right to subpoena, see 53 HARV. L. REV. 842 (1940).

requires that a denial of such an application must be accompanied by a statement of the reasons therefor.

The reluctance of many agencies to make subpoenas readily available to respondents is based upon a fear that attempts would be made to impede the expeditious progress of hearings by calling too many witnesses, or by calling witnesses to testify to irrelevant or immaterial matters, in the hope of possibly confusing the issue or at least delaying the issuance of the order. Such abuses are well known, but there are many devices to meet them which serve the purpose more aptly than does a conditional refusal to issue the subpoena. Hearing officers, generally, are not without power to exclude immaterial testimony. Where it becomes obvious that the purpose of the respondent is to waste time, administrative agencies can employ the same devices as do the courts to cut the hearing short. The danger that an unlimited right to subpoena witnesses might operate unfairly to the witnesses (as where competitors are subpoenaed to testify on an issue that is clearly irrelevant) can be met by making provision for quashing subpoenas at the instance of the witness.⁵⁰

While there may be sounder grounds for limiting the issuance of subpoenas *duces tecum* than subpoenas *ad testificandum*, in view of the substantially greater burden of producing documentary evidence, yet the admonition of Chief Justice Marshall in the *Burr* case,⁵¹ that "the opposite party can . . . take no more interest in the awarding of a subpoena *duces tecum* than in the awarding of an ordinary subpoena," applies as aptly to administrative agencies as to courts.

A useful purpose would be served by a requirement, equally applicable to agency representatives and to private parties,

⁵⁰ Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 162-164.

⁵¹ 25 Fed. Cas. 30, 35 (Case No. 14,692d).

that the application for a subpoena need state only the general reason for the request (and this could be shown without identifying the witness or outlining his testimony). No more should be required.

3. Subpoena to Agency Representatives

The files of an agency may contain matters which, if made a part of the record at the hearing, would be helpful to the respondent's case, but which the agency for tactical reasons does not care to introduce in evidence. Similarly, members of the agency's staff occasionally are potentially valuable witnesses as to occurrences which the agency has no wish to make a matter of record. Since the respondent in such a case must in effect ask the agency to compel itself to testify, he is ordinarily without a remedy to compel the production of any information which the agency does not wish to produce voluntarily, and the agencies quite properly are reluctant to open their files in all cases to the parties appearing before them. Agency staffs welcome fishing expeditions no more than do private parties. Further, the agency's files often contain matters which are privileged from compulsory disclosure.

But where the proceedings are being conducted before a tribunal other than that of the agency to which the request is directed, a subpoena may properly issue to require disclosure of specified, relevant factual data ⁵² (unless the agency has by rule prohibited the production of official records in court proceedings on the ground that to do so would be prejudicial to the public interest) ⁵³ and, in some cases, of certain information as to agency practices and procedures.⁵⁴ Inquiry directed to the mental processes of members of the adminis-

⁵² *Blair v. Oesterlein Machine Co.*, 275 U. S. 220, 48 S. Ct. 87 (1927).

⁵³ *Bank Line, Ltd. v. United States* (C.C.A. 2d 1947), 163 F. (2d) 133.

⁵⁴ *National Labor Relations Board v. Cherry Cotton Mills* (C.C.A. 5th 1938), 98 F. (2d) 444.

trative staff, however, is ordinarily forbidden on the same grounds which preclude cross-examination of a judge or jury as to the basis on which a certain decision was reached.⁵⁵

⁵⁵ United States v. Morgan, 313 U. S. 409, 61 S. Ct. 999 (1941); National Labor Relations Board v. Botany Worsted Mills, Inc. (C.C.A. 3d 1939), 106 F. (2d) 263; National Labor Relations Board v. Biles Coleman Lumber Co. (C.C.A. 9th 1938), 98 F. (2d) 16. For a general discussion, see Pike and Fischer, "Discovery Against Federal Administrative Agencies," 56 HARV. L. REV. 1125 (1943).

CHAPTER 8

Right to a Fair Trial

1. General Tests of Fairness of Trial

THE granting of a fair trial is the one *sine qua non* of administrative procedure. It is the one fixed criterion of judicial review. Although the courts may decline to review an agency's findings of fact and in some cases at least its conclusions of law, there is always the opportunity for judicial review of the issue as to whether an administrative determination was made without giving an opportunity for full presentation of a party's case or without fair consideration of the just rights of the party.¹

But provisions for judicial review are not an appropriate means for achieving and guaranteeing fairness in administration. Even if an agency were stripped of every vestige of judicial power, and its determinations thus removed from the ambit of judicial review, the problem of administrative fair play would remain substantially undiminished.²

The achievement of the goal is fundamentally a task committed to the agencies themselves. As the agencies attain the stability and poise of maturity, their attention is increasingly devoted to refining the procedural devices which they have worked out in their specific fields, adding safeguards wherever the need appears, to the end of assuring not only the effective enforcement of the social or economic policies whose implementation is entrusted to their care, but assuring also that fair consideration be given the individual rights of the

¹ Final Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 78; Hale, "Administrative Hearings under the Federal Constitution," 30 KY. L. J. 137 (1942).

² Chester Lane, Address before the Association of American Law Schools, Handbook of Proceedings, 36th annual meeting (1938) 184, 199.

parties involved, to the end that adjudication be not only prompt but just.

The requirement of a fair trial is commonly associated with the hearing procedure itself. This association probably springs from the identification of hearing and trial in the common-law courts, where they constitute the essence of the adjudicatory process; and from the fact that the formal hearing constitutes the most dramatic step in administrative procedure. But because of deep-seated differences between judicial and administrative techniques, many of the requirements encompassed in the constitutional guaranty of a fair trial are to be applied, in administrative proceedings, to activities that either precede or follow the actual hearing. The question as to whether a fair trial has been granted cannot be answered by looking to the hearing procedure alone.

Thus, one of the three fundamental requisites of a fair trial—an opportunity to be fully informed of the nature of the charge in time to prepare to meet it—has only a collateral connection with the hearing procedure proper. The notice may, as above discussed, either precede or follow the hearing. Sometimes the hearing procedure itself is utilized as the means of giving this information to the respondent. But whatever device may be appropriate in the operations of a particular agency, as a means of informing the respondent of the nature of the agency's claim, this requirement has no direct connection with the hearing procedure itself. It is rather a part of the general problem of the adequacy of notice, discussed above.

A second basic requirement of a fair trial—that the one who decides must hear, i. e., that the actual decision must be that of the officer or board to whom the responsibility has been delegated by the legislature and who must reach that decision on the basis of a personal knowledge of the evidence—is likewise disassociated from the hearing proce-

cedure proper. Contrary to normal judicial practice, where the initial decision is ordinarily that of the officer before whom the testimony is taken, the actual process of determination in administrative agencies is normally a posthearing procedure. The requirement is spoken of as part of the general guaranty of a fair trial because of the intimate association between hearing and decision in the courts, where indeed (as in jury trials) the decision is often the final step of the trial or hearing procedure. But in administrative proceedings, the process of determination is to a large extent divorced from the hearing procedure proper. This second requirement is therefore treated separately, *infra*.

The third general requirement of a fair trial—that the party on trial be granted an opportunity fully to present his contentions, by adducing testimony and arguing thereon before an unbiased tribunal—is the only aspect of this general guaranty which, in administrative procedure, is directly connected with the hearing itself. It is this particular portion of the general problem that is here discussed.

In addressing the problem as to what is and should be required of administrative tribunals as a means of safeguarding individual rights at the formal hearing, there is one fundamental to be borne in mind. The basic characteristics of trial procedure in the courts (which are largely a reflection of a particular Anglo-American historical development, influenced by many diverse factors, prominent among which has been the rather narrowly defined range of judicial activity) are not imposed on administrative tribunals,³ which represent an outgrowth of conditions far different from those which influenced the course of the judicial procedures of the courts.⁴ While the requirements imposed with respect

³ Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 60 S. Ct. 437 (1940).

⁴ See Maitland, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908) 415-418; Landis, THE ADMINISTRATIVE PROCESS, *passim*.

to hearings conducted by administrative agencies have been worked out with reference to judicial standards, yet the analogy is not to be taken in any technical sense. The fundamental principle is only that the rudimentary requirements of fair play be observed.⁵ Lawyers who have objected long and bitterly to many aspects of customary court procedure, so far as its application in the courts is concerned, have had a tendency to enshrine this procedure as sacrosanct when administrative tribunals set out boldly on new and unfamiliar courses. But the courts see no immutable perfections in court-type procedure which administrative agencies must, at their peril, follow. Rather, the agencies are free to work out any type of hearing procedure which appears reasonably apt to the requirements of their particular task, subject only to the one requirement that the technique adopted must not violate the fundamental requirements of fair play and common decency. Little more is required than that the one who decides shall be bound in good conscience to consider the evidence, and to be guided essentially by what the evidence discloses, rather than by extraneous considerations which in other fields might control purely executive action.⁶

The reason for allowing wide departures from normal hearing procedures is said to be that such departures may make for brevity and speed. These ideals, however, are seldom realized. Records comprising several thousand pages are not unusual. Hearings before such bodies as the Federal Trade Commission are protracted not infrequently over a period of months if not years. Indeed, the Securities and Exchange Commission has found it desirable in one branch of its work to resort to the federal courts for the trial of

⁵ *Morgan v. United States*, 304 U. S. 1, 58 S. Ct. 773, 999 (1938). Among the many law review articles discussing the *Morgan* cases, the following are noteworthy: 27 *GEO. L. J.* 351 (1939); 47 *YALE L. J.* 647 (1938); 10 *GEO. WASH. L. REV.* 43 (1941); 30 *KY. L. J.* 408 (1942).

⁶ *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906 (1936).

its cases, utilization of the administrative hearing having been found to be slower and more expensive.⁷

In cases where the reason for the rule is lacking, the rule should have but little application. In lengthy hearings on closely contested technical issues of fact and law, where the contentions of the opposing parties are presented by skilled attorneys, the cause of good administration is furthered by the adoption of customary judicial techniques in conducting the trial of cases. In other instances, as where a wounded veteran seeks disability benefits, or an aged applicant seeks an old-age allowance under the Social Security Act, or an unemployed worker seeks unemployment benefits, an atmosphere of sympathetic conversation is perhaps best conducive to proper administration. There, the rule that informal hearing procedures are proper, so long as the rudimentary requirements of fair play are observed, has just and fitting application. But the rule does not so well fit the case of proceedings before the Federal Trade Commission, state or federal utility commissions, the National Labor Relations Board, and other bodies before which experienced attorneys present evidence in heated controversies involving highly complex issues of law and fact. In such cases, formality is desirable, not only as a means of assuring dignity and decorum, but as the most effective means of assuring that the administrative officers presiding at the hearing shall not be misled by extraneous distractions.

Even in such cases, however, undesirable though it is, unrestrained informality does not void the administrative proceedings. The niceties of judicial procedure cannot be insisted upon. It is the responsibility of the agencies so to shape hearing techniques in these cases as to utilize the merits of the procedures that have developed in the courts.

⁷ Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 61.

2. The Requirement of Impartiality

(a) *The general problem.* It is frequently said that the complete impartiality of the tribunal which hears and decides the case is one of the prerequisites of a fair trial. Indeed, it has been suggested that the requirement of an impartial tribunal, unconcerned with the result, applies with even greater rigidity to administrative officers than to judges;⁸ and it has been said that an administrative body exercising quasi-judicial powers "must, from the very nature of its duties, act with entire impartiality";⁹ because "Judgment ceases to be judicial if there is condemnation in advance of trial."¹⁰

But this requirement of impartiality should not be taken as meaning that the administrative agency must be indifferent to the result. So far as constitutional requirements are concerned, an agency may approach a hearing with a strong hope that a record may be built up which will permit the agency to enter and enforce an order, the desirability of which is to the agency a matter of predetermined conviction.

This is the very core of the problem as to the practical connotations of the requirement of impartiality. In view of the frequent tendency of the agencies to make decisions on the basis of preformed opinions and prejudices, and the related tendency of many administrative officials to feel they are appointed to perform a mission and intentionally to direct their determinations accordingly,¹¹ the parties whose interests are adverse to those of the agency assail as prejudice an attitude of mind which on closer examination proves to be no

⁸ *National Labor Relations Board v. Phelps* (C.C.A. 5th 1943), 136 F. (2d) 562.

⁹ *Humphrey's Ex'r v. United States*, 295 U. S. 602, 624, 55 S. Ct. 869 (1935).

¹⁰ *Escoc v. Zerbst*, 295 U. S. 490, 494, 55 S. Ct. 818 (1935); see also, *Tumey v. Ohio*, 273 U. S. 510, 47 S. Ct. 437 (1927); *Jordan v. Commonwealth of Massachusetts*, 225 U. S. 167, 32 S. Ct. 651 (1912).

¹¹ See instances cited in 1938 report of American Bar Association Committee on Administrative Tribunals, 63 A. B. A. REP. 331, 349.

more than a permissible interest in enforcing a legislatively declared policy.

This problem is inherent in the very nature of administrative tribunals. Charged as they are with responsibility for the advancement of a particular public policy, their desire to enforce that policy renders it difficult for them to appraise with impassive objectivity the evidence adduced at the hearing. Their special experience and conviction may lead them to find claims clearly established on a record which would leave a disinterested judge in doubt.¹² Ideally, the administrator should concern himself with his public duty to further broad statutory policies only when formulating regulations and general interpretative rulings, and should drop this attitude in favor of a strictly impartial, disinterested judicial approach in weighing the evidence presented at the hearing of a particular case.¹³ But this idealism is rarely found. Administrative officers may strive for it,¹⁴ but in practice it is not easy to lay aside the role of the legislator for that of the judge when walking from the committee room to the hearing room. The administrator is only a man. Often, he is a man without legal training, and the distinction between creating rules and applying them may not be so clear to him as to the counsel who argues before him. Or, for example, if the administrator sees that a cease and desist order would further the policy in which he is interested, he cannot easily perceive why, if a respondent's protestations of intent to comply with the law are sincere, the respondent should object to the entry of such an order. He sees but little point in respondent's protestations that the evidence pre-

¹² Jaffe, "Invective and Investigation in Administrative Law," 52 HARV. L. REV. 1201 (1939).

¹³ Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 22. Cf., Davis, "Bias of Administrative Officers," 32 MINN. L. REV. 199 (1948).

¹⁴ See opinions in *In Matter of Segal & Smith*, 5 F. C. C. 3 (1937); *In Matter of Express Pub. Co.*, 8 N. L. R. B. 162 (1938).

sented does not justify a finding of facts which the statute makes a condition precedent to the entry of the order.

Erroneous and unjust determinations too often result from this predilection of administrative agencies to determine cases and appraise facts in the light of predetermined policy motives. But the remedy lies rather with the agencies and the legislatures than with the courts. A significant step toward the amelioration of this condition would be a separation of the policy-making and fact-finding functions within the agencies. The individuals who make the rules and enforce them should not ordinarily be permitted to determine whether a violation of the rules has been proved. The decision on this question, preferably, should be left to individuals quite independent of the policy-making officials, so that the latter could not overrule the expert conclusions of the fact-finding officer in order to further executive policies or curry favor with the appropriating agencies at whose mercies the agency heads are often placed.¹⁵

In some cases, of course, although the hearing is judicial in form the decision is largely legislative in nature. This is often true where the agency instead of laying down broad rules in advance prefers to work out rules of policy a step at a time, by exercising its administrative or legislative discretion in deciding the result that should be reached in the various factual situations presented in a large number of cases. Here, the ideal of a disinterested appraisal of the evidence is even more difficult of achievement. In such cases, accepted concepts of administrative discretion permit decisions to be rooted in the agency's bias in favor of postulated ends. This must be accepted as part of the price to be paid for the advantages of administrative enforcement of the laws.

¹⁵ Pound, *ADMINISTRATIVE LAW* (1942) 79. *Cf.*, provisions of Federal Administrative Procedure Act for appointment of trial examiners.

The fact that an agency's interest in implementing predetermined policies may dictate the result in particular cases—and dictate, in such cases, a different result than would be reached on the same facts by a judge who was completely disinterested in the result—does not constitute the type of bias and prejudice which invalidates an administrative determination. This exists, generally, only where the agency or a responsible official thereof has a personal or pecuniary interest in a particular case, or where there exists a personal prejudice against a particular respondent, or where the intemperate conduct of the hearing officer has made it impossible for a respondent fairly to present his case.

(b) *Personal or pecuniary interest.* Where a representative of an agency has a direct pecuniary interest in the outcome of a case pending before the agency, he is of course disqualified to participate in the decision of the case. Where his interest is indirect, the same principle applies, but considerations of *de minimis* may be invoked where a collateral interest is so unsubstantial that it is unlikely it would affect the decision. The situation is similar to that where a judge is a stockholder of a corporation involved in a lawsuit.¹⁶ An interesting and typical situation was presented to the Supreme Court of Michigan,¹⁷ in a case involving the fixing of milk prices by a board, four fifths of whose members were engaged in the business of producing or distributing milk. The order was protested by a distributor whose business methods differed from those of the distributors and producers represented on the board, and the court held that the statute creating the agency was fatally defective in failing to provide for a fair and impartial board. The facts of the case disclosing

¹⁶ See 1 CYC. OF FEDERAL PROCEDURE (Perm. ed.) § 18.

¹⁷ *Milk Marketing Board v. Johnson*, 295 Mich. 644, 295 N. W. 346 (1940), commented on in 89 U. PA. L. REV. 977 (1941).

a somewhat direct interest on the part of the board members, some of whom at least were in a sense business competitors of the petitioner, the result seems eminently fair and well calculated to preserve public respect for the work of administrative agencies. But it would not seem that the same result should follow necessarily in every case where the members of an agency are engaged in the same line of business as that falling within the jurisdiction of the agency. A manufacturer engaged in the aviation industry, for example, should not be deemed disqualified to act as a member of an agency charged with the responsibility for prescribing regulations governing the use of safety devices on airships.

(c) *Personal prejudice*. If an officer participating in the decision has a personal prejudice against a party appearing as a petitioner or respondent before the agency, the agency's action is void or at least voidable on proper petition by the party affected.¹⁸ While the principle is clear, its application involves the same difficulties which plague the courts in cases involving recused judges.¹⁹ In the first place, the existence of such personal prejudice is more easily asserted than proved. There is not ordinarily any statutory provision of the sort commonly found in judicature acts giving automatic effect to an affidavit alleging, in proper form, the existence of such personal prejudice (e. g., Section 7 (a) of the Federal Administrative Procedure Act of 1946 provides that upon the filing of such an affidavit, the agency shall determine the claim of disqualification as a part of the decision in the case). Claims of unfair trial based on the asserted prejudice of the

¹⁸ *Narragansett Racing Ass'n v. Kiernan*, 59 R. I. 90, 194 Atl. 692 (1937); *Clark v. Alcoholic Beverage Commission*, 54 R. I. 126, 170 Atl. 79 (1934). See Scott, "Administrative Law: Bias of Trial Examiner and Due Process of Law," 30 GEO. L. J. 54 (1941); also, "The Disqualification of Administrative Officials," 41 COL. L. REV. 1384 (1941).

¹⁹ See 41 HARV. L. REV. 78 (1927); Kramer "Judges—Appointment of Substitute for Recused Judges—Disqualification of Judges," 36 MICH. L. REV. 985 (1938); Godman, "Disqualification for Bias of Judicial and Administrative Officers," 23 N. Y. U. L. Q. REV. 109 (1948).

administrative officers frequently fail for lack of proof.²⁰ Secondly, and more important, there is involved here the difficulty above referred to of distinguishing between, on the one hand, those strong convictions of probable guilt, based on prior experience in situations involving a particular party or particular situations, which do not disqualify an administrator any more than they disqualify a trial judge;²¹ and, on the other hand, a predisposition against a particular party founded on purely personal dislike or mistrust, which constitutes improper prejudice.

(d) *Interference with presentation of evidence.* The process of presenting evidence in hearings before administrative tribunals must be kept free from forces generating bias or intimidation.²² At times an administrative officer, who though appointed by law is misguided by inexperience, so conducts himself at a hearing as to violate this wise precept. In some cases, which fortunately are comparatively few, a hearing officer adopts so partisan a manner and exhibits so obvious an attitude of bias as to interfere unfairly with the presentation of evidence, to the end that the record does not fairly reflect the true factual situation. Such interference may take the form of interrogating witnesses in a manner so hostile as to intimidate them, or interrupting the examination of a witness so frequently as to interfere with the orderly presentation of his testimony, or interfering unfairly with the cross-examination of witnesses, or exhibiting an abusive attitude toward witnesses or counsel or both, or sometimes, indeed, ordering the exclusion from the record of colloquies which show the general tone and character of the proceeding.

²⁰ *Montana Power Co. v. Public Service Commission of Montana* (D. C. Mont. 1935), 12 F. Supp. 946; *Georgia Continental Tel. Co. v. Georgia Public Service Commission* (D. C. Ga. 1934), 8 F. Supp. 434.

²¹ See *Craven v. United States* (C.C.A. 1st 1927), 22 F. (2d) 605; *Parker v. New England Oil Corp.* (D. C. Mass. 1926), 13 F. (2d) 497; *Johnson v. United States* (D. C. Wash. 1929), 35 F. (2d) 355.

²² *National Labor Relations Board v. Indiana & M. Elec. Co.*, 318 U. S. 9, 63 S. Ct. 394 (1943).

Of course, if such conduct can be shown to have affected the result, the objection of bias and prejudice is well taken. But ordinarily, the effect cannot be precisely measured, nor can it be demonstrated that actual harm resulted. At best, there is an inference, tenuous or persuasive in the particular case, that the result might have been otherwise if the trial had been properly conducted. How far must the respondent go in establishing that he has been harmed? The prevailing view is that unless the inference of probable injury to the respondent is so strained as to be completely unimpressive, the burden is on the agency to show that posthearing procedures were effective to obliterate the effect of the injudicious conduct of the hearing officer.

In the court decisions reviewing such cases, the opinions reveal a variety of judicial utterances which may be misleading unless considered in view of all the facts of the case as presented to the court. Thus, it may be said that so long as the result reached was right, it is no grounds for voiding the administrative order that the hearing was improperly conducted, where the evidence amply supports the conclusion of the agency;²³ or on the other hand, it may be said that the existence of evidence in support of the agency's conclusions is immaterial, since, once partiality appears, it taints and vitiates all the proceedings.²⁴ The conflict between the decisions, however, is more seeming than real. Decisions supported by statements to the effect that once partiality appears, prejudice will be presumed,²⁵ are not really inconsistent with the decisions wherein statements are made that

²³ *National Labor Relations Board v. Western Cartridge Co.*, Winchester Repeating Arms Co. Division (C.C.A. 2d 1943), 138 F. (2d) 551.

²⁴ *National Labor Relations Board v. Phelps* (C.C.A. 5th 1943), 136 F. (2d) 562.

²⁵ *Inland Steel Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 109 F. (2d) 9.

material prejudice to the complaining litigant must clearly appear, before the court will set aside an administrative order because of the misconduct of the hearing officer.²⁶ Each decision is based on the peculiar facts of the case involved, and the kind and degree of the impropriety.²⁷ If the case against the respondent is a close one, and it appears that the agency made no effective effort to correct the hearing officer's misbehavior, justice may require the granting of a new hearing.²⁸ On the other hand, if it fairly appears that the respondent was able to get into the record enough evidence to establish fairly the defenses on which he relied, and if the agency was apparently able to decide the case uninfluenced by the behavior of the hearing officer, and if it quite clearly appears that the granting of a new trial would not affect the final result, the administrative order is allowed to stand, regardless of the harm done to the cause of good administration.

(e) *Where the only officers with power to act are prejudiced; doctrine of necessity.* Where an administrative agency, or a majority of the members thereof, is disqualified by reason of prejudice from proceeding to hear and determine a pending case, a situation sometimes ensues where an alleged lawbreaker must be permitted to escape standing trial unless the agency is allowed to proceed notwithstanding its bias. The great majority of decisions sustain the proposition that in such cases what has been called "the stern rule of necessity"

²⁶ *National Labor Relations Board v. Ford Motor Co.* (C.C.A. 6th 1940), 114 F. (2d) 905.

²⁷ *Cupples Company Manufacturers v. National Labor Relations Board (Mutual Relations Ass'n)* (C.C.A. 8th 1939), 106 F. (2d) 100; *National Labor Relations Board v. Washington Dehydrated Food Co.* (C.C.A. 9th 1941), 118 F. (2d) 980.

²⁸ *Montgomery Ward & Co. v. National Labor Relations Board (Union of Ward Employees)* (C.C.A. 8th 1939), 103 F. (2d) 147; and see *National Labor Relations Board v. Western Cartridge Co., Winchester Repeating Arms Co. Division* (C.C.A. 2d 1943), 138 F. (2d) 551.

requires the agency to act.²⁹ Inasmuch as the doctrine disqualifying a tribunal for prejudice is based on the mere likelihood of an erroneous determination, the result seems clearly proper. It does not necessarily follow that a biased tribunal will decide a case incorrectly. The officers will be presumed to make an honest effort to carry out their sworn obligation to decide the case fairly; and the reviewing court will be diligent to examine the record with particular care.

Of course, if there is anyone else who can act in the place of the disqualified persons, such substitution of personnel will be required. In such cases, the doctrine of necessity has no application.³⁰

Since furtherance of the cause of good administration requires the avoidance of all appearances of unfairness, many agencies very properly strive to avoid reliance on this doctrine of necessity. While legislative authorization for substitution of *pro hac* board members temporarily to fill the places of the recused members would be required to eliminate the problem, much can be done even in the absence of statute by the appointing of a special panel or hearing officer to receive the evidence and make recommendations to the board members as to the proper disposition of the case. By utilizing such procedure in cases where the members of the board are prejudiced, it is possible to afford the respondent the opportunity of presenting his evidence and arguing his case before officers who do not share this prejudice. Their recommenda-

²⁹ *Brinkley v. Hassig* (C.C.A. 10th 1936), 83 F. (2d) 351; *Loughran v. Federal Trade Commission* (C.C.A. 8th 1944), 143 F. (2d) 431; *Marquette Cement Mfg. Co. v. Federal Trade Commission* (C.C.A. 7th 1945), 147 F. (2d) 589, *aff'd sub nom.* *Federal Trade Commission v. Cement Institute, et al.*, 333 U. S. 683, 68 S. Ct. 793 (1948); and see many cases collected in 39 A. L. R. 1476. A few cases reach a contrary result. *Abrams v. Jones*, 35 Idaho 532, 207 Pac. 724 (1922); *State ex rel. Miller v. Aldridge*, 212 Ala. 660, 103 So. 835 (1925). The problem is discussed in Fischer, "Should Prejudgment Before Hearing in a Quasi-Judicial Proceeding Disqualify an Administrative Agency?" 33 GEO. L. J. 311 (1945).

³⁰ Cases collected in 39 A. L. R. 1476.

tions to the board members who must decide would be unaffected by any improper interest, and by relying on such recommendations the members of the board can more easily overcome the effect of their personal prejudices in the matter.

3. Time, Place, and Manner of Holding the Hearing

(a) *Time.* Requirements as to the time of holding a hearing are ordinarily a subject for the rules of a particular agency. It is required, to be sure, that the respondent be given sufficient advance notice of the time of hearing in order to enable him properly to prepare his case. In practice, however, little difficulty arises on this score because of the general tendency of administrative agencies to hold hearings at intervals. If the respondent is not fully prepared to present his case when the hearing is called, the representatives of the agency will put in their proofs, and an adjournment will ordinarily be granted to enable the respondent to prepare his evidence. Refusal to grant a respondent a reasonable amount of time to prepare and present his case would undoubtedly constitute a deprivation of a fair trial, vitiating the administrative proceedings. Section 5 of the Federal Administrative Act provides (as to cases where federal agencies are required by statute to hold hearings) that in fixing the time and place of hearing "due regard shall be had" for the convenience and necessity of the parties or their representatives.

(b) *Place of hearing.* Administrative tribunals are frequently ambulatory, holding the hearing at such place as will be most convenient for the majority of the witnesses and will afford most convenient access to the records which the agency desires to examine. Frequently, successive hearings are held in a single case at widely separated localities. Selection of the place of hearing and the removal of the

hearing from one place to another is within the prerogative of the agency, subject to the requirement that ample notice be given the parties affected as to the removal of the hearing from one place to another.³¹

While agencies have asserted an uncontrolled discretion as to the selection of the place where the hearing will be held, it would seem that they must be able to show at least a sound reason of administrative convenience to justify the holding of the hearing in a locality other than that where it would normally be held. If it appears that the selection of the place of the hearing was motivated by a desire to handicap the respondent, or to escape the process of a particular court, it may be held that deprivation of a fair trial has resulted.³² The power to hold hearings any place within the country is conferred not alone for the benefit of the agency but also for the convenience of those subject to the provisions of the statute which the agency administers; and in the case last cited it was held that fair play requires an agency to hold hearings at a place convenient to each of the parties.

(c) *Public v. private hearing*. It is difficult to conceive of a case where an agency's refusal to disclose to the public information obtained by an agency (either at a hearing or in the course of *ex parte* investigations) could be made the basis of a claim of deprivation of the right to a fair trial. The only adverse effect of such a policy of making hearings private would be to deprive a collaterally interested party of an opportunity to learn the details of another party's case in which he might be interested; and this opportunity does not fall within the scope of the constitutional guaranty. If an agency wishes to conduct the hearing in private, it has the

³¹ *Wright v. Securities and Exchange Commission* (C.C.A. 2d 1940), 112 F. (2d) 89.

³² *National Labor Relations Board v. Prettyman* (C.C.A. 6th 1941), 117 F. (2d) 786.

privilege of so ordering, so long as the parties directly affected are afforded adequate opportunity to participate.

Normally, administrative hearings are public; and this is often required by statute. May insistence by the agency upon a public hearing deprive a respondent of a fair trial? In occasional cases, this result may obtain, as where the fair presentation of the respondent's case requires the disclosure of trade secrets or closely guarded secrets of business practices, and where the respondent could not afford to make public disclosure of such properly confidential matters. In such cases, it would seem to be the duty of the agency to protect the respondent's privilege of privacy by some method appropriate to the particular case.³³

(d) *Representation by counsel.* The zealotry with which the courts in criminal cases have insisted upon protecting the right of defendants to be aided by counsel³⁴ is based upon a philosophy that by logical implication also requires administrative agencies to permit any party to be represented by counsel in a proceeding in which the agency passes upon judicial questions. Such proceedings have many of the qualities of criminal prosecutions, in that they typically involve a determination as to the truth of an allegation by the government that the respondent has violated the law of the land. While the Sixth Amendment is not applicable, its spirit is. As declared in broad language in *Powell v. Alabama*,³⁵ the right to a hearing "has always included the right to the aid of counsel. . . . If in any case, civil or criminal,

³³ Cf., *American Sumatra Tobacco Corp. v. Securities and Exchange Commission* (App. D. C. 1937), 93 F. (2d) 236; *E. Griffiths Hughes, Inc. v. Federal Trade Commission* (App. D. C. 1933), 63 F. (2d) 362.

³⁴ E.g., *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019 (1938); *Williams v. Kaiser*, 323 U. S. 471, 65 S. Ct. 363 (1945).

³⁵ 287 U. S. 45 at 68, 69, 53 S. Ct. 55 (1932). The quoted phrase is dictum. See Green, "The Bill of Rights, The Fourteenth Amendment, and The Supreme Court," 46 MICH. L. REV. 869 (1948) for a discussion of this general problem.

a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

The right to be heard by counsel has been recognized by the Department of Justice³⁶ as a necessary ingredient of a fair hearing in administrative proceedings, and is specifically provided for in Section 6 (a) of the Federal Administrative Procedure Act of 1946. Numerous decisions in state courts are to the same effect.³⁷

But the right is no broader than the need requires.

Where, for example, it fairly appears that the party's failure to be represented by counsel was attributable to the party himself, or his attorney, rather than to the administrative tribunal, the agency may continue its hearings in the absence of counsel, even over the protest of respondent.³⁸

Further, the right to representation by counsel does not apply to cases where the agency is not engaged in the determination of a judicial question, but is merely conducting an investigation or taking testimony to aid it in reaching a purely executive decision.³⁹

In proceedings where elements of wide administrative or executive discretion are inextricably intertwined with the adjudication of justiciable rights, doubts should be resolved in favor of allowing representation by counsel. This, generally, is the result in the alienage cases, where the rule

³⁶ 33 Op. Atty. Gen. 17, 19 (1921).

³⁷ *People ex rel. Mayor v. Nichols*, 79 N. Y. 582 (1880); *People ex rel. Rea v. Nokomis Coal Co.*, 308 Ill. 45, 139 N. E. 41 (1923); *Christy v. City of Kingfisher*, 13 Okla. 585, 76 Pac. 135 (1904).

³⁸ *National Labor Relations Board v. American Potash & Chemical Corp.* (C.C.A. 9th 1938), 98 F. (2d) 488; *Manufacturers' Light & Heat Co. v. Ott* (D. C. W. Va. 1914), 215 Fed. 940.

³⁹ *Bowles v. Baer* (C.C.A. 7th 1944), 142 F. (2d) 787; *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752 (1901).

allowing counsel in deportation cases seems fairly well established,⁴⁰ although the decisions in this particular field exhibit a great contrariety of result, reflecting in large part the doubt as to the applicability of the constitutional guaranties to aliens "knocking at the door."⁴¹

(e) *Following agency rules.* Administrative agencies have no greater rights than do courts to depart from their accustomed procedural rules and practices, in order to facilitate the achievement of a desired result in a particular case. If such departure is shown to have prejudiced, or seems likely to have prejudiced, the rights of a party appearing before the agency, it will be held that such departure deprived the party of a fair trial and vitiated the administrative proceeding.

This general principle has many ramifications.

At one extreme, there are occasional cases where there is at least a suggestion or colorable inference that a change in an agency's rule was of a temporal nature, and adopted for the purpose of affecting the outcome of a particular case. The reprehensibility of such conduct needs no arguing and has been made a basis for setting aside administrative action.⁴²

⁴⁰ *Whitfield v. Hanges* (C.C.A. 8th 1915), 222 Fed. 745; *Low Wah Suey v. Backus*, 225 U. S. 460, 32 S. Ct. 734 (1912).

⁴¹ *Brownlow v. Miers* (C.C.A. 5th 1928), 28 F. (2d) 653. Among decisions insisting strongly on the right to counsel in this type of case are: *Chew Hoy Quong v. White* (C.C.A. 9th 1918), 249 Fed. 869; *Ex parte Lam Pui* (D. C. N. C. 1914), 217 Fed. 456; *Ex parte Plastino* (D. C. Wash. 1916), 236 Fed. 295; *Ex parte Radivoeff* (D. C. Mont. 1922), 278 Fed. 227. Other cases, permitting some restrictions on the right to representation by counsel in the preliminary stages of the administrative proceeding, include *Chin Shee v. White* (C.C.A. 9th 1921), 273 Fed. 801; *Plane v. Carr* (C.C.A. 9th 1927), 19 F. (2d) 470; *United States ex rel. Buccino v. Williams* (C. C. N. Y. 1911), 190 Fed. 897; *United States ex rel. Ivanow v. Greenawalt* (D. C. Pa. 1914), 213 Fed. 901; *Ex parte Cahan* aff'd *sub nom.* *Cahan v. Carr* (C.C.A. 9th 1931), 47 F. (2d) 604.

⁴² *Sibray v. United States* (C.C.A. 3d 1922), 282 Fed. 795; *Colyer v. Skeffington* (D. C. Mass. 1920), 265 Fed. 17; *Chamberlain, Dowling, and Hays*, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 15.

At the opposite extreme, if it can be shown that the failure to observe the departmental regulation had no effect on the result, the administrative proceeding will not be invalidated.⁴³

Between these two extremes lie the vast bulk of cases, where it is plain that the failure to follow the usual procedural devices caused a more or less substantial degree of inconvenience to the party appearing before the agency, but it is uncertain whether or not the irregularity affected the final result. The courts have been strongly inclined to resolve the doubt in favor of the party protesting the failure to follow the rules. Where the rules which were disregarded had been promulgated for the purpose of safeguarding the rights of the persons affected by administrative action, this result is of course to be expected.⁴⁴ In such cases, the departmental or agency rules may properly be considered as setting minimum standards of fair procedure, and any departure therefrom is not to be tolerated.

But the same result has been reached in other cases where the rule in question was apparently designed rather for the convenience of the agency than for the protection of the parties appearing before it.⁴⁵ In such cases, there is doubt whether the administrative proceedings should be invalidated unless prejudice is fairly indicated. But even where the nonobservance of administrative regulations is not, standing alone, of any seeming great significance, it may nevertheless be an important element giving color to a claim that other irregularities of procedure, when considered together with the

⁴³ *United States ex rel. Minuto v. Reimer* (C.C.A. 2d 1936), 83 F. (2d) 166.

⁴⁴ *Mah Shee v. White* (C.C.A. 9th 1917), 242 Fed. 868; *Ex parte Radivoeff* (D. C. Mont. 1922), 278 Fed. 227; *United States ex rel. Ohm v. Perkins* (C.C.A. 2d 1935), 79 F. (2d) 533; *United States ex rel. Chin Fook Wah v. Dunton* (D. C. N. Y. 1923), 288 Fed. 959.

⁴⁵ *Erie R. Co. v. City of Paterson*, 79 N. J. L. 512, 76 Atl. 1065 (1910).

departure from the agency's customary rules, had a combined or cumulative effect of depriving a party of a fair trial.⁴⁶

4. Right to Meet the Agency's Case

One of the indispensable requisites of a fair hearing is that the course of the proceedings shall be such that the party appearing before the agency "shall have an opportunity to be heard and cross-examine the witnesses against him and shall have time and opportunity at a convenient place, after the evidence against him is produced and known to him, to produce evidence and witnesses to refute the charges."⁴⁷ The principle is plain; and in cases where the administrative determination rests fundamentally upon the testimony of witnesses taken at an open hearing, there is no difficulty in its application. But because administrative agencies so often base their findings and conclusions upon data otherwise obtained, the exact requirements of this rule are a source of perennial difficulty. Administrative bodies typically carry out many other functions in addition to their purely judicial duties; and in conducting their normal business they come into the possession of vast compilations of data which have some general bearing on a great number of cases and which they cannot intelligently disregard in the decision of any particular individual case. Sometimes the data represents the results of general fact-gathering activities; the agency has perhaps received reports from a group of persons or companies over a period of years, or it may have itself compiled official records which are a valuable source of information in specific cases. In other instances, and especially where the agency's function is that of enforcing a general legislative policy, or

⁴⁶ E.g., *People ex rel. Cotton v. Leo*, 194 App. Div. 921, 184 N. Y. S. 943 (1920).

⁴⁷ *National Labor Relations Board v. Prettyman* (C.C.A. 6th 1941), 117 F. (2d) 786, 790.

policing a particular industry or particular type of activity, the agency may employ a corps of investigators to gather facts concerning a particular case. Insofar as the agency's case against a respondent rests in part upon information derived from such sources, to what extent must the respondent be permitted to delve into the files of the agency, or seek to discredit the information therein contained? In general terms, it can be said that he must be granted an opportunity to learn what the agency relies on, to investigate and rebut (by oral cross-examination of witnesses or otherwise) the accuracy of the information so relied on, and to present all the evidentiary data in his possession which may call for a different conclusion or different inference from that suggested by the agency's information.

(a) *Right to examine opposing evidence.* The party appearing before an agency may insist that the agency advise him, by specific reference, of those parts of its general files and records on which it intends to rely in reaching a decision in the particular adversary proceeding with which he is concerned.⁴⁸ He does not have a right to delve and pry into all the records of the agency, or to examine secret reports of the agency's investigators, but all material upon which an agency proposes to rely as establishing a fact should be open for inspection.⁴⁹

In enforcing this requirement, reliance must necessarily be placed on the integrity of the agencies. It is quite possible for an agency, should it so desire, to rely *sub silentio* on secret information, accurate or otherwise, which it does not disclose to the respondent. But to the extent that the agency's findings must be supported by the record of the proceedings before it, the agency is bound to introduce into the record at least

⁴⁸ United States and Interstate Commerce Commission v. Abilene & S. Ry. Co., 265 U. S. 274, 44 S. Ct. 565 (1924).

⁴⁹ United States *ex rel.* St. Louis Southwestern Ry. Co. v. Interstate Commerce Commission, 264 U. S. 64, 44 S. Ct. 294 (1924).

enough of its information to afford substantial support for its findings. More than this, the courts cannot require. In appraising the facts appearing in the record, an agency may be subconsciously influenced by a general background of information or belief which the respondent might be able to show to be inaccurate, but there is no practical way of giving the respondent an opportunity to essay this task. It must be hoped that the agency will desire the grounds of its tentative conclusions to be subjected to searching tests, and will thus make available for respondent's information all pertinent information.

(b) *Right to cross-examine opposing witnesses.* The right to cross-examine an opposing witness is a substantial part of the guaranty of a fair trial. There can be no doubt that where a witness is called to testify *vive voce*, the respondent must have an opportunity to cross-examine that witness. Nor can this right be defeated merely by permitting a witness to put his testimony in writing in advance of trial, and introducing his affidavit or report in lieu of calling him to the stand.

But on the other hand, the respondent has no right to insist that every bit of information on which the agency relies must be proved by oral testimony of a witness subject to cross-examination. Were the rule pushed so far, it would obviously collide with the principle that enables agencies to receive hearsay proof, and would in fact make it practically impossible for most agencies to conduct their business.

It is at this point that the difference between courts and administrative agencies in respect to fact-finding techniques produces a real difficulty in setting standards to determine when a party's right to a fair trial has been infringed.⁶⁰ The general theory is clear—the agency is not to be permitted to accept as evidence anything which is devoid of evidential

⁶⁰ Cf., Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 196, 198; and Gellhorn, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941) 100, 111.

value, and the party concerned must be given a fair opportunity to demonstrate the unreliability of the proffered proof.⁵¹ In some cases, the only adequate way to undertake such a demonstration is by oral cross-examination of the party who is the author of the statement, but in others, an opportunity to rebut the accuracy of the statement, or demonstrate that it does not rest on reliable sources of information, is sufficient. The general test is well phrased in Section 7 (c) of the Federal Administrative Procedure Act of 1946, providing (in case of certain proceedings before federal agencies) a right "to conduct such cross-examination as may be required for a full and true disclosure of the facts." A great deal depends on the court's judgment as to what constitutes, in the circumstances of a particular case, a reasonable substitute or equivalent for the typical judicial cross-examination procedure; and it is not unnatural that courts exhibit some differences of opinion in specific case situations.

But several general propositions may reasonably and safely be accepted. If a letter, affidavit, or other written report is offered as a substitute for the oral testimony of an individual witness as to what he has seen, or believes, or concludes, the other party (at least if the contents of the writing are of any importance) must be given an opportunity to cross-examine the author.⁵²

Similarly, where the only means of attacking the accuracy of the proffered evidence is by cross-examination of the author, that opportunity must be afforded.⁵³

Again, where the credibility of the author is in issue, the opportunity for cross-examination must be afforded.

⁵¹ *Pacific Livestock Co. v. State Water Board of Oregon*, 241 U. S. 440, 36 S. Ct. 637 (1916).

⁵² *Bereda Mfg. Co. v. Industrial Board of Illinois*, 275 Ill. 514, 114 N. E. 275 (1916).

⁵³ *United States v. Baltimore & O. Southwestern R. Co.*, 226 U. S. 14, 33 S. Ct. 5 (1912).

Where the testimony relates to a specific factual dispute at issue in a particular case, cross-examination is more generally insisted upon than in cases where the testimony relates to matters of general information.

But on the other hand, where an agency desires to rely on information gathered in the course of a general investigation, or on data revealed by hundreds of reports filed by disinterested parties, the rights intended to be guaranteed by the privilege of cross-examination can ordinarily be safeguarded so long as the affected party is given full opportunity to rebut the *prima-facie* showing made by the reports. The impracticability of calling a large number of witnesses for cross-examination as to a variety of issues related only collaterally to the specific question before the agency, coupled with the apparent unlikelihood that such cross-examination would affect the statements or reports in question, make it unwise to insist upon a literal application of the general right of cross-examination.

The apparent reliability of the hearsay received without privilege of cross-examination and the weight attached to it by the agency, are both important factors. Sometimes, there is little real controversy as to the factual question involved; in such cases, deprivation of the right of cross-examination is likely to be deemed unimportant. And if the administrative decision can be supported by reliance on other evidence, as to which there was afforded an opportunity for cross-examination, the denial of cross-examination is harmless.

Generally, the respondent must be accorded an opportunity to cross-examine the authors of the information on which the agency relies, except in cases where the nature of the statement is such that its asserted unreliability can be just as well demonstrated by rebutting proofs as by actual cross-examination.

In cases where the agency's function is legislative or executive rather than judicial, of course, the right to cross-examination does not exist.⁵⁴

The question as to how far the right of cross-examination may be abridged without denying a fair trial is intimately related to the question as to the extent to which agencies may rely on official notice of facts not proved, a question which is discussed more fully, *infra*.

(c) *The right to introduce evidence.* The right to a full hearing implies the privilege of introducing all evidence which is competent, material, and relevant to the issues.⁵⁵ Exclusion of evidence which should have been received and considered may be a fatal error.⁵⁶ However, a party complaining of the exclusion of proffered evidence must exhaust every remedy to get the matter before the tribunal, if he is to rely on this ground as an attack upon an administrative determination. If, for example, the governing statute makes available the device of petitioning the appellate court for an order granting leave to adduce the additional evidence before the agency, he must resort to this device; and his failure to make such an effort estops him from raising the point.⁵⁷

5. Timeliness of Hearing; Rehearing

Administrative adjudication ordinarily differs from the typical court decision in that it is not directed principally to a determination of rights and liabilities arising out of a closed

⁵⁴ *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 53 S. Ct. 350 (1933).

⁵⁵ *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 57 S. Ct. 816 (1937); *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 93, 33 S. Ct. 185 (1913); *State of Washington ex rel. Oregon Railroad and Navigation Co. v. Fairchild*, 224 U. S. 510, 32 S. Ct. 535 (1912); *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U. S. 63, 55 S. Ct. 316 (1935); and see § 7 (c) of the Federal Administrative Procedure Act of 1946.

⁵⁶ *Chicago, M. & St. P. Ry. Co. v. Public Utilities Commission of State of Idaho*, 274 U. S. 344, 47 S. Ct. 604 (1927); *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U. S. 63, 55 S. Ct. 316 (1935).

⁵⁷ *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938).

situation, but rather is chiefly significant as a mandate to govern a continuing course of action. Any material changes in the factual situation that may occur between the time of the hearing and the time when the order is drafted should be made known to the agency, so that it may fashion its remedy to fit the current situation.

The problem arises frequently because of the lapse of time which occurs between the date of the hearing and the date when the order is prepared. After the testimony has been completed, the trial examiner writes his report, copies of this document are sent to the parties, they file exceptions thereto, and there is an argument on these exceptions before the agency. Such, at least, is the typical course of procedure in many tribunals. But this process, especially in cases where the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful, often consumes a half year or more; and (such being the nature of human activities in many of the fields committed to the supervision of administrative agencies) during these six months there often occur significant changes in the factual situation.

If the case is set down for a new hearing before a trial examiner, the whole process is put into operation a second time; and by the time the case again reaches the agency heads, there may have been further changes in the factual situation.

In order to permit the eventual completion of the administrative process, it is necessary for the agency heads either to hear the new evidence personally, or to cut the matter short by deciding the case without reference to the recent changes in the factual situation.

The choice between these two alternatives is that of the agency. Its discretion in the matter will not ordinarily be reviewed by the courts.⁵⁸ In making the choice, the agency must consider: the apparent importance of the new facts (there

⁵⁸ *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503, 64 S. Ct. 1129 (1944).

may be but little indication that they would affect the result); the need for speedy action; and the likelihood that the plea for a rehearing is premised principally on the hope of stalling enforcement of the administrative order. In some cases, a rehearing before a trial examiner or before the agency heads themselves may appear to be justified, but in other cases, justification does not appear. Denial of a rehearing cannot, except in an extraordinary case of clear abuse of discretion, be considered a deprivation of a fair trial.⁵⁹

In some cases, however, abuse of discretion has been established, as where the petition for a rehearing showed persuasively that economic conditions had so altered since the close of the prior hearing (two and a half years before) that the administrative record was irresponsive to present conditions and so could not be made a proper basis for administrative application of the statutory mandate.⁶⁰

6. The Hearing Officer

The right to a fair trial does not include the privilege of insisting that the hearing be conducted before the members of the agency who are to make the decision in the case. The obvious practical necessity of delegating to hearing officers the duty of taking the evidence has long been recognized and uniformly upheld.⁶¹ Employment of examiners to preside over the hearing at which will be made the record for subsequent decision by administrative officials and review by the courts, is almost the universal practice, although Section 5 of

⁵⁹ *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 54 S. Ct. 692 (1934); *United States v. Northern Pac. R. Co.*, 288 U. S. 490, 53 S. Ct. 406 (1933); *Acker v. United States*, 298 U. S. 426, 56 S. Ct. 824 (1936).

⁶⁰ *Atchison, T. & S. F. R. Co. v. United States*, 284 U. S. 248, 52 S. Ct. 146 (1932).

⁶¹ E.g., *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906 (1936); *Quon Quon Poy v. Johnson*, 273 U. S. 352, 47 S. Ct. 346 (1927); *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 57 S. Ct. 816 (1937); *California Lumbermen's Council v. Federal Trade Commission* (C.C.A. 9th 1940), 115 F. (2d) 178.

the Administrative Procedure Act of 1946 provides that, where federal agencies are required by statute to hold hearings, the hearing officer shall make the initial or recommended decision.

The actual conduct of the hearing—its fairness and adequacy—is thus committed to the hands of the hearing officer. It is important that this official shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it.⁶² He should have the status, responsibility, and powers of a trial judge. But normally his position is far different. Frequently, the hearing officer is no more than a monitor, without effective power even to keep order at the hearing or to supervise the recording of the evidence, his position in some instances being shockingly similar to that of a notary public before whom a deposition is taken. In most agencies, he does have some powers to rule on questions arising in connection with the hearing and has the responsibility of preparing tentative findings (the weight of which varies in different agencies) or of recommending the decision in the case. Occasionally, wide powers are vested in the hearing officer—and the trend of development is increasingly in this direction (see Section 7 of the Federal Administrative Procedure Act of 1946)—but on the whole his position has been ministerial in nature.

The insignificant position of the hearing officer has resulted in the paradox that the conduct of the official who should be primarily responsible for the fairness of the hearing is ordinarily held to have but little effect in determining whether a fair trial has been accorded. Unless his conduct is such as to intimidate witnesses or to make it impossible for one of the parties to get his evidence into the record, the assumption of an unfair attitude on his part, it is reasoned, does

⁶² Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 43.

not result in the deprivation of a fair trial, because his attitude will not contaminate the review of the record and the making of the decision by the responsible officers of the agency. But as the reason for the rule disappears, the rule itself will undoubtedly be modified. As greater powers and more substantial responsibilities are vested in the hearing officers, unjudicial conduct on their part will come more and more to be regarded as a deprivation of the right of a fair trial.

The responsibility of the agencies to further the cause of good administration, furthermore, requires insistence that the hearing officer approach the hearing with an open mind, without bias and without prejudgment of the issues, and without any fear that his chances for promotion in the agency may be affected by his recommendations (see Section 5 (c) of the Federal Administrative Procedure Act of 1946). His chief purpose should be to afford to each party an adequate opportunity to present his case and to meet the case against him. This is required not only in the interests of fairness but in the interests of assuring a proper basis for informed and correct administrative action.⁶³

The hearing officer, like a trial judge, should participate sparingly in the examination of witnesses, except where such participation is necessary to a full development of the significant facts.

He should see to it that the record of the hearing is clear and meaningful. The informality of administrative hearings, and unskillful employment of the device of going "off the record,"⁶⁴ frequently results in the production of transcripts that are almost unreadable and of limited helpfulness either to the responsible heads of the agencies or to reviewing courts.

⁶³ Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 108.

⁶⁴ Benjamin, *op. cit.*, 140.

In order that he properly execute these responsibilities, it is obviously necessary that the hearing officer be an individual who is trained in the law and who has had an ample background of instructive experience. The fact that this is not in practice required ⁶⁵ has much to do with the current need for general improvement in this aspect of administrative practice.

If the initial decision of the hearing officer can carry the hallmark of fairness and ability, a great part of the criticism directed against the hearing procedures of administrative agencies will have been met. The recommendations of the Attorney General's Committee ⁶⁶ indicate the direction which future development will take. To assure the fairness and efficiency of the hearing procedure, the hearing officer must be an official who is fully trained in law, in administration, and in the particular field in which the agency operates. The position must carry substantial compensation—sufficient to attract very able men. It must carry also full power to direct the conduct of the hearing, and to make decisions which will be accorded, within the agency, the status which in the judicial system is possessed by the decision of the trial judge. Finally, the position should carry the security of tenure and freedom from political pressure which is necessary to guarantee the impartiality and dignity of any judicial officer. Great progress toward this end is made by Section 11 of the Federal Administrative Procedure Act of 1946.

⁶⁵ As to the training and experience of the hearing officers of many federal agencies, see report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 375.

⁶⁶ *Idem.* 45.

CHAPTER 9

Presentation of Evidence

THE power of administrative tribunals to disregard the common-law exclusionary rules of evidence has not resulted, as is often erroneously assumed, in their being utterly ignored in administrative proceedings involving the adjudication of judicial questions. In cases involving the discharge of legislative or executive functions, to be sure, the common-law rules of evidence have no more application than they do to proceedings before a legislature or in a conference with an executive officer. But in cases where agencies exercise judicial functions, the nature of the proof-taking procedure is often almost indistinguishable from the taking of proofs in nonjury cases in the courts.

While often freed by statutory provision from the necessity of following the common-law rules of evidence—or, as it is not infrequently expressed, the technical rules of evidence—most agencies in practice, and often by specific agency rule, apply the fundamental principles of relevancy, materiality, and probative force in a manner not unlike that of equity courts. Partly, this results from their constant consciousness of the necessity of supporting all findings by “substantial evidence,” in order to avoid the possibilities of judicial reversals of their determinations, and partly, the tendency is a reflection of their appreciation of the innate wisdom of the general rules as worked out in the courts.¹

¹ Wigmore found a “general and instructive use” of the common-law rules of evidence in contested cases deemed important. 1 WIGMORE ON EVIDENCE, 3d ed. (1940) 44. See also, Wigmore, “Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?” 17 ILL. L. REV. 263 (1922); Stephan, “The Extent to Which Fact-Finding Boards Should be Bound by Rules of Evidence,” 24 A. B. A. J. 630 (1938).

Although disregarding many of the subtleties of jury-trial evidentiary requirements which are coming to be regarded as archaic even in the courts, the agencies as they develop and mature are trending significantly in the direction of the general rule recommended by the concurring members of the Attorney General's Committee,² which would require that immaterial, irrelevant, and unduly repetitious evidence be excluded from the record of any hearing and that the basic principles of relevancy, materiality, and probative force, as recognized in federal judicial proceedings of an equitable nature, govern the proof of all questions of fact, except that such principles be (1) broadly interpreted in such manner as to make effective the adjudicative powers of administrative agencies; (2) adapted to the legislative policy under which adjudications are made; and (3) administered in such a way as to assure that testimony of reasonably probative value will not be excluded, as to any pertinent fact.

As expressed by the Eighth Circuit Court of Appeals, the practice of the hearing officer "in taking evidence and ruling upon objections thereto should be that which applies to special masters in equity proceedings."³

He should know the exclusionary rules and when he refrains from applying them he should have a cogent reason for refraining. Conversely, he should have the courage to refrain from applying them where the nature of a particular issue or proceeding requires such departure.⁴

In thus following the basic rules of evidence, the agencies have power to exclude immaterial or incompetent evidence.⁵

² Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 241.

³ *Pittsburgh Plate Glass Co. v. National Labor Relations Board* (C.C.A. 8th 1940), 113 F. (2d) 698, 702.

⁴ Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 179. Sec. 7 (c) of the Federal Administrative Procedure Act of 1946 requires federal agencies "as a matter of policy" to exclude irrelevant and immaterial evidence.

⁵ *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (C.C.A. 8th 1944), 143 F. (2d) 488.

Logically, it would seem that this principle would authorize the exclusion of any testimony affecting issues which it was not within the power of the agency to determine, and it has been so held.⁶ But it would seem that in many cases the better administrative practice is to receive all evidence which is pertinent to the case, even though consideration of some phases of the proofs must be deferred until the case comes before the courts. Where, for example, the constitutionality of the statute under which the agency is operating depends in part upon questions of fact, the agency should permit the respondent in proceedings before it to introduce evidence bearing on such factual issues. Even though the agency may not determine the constitutional issues, nevertheless consideration of such factual matters may influence the determination of the agency as to matters within its competence. Furthermore, when the issue of constitutionality subsequently reaches the courts, it is much more convenient if all the facts which the court must consider are found in a single record.

1. Legally Incompetent Evidence: Types Admissible

The practice of general adherence to the underlying rules of evidence is ordinarily a matter of administrative choice, rather than of legal requirement.⁷ It was early recognized by the Supreme Court that administrative agencies should not be "narrowly constrained by technical rules as to the

⁶ *Engineers Public Service Co. v. Securities and Exchange Commission* (App. D. C. 1943), 138 F. (2d) 936.

⁷ But there is a recent trend to require by statute that the agencies follow, in the main, the fundamental rules of evidence. Thus, § 7 (c) of the Federal Administrative Procedure Act provides that, in hearings held pursuant to a statutory requirement, the agencies shall "as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." The Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Supp. I, § 141, goes further in requiring the National Labor Relations Board to follow court rules of evidence "so far as practicable." For law review comment, see Hoyt, "Some Practical Problems Met in the Trial of Cases Before Administrative Tribunals," 25 MINN. L. REV. 545 (1941); Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 HARV. L. REV. 364 (1942); Norwood, "Administrative Evidence in Practice," 10 GEO. WASH. L. REV. 15 (1941).

admissibility of proof.”⁸ The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order.⁹ So long as the evidence is “of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs,”¹⁰ it may be received and considered by the agency, even though it is technically incompetent.

Hearsay is often received, if the attendant circumstances persuasively indicate its reliability, but this is the trend of the courts.¹¹

Opinion evidence, and statements by expert witnesses whose qualifications have been but sketchily established, is sometimes received.

Likewise, if the agency chooses to disregard the best evidence rule, it is not error for it to do so.¹²

But this does not mean that it is typical of administrative procedure to receive, carelessly, whatever statements of hear-

⁸ *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44, 24 S. Ct. 563 (1904). This remark was dictum, the actual decision in the case being that the commission was entitled to require the production of certain evidence, the relevancy of which was challenged but which was held to be proper and relevant evidence. The remark, however, has been widely quoted and followed not only as to questions involving the relevancy of evidence, but also as to cases involving the competency of evidence. The cited case is the first in a series of five Supreme Court decisions involving the admissibility of evidence in proceedings before the Interstate Commerce Commission, which are significant as marking the origin of the rules which have since been generally applied to other agencies. The other cases, all of which are carefully analyzed in Stephens, *ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE* (1933) 21, *et seq.*, include: *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913); *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 40 S. Ct. 466 (1920); *United States and Interstate Commerce Commission v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 44 S. Ct. 565 (1924); *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 46 S. Ct. 500 (1926).

⁹ *United States and Interstate Commerce Commission v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 44 S. Ct. 565 (1924).

¹⁰ *John Bene & Sons, Inc. v. Federal Trade Commission* (C.C.A. 2d 1924), 299 Fed. 468, 471.

¹¹ E.g., Rules 503-530, American Law Institute, *MODEL CODE OF EVIDENCE* (1942).

¹² *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 133, 40 S. Ct. 466 (1920).

say or opinion a witness may offer, or to disregard the principle of the best evidence doctrine (which even in court cases is coming with great frequency to be stated as requiring only the best evidence which the nature of the case permits). Nor does it mean that the other exclusionary rules are quite forgotten. On the contrary, it is quite as common to hear objections to testimonial offers made and argued in administrative proceedings as in the courtroom. The point is that the mere reception of legally incompetent evidence, whether or not objected to (of course, if received without objection, objectionable evidence may be and is considered even in court cases), is not normally a ground for attacking the administrative determination, unless prejudice can be shown.

2. Legally Incompetent Evidence: Restrictions on Admission

While the exclusion of incompetent and immaterial evidence matter ordinarily depends upon the exercise of self-restraint by the administrative agency, there are some types of cases where such a mandate is judicially imposed.

Thus, agencies are required to recognize the privileges which the law attaches to communications to priests, attorneys, physicians, and other confidential disclosures.¹³

The admission of hearsay under such circumstances as to infringe substantially the right of cross-examination may amount to a denial of a fair hearing.¹⁴

Reception of evidence which is not only without probative force but is prejudicial in effect is similarly sometimes made a basis for invalidating an administrative determination.¹⁵

¹³ *Baldwin v. Commissioner of Internal Revenue* (C.C.A. 9th 1942), 125 F. (2d) 812; *Matter of City Council of City of New York v. Goldwater*, 284 N. Y. 296, 31 N. E. (2d) 31 (1940).

¹⁴ *Powhatan Mining Co. v. Ickes* (C.C.A. 6th 1941), 118 F. (2d) 105; *Tri-State Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 96 F. (2d) 564; *United States v. Baltimore & O. Southwestern R. Co.*, 226 U. S. 14, 33 S. Ct. 5 (1912).

¹⁵ *People ex rel. Shiels v. Greene*, 179 N. Y. 195, 71 N. E. 777 (1904); *People ex rel. Moynihan v. Greene*, 179 N. Y. 253, 72 N. E. 99 (1904); *Bridges v. Wixon*, 326 U. S. 135, 65 S. Ct. 1443 (1945).

The power given the agencies to receive incompetent evidence is conditioned on the premise that it must be done fairly.¹⁶

3. Exclusion of Proper Evidence

The exclusion of proper evidence may vitiate a quasi-judicial determination of an administrative agency. Refusal to receive competent and material evidence is a denial of due process.¹⁷ The requirement that evidence be received is a necessary counterpart of the rule that the agency must also give due weight to all the evidence before it; refusal to consider evidence properly introduced or proffered falls within the condemnation that voids arbitrary administrative action.¹⁸

The wisdom of this rule is not controverted by the agencies. On the contrary, there are instances wherein an agency has dismissed charges because of the hearing officer's violation of this cardinal principle.¹⁹

If it appears that the excluded evidence could not materially have affected the outcome of the case—if a remand to receive and consider the evidence improperly excluded would amount to nothing more than "a postponement of the inevitable"²⁰ the error committed is not prejudicial. But normally it is impossible for a reviewing court to be assured that the outcome could not have been affected by the consideration of the excluded testimony, and in the usual case the necessary result of the exclusion of proper testimony is to void the administrative order.

¹⁶ *John Bene & Sons, Inc. v. Federal Trade Commission* (C.C.A. 2d 1924), 299 Fed. 468, 471.

¹⁷ The authorities are reviewed in *Donnelly Garment Co. v. National Labor Relations Board* (C.C.A. 8th 1941), 123 F. (2d) 215.

¹⁸ *Chicago Junction Case*, 264 U. S. 258, 44 S. Ct. 317 (1924).

¹⁹ E.g., *In the Matter of Mid-Continent Petroleum Corp.*, 54 N. L. R. B. 912 (1944).

²⁰ *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 61 S. Ct. 908 (1941); *idem.*, (C.C.A. 8th 1940) 113 F. (2d) 698, 702.

4. Practices of the Agencies

Perhaps the best recommendation of the wisdom of applying rules of evidence to proceedings before administrative agencies is that the agencies are coming more and more to turn to these rules voluntarily, and often develop elaborate codes of their own to govern questions relating to the proof of specific types of questions. Even in the case of the agencies whose function is primarily the distribution of governmental largess, such as pensions and old age benefits (where ordinarily there is encountered the greatest relaxation of the rules of evidence in order to permit claimants ignorant of the law and unaided by counsel to present their cases), the regulations contain extensive rules governing the modes of proving such crucial issues as birth, death, years of service, and the like.

Some agencies provide in considerable detail what rules of evidence shall be followed. The Interstate Commerce Commission is perhaps an outstanding example, its rules of practice²¹ covering such topics as the admissibility of evidence, restrictions as to cumulative evidence, reading prepared statements into the record, introduction of official records, introduction of business entries, rules regarding immaterial portions of documents, reference to documents in Commission's files, records in other Commission proceedings, abstracts of documents, exhibits, making objections to evidence, submission of further evidence subsequent to the hearing, et cetera.

The Federal Communications Commission provides that, saving exceptional cases where the ends of justice will be better served by relaxing the rules, the rules of evidence governing civil proceedings in matters not involving trial by jury in the federal courts shall be followed in formal pro-

²¹ I.C.C. Rules 75-87.

ceedings before the Commission.²² A similar provision is found in the Maritime Commission's Rules of Procedure,²³ and the general practice of the Civil Service Commission is the same.²⁴ While the rules of the Federal Trade Commission are indefinite as to the standards to be followed in the reception of evidence,²⁵ that Commission informally announced some time ago that in practice it has "intended to receive only legally competent evidence."²⁶

While there is much disagreement between the various agencies and commissions as to just what rules of evidence should be made to apply to their proceedings, it is very common to find some general provisions made in agency rules setting up certain standards to be followed in receiving evidence,²⁷ and on the whole there is no general pattern of departure from the basic principles of evidence.²⁸

A great deal depends, of course, on the training and native abilities of the hearing officer. These officials are often lawyers by training and, being accustomed to the application of the rules of evidence in court proceedings, find it natural to follow them during the administrative hearing.²⁹ In some cases, the choice of hearing officers is less fortunate, and there are of course instances wherein poorly trained or incompetent

²² F.C.C. Regulations, §§ 1.212-1.217.

²³ U.S.M.C. Rules, § 8.10.

²⁴ *In re J. M. Procter, et al.*, Docket No. 115, Jan. 22, 1944.

²⁵ F.T.C. Rule XVII.

²⁶ Stephens, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933) 82.

²⁷ Blachly and Oatman, "A New Approach to the Reform of Regulatory Procedure," 32 GEO. L. J. 325 (1944), reviewing the rules of many agencies; 1 WIGMORE ON EVIDENCE, 3d ed. (1940) § 4c.

²⁸ Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 70. Some authors believe that an exception has been, or should be, made in workmen's compensation proceedings. Among law review articles or notes as to this, see 21 IND. L. J. 473 (1946); 10 WIS. L. REV. 340, 431 (1935); 36 HARV. L. REV. 263 (1923); 68 U. PA. L. REV. 203 (1920); 24 IA. L. REV. 576 (1939).

²⁹ Chamberlain, Dowling, and Hays, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942) 22.

hearing officers admit much irrelevant and unreliable evidence, largely because of their inability to distinguish the good from the bad. But adherence to higher standards in the selection of hearing officers has in recent years done much to improve this situation. The trend is away from the loose habit of receiving almost any testimonial offer "for what it is worth," a practice which results in unduly swelling records by incorporation of much that is clearly worth nothing, and toward the practice of receiving only material, relevant evidence of reliable probative value.³⁰

5. Utilization of Written Evidence

In many types of administrative proceedings, the utilization of written evidence as a substitute for oral examination of witnesses, is effective to expedite the consideration of cases, without injury to the justice of the result. In certain types of proceedings before the Interstate Commerce Commission, for example, a so-called "shortened procedure" is made available, under which, with the consent of the affected parties, a case may be decided upon stipulations, depositions, and briefs.³¹ Over a period of time, this procedure has been chosen by the parties in approximately one third of the cases wherein it is applicable. Because of the circumstance that in many cases before the agencies there is but little argument over the facts, which are often chiefly statistical in nature—the argument being as to the significance or proper interpretation of a technical and complex factual situation—there is every indication that similar procedures could well be adopted more generally. While in some types of proceed-

³⁰ For typical administrative rulings excluding proffered evidence, see *In the Matter of Lindeman Power & Equipment Co.*, 11 N. L. R. B. 868 (1939), and *In re Riemer and the State of Illinois*, U. S. Civil Service Commission, Docket No. 56, July 7, 1943. For law review comment, see Vanderbilt, "The Technique of Proof Before Administrative Bodies," 24 IA. L. REV. 464 (1939).

³¹ Monograph No. 11 of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 10, 77th Cong., 1st Sess. (1941) 23.

ings, such as cases before the National Labor Relations Board involving charges of unfair labor practices, it would be quite out of the question to attempt to decide the cases on the basis of *ex parte* affidavits, still there are many opportunities for profitable expansion of this practice.

Without the necessity of any changes in present rules, it is possible by informal co-operation between attorneys for the agency and for the respondent to approximate this result. Often, an agency assigns a case for hearing before its staff members have become familiar with the factual data involved; and the submission by the respondent's attorney of a carefully prepared statement covering the significant facts of the case may become the basis for a stipulation of facts, on which the case may be disposed of. Utilization of this informal device is obviously advantageous for the respondent as well as for the public interests served by the agency.

6. Presumptions and Inferences; Burden of Proof

In theory at least, it is true as well in the case of administrative proceedings as in the case of proceedings in courts that the party seeking relief has the burden of proof, even though that party be the administrative agency; and it has been held that administrative agencies have no general authority by regulation to shift the fundamental burden of proof.³² But in practice it is easy for the agency, acting as judge as well as plaintiff, to satisfy itself that it has sustained the burden of proof which formally is imposed upon it. While the burden of going forward with the proofs rests indeed on the agency, in many senses the burden of ultimately convincing the tribunal that the respondent is not guilty as charged rests upon the respondent.

This is so, largely because of the fact that the ultimate finding by the administrative agency frequently depends on

³² *Petition of Warszawski* (D. C. Mich. 1936), 16 F. Supp. 43. And note provisions of Federal Administrative Procedure Act.

inference. It must determine, for example, whether a gift was made in contemplation of death, or what the intent was which motivated an employer in discharging an employee. Where the important question is not a matter of primary fact but of inference, it is inevitable that an agency approaching a case (as many administrative agencies do) with a desire to reach one result, if possible, rather than another, will often find it easy to make an inference on facts which to a totally disinterested judge would not preponderate in support of the inference.

This situation gives rise to a question which has a long history in the field of administrative law. In cases where the evidence equally supports an inference imposing liability and likewise a contrary inference exonerating of liability, must the agency dismiss the case, or may it choose the inference it desires? In the earlier days, there was a strong tendency in the courts to rule that where the evidence equally supported either inference, the agency would not be permitted to make the inference that would impose liability.³³

Dissatisfied with the result of such decisions (which frequently made it impossible, for example, to award workmen's compensation to the family of a worker killed while at work, but under circumstances which rendered it impossible to establish clearly whether the death was due to accident or suicide), the state legislatures and Congress as well, sought to change the rule by adopting various "presumption" statutes. They were principally of two types: first, creating a presumption effective on appeal in favor of the correctness of the administrative decision; and second, a presumption in favor of one party that would operate throughout the administrative proceedings (for example, a presumption that a workmen's compensation claim came within the statute, that

³³ See, for example, *Chaudier v. Stearns & Culver Lumber Co.*, 206 Mich. 433, 173 N. W. 198 (1919); *Sparks v. Consolidated Indiana Coal Co.*, 195 Iowa 334, 190 N. W. 593 (1922). Many state courts follow this rule.

the injury did not result from negligence or intoxication, that death was not suicide, et cetera).

Some state courts quite ignored these presumption statutes, construing them so as to deprive them of any substantial operative effect.³⁴ But it has now been established at least for the federal agencies that such presumptions are valid; and while their force vanishes upon the introduction of any countervailing evidence, it is indicated that in the absence thereof, the statutory presumption satisfies the requirement that the finding be supported by evidence.³⁵

7. The Requirement of Substantial Evidence

A further limitation on the power of administrative tribunals to exercise free discretion in making inferences as to facts not specifically established, is the provision so frequently found in the statutes (and imposed by the courts themselves where the statute is silent) that the findings of the administrative body are binding and conclusive only if supported by substantial evidence. So used, the term is chiefly significant as a criterion of the scope of judicial review. As hereinafter discussed, the term in such connection has no fixed meaning. The extent to which the courts will examine the reasonableness of the inferences made by an agency, in ascertaining whether there is substantial evidence to support those inferences, varies widely from agency to agency, if not from court to court. The extent to which the inferences are examined is influenced by many factors, and the characterization of the supporting evidence as substantial or otherwise, ordi-

³⁴ See e.g., *Joseph v. United Kimono Co.*, 194 App. Div. 568, 185 N. Y. S. 700 (1921).

³⁵ See *Del Vecchio v. Bowers*, 296 U. S. 280, 56 S. Ct. 190 (1935), commented on in 34 MICH. L. REV. 878 (1936); *Tot v. United States*, 319 U. S. 463, 63 S. Ct. 1241 (1943), commented on in 17 S. CAL. L. REV. 48 (1943); *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 57 S. Ct. 816 (1937); *Webre Steib Co. Ltd. v. Commissioner of Internal Revenue*, 324 U. S. 164, 65 S. Ct. 578 (1945).

narily reflects the result attained rather than the tests employed.

However, the existence of this vague requirement that a finding may be revised, if not supported by substantial evidence, has influenced the proof-taking processes of the agencies. In making a record in a case which may be subjected to judicial review, an administrative agency is assiduous in its effort to make sure that substantial evidence can be pointed to in support of its findings.

One particular aspect of the requirement of substantial evidence is particularly significant in this connection. This is the so-called legal residuum rule.³⁶ Under this rule, it is said that a finding cannot be deemed to be supported by substantial evidence unless there is at least a residuum of legally competent evidence to support it. This would mean, for example, that no matter how convincing the record might be, the courts would have the power to set aside the findings of fact on the sole ground that nowhere in the record was there a residuum of technically competent proof which supported the finding.

The artificiality of this legal residuum rule seems clear. The administrative officers reach their decision upon a consideration of all the evidence received, be it hearsay or otherwise. Their decision is influenced by the preponderance of the testimony, not by the residuum thereof. The fact that there is some residuum of proof pointing in one direction or another has nothing to do with the making of the administrative finding. As observed by Wigmore, "it is obviously fallacious to assume that one or more pieces of 'legal' evidence are

³⁶ The legal residuum rule is sometimes spoken of as a rule separate from and in fact opposed to the substantial evidence rule. Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 189. It is true that many courts which apply the substantial evidence requirement have repudiated the legal residuum rule, but it would seem that the two rules are but a broader and narrower aspect of the same general requirement.

'per se' a sufficient guarantee of truth."³⁷ The only beneficial effect which the rule has had lies in the influence that has been exerted upon administrative tribunals to follow generally the basic principles of evidence so far as it is practical to do so.

Despite the artificiality of the rule, it has been of some indirect value in this way, and has at least done no substantial amount of harm. For better or worse, the rule is still in effect in apparently a majority of the state courts.³⁸

The extent to which the legal residuum rule will be followed in the federal courts is not so clear. The different circuits are not in complete agreement, and the Supreme Court has not spoken with finality.

Some of the circuit courts of appeal insist that there must be a residuum at least of legally competent proof to support the finding of an administrative agency. Thus, the Fifth Circuit declared on one occasion that a statutory provision that rules of evidence prevailing in courts of law and equity will not control an administrative agency means that it is not error for the Board to "hear incompetent evidence, but does not mean that a finding of fact may rest solely on such evidence."³⁹ Similarly, the Seventh Circuit has declared that the relaxation of the strict rules of evidence in the case of proceedings before administrative agencies "was done for the sole purpose of expediting administrative procedure, and not to limit in any manner the well-known rules relating to

³⁷ 1 Wigmore on EVIDENCE, 3d ed. (1940) 41.

³⁸ Many cases are cited in 1 Wigmore on EVIDENCE, 3d ed. (1940) 83 *et seq.*; *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507 (1916); *Englebreton v. Industrial Accident Commission*, 170 Cal. 793, 151 Pac. 421 (1915); *Jensen v. Wheeler & England*, 51 Idaho 91, 1 P. (2d) 624 (1931); *Selz-Schwab & Co. v. Industrial Commission*, 326 Ill. 120, 156 N. E. 763 (1927); *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247 (1914); *Smith v. Philadelphia & Reading Coal & Iron Co.*, 284 Pa. 35, 130 Atl. 265 (1925).

³⁹ *National Labor Relations Board v. Bell Oil & Gas Co.* (C.C.A. 5th 1938), 98 F. (2d) 870.

the weight or the applicability, or the materiality of the evidence.”⁴⁰

Similarly, the Ninth Circuit has declared that where improper, immaterial, or hearsay testimony “is the only foundation for the findings . . . [then it cannot be said that] they are supported by such substantial evidence as the law requires.”⁴¹ The position of the Court of Appeals for the District of Columbia is not so clear, but in at least one case it has applied a similar rule.⁴²

In other circuits, however, it has been specifically ruled that the evidence in support of a finding may be “substantial,” so as to render that finding unassailable, even though there is no residuum of technically competent proof. The Second Circuit Court of Appeals has spoken clearly, declaring that while mere rumor would doubtless not be sufficient to support a finding, yet “hearsay may do so, at least if more is not conveniently available and if, in the end, the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.”⁴³

⁴⁰ *National Labor Relations Board v. Illinois Tool Works* (C.C.A. 7th 1941), 119 F. (2d) 356, 363, 364; the court added:

“We think Congress presupposed that the trier of facts would weigh and apply the evidence as before and use only that which was competent and material, and disregard that which was not. The effect of the statute is to shorten trial procedure by permitting the trier, if he chooses, to admit all evidence of doubtful materiality and thus eliminate delays caused by arguments. The statute does not attempt to define competent and material evidence. That is still left to the determination of the trier. The statute merely gives him a longer time in which to make his decision, and at the same time shortens the trial. There is nothing new in this formula, for courts have used it from time immemorial in cases not triable by juries. They could always, in their findings, guard against errors in the admission of evidence, and when they did, the reviewing court would regard such errors as harmless. What was heretofore permitted by the courts has likewise been authorized by this statute in cases of this character.”

⁴¹ *National Labor Relations Board v. Washington Dehydrated Food Co.* (C.C.A. 9th 1941), 118 F. (2d) 980.

⁴² *Tri-State Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 96 F. (2d) 564—a decision on which Wigmore commented, “No wonder the administrative agencies chafe under such impractical control.” 1 Wigmore on EVIDENCE, 3d ed. (1940) 34.

⁴³ *National Labor Relations Board v. Remington Rand, Inc.* (C.C.A. 2d 1938), 94 F. (2d) 862, 864; see also *Art Metals Const. Co. v. National Labor*

Similarly, the First Circuit Court of Appeals has held that since an administrative agency is not bound by technical rules of evidence, and may admit evidence, such as hearsay, which would be inadmissible in a court, it need not single out this evidence for special treatment but may make it the basis for findings, if the evidence is such as would normally be relied on by reasonable people.⁴⁴

Again, the Court of Appeals for the District of Columbia has declared that "it is only convincing, not lawyers' evidence which is required."⁴⁵

Many other cases could be cited from these and other circuits, but the resulting picture would be the same. There is no consistent trend, and remarks found in one opinion of a given court are sometimes seemingly at odds with remarks found in other decisions by the same court.

The test toward which the federal courts are apparently moving is to say that a finding may be deemed to be supported by substantial evidence, even though there is no residuum of legally competent proof, so long as the evidence on which the Board relied was the best that was conveniently available and was of a kind on which responsible persons are accustomed to rely in serious affairs; but to say that technically incompetent proof, such as hearsay, is not sufficient to constitute substantial evidence in a case where it is substi-

Relations Board (C.C.A. 2d 1940), 110 F. (2d) 148, 149-150, where the court said:

"We cannot see any basis to challenge the competency of this evidence, or its sufficiency to support the finding, even though common law evidence alone were competent, which is not the case."

In an earlier decision, *John Bene & Sons, Inc. v. Federal Trade Commission* (C.C.A. 2d 1924), 299 Fed. 468, the court held it proper for an agency to consider legally incompetent evidence so long as it was evidence of a kind that would affect fairminded men in the conduct of important affairs.

⁴⁴ *National Labor Relations Board v. Service Wood Heel Co., Inc.* (C.C.A. 1st 1941), 124 F. (2d) 470.

⁴⁵ *International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. National Labor Relations Board* (App. D. C. 1939), 110 F. (2d) 29, 35, *aff'd* 311 U. S. 72, 61 S. Ct. 83 (1940).

tuted for direct evidence that is conveniently available—and particularly where there is a denial of the hearsay.⁴⁶

The Supreme Court declared in *Consolidated Edison Co. v. National Labor Relations Board*:⁴⁷ “Mere uncorroborated hearsay or rumor does not constitute substantial evidence.” This may properly be taken as suggesting that hearsay which rises above the level of rumor and is corroborated by circumstantial indication of its reliability, may constitute substantial evidence. In *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor*,⁴⁸ the court found that statistical studies by a government department, which would not be legally competent, were sufficient to constitute substantial support for the agency’s findings. The opinion strongly indicates that evidence which would not be competent in a court of law may be substantial evidence to support a finding of an administrative board. However, the court did not squarely face the question, since it appeared that the documents in question were received in evidence without objection, and that accordingly, even in a court of law, such evidence could have been considered and accorded its natural probative effect, as if it were admissible.

Ordinarily, it cannot be said that evidence is substantial unless at least a substantial portion of the evidence relied upon is technically competent. The administrative agencies have refused to make findings on the basis of charts made by witnesses who were not examined, on the basis of letters, et cetera.⁴⁹ But in rare cases, such incompetent testimony may be the best that is available, and if it is persuasive, many

⁴⁶ *Martel Mills Corp. v. National Labor Relations Board* (C.C.A. 4th 1940), 114 F. (2d) 624.

⁴⁷ 305 U. S. 197, 230, 59 S. Ct. 206 (1938).

⁴⁸ 312 U. S. 126, 61 S. Ct. 524 (1941). This case has been the subject of extensive law review comment, e. g., 27 WASH. U. L. Q. 1 (1941); 35 ILL. L. REV. 840 (1941); 29 GEO. L. J. 882 (1941); 10 GEO. WASH. L. REV. 219 (1941).

⁴⁹ See *In the Matter of W. H. B. Broadcasting Co.*, 3 F. C. C. 592 (1936); *In re Queensboro Gold Mines, Ltd.*, 2 S. E. C. 860 (1937).

courts can be expected to rule that there is substantial evidence to support the finding, even though there is no residuum of legally competent proof.

In many cases, the requirement that there be substantial evidence in order to render the findings unassailable, is said to be approximately the same test as that applied by appellate courts in determining whether or not a jury verdict must be set aside—the test then being, generally, whether the finding is so contrary to the evidence that no reasonable group acting reasonably could have reached the conclusion assailed.⁵⁰ The suggestion cannot be taken technically because in a jury trial, if there is not at least a residuum of legal evidence to support the verdict, a directed verdict must be entered by the court. The rule, rather, should be construed broadly to mean that such substantial evidence as confers finality upon the administrative decision on the facts exists when the evidence is such that a reasonable man acting reasonably might have reached the decision which is assailed.

The rule is then not much different from saying, as the courts sometimes do, that substantial evidence exists if there is a rational basis for the decision. The general spirit of this requirement is illustrated by the provisions of Section 7 of

⁵⁰ E. B. Stason, "Substantial Evidence" in Administrative Law," 89 U. PA. L. REV. 1026 (1941). Among the numerous cases in which "substantial evidence" is equated to the directed verdict rule in jury trial are the following: National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 59 S. Ct. 501 (1939); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938); Magnolia Petroleum Co. v. National Labor Relations Board (C.C.A. 5th 1940), 112 F. (2d) 545; National Labor Relations Board v. Goshen Rubber & Manufacturing Co., (C.C.A. 7th 1940), 110 F. (2d) 432; National Labor Relations Board v. Sterling Electric Motors, Inc. (C.C.A. 9th 1940), 109 F. (2d) 194; National Labor Relations Board v. Asheville Hosiery Co. (C.C.A. 4th 1939), 108 F. (2d) 288; National Labor Relations Board v. Bell Oil & Gas Co. (C.C.A. 5th 1938), 98 F. (2d) 406; National Labor Relations Board v. Wallace Mfg. Co. (C.C.A. 4th 1938), 95 F. (2d) 818; Appalachian Electric Power Co. v. National Labor Relations Board (C.C.A. 4th 1938), 93 F. (2d) 985. That the provisions of the Federal Administrative Procedure Act somewhat enlarge the powers of the courts to hold evidence not "substantial" is indicated by Universal Camera Corp. v. N.L.R.B. (Feb. 26, 1951, No. 40, Oct. 1950 term). The precise extent of the enlargement has not been precisely defined. See citations in n. 25, Ch. 16, at p. 313, *infra*.

the Federal Administrative Procedure Act of 1946 that decision must be based on the *whole record* and "in accordance with the reliable, probative, and substantial evidence." See the cases cited below.⁵¹

Thus the substantial evidence rule is a strong inducement to administrative agencies to insist upon a general adherence to the basic principles of evidence; but it is doubtful that this requirement will continue to be available as a basis for setting aside an administrative determination on the sole ground that it is not supported in part, at least, by proof which is technically "competent" under common-law standards.

⁵¹ *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 59 S. Ct. 754 (1939); *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 54 S. Ct. 692 (1934); *Montana Power Co. v. Federal Power Commission* (C.C.A. 9th 1940), 112 F. (2d) 371; *Yankee Network, Inc. v. Federal Communications Commission* (App. D. C. 1939), 107 F. (2d) 212.

CHAPTER 10

Official Notice

1. In General

ONE of the principal reasons for entrusting to administrative tribunals the determination of specialized classes of justiciable controversies is the belief that through their extensive experience in a particular field they gain information, knowledge, and wisdom which enable them to decide cases of a highly technical or specialized nature more wisely than could a court of general jurisdiction. Limitations on their power to utilize the breadth of knowledge gained through intensive experience in their particular fields, therefore, can be imposed only at the cost of reducing proportionately one of the prime benefits sought through the creation of such tribunals. But some limitations are nonetheless necessary, in the interests of assuring fair and just determinations, for the simple reason that without them there would be no means of correcting an administrative determination which was erroneous because the agency's experience had convinced it of certain conclusions which could be shown to an impartial tribunal to be without foundation. To the extent that an agency is permitted to notice officially the existence of alleged facts, its conclusions with respect thereto (whether or not supported by any evidence) become final and unassailable. Determinations may thus be based not on the evidence produced at the hearing, but on conclusions reached dehors the record. The hearing can accordingly be reduced to a mere talisman. But such reduction, of course, cannot be permitted in cases where hearings are required. And so the courts have been compelled to work out methods whereby the special experience and knowledge of adminis-

trative tribunals can be fully utilized under conditions which will safeguard the right of the parties to contest the accuracy and correctness of the conclusions which the tribunal's experience has taught it to believe.

This is the general problem of "official notice." So stated, it involves a variety of related but separable inquiries, which may be reduced to clearer focus by narrowing the general definition to exclude the related subsidiary questions.

2. Use of Expert Knowledge in Drawing Inferences

In the process of decision, as distinguished from the process of proof, agency officials are at liberty to give the fullest play to their expert knowledge and experience in evaluating the evidence that is in the record and drawing conclusions therefrom. Such utilization is not only permissible, but is desirable.¹ This, of course, is quite a different thing than the utilization of special experience and asserted knowledge as a substitute for evidence and as a basis for making factual determinations as to matters not proved by evidence in the record.

The difference is one of degree rather than of kind, to be sure. If a certain conclusion has become firmly fixed in the administrator's mind, he will find it easy to discredit evidence tending to support a contrary conclusion and will, on the other hand, be easily persuaded to make inferences consonant with his prepossessed ideas, and this on the basis of evidence which to another would not seem to justify any such inference. But so long as the factual conclusion must be supportable by evidence in the record, and cannot be premised upon the asserted independent knowledge of the agency, the tendency of the agencies to rely heavily on their special experience (and the predilections induced thereby) in

¹ Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 209, 210; Report of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 71.

drawing inferences from the evidence, does not present any insurmountable problems. The court may set the conclusion aside unless it appears that the inference so drawn can reasonably be premised upon the record evidence. By and large, this is a sufficient protection against the danger that asserted expertness may become a euphemistic label concealing actual arbitrary decision. Any further safeguards would interfere with the fullest utilization of the admitted expertness which agencies acquire.

Closely related to the problems posed by the tendency of agencies to rely on their special information and experience in evaluating and drawing inferences from the evidence before them, is the question arising out of an agency's refusal (induced by its special experience) to accept as true the uncontradicted evidence of witnesses testifying in support of a given conclusion.

Where the burden is on the party appearing before the agency to convince it of a certain conclusion, there is no reason why an agency should not have at least as much power as that of a common-law jury to refuse to accept testimony which its experience shows to be incredible. The need of such a power is particularly great in the case of administrative agencies, because so often the testimony offered is opinion evidence—the ideas of experts as to the value of property, the cause of a hernia, the safety of a mechanical device, and the like. Hearings before administrative agencies frequently involve a situation where a board of experts is called upon to pass judgment upon the opinions of other experts representing the parties. Quite properly, the agency is usually held to have the power to refuse to accept the opinions of the experts who testify.

A typical case is that where, in a claim for workmen's compensation, the issue is whether a hernia is traumatic. Claimant's doctors give their opinion that it was. There is

no direct contradictory evidence, but the Board is convinced that the physicians' opinion is so at odds with the physical facts of the case as to be incredible. The Board may disbelieve the expert witness.²

Similarly, where an agency is called upon to fix a valuation on property, it may rely on its own knowledge as to values in refusing to accept an expert's estimate, even though because of the *ex parte* nature of many valuation proceedings there is no directly contrary evidence before the agency.³ In this case again, the problem involved is different than that of an agency's officially noticing facts as to which there is no evidence; for in many instances there is no requirement in assessment proceedings that the agency's determination be supported by substantial evidence. In cases where this requirement does exist, it is of course held that the agency may not arbitrarily substitute a different value than that indicated by the testimony.⁴

3. Notice of "Litigation" Facts

The principle of official notice is based on the premise that administrative tribunals should be permitted to utilize their special information and knowledge built up over many years of intensive study of a specialized field, and not be required to treat each case as an isolated phenomenon in the consideration of which their accumulated knowledge must be excluded. This premise does not apply to a case where an agency may be inclined to rely on *ex parte* reports of investigators as to particular factual details peculiar to a given case. Information

² *McCarthy v. Industrial Commission of Wisconsin*, 194 Wis. 198, 215 N. W. 824 (1927). See Pillsbury, "Review of Decisions of Administrative Tribunals—Industrial Accident Commission," 19 CAL. L. REV. 282 (1931).

³ *Uncasville Mfg. Co. v. Commissioner of Internal Revenue* (C.C.A. 2d 1932), 55 F. (2d) 893; *Gloyd v. Commissioner of Internal Revenue* (C.C.A. 8th 1933), 63 F. (2d) 649.

⁴ *Boggs & Buhl, Inc. v. Commissioner of Internal Revenue* (C.C.A. 3d 1929), 34 F. (2d) 859; *Bonwit Teller & Co. v. Commissioner of Internal Revenue* (C.C.A. 2d 1931), 53 F. (2d) 381.

gathered privately by an agency with reference solely to a particular case at hand, does not bear the hallmark of expert knowledge. It is rather to be compared, from the standpoint of reliability, with the report of a private detective agency. There is no reason to permit an agency to rely on such reports as a basis for decision. Rather, there is every reason to insist that such reports should be subjected to the searching light of cross-examination. Such information should be adduced only by the ordinary process of proof, and should be considered only if it is in the record and if there has been adequate opportunity to examine the ability and credibility of the investigator.

It is only when the information in question has been developed over a period of years in the usual course of the business of the agency, and has emerged from a coterie of facts established indisputably in numerous cases, that there is a basis for permitting an agency to utilize its knowledge in noticing facts, even though not all the sources thereof are reproduced in full detail in the record. It is only where truly expert knowledge is involved that the doctrine of official notice applies. Asserted testimonial knowledge based on private investigations as to the particular facts in litigation in an individual case is not expert knowledge. The doctrine of official notice does not permit an agency to rely on it.

Here again, just as in the case of the distinction between utilization of expert knowledge as a substitute for evidence and the utilization thereof as a basis for evaluating evidence, the difference is only a matter of degree. A report by an expert accountant employed by an agency, for example, may inextricably intertwine matters representing the accumulated expert knowledge of the agency with other matters representing an opinion as to the "litigation" facts of a particular case. It is the responsibility of the agency to refuse to give undue weight to the latter aspects of the report, for there

is usually no way of proving that the agency has relied unduly on the results of its *ex parte* investigation into the "litigation" facts.

4. Use of Record in Another Proceeding

Not infrequently, administrative agencies incorporate into the record of a particular proceeding, either by introduction of bulky exhibits or by reference to the agency's files and records, a transcript of the proceedings in another case. The agency thus relies on what it heard and what it concluded in another case, as a basis for its decision in the instant case. But here again, there is really no problem of official notice involved, for it is open to the parties to examine the files of the cases referred to and to meet by their own proofs whatever adverse factual data such files may contain.

Reliance upon the records made in other cases, specifically referred to, involves primarily the question as to whether the party appearing before the agency has been unfairly deprived of the right to cross-examine the witnesses who testified in the other proceeding. Ordinarily, in accordance with the principles discussed *supra*, opportunity to rebut the testimony offered in the prior proceeding is deemed to be a satisfactory substitute for the actual cross-examination of the witnesses therein.⁵

It is only where the agency relies on its records in other proceedings as a basis for reaching a conclusion in a particular

⁵ *Lakemore Co. v. Brown* (Emergency Ct. of App. 1943), 137 F. (2d) 355. In immigration cases, the courts have been noticeably liberal in permitting utilization of records in other proceedings; e. g., *Jung See v. Nash* (C.C.A. 8th 1925), 4 F. (2d) 639; *Lui Tse Chew v. Nagle* (C.C.A. 9th 1926), 15 F. (2d) 636; *Soo Hoo Yen ex rel. Soo Hoo Do Yim v. Tillinghast* (C.C.A. 1st 1928), 24 F. (2d) 163; *Yong Yung See v. United States* (C.C.A. 9th 1937), 92 F. (2d) 700. In Interstate Commerce Commission cases, less liberality is permitted, e. g., *Louisville & N. R. Co. v. United States* (D. C. Ky. 1915), 225 Fed. 571, *aff'd* 245 U. S. 463, 38 S. Ct. 141 (1918). The general problem is discussed by J. F. Davison in 25 *IA. L. REV.* 555 (1940).

case, without giving the parties adequate notice of the records so to be relied on, and an adequate opportunity to examine and rebut them, that a problem of official notice is involved.

5. Where Agency Is Not Exercising Judicial Function

Since the problem of official notice is concerned fundamentally with the extent to which an agency may substitute its own knowledge or conclusions for evidence, it is clear that the problem cannot arise in cases where there is no requirement that the agency act on the basis of evidence. Where an agency exercises legislative or executive functions, it is not ordinarily required to show any basis of substantial evidence to support its findings and conclusions (except where a statute imposes such a requirement) and therefore in making findings it may rely as fully on its own experience as on any other factor. It could be said that in such cases there is no limit to what an agency may officially notice. More accurately, it should be concluded that the doctrine of official notice is not involved where an agency exercises executive or legislative functions.

Thus, in cases where no hearing need be given, the agency is at liberty to determine the case without reference to the testimony adduced at any hearing which may be held; and the doctrine limiting the extent to which an agency may officially notice facts is inapplicable.

Similarly, in cases where there is no judicial review of the factual findings (as in many *ad valorem* tax-assessment cases, where ordinarily the assessors are not required to support their judgment of values by a formal record containing substantial evidence tending to establish the accuracy of the assessment) the doctrine of official notice is really inapplicable.⁶

⁶ Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 27 S. Ct. 326 (1907); Olympia Water Works v. Gelbach, 16 Wash. 482, 48 Pac. 251 (1897).

6. Official Notice Redefined

The real crux of the problem, then, after all the subsidiary inquiries are put to one side, is simply this: To what extent may an administrative tribunal, in the exercise of its judicial functions, rely on conclusions developed as a result of its intensive experience in its specialized field of activity, as a basis for factual findings as to matters of a general nature which are not fully established by evidence in the record made in a particular case?

7. When Notice Freely Permitted

The rule is now clearly emerging (see, e. g., Section 7 (d) of the Federal Administrative Procedure Act of 1946) that an administrative agency may take official notice not only of such factual matters as courts judicially notice,⁷ but also of any factual matter of a general nature which its experience has shown to be true, subject always to the proviso that the parties must be given adequate advance notice of the facts which the agency proposes to note, and given adequate opportunity to show the inaccuracy of the facts or the fallacy of the conclusions which the agency proposes tentatively to accept without proof. Such official notice, therefore, has only *prima-facie* effect. The agency is permitted to announce any reasonable presumption it proposes to make as to factual matters of a general nature within the field of its special knowledge, but the presumption may be substituted for evidence only so long as it is not rebutted. Often, the party against whom the notice is asserted will seek to show not

⁷ This is commonly said to be restricted to matters of common knowledge and notoriety. But the courts have been exceedingly liberal in their interpretation of what constitutes common knowledge; and have in fact been willing to notice a wide variety of facts which are deemed to be readily susceptible to objective ascertainment, noticing such facts as the height of the tallest man in history; that dynamic radio completely superseded the magnetic; that pneumatic tires are more damaging to highways than hard rubber tires. See E. D. Ransom, comment, 36 MICH. L. REV. 610 (1938).

that the general fact of which the commission proposes to take notice is entirely wrong, but only that the generality should be somehow modified because of conditions present in his particular case. Often, the area of disagreement concerns only the significance of the facts to be noticed, and the deductions to be drawn from them.

So long as adequate notice is given, at the hearing or prior thereto, of what generalities the agency proposes to notice, and so long as the parties have adequate opportunity to meet and rebut the inference which the agency proposes to make, wide latitude should be given. For example, if the issuance of a license to operate a common or contract carrier depends on whether or not public convenience requires such service between two cities, the commission should be able to rely on conclusions reached in a recent hearing on a similar application as to the same route, and should not be required to put into the record again all the information it had heard a few weeks previously.⁸

But if the agency fails to advise the parties as to the assumed facts which it proposes to notice, or fails to give the parties adequate opportunity to examine their accuracy and rebut or explain them, there has been a denial of due process.⁹

Thus, there are two limitations imposed on the power of administrative agencies to notice officially as facts certain generalities which their special experience has taught them to believe. They are: (1) the facts noticed must be incorporated into the record, or there must be citation of the source ma-

⁸ *Railroad Commission v. McDonald* (Tex. Civ. App. 1936), 90 S. W. (2d) 581; *Pennsylvania R. Co. v. United States* (D. C. Pa. 1930), 40 F. (2d) 921; Gellhorn, *FEDERAL ADMINISTRATIVE PROCEEDINGS* (1941) 89-92.

⁹ *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 57 S. Ct. 724 (1937); *United States and Interstate Commerce Commission v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 44 S. Ct. 565 (1924); *West Ohio Gas Co. v. Public Utilities Commission of Ohio* (D. C. Ohio 1928), 42 F. (2d) 899. See Smith, "Practice and Procedure Before the Interstate Commerce Commission," 5 *GEO. WASH. L. REV.* 404 (1937).

terial on which the agency relies; and (2) this source material must be made available to the parties for their examination.¹⁰

8. Relaxation of Requirements Where Risk of Error Is Slight

Ordinarily, disregard of either of the two last-mentioned requirements is fatal to the validity of the administrative determination, but in cases where the risk of error seems plainly small, some relaxation of the requirements is permitted. Thus, agencies have been permitted to notice such matters as the average earnings of a day laborer,¹¹ or an individual's earning capacity.¹² For somewhat similar reasons, notice is freely permitted in alienage cases.¹³ Where an agency notices a party's own prior reports, no reversible error exists, at least in the absence of a showing of actual prejudice.¹⁴

Some state courts have suggested that public utility commissions have almost unlimited powers to notice officially anything in their files, and rely on any report contained therein, without notice to the parties.¹⁵ But to the extent that such decisions appear to permit a broader scope to the exercise of official notice than do the Supreme Court cases above cited, it would seem clear (in view of the constitutional basis of the federal decisions in the guaranties of the Fifth Amendment and the Fourteenth Amendment) that they cannot be regarded as authoritative. Further, examination of many of

¹⁰ The following law review articles discuss this general problem: Gellhorn, "Official Notice in Administrative Adjudication," 20 TEX. L. REV. 131 (1941); Faris, "Judicial Notice by Administrative Bodies," 4 IND. L. J. 167 (1928); Merrill, "Rules of Evidence in Administrative Proceedings," 14 OKLA. BAR A. J. 1934 (1943).

¹¹ *Walsh's Case*, 227 Mass. 341, 116 N. E. 496 (1917).

¹² *O'Reilly's Case*, 265 Mass. 456, 164 N. E. 440 (1929).

¹³ E. g., *Jung See v. Nash* (C.C.A. 8th, 1925), 4 F. (2d) 639.

¹⁴ *Market Street Railway Co. v. Railroad Commission of California*, 324 U. S. 548, 65 S. Ct. 770 (1945), commented on in 60 HARV. L. REV. 620 (1947).

¹⁵ *Chicago & N. W. Ry. Co. v. Railroad Commission of Wisconsin*, 156 Wis. 47, 145 N. W. 216, 974 (1914); *City of Elizabeth v. Board of Public Utility Commissioners*, 99 N. J. L. 496, 123 Atl. 358 (1924).

the decisions containing such broad remarks as to the powers of agencies to take official notice of facts not incorporated in the record indicates that the requirements of the rule as above stated had been satisfied, the parties having in fact been given adequate opportunity to learn what facts a commission proposed to notice and adequate opportunity to rebut them.¹⁶

¹⁶ E. g., *Duluth Street Railway Co. v. Railroad Commission*, 161 Wis. 245, 152 N. W. 887 (1915); *Steamboat Canal Co. v. Garson*, 43 Nev. 298, 185 Pac. 801 (1919), 1119 (1920); *St. Louis Southwestern Ry. Co. v. Stewart*, 150 Ark. 586, 235 S. W. 1003 (1921). See Hanft, "Utilities Commissions as Expert Courts," 15 N. C. L. REV. 12 (1936); Brown, "Public Service Commission Procedure—A Problem and a Suggestion," 87 U. PA. L. REV. 139 (1938).

CHAPTER 11

Posthearing Procedure

1. The Nature of the Problem

SOME separation of hearing procedure and decision procedure is characteristic of administrative agencies. The hearings are but rarely conducted by an officer with power to make any effective decision. Rather, the decision is frequently made by an officer who was not present at the hearing. The resulting effects on the actual process of case determination can be visualized by comparing the situation with that which would exist if, in the courts, the trial judges, at the termination of the hearing in every lawsuit, simply submitted a summary or memorandum as to the contentions of the parties to an appellate court, which without hearing the parties or reading the evidence, then proceeded to decide all the cases assigned for trial before all the trial judges, relying only on a short oral argument and advice from their law clerks as to the contents of the record and of briefs filed by counsel to determine the facts and law of each case.

While the postulated hypothetical situation represents an extreme, yet it fairly describes a procedure which could be followed by most federal agencies and many state agencies; and it is indicative of the type of procedure actually followed by a number of agencies.

A mere description of the process is suggestive of the difficulties that inhere. As pointed out by the Attorney General's Committee,¹ two undesirable consequences ensue as the conduct of the hearing becomes divorced from responsibility for decision: (1) the hearing itself tends to degenerate; and (2)

¹ Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 45.

the decision becomes anonymous, and therefore less respected.

Of course the procedural mechanics employed vary widely from agency to agency, and changes occur frequently within each agency as attempts are made to devise methods that will meet, so far as possible, the difficulties encountered by the agencies in their attempts to decide wisely and justly the multitude of cases which they can study so little. But the typical course of procedure, recognized in Section 8 (b) of the Federal Administrative Procedure Act of 1946, calls for the making of an intermediate report and recommendation by the hearing officer, which is served on the parties, who then submit exceptions thereto (together with supporting briefs) to the agency, which (with copious assistance of law clerks) proceeds to learn the high spots of the case and then renders its decision. Oral arguments are usually utilized when requested by the parties, but they are typically too short to enable counsel to do more than acquaint the agency with the barest outline of the case.

The system which has evolved owes its existence to practical exigencies rather than to any theory of jurisprudence. Faced with a necessity of deciding a staggering number of cases annually, it has been simply a matter of necessity for the agencies to delegate to assistants, so far as possible, the tasks of hearing and weighing the evidence. Constitutional and statutory proscriptions have ordinarily made it impossible for the agencies to carry this process to its ultimate logical conclusion, by appointing responsible staff members and giving them power to decide cases. Where an agency is given the power to decide cases, it has been held to be the duty of the agency itself (in the sense of the board of three or four or six members appointed by law as members of the agency) to make the decisions and enter the orders.

Many administrators contend ably that this process of decision has worked well and achieved just results. But it is of course impossible to determine whether the decisions would have been otherwise had they been made on the basis of an intensive knowledge of the case, such as that possessed by a trial judge when he makes his decision; and it is likewise impossible to determine whether the decisions as made are on the whole as fair, just, and well considered as would be true if conventional judicial methods were employed. While it serves current exigencies, there can be little defense of this method as a jurisprudential model. It has been quite generally agreed that future development should be in the direction of endowing the hearing officer with substantially the responsibilities and powers of a trial judge, so that the initial decision in the case is by him, and his decision becomes the decision of the agency, unless on an appeal to the agency heads (which would be conducted generally in the manner characteristic of appeals from trial to appellate courts) his decision is reversed.² Some agencies have been seeking *sua sponte* to move in this direction, so far as existing statutory provisions permit.

The procedure which has developed has arisen from the necessities of the situation. The number of cases which the agencies are required to dispose of has required delegation. Agencies like the Federal Trade Commission and the National Labor Relations Board frequently dispose of 500 to 700 cases a year. The Interstate Commerce Commission may dispose of 6,000 or more.³ Transcripts in individual cases frequently run 3,000 to 5,000 pages in length and may be accompanied by several volumes of exhibits. It is obvious that hearing examiners must be employed to take the testimony.

² See report of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 45-46, 51.

³ 2 B. N. A. Smith Investigating Committee Verbatim Record 360; Exhibit No. 18, Official Hearings, 2731.

Normally, after a hearing has been completed, the hearing officer submits an intermediate report. In the case of the federal agencies, Section 5 (c) of the Administrative Procedure Act of 1946 provides (where a hearing is required by statute) that the officer hearing the evidence shall make the recommended decision or initial decision, except in cases where the record is transferred to the agency heads for initial determination. The nature and effect of this report vary widely in different agencies. In some cases, it is little more than a summary of the contentions of one or both of the parties. In other cases, it embraces a fair summary of the testimony, concluded by findings of fact, conclusions of law, and detailed recommendations as to the disposition of the case. Between these two extremes, of course, there are encountered many intermediate forms. The preparation of the report may represent a diligent and conscientious study of the case by the hearing officer; or, on the other hand, it may be prepared not by the hearing officer but by other employees of the agency—perhaps the attorney who tried the case for the agency.⁴

In agencies where the intermediate reports are typically prepared in careless fashion, they serve little other purpose than to state the respective contentions of the parties. In such cases, the agency heads place but little reliance on the reports. On the other hand, where the general level of performance by the hearing officers is on a higher plane, their reports carry greater weight with the heads of the agency, and are sometimes viewed informally as representing a sort of *nisi-prius* decision of the agency. Section 8 (a) of the Federal Administrative Procedure Act of 1946 contemplates this result.

But whatever the status of the intermediate report (and there is in fact no requirement that such reports be issued or

⁴ Cf., Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 112. The Administrative Procedure Act of 1946, § 5 (c), goes some distance toward prohibiting this practice in the case of some of the judicial functions of the federal agencies.

served on the parties, so long as other appropriate means are employed to advise the parties of the agency's contentions) it is necessary, when the case is presented to the agency for actual decision, for the agency heads to learn enough of the case to be able to make their own decision as to its proper disposition. The only way in which it is possible for them to do this is to rely heavily on the assistance of staff employees whose job it is to digest records and briefs and then consult informally with the agency heads, who thus get the case more or less at second hand.

Necessary though this practice may be, and conceding that the staff members to whom are entrusted these heavy responsibilities are on the whole fairly competent, yet it seems clear that full public confidence in administrative procedures cannot be gained until there are eliminated the possibilities of gross maladministration which inhere in this system. The public knows that the staff assistants who thus recommend decision and often write the opinion are frequently inexperienced and untrained. It knows that the positions are generally not such as to attract large numbers of mature and competent men. It suspects that recommendations are sometimes based on a desire to pick and choose from the record something that will support a desired result, rather than on a conscientious analysis of the record. It suspects that portions of testimony or matters of argument which are hard to meet are conveniently ignored, and suspects that it is unduly difficult for counsel to convince an agency on oral argument of the controlling importance of such overlooked portions of the record, when the staff employees assure the agency heads that the record "as a whole" does not support what counsel claims, and when the agency heads do not have time to determine this for themselves.

Many able administrators have pointed out the defects of the current practice.⁵ There is a plain need for improvement of administrative procedure at this point. The cure seems to be in the direction, which has so often been suggested and is adopted—for the federal agencies—by Section 11 of the Administrative Procedure Act of 1946, of making the position of hearing officer sufficiently attractive (by endowing it with large powers of decision and the security of assured tenure and liberal compensation) to render it possible to fill these positions with experienced and highly competent professional men, whose initial dispositions of cases will carry sufficient weight to command public confidence and be of such a character that they can safely be accepted as the decision of the agency (subject to limited rights of intra-agency appeal).

2. The Rule That the One Who Decides Must Hear

Under most statutes creating administrative tribunals with judicial powers, power of decision is vested in the agency. It is the agency, and not some staff assistant or employee, who must decide the case. The authority to make the decision cannot be delegated.

But one of the fundamental requirements of a fair trial, previously adverted to⁶ is that the one who decides must hear. Such was the phraseology of the Supreme Court in the first of the celebrated *Morgan* cases.⁷ The agency, in which alone is vested authority and responsibility to make the decision, must hear the evidence. This, of course, does not require that the agency must listen to all the witnesses, but only that the agency which makes the determinations "must consider

⁵ Various criticisms by authors with a wealth of administrative experience are cited in Montague, "Reform of Administrative Procedure," 40 MICH. L. REV. 501, 514 (1942).

⁶ Page 150, *supra*.

⁷ *Morgan v. United States*, 298 U. S. 468 at 481, 56 S. Ct. 906 (1936).

and appraise the evidence which justifies them.”⁸ The reason for this requirement, as the court further explained in the case cited, lies in the fact that the weight ascribed by the law to administrative findings—their conclusiveness when made within the sphere of the authority conferred on the agency—rests on the assumption that the officer or body who makes the findings has considered the evidence and upon that evidence has conscientiously reached a conclusion deemed to be justified thereby.

Limiting the rule thus enunciated by the reason given as its basis, this celebrated decision means little more than this: An agency in deciding a case is required to master the record made in the administrative proceedings to the same degree as a trial judge is required to master the record in a case referred to a referee for the taking of testimony, before reaching his decision.⁹ So stated, the rule of the *Morgan* case did not come as a startling innovation. The principle had been previously applied in a variety of cases.¹⁰ But the vigorous language of the opinion, and the attention which the case received as a *cause célèbre*, served to bring into sharp focus the question as to whether administrative agencies, operating under the procedures discussed in the preceding section, were sufficiently mastering the records in the cases they were deciding. The opinion of course did not state (nor could there be enunciated) any precise measuring stick which could be utilized in determining whether an agency had sufficiently performed its duty in this respect. But the case did raise many questions as to just what was required. Most of these questions remain

⁸ 298 U. S. 468 at 482, 56 S. Ct. 906 (1936).

⁹ This probably contemplates a greater familiarity with the details of evidence than is ordinarily required of an appellate court, which except possibly in cases of equitable reviews *de novo* is not ordinarily required to make evidentiary determinations.

¹⁰ See, e. g., *United States ex rel. Ohm v. Perkins* (C. C. A. 2d 1935), 79 F. (2d) 533; *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627 (1933).

unanswered; and, for reasons discussed below, it is doubtful whether the answers will ever be afforded.

A few cases, decided shortly after the first *Morgan* case, intimated that the requirement was that all the members of an agency must personally review the entire record of a case.¹¹ But this would impose a greater burden on members of administrative agencies than is imposed on courts composed of several judges, and hence goes too far, for it has been suggested in many cases that there is no legal reason and no practical justification for requiring agencies to do more than courts do in mastering the evidence in the record of the case.¹²

While many of the questions raised by the decision in the *Morgan* case remain unanswered, the general application of the principle there declared can be roughly defined—and by way of exclusion, rather than inclusion—by examining cases where it has been held that the procedure adopted by the agency was not improper.

Thus, it is not required that all the members of the agency sit in each case.¹³ Nor is it necessary that any member of the agency be present at the taking of testimony; hearing examiners may be appointed.¹⁴ A change in the personnel of an agency during the pendency of proceedings in a particular

¹¹ State *ex rel.* Madison Airport Co. v. Wrabetz, 231 Wis. 147, 285 N. W. 504 (1939); Joyce v. Bruckman, 257 App. Div. 795, 15 N. Y. S. (2d) 679 (1939).

¹² In some decisions, the duty of the administrative agency in respect to mastering the record is made analogous to the duty of an appellate court. Logically, this is unsound, for the administrative agency makes an original determination, rather than an appellate review; and its mastery of the record should be equated to that of a trial judge who decides a case upon a record made before a master or referee. But as a practical matter, this theoretical distinction will presumably exercise but little influence, because of the fact that, as noted below, the courts generally refuse to undertake the task of determining the extent to which the members of an agency have studied the record of a case.

¹³ Frischer & Co. v. Elting (C.C.A. 2d 1932), 60 F. (2d) 711; Frischer & Co. v. Bakelite Corp. (C.C.P.A. 1930), 39 F. (2d) 247.

¹⁴ California Lumbermen's Council v. Federal Trade Commission (C.C.A. 9th 1940), 115 F. (2d) 178; Plapao Laboratories, Inc. v. Farley (App. D. C. 1937), 92 F. (2d) 228; Quon Quon Poy v. Johnson, 273 U. S. 352, 47 S. Ct. 346 (1927).

case does not require that a fresh start be made.¹⁵ The agency members need not personally examine the record; they may employ assistants to sift and analyze the evidence.¹⁶

The second *Morgan* case¹⁷ is one of the comparatively few cases in which any affirmative showing was made as to the extent to which the deciding authority (in that case a single officer) had examined the record. In that case, the Secretary of Agriculture testified that the bulky transcript of testimony, some 10,000 pages exclusive of exhibits, was placed on his desk and he dipped into it from time to time to get its drift. He read the respondent's brief and a transcript of the oral argument. He conferred with his subordinates who had sifted and analyzed the evidence, and discussed the proposed findings. He said that his order represented his own "independent reactions to the findings" of the men in the Bureau. The court said (by way of dictum) that it would assume that the Secretary sufficiently understood the evidence, and the case was decided on the point that the respondents had not been properly advised of the nature of the claims made by the government. It is not clear whether the court's assumption was based on the supposition that such a study of a record was sufficient, or whether it was based on the proposition that it was improper for the courts to probe the mental processes of administrative officials. The significance of the case is thus obscured. Nevertheless, it is generally indicative of what is permitted.

In any event, due process does not require that the members of an agency hear or read a transcript of the testimony,¹⁸

¹⁵ United States *ex rel.* Minuto v. Reimer (C.C.A. 2d 1936), 83 F. (2d) 166; Eastland Co. v. Federal Communications Commission (App. D. C. 1937), 92 F. (2d) 467; Vogeley v. Detroit Lumber Co., 196 Mich. 516, 162 N. W. 975 (1917).

¹⁶ *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906 (1936).

¹⁷ 304 U. S. 1, 58 S. Ct. 773, 999 (1938).

¹⁸ Sec. 10 of the Model State Act provides that the officials who are to render the decision "shall personally consider the whole record or such portions thereof as may be cited by the parties." Similarly, Section 7 (c) of the Federal Admin-

but only that they sufficiently familiarize themselves with the evidence to be able to render a decision based thereon. So stating the requirement, it becomes obvious that it is exceedingly difficult to determine, in any particular case, whether the members of the agency did in fact perform their duty of mastering the record. Ordinarily, the only source of information on this critical point would be the testimony of the agency members. Unless they can be compelled to testify as to the extent to which they familiarized themselves with the record in deciding a case, there is ordinarily no method of raising the question.

It quite clearly appears that the courts will not permit agency members to be summoned for cross-examination as to this. The impropriety of such examination, suggested in the second *Morgan* case, *supra*, was strongly emphasized in a later opinion.¹⁹ Similarly, attempts to require members of agencies to answer depositions raising particular questions as to their consideration of a specific case have been almost uniformly unsuccessful.²⁰

Thus (except where specific statutory requirements exist), the broad requirement that the members of an agency in deciding a case must sufficiently master the record made therein so as to be able to reach an independent decision based on the evidence taken in the case, is one which for most practical

Administrative Procedure Act in terms requires agencies to consider the whole record or such portions thereof as may be cited by any party.

¹⁹ *United States v. Morgan*, 313 U. S. 409, 61 S. Ct. 999 (1941).

²⁰ In *National Labor Relations Board v. Cherry Cotton Mills* (C.C.A. 5th 1938), 98 F. (2d) 444, interrogatories were allowed; but the court relied largely on particular factors deemed to indicate unfair administrative handling of the case; and this decision was distinguished and limited in a later decision of the same court, denying the issuance of interrogatories. *National Labor Relations Board v. Lane Cotton Mills Co.* (C.C.A. 5th 1940), 108 F. (2d) 568. Other cases refusing to permit similar inquiries are: *National Labor Relations Board v. Biles Coleman Lumber Co.* (C.C.A. 9th 1938), 98 F. (2d) 16; *Cupples Company Manufacturers v. National Labor Relations Board* (C.C.A. 8th 1939), 103 F. (2d) 953; *National Labor Relations Board v. Botany Worsted Mills, Inc.* (C.C.A. 3d 1939), 106 F. (2d) 263; *Inland Steel Co. v. National Labor Relations Board* (C.C.A. 7th 1939), 105 F. (2d) 246.

purposes is committed to the consciences of agency members. And this of course is in keeping with the spirit which recognizes administrative agencies as independent instrumentalities of justice, collaborative with the courts, whose independence and integrity must be respected.²¹

3. Necessity of Intermediate Findings by Hearing Officers

In fulfilling their duty to master the essence of the record in each individual case decided judicially, agencies have found that ordinarily the most effective and expeditious aid toward this end is to require the officer who hears the testimony to prepare an intermediate report which at least summarizes the claims of the parties and normally contains at least some suggestion as to what findings the hearing officer believes should be made by the agency (in cases where Section 8 of the Federal Administrative Procedure Act applies, the hearing officer must submit a recommendation as to what the decision should be). Even if it serves only to narrow the focus of argument before the agency itself, such a report is obviously of great value.

So common has the practice become, and so dismayed is the litigant who is deprived of the advantages of receiving such an intermediate report, that it has been urged that failure to provide some statement as to the findings and recommendations of the hearing officer, to guide the parties in their further presentation of the case before the agency, is in itself tantamount to a denial of a fair trial.

As to this, the rule adopted by the courts has been that if no alternative device is employed to apprise the parties fairly of the claims and contentions made by the agency, then the absence of the intermediate report may be fatal. But it is considered as only one of several alternative devices which may perform this function; and if the respondents are otherwise fully advised of the issues on which the agency will

²¹ See *United States v. Morgan*, 313 U. S. 409, 422, 61 S. Ct. 999 (1941).

decide the case, the absence of an intermediate report is not fatal.²²

4. The Adjudication of Cases and the Separation of Powers

It is, of course, at the stage of actual decision that there is brought into sharp focus the question as to the effect of combining in a single agency the powers of witness, prosecutor, judge, and executioner. This general problem is primarily a matter involving constitutional questions as to the separation of powers.²³ The effect of such combination characterizes the whole administrative process, and the stage of decision is only one point of impact.

However, one extreme consequence of the hazards inherent in complete combination of powers within an agency appears intimately as a part of the actual process and mechanics of decision-making. It occurs where a staff member who investigated a case *ex parte*, or the agency's attorney who handled the trial of the case, is permitted to write the findings, opinion, or decision of the agency—or to collaborate to a large degree in the writing thereof. There can be no valid reason for such practice, and Section 5 (c) of the Administrative Procedure Act of 1946 goes far toward eliminating it in the case of the federal agencies. But here again, the responsibility for avoiding this situation is one which must be entrusted to the agencies.

5. Requirement That Final Decision Be Supported by Findings

It is often required by statute, and perhaps by the Constitution²⁴ that the determination of an administrative agency

²² *Morgan v. United States*, 304 U. S. 1, 58 S. Ct. 773, 999 (1938); *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 58 S. Ct. 904 (1938); *National Labor Relations Board v. Hearst* (C.C.A. 9th 1939), 102 F. (2d) 658.

²³ See, *supra*, p. 50 *et seq.*

²⁴ *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935).

must be supported by findings. This requirement presents greater difficulties in cases where the administrative order is primarily legislative in character than in cases where the determination is essentially judicial in nature. In the latter type of case, established administrative practice (recognizing the practical necessity of a statement of findings as a matter of sound administration, as a condition precedent to effective judicial review, and perhaps as a constitutional requirement) is to rest each determination on definite findings.²⁵

²⁵ On the broad question as to the necessity of findings, see many cases collected in Vom Bauer, *FEDERAL ADMINISTRATIVE LAW* (1942) 535 *et seq.*, Gellhorn, *ADMINISTRATIVE LAW* (1942) 770 *et seq.*; 146 A. L. R. 209.

CHAPTER 12

Administrative Adjudication and the Role of Discretion

THE decisions of administrative tribunals are made by administrators, not by judges. Viewing their function as basically that of administering and implementing a stated legislative purpose, administrators adopt as their model not the judicial attitude of deciding impartially between opposed litigants, but rather the attitude of an executive who wants to get a job done. It should not be surprising, therefore, that the agencies, while using essentially the same materials of decision as do the courts (i. e., constitutions, statutes, prior decisions, and testimony), do not deal with these materials in the same way that judges do.

To the objection that an agency should construe statutes and evaluate evidence on the basis of the same canons and standards as are employed by courts, the administrators reply that one of the prime purposes in the creation of an agency is, frequently, to enable the clarification of policy in a new and perplexing field by putting decision on a basis of *ad hoc* discretion. To achieve this end, it is said, agencies must depart from the normal standards of decision that guide the courts. Justifiable or not as this answer may be, it is at least a fair description of the general approach of the agencies to the jurisprudential aspects of the problem of decision-making.

While the extent of departure from judicial norms varies considerably as between different agencies, there is a pervasive tendency, which can be noted in all administrative agencies, to base decision of judicial questions on general considerations of policy to a far greater extent than is true in the courts, wherein decision is ordinarily based on

the provisions of a statute or a common-law doctrine.¹ This tendency has been encouraged by the plain intimations found in many judicial opinions that an administrative decision based on the experience and peculiar competence of the agency will command far more respect, and be much less subject to judicial reversal, than a decision based on legal grounds.² The implication seems to be that when an agency's decision is based on purely judicial questions presented in the record before it, the courts will exercise their superior competency in reviewing such questions of law; but when, on the other hand, decision is rested on imponderable considerations of a policy which can be known fully only to the agency, then the courts will but seldom venture to interfere with the result of the administrative determination. It is not surprising that the agencies, which rarely welcome judicial review of their decisions, seize upon the opportunity to rest every decision, so far as possible, on general grounds of policy.

¹ Cf., the observation in Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 216: "The distinction between an agency acting judicially and a court is largely in the extent to which policy is determined by decision or previously defined by statute or common law."

² *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 63 S. Ct. 454 (1943). In that case, the Commission said that under general principles of equity law, stock acquired by officers of a corporation during a period of reorganization could not be permitted to share in the reorganization on an equal footing with other stock of the same class. Pointing out (as conceded by counsel for the Commission) that this decision involved a misunderstanding of the court decisions in question, the court reversed the Commission, but pointed out that the result might have been quite the opposite if the Commission had seen fit to promulgate its own rule of policy as the governing factor in its decision. The case was remanded to the Commission for further consideration. On remand, as the Supreme Court later said, "the Commission re-examined the problem, recast its rationale and reached the same result." The Supreme Court on a second appeal affirmed the Commission, pointing out (332 U. S. 194, 199, 67 S. Ct. 1575 (1947)):

"The latest order of the Commission definitely avoids the fatal error of relying on judicial precedents which do not sustain it. . . . It has drawn heavily upon its accumulated experience in dealing with utility reorganizations."

But in many cases the agencies cannot escape the necessity of passing on issues involving the interpretation of the governing statute, the evaluation of conflicting evidence, the effect to be given prior decisions involving the same or other parties, and other similar issues, where the question presented involves the use of the same techniques as those employed by lawyers and judges in court cases. It is here that the unique jurisprudential approach of the agencies most clearly appears.

1. Interpretation of Statutes

Two frequently noted tendencies of administrative tribunals are of far-reaching effect in coloring administrative interpretation of statutes. The first is the natural tendency of an agency to emphasize (if not magnify) its own stature and importance by seeking to extend its jurisdiction and power to the furthest possible limits. The second is the tendency to broaden, by successive steps of administrative implementation, the policy of the statute which the agency is administering. Frequently, the statement of policy as contained in the legislative enactment is considered to be only a starting point from which the agency can develop policies and programs deemed to further the general objectives which motivated the enactment of the law. Such development, which frequently in recent years has assumed the guise of "economic interpretation" sometimes pushes the policy of the statute far afield.

(a) *Enlarging jurisdiction of agency.* Whether or not any particular decision on a jurisdictional question amounts to an enlargement of the agency's powers involves a point of argument that cannot be conclusively settled except where an administrative determination as to the existence of jurisdiction has been reversed upon court review. Several such

cases could be noted. But any mention of them should not overlook the existence of other cases where a gradual expansion of jurisdiction was accomplished, step by step, without being subjected to the test of judicial review; and where after such expanded jurisdiction had in fact been exercised for several years before being challenged in the courts, it was in effect held that the lapse of time coupled with silent legislative acquiescence had developed a power which perhaps the court could not otherwise have read into the original statute.³ Nor should there be overlooked cases where an expanded jurisdiction, gradually developed, has never been tested in the courts. The citation of cases reversing administrative findings of jurisdiction does not tell the whole story.

Characteristic of this tendency of the agencies to enlarge their jurisdiction was the determination of the Federal Trade Commission (after it had unsuccessfully attempted to persuade Congress to enlarge its jurisdiction beyond the prevention of unfair methods of competition *in commerce*, to include the prevention of unfair methods of competition in transactions *affecting commerce*) that it had power even under the more restrictive phraseology, to enjoin allegedly unfair sales methods in purely intrastate sales. The theory was that the power to prevent the use of unfair methods of competition in interstate commerce embraced a power to prevent the use of unfair methods in intrastate sales, where the result

³ E.g., the long series of steps by which the National Labor Relations Board obtained judicial acceptance of its claims to a constantly broadened jurisdiction; asserting it first in cases of large corporations with integrated multi-state activities, and gradually pushing it to the point of including retail stores—although in the earlier days of the administration of the act, the agency refused to assert jurisdiction over retail stores, thinking that the intimations of the comparatively early case of *Consolidated Edison Co. of New York v. National Labor Relations Board* (C.C.A. 2d 1938), 95 F. (2d) 390, 393, *aff'd* 305 U. S. 197, 59 S. Ct. 206 (1938), indicated that such claims of jurisdiction would not then have been accepted.

was to handicap interstate competitors. But this theory was rejected by the court.⁴

Similarly, the Wage and Hour Division of the Department of Labor (which under the explicit provision of the controlling statute had no jurisdiction over employees with respect to whom the Interstate Commerce Commission had "power" to establish maximum hours of service) concluded that the Interstate Commerce Commission had such "power" only in cases where it had exercised it by prescribing maximum hours, and that until such regulations were promulgated by the Interstate Commerce Commission, such employees were within the jurisdiction of the Wage and Hour Division.⁵ This extension of jurisdiction, similarly, was voided by the Supreme Court.⁶

Another example of the same tendency can be seen in the assertion by the Securities and Exchange Commission of a continuing jurisdiction to conduct "stop order" proceedings despite the fact that the registration statement, proposing the issuance and offering of certain securities, had been withdrawn. Here again, the court found jurisdiction did not exist.⁷

Examples need not be multiplied to illustrate further the general tendency. It is a part of administrative jurisprudence that statutory grants of power are to be broadly construed, and every doubt resolved in favor of the existence of jurisdiction on the part of the agency. This trend is in part no

⁴ Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 61 S. Ct. 580 (1941).

⁵ Interpretative Bulletin No. 9, 1942 Wage Hour Manual, 377, 379.

⁶ Southland Gasoline Co. v. Bayley, 319 U. S. 44, 63 S. Ct. 917 (1943). In a more recent case involving substantially the same question, the court (overruling a claim by the Wage Hour Division that it had jurisdiction over part-time truck drivers), said in part: "This position no doubt arose from a desire to give wide effect to the Fair Labor Standards Act." Levinson v. Spector Motor Service, 330 U. S. 649, 682, 67 S. Ct. 931 (1947).

⁷ Jones v. Securities and Exchange Commission, 298 U. S. 1, 56 S. Ct. 654 (1936).

doubt a reaction to the efforts of private litigants who seek unfairly to limit and narrow an agency's jurisdiction. An atmosphere of litigious hostility is created in which the agency plays the part of its own advocate. And all this is a reflection of the newness of many of the agencies. As the agencies achieve a greater degree of maturity, and become more thoroughly integrated into a general plan whereby the administration of the law is divided between courts and agencies, this tendency should gradually diminish. Indeed, in the case of some of the older agencies, the trend has already largely disappeared.⁸

(b) *Broadening policy of act.* Here again, in discussing administrative decisions as to the substantive requirements of the statute which an agency administers, no positive assertion of improperly extensive interpretations can be made except in cases where such interpretations have been set aside by the courts, as going too far beyond the realm wherein an agency's interpretation as to the meaning of a statute will carry highly persuasive weight. Such examples can be found in plenty, but they do not fully cover the field. There remains a much broader territory, the exact extent of which can be only conjectured, where the broadening of the originally announced legislative purpose or policy (as a result of administrative development) has been accepted by the courts, and has led to the creation of rules of conduct which might never have been reached had the interpretation of the statutes been left to the less colorful imagination of the courts. Yet it is precisely at this point that the process of free interpretation by administrative agencies has its greatest effects.

An example or two will illumine the thought. The proscription of unfair labor practices on the part of employers

⁸ The Interstate Commerce Commission, for example, has been reversed for failing to accept jurisdiction in cases where the court found it existed. *Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474, 32 S. Ct. 556 (1912).

as against their employees, as contained in the National Labor Relations Act,⁹ might well never have been extended to embrace the employment of such practices on the part of an employing unit when directed against an independent contractor, had the interpretation of the statute been left to the courts.¹⁰ But when administrative ingenuity discovered that independent contractors could, for purposes of the particular statute, be treated as employees, the court accepted this administrative development of the statute.¹¹ A somewhat similar situation was presented with the enactment of the Fair Labor Standards Act of 1938,¹² requiring the payment of at least time-and-one-half overtime compensation to employees engaged in occupations necessary to the production of goods for commerce. The question of course arose as to the effect of the statute in the case of a salaried employee, whose salary (established by a contractual agreement antedating the adoption of the law) was stated to cover compensation for a certain number of hours of work per week, in excess of the maximum which could be worked without payment of overtime compensation. In such a case, could the contract legally be continued, so long as the amount due was in excess of what the law required as a minimum wage plus overtime? The original administrative suggestion, that perhaps such an arrangement would satisfy the law,¹³ was the same as the conclusion of a number of lower courts, which early considered the question and so held.¹⁴ But the original suggestion of the agency was speedily replaced by

⁹ 49 Stat. 449, 29 U.S.C. § 151.

¹⁰ See *Columbia River Packers Ass'n., Inc. v. Hinton*, 315 U. S. 143, 62 S. Ct. 520 (1942).

¹¹ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

¹² 52 Stat. 1060, 29 U.S.C. § 201.

¹³ 1 W. H. Ref. Man. 60 (1939); 3 Wage and Hour Reporter 28 (1938).

¹⁴ E.g., *Missel v. Overnight Motor Transp. Co.* (D. C. Md. 1941), 40 F. Supp. 174; *Reeves v. Howard County Refining Co.* (D. C. Tex. 1940), 33 F. Supp. 90.

an interpretation definitely requiring the enlargement of such salaries,¹⁵ and the revised administrative interpretation ultimately gained judicial acceptance.¹⁶

The tendency of the taxing authorities to interpret tax statutes to the end of achieving the largest possible tax revenue scarcely needs documentation; and the effect of the decision in the famous *Dobson* case¹⁷ tends in some degree to give the administrative agencies free play in this particular field.

More significant, perhaps, than the trend of the agencies to broaden legislative policies within limits which the courts find sustainable, is the large number of cases where courts have found that agencies have carried interpretation to a point of legislation, and the courts have accordingly set aside administrative determinations as being incompatible with the requirements of the statute which the agency was created to administer. These cases reveal an administrative tendency to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency.¹⁸

Many examples could be cited. The Supreme Court has more than once had occasion to condemn administrative determinations of the taxing officials as being invalid attempts to "add a supplementary legislative provision" to a statute.¹⁹

In furtherance of a policy which was quite understandable, but unwarranted by law, the Interstate Commerce Commis-

¹⁵ 1 W. H. Ref. Man. 197 (1939).

¹⁶ *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U. S. 572, 62 S. Ct. 1216 (1942).

¹⁷ *Dobson v. Commissioner of Internal Revenue*, 321 U. S. 231, 64 S. Ct. 495 (1944).

¹⁸ Pound, *ADMINISTRATIVE LAW* (1942) 70-73.

¹⁹ E.g., *Helvering, Commissioner of Internal Revenue v. Credit Alliance Corp.*, 316 U. S. 107, 113, 62 S. Ct. 989 (1942). See also *Helvering, Commissioner of Internal Revenue v. American Dental Co.*, 318 U. S. 322, 63 S. Ct. 577 (1943), where the court reversed an administrative determination that a gift would not be accorded the statutory exemption from tax unless it was proved that the motives for making the gift were solely altruism and generosity.

sion declined to issue a certificate as a motor carrier to a railroad which operated a co-ordinated rail-motor freight service, on the grounds that such certificate should go only to one who exercised complete direction and control of the motor-truck operation and assumed full responsibility to the shipper and public. But the statute did not permit denial of a certificate on this ground of policy, and the administrative decision was accordingly reversed.²⁰

The same trend has been observed in the administration of the labor laws. In one such instance, the Wage and Hour Division of the United States Department of Labor, being empowered by the statute to define the "area of production" for purposes of an exemption relieving canneries located within such areas from the necessity of paying overtime compensation, so defined the term as to exclude larger canneries. The theory was that the boundaries of a given "area of production" could be so drawn as to stop at the walls of any cannery employing more than a certain number of persons. This was held invalid.²¹

Earlier, the Wage and Hour Division had argued that the statutory requirement of paying one and one half of an employee's regular rate of pay for overtime work had the effect of invalidating any agreement to reduce an employee's

²⁰ Thomson, *Trustee v. United States*, 321 U. S. 19, 64 S. Ct. 392 (1944). In the 1946 term, the Supreme Court twice reversed the Interstate Commerce Commission for giving effect to policies unwarranted by the governing statute. *Interstate Commerce Commission v. Mechling*, 330 U. S. 567, 67 S. Ct. 894 (1947); *United States v. Seatrains Lines, Inc.*, 329 U. S. 424, 429, 67 S. Ct. 435 (1947). In the latter case the court said:

"Thus it seems apparent that the Seatrains proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss* case."

A dramatic instance of administrative extension of statutory policies by a state agency, is *Puhl v. Pennsylvania Public Utility Commission*, 139 Pa. Super. 152, 11 A. (2d) 508 (1939), where an application for a carrier permit had been denied by the Commission on the grounds that a married woman could not qualify as a bona fide owner and operator of a business venture, where she employed her husband to assist in the business.

²¹ *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215 (1944).

regular rate. These interpretations likewise were not sustained.²² The National Labor Relations Board, empowered by statute to require employers to correct unfair labor practices, reasoned that an effective corrective would be the imposition of punitive measures against offending employers, and in effect required the payment of fines until the Supreme Court held that the Board's powers were only remedial and not punitive.²³

The Federal Trade Commission has similarly sought over a long period of years to extend the concept of "unfair methods of competition";²⁴ and it has indeed in large measure been successful. But it has frequently attempted to go further than the courts would permit.²⁵

The general trend is, then, for the agency to create a program or policy which it conceives to be in furtherance of the general purposes or objectives of the law it administers (and which frequently is not merely in furtherance of, but indeed goes further than the law so that there is "added a requirement not included or authorized by the statute").²⁶ The general aim having been crystallized, the agency then interprets the statute in such a way as to achieve the agency-conceived policies.

In cases where the statute has financial implications (embracing a policy, colloquially expressed, to "soak the rich" or "aid the needy," for example) one particular avenue of approach is that of the so-called "economic interpretation" of the statute. This is but another manifestation of the same

²² *General Mills v. Williams* (C.C.A. 6th 1942), 132 F. (2d) 367; *Walling v. A. H. Belo Corp.*, 316 U. S. 624, 62 S. Ct. 1223 (1942).

²³ *Republic Steel Corp. v. National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77 (1940), denying the power of the Board to compel an employer to refund to public relief agencies sums which such agencies had paid strikers.

²⁴ 38 Stat. 717, 15 U.S.C. § 41.

²⁵ E.g., see *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572 (1920); *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, 43 S. Ct. 450 (1923); many Court of Appeals cases could be cited.

²⁶ *Barrett Line, Inc. v. United States*, 326 U. S. 179, 189, 65 S. Ct. 1504 (1945).

general trend. An illustration—somewhat a caricature—is the suggestion by the Wage and Hour Division that a gardener tending the flowers and cutting the lawns in front of a factory was engaged in a process necessary to the production of the goods made in the factory. Since a janitor sweeping floors or stoking furnaces within the factory was deemed to be so engaged, it was apparently felt that it would be unfair to deny the gardener the economic benefits of overtime pay enjoyed by his co-employee working within the plant.²⁷

In cases where an agency is empowered to issue a license, without which engagement in a certain line of activity is prohibited, the door to the imposition of extrastatutory requirements as conditions to the issuance of a license is invitingly opened. This is so in large part because the applicant for the license is often willing to comply with almost any condition, in order to get a permit to start his business. But the practice of insisting on more than the statute requires in these licensing situations is only a manifestation of the broader trend.

This predilection toward interpretations which accomplish results "in the right direction" (which to the agency is often along a road leading somewhat farther than the statute goes) sometimes leads agencies to play loose and fast with established legal principles which may require a different interpretation. As C. K. Allen said of the administrator, "His business is to get things done . . . and when principles of law are put in his way, he is apt to be impatient of them as mere pedantic obstructions."²⁸ Thus, in order to assess a greater tax, the federal revenue authorities have insisted that a transfer of stock incident to the consolidation of banks, which was not evidenced by any instrument of conveyance

²⁷ 4 Wage and Hour Reporter 196 (1941).

²⁸ C. K. Allen, "Some Aspects of Administrative Law," J. SOC. PUB. TEACH. OF LAW (1929) 10, 16.

or other document, was nevertheless not accomplished wholly by operation of law, because the consolidation agreement recited that the assets of each constituent bank would pass to the consolidated organization.²⁹ Disregard of opinions of the agency's own counsel is not an unknown phenomenon, where such disregard permits an interpretation in furtherance of the agency's general purposes.³⁰

Where an agency thinks that what it deems a desirable result can be rested on "established judicial principles"—thereby enabling the agency to deny that it is doing anything more than its plain legal duty requires—it sometimes reads into prior decisions more than the courts can find therein.³¹ A somewhat unique misapplication of established legal doctrine was the argument of one of the federal agencies that an amendment to a statute, adopted to preclude the continuance of a prior administrative interpretation, had the effect of indicating congressional approval of the precluded interpretation, for all periods up to the effective date of the amendatory law.³²

These related tendencies—to enlarge the scope of the statute by construction, to find unwarranted sanctions for administrative orders, to place interpretation on an economic rather than a legalistic basis, to pervert common-law doctrine to suit the agency's own ends—are all manifestations of the position of advocate-litigant which the agencies so often occupy. It is as natural for them to argue a doubtful point of statutory construction in their own favor as it is for counsel in private litigation to urge his client's argument to the furthestmost position which appears in any way tenable. Their

²⁹ This decision was reversed in *United States v. Seattle-First Nat. Bank*, 321 U. S. 583, 64 S. Ct. 713 (1944).

³⁰ *Taft v. Helvering*, Commissioner of Internal Revenue, 311 U. S. 195, 61 S. Ct. 244 (1940).

³¹ *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 63 S. Ct. 454 (1943).

³² *Haggar Co. v. Helvering*, Commissioner of Internal Revenue, 308 U. S. 389, 60 S. Ct. 337 (1940).

interpretation of statutes is essentially not judicial, but rather that of a party in interest.

2. Evaluation of Evidence

Since agency heads often feel a distinct professional interest in achieving a particular result in cases decided by them, they are apt to be "convicting judges." Tax agencies feel their work is more successful when the decision involves the imposition of a tax liability; many labor agencies would rather decide for unions than against them; public service commissions are happier when they can order rate reductions; unemployment compensation commissions deem it their mission to disburse the greatest possible amount of benefit payments; trade commissions prefer if possible to sustain the charges of the existence of unfair trade practices. While there are exceptions, to be sure, and while there are many instances where it is immaterial to the agency what result may be reached in a particular case, yet the tendency is in the opposite direction.

This attitude, and this striving for results, inevitably affect an agency's evaluation of the evidence presented before it.

Under such circumstances, it would be extremely difficult even for a professionally trained judge to weigh the evidence impartially; and most agency heads do not have the benefit of the long professional training, and the discipline of continuous professional criticism of their judgments, which assist the judge in the task of evaluating evidence.

Therefore, the activity of most agencies in the appraisal of evidence leaves something to be desired, from the viewpoint of achieving a scrupulously impartial determination of facts.

One of the most common tendencies is that of resting decision on the basis of preformed ideas. Often, this takes the form of reliance on "official notice" of matters which in

fairness (see Chapter 10, *supra*) should be left to proofs.³³ In other cases, it leads agencies to rest decision on what the courts describe, in setting the findings aside, as mere conjecture and speculation.³⁴ Sometimes, in their zeal to support a certain finding, agencies adopt *in toto* testimony of a witness, failing to note that his testimony was modified on cross-examination, or improperly disregarding other credible evidence in the record which compels the conclusion that the testimony in chief cannot be accepted in whole at face value.³⁵

The number of cases annually in which the federal appellate courts reject factual findings of administrative agencies—despite their insulation from attack (in all except the most flagrant cases of error) by the doctrine that the finding must be accepted if there is any substantial evidence to support it—lends weight to the suggestion that this tendency has far-reaching untoward results. There is some evidence, indeed, that hearing officers have been selected on the basis of their willingness to champion the agency policies and their ability to discover a means of supporting a desired finding.³⁶

A second tendency is the inclination to decide a case without a hearing, or without hearing both sides. Many cases could be cited. Typical is the attempt of a price-fixing agency to make minimum price orders, without affording a notice or hearing to interested parties, and without making any findings of fact.³⁷ Even so highly respected an agency as

³³ Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 57 S. Ct. 724 (1937).

³⁴ E.g., Ohio Power Co. v. National Labor Relations Board (C.C.A. 6th 1940), 115 F. (2d) 839; Doran v. Eisenberg (C.C.A. 3d 1929), 30 F. (2d) 503.

³⁵ E.g., National Labor Relations Board v. Union Pacific Stages (C.C.A. 9th 1938), 99 F. (2d) 153. Cf., the admonition of § 7 (c) of the Federal Administrative Procedure Act, that no order is to be made except on consideration of the whole record.

³⁶ See the testimony set forth in National Labor Relations Board v. Cudahy Packing Co. (D. C. Kan. 1940), 34 F. Supp. 53, 59.

³⁷ Saxton Coal Mining Co. v. National Bituminous Coal Commission (App. D. C. 1938), 96 F. (2d) 517.

the Interstate Commerce Commission has had to be reminded that "there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."³⁸ Not long ago the Supreme Court was compelled to point out that a Conciliation Commissioner, making a reappraisal of a debtor's property pursuant to Section 75 (s) (3) of the Bankruptcy Act,^{38a} erred in basing his valuation partly on evidence obtained by his personal investigation without the knowledge or consent of the parties.³⁹ An interesting example is that of a state public utilities commission, which was empowered to annul new tariff schedules only after a full public hearing, but which (after adjourning a hearing in order to obtain further evidence necessary to permit it to consider the case fully) ordered that the tariff should stand annulled pending the renewal of the hearing.⁴⁰

Closely related is the tendency to make determinations upon the basis of consultations had in private or on the basis of reports which are not disclosed. Many agencies have yet to take to heart the admonition of Scott, L. J., in *Cooper v. Wilson*⁴¹ that "when a tribunal considers its decision behind closed doors it has no right to invite one party in and shut the other out."

Animated by excessive zeal, and convinced of the great importance of their missions, many agencies see their task

³⁸ Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 93, 33 S. Ct. 185 (1913).

^{38a} 11 U.S.C. § 203.

³⁹ Carter v. Kubler, 320 U. S. 243, 64 S. Ct. 1 (1943). Cf., § 7 (d) of the Administrative Procedure Act of 1946, providing that in the case of certain proceedings before federal agencies, the "exclusive record for decision" shall comprise the transcript of testimony and exhibits, together with the papers and requests filed in the proceeding.

⁴⁰ *In re Atchison, T. & S. F. Ry. Co.'s Protest of Rates*, 44 N. M. 608, 107 P. (2d) 123 (1940). Many other examples are cited in Pound, ADMINISTRATIVE LAW (1942) 68-72.

⁴¹ *Cooper v. Wilson*, [1937] 2 K. B. 309, 345.

out of true proportion. The seeming desirability of obtaining a particular result in an instant case, as a step toward furthering a broad general program, leads them sometimes to pay too little attention to the stubborn facts which interfere with the desired disposition of a particular case.⁴²

3. *Stare Decisis*

Both from the viewpoint of history and that of logic, there is but little room to apply the doctrine of *stare decisis* to determinations of administrative tribunals. Agencies are ordinarily created for the very reason that it appears unsatisfactory to attempt to dispose of disputes in a particular field by strict application of a rule of law. They are not expected to apply fixed or unyielding rules or policies, but to exercise discretion and ingenuity in working out a satisfactory solution for each new case. Further, the announcement of a decision by an administrative tribunal does not establish a rule of law, as does a court's judgment. Its basis is rather that of an *ad hoc* determination. Therefore to the extent at least that the doctrine of *stare decisis* is founded on the notion that the law is unchanging, the classical doctrine of *stare decisis* does not square with the theory and practice of the agencies.

It is well established that an administrative agency may depart from the principle of its former rulings and establish a new rule.⁴³ Not only may it change its theory of decision and depart from what might be called the "common law" of the agency's rulings, but it may amend or set aside its own formally established rules, if in its discretion such action appears fair and proper in a particular case.⁴⁴

⁴² *Doran v. Eisenberg* (C.C.A. 3d 1929), 30 F. (2d) 503.

⁴³ *Shawmut Ass'n v. Securities and Exchange Commission* (C.C.A. 1st 1945), 146 F. (2d) 791; *American Chicle Co. v. United States*, 316 U. S. 450, 62 S. Ct. 1144 (1942).

⁴⁴ *Brotherhood of Locomotive Firemen and Enginemen v. Kenan* (C.C.A. 5th 1937), 87 F. (2d) 651.

But despite the unquestioned freedom enjoyed by the agencies in this respect, many agencies, motivated in part no doubt by practical considerations and arguments of convenience, have adopted the practice of relying heavily on their decisions in former cases.

Thus, the research staff of the Attorney General's Committee on Administrative Procedure found, after extensive interviews with the staff members of the federal agencies, that "in almost every instance the agencies' officers who were interviewed expressed the belief that they accorded to the precedents of their respective agencies as much weight as is thought to be given by the highest court of a state to its own prior decisions."⁴⁵ Many statements of such a policy are found in agency decisions. The impulse is particularly strong in such fields as taxation and public lands administration, where precedents are easy to find and where the agency is conscious of the fact that hundreds of important transactions are consummated in reliance on rules announced in particular cases. Similarly, in the agencies which have been longer established, the principle of reliance on precedent plays an important part in agency jurisprudence. This is true, for example, of the Interstate Commerce Commission.⁴⁶ The Federal Trade Commission, too, is said to regard as an authoritative precedent every case in which the Commission has determined, after investigation, that a particular trade practice was not an unfair or deceptive act.⁴⁷

Expressions of this policy are frequent in the decisions of the agencies. Thus the Federal Power Commission has de-

⁴⁵ "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 466. See McClintock, "The Administrative Determination of Public Land Controversies," 9 MINN. L. REV. 638 (1925).

⁴⁶ See Pittman, "The Doctrine of Precedents and the Interstate Commerce Commission," 5 GEO. WASH. L. REV. 543 (1937); and Pittman, "The Doctrine of Precedents and Public Service Commissions," 11 MO. L. REV. 31 (1946).

⁴⁷ "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 468.

clared that "as a matter of principle" it should follow a former decision.⁴⁸ Similarly, the United States Civil Service Commission has declared that "to the extent that determining factors in two cases are the same, results should be the same. Consistency of decision should prevail in quasi-judicial as well as in judicial fields."⁴⁹

Other agencies, however, as noted by the Attorney General's Committee, refuse to regard their adjudications as building up any body of precedents which should be considered as guides in the decision of subsequent cases.

Further, in all the agencies, there is no feeling of compulsion to follow precedents. The agencies do not feel, as do the courts, that the following of precedents as a means of establishing stability in the law is an end in itself, and that a principle once firmly established should be followed unless overpowering reasons compel its abandonment. Rather, the agencies are inclined to follow their precedents chiefly as a matter of convenience, and regard all their statements of principle and policy as subject to change or modification upon further consideration of the matter.⁵⁰ There is no feeling that a change of policy requires an apology, or an explanation of the overwhelming necessity of changing a previously established rule. Thus, the doctrine of precedents plays quite a different role in the jurisprudence of administrative tribunals than in that of the courts.⁵¹

Another limitation upon the effective use of the doctrine of *stare decisis* in administrative adjudication is found in the practices of the agencies as to writing opinions. Many agencies

⁴⁸ In the Matter of Pacific Power & Light Co., 2 F. P. C. 508 (1941).

⁴⁹ In the Matter of Arrington, *et al.*, Docket No. 120 (1944).

⁵⁰ American Glue Co. v. Boston & M. R. Co., *et al.*, 191 I. C. C. 37 (1932); In the Matter of Maryland Drydock Co., 49 N. L. R. B. 733 (1943).

⁵¹ Chamberlain, Dowling, and Hays, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942) 62-63; Davis, "Res Judicata in Administrative Law," 25 TEX. L. REV. 199 (1947); Parker, "Administrative Res Judicata," 40 ILL. L. REV. 56 (1945).

dispose of hundreds of cases without written opinion. Others, even in important or leading cases, restrict their findings to formal pronouncements couched in statutory language, without explanation of the facts in any detail and without a statement of the reasons leading to the conclusions announced. It is accordingly difficult to discover what rules of policy or of statutory construction are embraced in the decision. In other cases, opinions consist largely of a minutely detailed statement of facts, concluded by a formal order. In such cases likewise, the absence of any rationally developed statement of rules and policies renders it difficult to ascertain exactly what the case stands for. It is accordingly easy for an agency to alter or modify its policies to a considerable extent without having the change apparent. The absence from the decisions of precise statements of rules and policies renders it correspondingly easy for the agency to distinguish any prior decision which may be urged upon it.

While agencies do exhibit the natural tendency to decide similar cases consistently, and do quite frequently profess reliance on their own precedents, yet the doctrine of *stare decisis* has, as such, no application to their adjudications; and in practice the asserted consistency of opinion is often quite debatable, and the extent of actual reliance on precedent a matter of argument.

4. The Doctrine of *Res Judicata*

(a) *Effect of agency determination on subsequent determinations of same agency.* The doctrine of *res judicata*—that a question of fact or of legal right determined by a judgment cannot be disputed in a subsequent suit between the parties thereto or their privies—does not apply, in any strict or technical sense, to the decisions of administrative agencies. They are not courts, and their determinations are not judg-

ments.⁵² There are, further, obvious practical reasons why the doctrine should not be applied to many types of administrative determinations. Agency determinations often combine an exercise of delegated legislative power, or the exercise of executive discretion, with the decision of quasi-judicial questions; and of course in cases where legislative or otherwise discretionary powers are exercised, an agency should be as free to change its mind as is a legislature.

Where, however, the determination is essentially judicial in nature, severe individual hardships might be incurred if agencies were free to unsettle decisions which parties had in good faith accepted as settling their rights. To forestall such untoward results, there has been applied in a variety of cases a species of equitable estoppel which produces approximately the same result as would application of the rules of *res judicata*—and which has indeed been referred to, both by courts and by the agencies themselves, by the term *res judicata*.

Cases involving grant. Perhaps the clearest case for the proposition that an agency's determination of a question of private right, unappealed from, should be treated as disposing finally of the question involved, is the case where the agency's order involves a grant of some right or privilege.

Thus, it has been held that the Secretary of the Interior has no authority to annul the action of a predecessor approving a grant of public lands.⁵³ The same principle doubtless applies in cases involving the grant of a patent or of a license.⁵⁴

Ruling on nonrecurring factual situations. Similar considerations of policy also apply where an agency has made a

⁵² *Pearson v. Williams*, 202 U. S. 281, 26 S. Ct. 608 (1906); *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 52 S. Ct. 183 (1932).

⁵³ *United States v. Minor*, 114 U. S. 233, 5 S. Ct. 836 (1885); *Noble v. Union River Logging Railroad Co.*, 147 U. S. 165, 13 S. Ct. 271 (1893).

⁵⁴ See *Brougham v. Blanton Mfg. Co.* (C.C.A. 8th 1917), 243 Fed. 503, and note in 31 HARV. L. REV. 487 (1918).

ruling, relied on by private parties, as to their rights in a particular situation, where the issue involved arises out of a single nonrecurring transaction. Aptly illustrating the reaction of the courts to this type of situation is the decision in *Woodworth v. Kales*.⁵⁵ In that case, the Commissioner of Internal Revenue had, on request of a stockholder, fixed the value of stock of the Ford Motor Car Company as of a certain date. Income taxes were paid on the basis of the values so computed, and the income tax return was confirmed by the Commissioner. Later, the Treasury Department fixed a new valuation on the stock as of the date in question, and deficiency assessments were levied on the basis of the new valuation. It was held that there was no authority for such action; and the court, referring to the dangerous possibilities of official oppression inherent in the situation, ruled in effect that by analogy to the doctrine of *res judicata*, the matter must be considered closed.

In other types of tax cases, the policy of giving effect to final administrative determinations of tax liability, by application of the principles of *res judicata*, has been widely recognized. Thus, the Tax Court speaks of its decisions as *res judicata*,⁵⁶ and it has held that the plea of *res judicata* is good although intervening Supreme Court decisions show the earlier decision to have been erroneous.⁵⁷

⁵⁵ (C.C.A. 6th 1928), 26 F. (2d) 178.

⁵⁶ *J. B. Barber, et al. v. Commissioner of Internal Revenue*, 1 T. C. 726 (1943).

⁵⁷ *Pryor & Lockhart Development Co. v. Commissioner of Internal Revenue*, 34 B. T. A. 687 (1936). See comments in 1 Vom Baur, *FEDERAL ADMINISTRATIVE LAW* (1942) 247. "*Res Judicata* in Tax Litigation," 46 HARV. L. REV. 692 (1933). In some tax cases it has been held that where the agency's determination is based on a mistake of law in construing a statute, the erroneous decision may be reopened by the agency, and a tax assessed. *National Rifle Ass'n of America v. Young* (App. D. C. 1943), 134 F. (2d) 524; *Utah Hotel Co. v. Industrial Commission*, 107 Utah 24, 151 P. (2d) 467 (1944). While this may be harsh, it is not without judicial analogy. See *Johnson v. Cadillac Motor Car Co.* (C.C.A. 2d 1919), 261 Fed. 878, discussed in Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 159.

Another case showing the basis on which the courts, by application of doctrines akin to those of estoppel, follow the rule of *res judicata* as to agency determinations involving matters of private right in a nonrecurring, past transaction, is *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*⁵⁸ In that case, the Interstate Commerce Commission had fixed reasonable rates to be charged by the railroad on certain hauls, and the railroad put them into effect. Some years later, the Commission (in reparations proceedings) determined that because of changing conditions the rates fixed in 1921 had become unreasonable in 1922, and ordered that reparations be paid. In setting aside this order, the Supreme Court declared that "while not bound by the rule of *res judicata*," the Commission "was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect."⁵⁹

This doctrine of adjudicatory estoppel applies only to official actions of the agency. Reliance on mere oral advice of an administrative officer does not ordinarily furnish a basis of a later claim that the agency is estopped from taking a position inconsistent with the informal, unofficial ruling.⁶⁰

Where order affects continuing course of conduct. The *Arizona Grocery Company* case illustrates the distinction between cases where the courts hold an agency bound by its prior determination, and those where an opposite result is reached. For the court, adding to the pronouncement above quoted, observed that the Commission "could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require."⁶¹

⁵⁸ 284 U. S. 370, 52 S. Ct. 183 (1932).

⁵⁹ 284 U. S. 370, 389, 52 S. Ct. 183 (1932).

⁶⁰ *Nichols & Co. v. Secretary of Agriculture* (C.C.A. 1st 1942), 131 F. (2d) 651; same case (C.C.A. 1st 1943), 136 F. (2d) 503; *Securities and Exchange Commission v. Torr* (D. C. N. Y. 1938), 22 F. Supp. 602; *United States v. Globe Indemnity Co.* (C.C.A. 2d 1938), 94 F. (2d) 576.

⁶¹ 284 U. S. 370, 389, 52 S. Ct. 183 (1932). The distinction is developed, with reference to Interstate Commerce Commission cases, in a comment, 34 MICH. L. REV. 672 (1936).

In other words, where an agency's decision is based on factors which may change during the course of time, and pertains to a subject matter over which the agency has a continuing jurisdiction,⁶² it is not bound by its prior decision, but may reopen and modify it from time to time.⁶³ For example, the dismissal of a complaint by the Federal Trade Commission does not preclude that agency from later reopening the case and taking further proceedings therein.⁶⁴

The policy factors deemed to be controlling in such cases are illustrated by the decision in *United States v. Stone & Downer Company*.⁶⁵ There, the Court of Customs Appeals had decided adversely to the government a question as to the classification, for customs purposes, of certain imported commodities. In a subsequent case between the same parties, involving the same questions and importations of similar merchandise, the same court reached a contrary conclusion. In rejecting the claim that by application of principles analogous to those of *res judicata*, the first judgment should be held controlling, the Supreme Court declared that circumstances justified limiting the finality of the conclusion in customs controversies to the identical importation, pointing out that the business of importing was carried on by large houses between which and the government there are constant differences as to proper classifications of similar importations, and that injustice and confusion would result if one importer could rely for years on an early decision rendered as to him which permitted low customs duties on a commodity which had been ruled in other cases, involving competing importers, to be subject to a higher rate. It was necessary to effective administration of the customs laws that a decision which rested on the evidentiary facts presented

⁶² This is true in the case of most of the so-called regulatory agencies.

⁶³ See, generally, 1 Vom Baur, *FEDERAL ADMINISTRATIVE LAW* (1942) 162 *et seq.*, 244 *et seq.*

⁶⁴ *Royal Baking Powder Co. v. Federal Trade Commission* (App. D. C. 1929) 32 F. (2d) 966.

⁶⁵ 274 U. S. 225, 47 S. Ct. 616 (1927).

in one particular case should not be binding upon the recurrence of a similar importation, when further evidentiary facts might be available.

For similar reasons, decisions of the Interstate Commerce Commission as to the status of a carrier under particular statutory definitions may be reopened and changed, when changing conditions show the wisdom of revising the former decision, insofar as it affects continuing and future operations.⁶⁶

Although, as above noted, an administrative decision approving a land grant is nonreversible, the opposite result is reached where such an application had once been rejected, and where, on rehearing, the agency decides to reverse its former decision. In the latter type of case, the agency has retained its control over the subject matter and exercises a continuing jurisdiction over the lands.⁶⁷ Similarly, where a grant of annuity rights to Indians does not represent a closed transaction, but is rather a ruling of a continuing nature, the grant may be revised as to the continuing rights of heirs to share in the grant.⁶⁸

In alienage cases, the doctrine of the right of the agency to revise orders made in the exercise of a continuing jurisdiction has been carried to an extent seemingly inconsistent with the results reached in cases holding decisions awarding various grants to be nonrevocable—the difference being essentially accounted for, no doubt, by the considerations which in other respects sustain a great degree of free administrative discretion for immigration authorities.⁶⁹

⁶⁶ *In re Chicago, N. S. & M. R. Co.* (C.C.A. 7th 1942), 131 F. (2d) 458; *Sprague v. Woll* (C.C.A. 7th 1941), 122 F. (2d) 128.

⁶⁷ *Beley v. Naphtaly*, 169 U. S. 353, 18 S. Ct. 354 (1898); *West v. Standard Oil Co.*, 278 U. S. 200, 49 S. Ct. 138 (1929).

⁶⁸ *Wilbur v. United States ex rel. Kadrie*, 281 U. S. 206, 50 S. Ct. 320 (1930).

⁶⁹ *Pearson v. Williams*, 202 U. S. 281, 26 S. Ct. 608 (1906); *Lum Mon Sing v. United States* (C.C.A. 9th 1941), 124 F. (2d) 21, both holding that an earlier decision admitting an immigrant could be later revoked in subsequent independent proceedings.

In many types of cases, of course, it is difficult to balance the competing public interest in effective administration and the individual's interest in being free from repeated litigation. Thus, where the Post Office classifies a publication as being entitled to second-class mailing privileges, and in reliance thereon a substantial business is built up, should the agency be permitted later to change its ruling? A reversal would cause pecuniary hardship to the publisher, but a continuance of the original ruling would harm his competitors who under revised administrative interpretations of the statute have been denied similar privileges. In one such case, the balance of interests was found to favor the right of repudiation of the prior decision.⁷⁰ A similar conflict in interests causes a diversity of result in workmen's compensation cases.⁷¹

It becomes, in final analysis, another phase of the problem of choosing between the public interest in free administrative action and the private interest in security.⁷²

Administrative recognition of doctrine. There is substantial recognition by the agencies of the rule that a prior determination will not be reversed to the detriment of an individual who fairly relied on an earlier ruling.⁷³

Where an agency refuses to reopen a case, or to change its decision in rehearing proceedings, it is sometimes said that

⁷⁰ *Houghton v. Payne*, 194 U. S. 88, 24 S. Ct. 590 (1904).

⁷¹ *Bartlett Hayward Co. v. Industrial Accident Commission*, 203 Cal. 522, 265 Pac. 195 (1928); *F. Jarka Co. v. Monahan* (D. C. Mass. 1928), 29 F. (2d) 741; 41 YALE L. J. 148 (1931).

⁷² *National Rifle Ass'n of America v. Young, et al.* (App. D. C. 1943) 134 F. (2d) 524, *cf.*, 26 WASH. U. L. Q. 268 (1941).

⁷³ *E.g.*, In the Matter of Baltimore Transit Co., 47 N. L. R. B. 109 (1943), holding that where in 1937 a Regional Director of the National Labor Relations Board had dismissed charges of unfair labor practices against a company on the grounds that the company did not fall within the agency's jurisdiction, while this decision was not *res judicata* to prevent the subsequent institution of proceedings, still in the exercise of administrative discretion the provisions of the order (in the subsequently instituted proceedings) as to reimbursement of certain funds to employees, would be limited to the period since the filing of the complaint by the agency in the second proceedings. The Wage and Hour Division of the United States Department of Labor has adopted similar practices.

principles of *res judicata* make it appropriate to follow the original decision.⁷⁴

(b) *Effect of administrative determination on determinations of other agencies.* Except as the contrary is provided by statute, the decision of a particular agency is not ordinarily binding on another agency which may be called upon to pass on the same issues, or substantially similar issues, in a matter falling within its own competence.⁷⁵

(c) *Effect of administrative determination on subsequent judicial actions.* While, for reasons above noted, an administrative determination is not technically *res judicata*, so as to preclude collateral attack on the determination in appropriate judicial proceedings,⁷⁶ still the courts are inclined to accept administrative determinations of a factual or technical nature, particularly where the collateral reversal of the decision might produce harsh results;⁷⁷ and in some cases, prior administrative determinations are apparently regarded as *res judicata*.⁷⁸ Of course, where the court is reviewing the administrative determination, either by direct appeal or by some other available statutory or common-law method, the administrative order does not bind the rights of the parties in court.⁷⁹

(d) *Effect of judicial determination on subsequent administrative action.* On orthodox principles, a judgment in a judicial action involving the government is binding in subsequent proceedings between that party and the same or

⁷⁴ In the Matter of Columbia Railway & Navigation Co., 1 F. P. C. 78 (1933); *In re Barratt's Appeal*, 14 App. D. C. 255 (1899).

⁷⁵ *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938); 1 Vom Baur, FEDERAL ADMINISTRATIVE LAW (1942) 246.

⁷⁶ *Proper v. John Bene & Sons, Inc.* (D. C. N. Y. 1923), 295 Fed. 729.

⁷⁷ *Morgan v. Daniels*, 153 U. S. 120, 14 S. Ct. 772 (1894); *Pennsylvania R. Co. v. Stineman Coal Mining Co.*, 242 U. S. 298, 37 S. Ct. 118 (1916); *New York, C. & St. L. R. Co. v. Frank*, 314 U. S. 360, 62 S. Ct. 258 (1941).

⁷⁸ *Greylock Mills v. White* (D. C. Mass. 1932), 55 F. (2d) 704; *United States v. Willard Tablet Co.* (C.C.A. 7th 1944), 141 F. (2d) 141.

⁷⁹ 1 Vom Baur, FEDERAL ADMINISTRATIVE LAW (1942) 246-247.

another representative of the government.⁸⁰ Where, therefore, a question presented to an administrative agency is *res judicata* as the result of a prior judgment of a competent court, the judgment is binding on the agency.⁸¹ This principle is, however, subject to the usual limitations as to identity of issues and parties. For example, an acquittal in criminal proceedings does not bar administrative action to recover penalties based on the same alleged wrong, because the difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*.⁸²

⁸⁰ *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620, 53 S. Ct. 706 (1933); *George H. Lee Co. v. United States* (C.C.A. 9th 1930), 41 F. (2d) 460.

⁸¹ *George H. Lee Co. v. Federal Trade Commission* (C.C.A. 8th 1940), 113 F. (2d) 583. Cases cited in 1 Vom Baur, *FEDERAL ADMINISTRATIVE LAW* (1942) 250.

⁸² *Helvering, Commissioner of Internal Revenue v. Mitchell*, 303 U. S. 391, 58 S. Ct. 630 (1938).

PART FOUR

RULE MAKING

CHAPTER 13

Practice and Procedure in the Making of Rules

1. Development of Rule-Making Activities

THE adoption of rules by administrative agencies to implement general provisions of statutes was a familiar part of the governmental process in America long before the development of the comparatively recent practice of entrusting substantial adjudicatory responsibilities to such agencies. The first Congress authorized the President to promulgate rules and regulations concerning trading with the Indian tribes.¹ The duty of the Secretary of the Treasury to prescribe regulations under internal revenue laws goes back to 1813.²

But until the twentieth century, administrative rule-making powers were ordinarily exercised only in connection with the conduct of the public business—customs, taxes, postal affairs, administration of the public lands, protection of the public health, and similar matters. It was only with the expansion of governmental controls over the fields of trade, business, and finance, and with the development of the now familiar technique of drafting regulatory statutes in purposely vague and broad terms, delegating to an agency the power to fill in the legislative details, that the problem of administrative legislation assumed its present importance. Today, the power to promulgate regulations having the force of law covers a vast range of activities which had long been comparatively immune from governmental control. For example, power is delegated to various agencies to legislate on

¹ 1 Stat. 137 (1790).

² 3 Stat. 26 (1813).

such diverse matters as maximum interest rates, margin requirements on security trading, minimum and maximum prices on commodities, and various elements of private employment contracts. The list could be extended indefinitely. It is in connection with the exercise of delegated legislative powers in fields regulating the conduct of private business that the problems as to the procedure to be followed in the promulgation of the rules, as to the legal effect of such rules, and as to their legal validity, become important.

2. Classification of Rules

Before considering the various types of rule-making activities, it is necessary to note at the outset the variable nature of the distinction between rule making and adjudication. This is but natural, for agencies often adopt adjudicatory techniques in making rules (e.g., a hearing before a public utility commission to fix electric rates); or adopt rule-making techniques in adjudicating cases (e.g., some licensing procedures). The distinction between rule making and adjudication is not fixed; it is largely a matter of emphasis. Under the Federal Administrative Procedure Act, a functional distinction is adopted, whereby "rule making" includes such matters as price fixing, wage fixing, approval of corporate reorganizations, et cetera, and other types of cases where only a single party is involved and adjudicatory techniques are often employed.³ But in the classical or traditional sense, rule making is regarded as a function of laying down general regulations, as distinguished from making orders that apply only to named persons or specific situations. It is only in connection with this latter type of rule making that there arise the problems discussed in the following pages.

³ Sec. 2. As to the distinction, under the act, between "rule making" and "adjudication," see 95 U. PA. L. REV. 621 (1947) and 61 HARV. L. REV. 389, 612 (1948).

Administrative rules and regulations of general application cover a wide range, from details of agency organization to legislative enactments having the force of law. Within these broad limits, there is a general line of division between procedural rules and those whose effect is primarily substantive.

(a) *Procedural rules.* The issuance and publication of procedural rules involve principally the development of a working compromise between the agency's interest in unregulated fluidity of procedure, and the public's interest in being able to ascertain in advance the mechanics which will govern the disposition of a case. As every lawyer knows, the rules of procedure are not infrequently determinative of the outcome of a case.

Even so simple a matter as a statement of an agency's organization may be important. If this is unpublished, it is in many cases almost impossible for persons interested in a matter pending before the agency to discover where to go in order to be heard, or whom to see—yet frequently there may be some particular branch within the agency which alone will lend an attentive ear to a certain plea. Recognizing this, Congress has required in Section 3 (a) of the Administrative Procedure Act that each federal agency publish a description of the agency's organization, including a statement of delegations of authority within the agency and the established methods whereby information may be secured and requests submitted.

The same is true as to rules of practice and procedure. Frequently, available statements covering these points are sketchy and incomplete, failing to reveal the whole process of administration, or the various alternative procedures which may in fact be utilized. Sometimes through mere inertia, and more frequently perhaps through a desire to avoid commitment to any set course of procedure (for once a definite rule

of procedure is established, a person appearing before the agency may justifiably complain of departures therefrom), many agencies have been loathe to adopt or publish detailed procedural rules. So far as federal agencies are concerned, the Administrative Procedure Act of 1946 serves to correct any such tendency. Section 3 of that act requires the publication of a description of the nature and requirements of all formal and informal procedures, together with forms and instructions. Promulgation of definite and explicit rules of practice helps substantially to improve the level of agency performance and to promote public confidence in the fairness and justice of administrative procedures. In the words of the Supreme Court, "The history of American freedom is, in no small measure, the history of procedure."⁴

(b) *Legislative regulations.* But the bulk of administrative rule making deals with regulations implementing the substantive provisions of statutory law. While these take many forms, from advisory opinions written in response to individual inquiries, to formal enactments written in the form and style of statutes, yet running through this heterogeneous mass of quasi-legislative activity there is one fairly definite dividing line. It involves the distinction between interpretative regulations and legislative regulations. The difference is in some respects a matter of form, but it is not without its consequences. If the statute provides a sanction for violation of the regulation, and it is written pursuant to specific delegation of power, then the regulation is legislative. If, on the other hand, the statute does not provide for such delegation of legislative power, and the regulation represents only the agency's opinion as to what the statute requires, then the regulation is interpretative.

(c) *Interpretative regulations.* An interpretative regulation frequently takes the form of an opinion construing the

⁴ *Malinski v. New York*, 324 U. S. 401, 414, 65 S. Ct. 781 (1945).

applicable statute. In such cases, while a great deal of weight may be attached to the interpretation, particularly if it is of long standing and if it represents the results of accumulated experience and technical knowledge in a particular field, yet the regulation does not possess any greater authority than that of a well-supported argument in favor of a particular interpretation of a statute. Sometimes, however, a regulation which in legal effect is only interpretative is written as a positive legislative command. Perusal of a regulation may leave a doubt as to whether it is intended to have legislative effect or not. The answer in such cases may be ascertained by an examination of the statute. If the statute fails to delegate express power to make the regulation and provides no sanction for violation of the regulation, then it is merely interpretative, even though cast in the form of a positive requirement of designated action.

From this it is obvious that the general classification of interpretative regulations could be subdivided into many categories. At least three deserve particular mention.

(1) One is the type of regulation that requires the filing of reports, the keeping of records, or the taking of other steps designated to assist the agency in its task of administration. The agencies must depend on various informal and sometimes extralegal sanctions to enforce these requirements. While ordinarily the agency is given specific power to make such regulations (under a general grant of authority to make such regulations as may be necessary to carry the statute into effect) yet the regulation is properly classifiable as administrative or interpretative.⁵

(2) More obviously interpretative are such regulations as the Interpretative Bulletins issued by the Wage and Hour and Public Contracts Divisions of the Department of Labor,

⁵ See F. P. Lee, "Legislative and Interpretative Regulations," 29 GEO. L. J. 1 (1940); Davis, "Administrative Rules—Interpretative, Legislative, and Retroactive," 57 YALE L. J. 919 (1948).

many of the income tax regulations, and other similar statements which in effect do no more than state the particular statutory interpretation which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.

(3) A third class of interpretative regulations are those which state general discretionary policies to be followed by the agency. For example, an agency given broad discretionary powers in respect to the granting of licenses may formulate a statement of the conditions which must be met in order to obtain a license. In many cases, agencies have thus worked out standards and policies, which in effect control the administrative decision in a wide variety of cases where the agencies have freedom of choice. These various alternatives do not reflect interpretations of a statute; rather, they represent extrastatutory policies.

Judicious use of the power to make interpretative rulings offers an opportunity to correct a woeful lack of adequate public information concerning both the procedure of administrative tribunals and the substance of administrative policies. Despite the flow of rules, regulations, press releases, and interpretative bulletins—which are issued in such abundance that a year's output of federal agencies' regulations may fill more pages than are required for the compilation of all federal statute law—lawyers and laymen alike are baffled by the difficulty of ascertaining from any official source, when confronted with the institution of agency proceedings, just what remedies are open to them, and what ruling the agency may be expected to make in the case. Inability to learn by what procedural rules the case will be heard, or by what process of decision the final determination will be made, breeds general dissatisfaction and leads to charges of unrestrained delegation of authority and star-chamber proceedings. The problem of public information is thus an important

one with the agencies, and it can best be solved by the careful preparation and publication of rules.

An agency of any size cannot very well function without rules of procedure, and it may be supposed that every agency has such rules, at least at a level of interoffice memoranda. But in too frequent cases, the only rules published and made generally available contain so little information as to the actual procedural steps, and the various alternative procedures which may be available, that a person having a case before the agency is at a loss as to how to proceed except upon seeking advice of a representative of the agency, and then because of the partisan position necessarily assumed by agencies in many matters, the person seeking information may entertain understandable doubts as to whether the advice he has received is entirely disinterested. It is for this reason that the Attorney General's Committee strongly urged ⁶ that each agency be required to make available, and to maintain current, statements describing both formal and informal procedures available in various types of cases, specifying among other things the officers and types of personnel, the various subdivisions of the agency, and the duties, functions, and general authority or jurisdiction of all divisions of the agency in each of the several types of cases handled.

Similar problems are presented in connection with administrative interpretations of the regulatory statutes administered by the agencies. It having become an accepted technique of statutory draftsmanship to establish legislative standards in broad, vague, and general terms, the office of interpretation and construction has become commensurately more important. Without it, those subject to the statutory regulation are at a loss to know what compliance will be deemed to require. For example, the term "employee" may under one statute

⁶ Administrative Procedure in Government Agencies, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 195. Sec. 3 of the Administrative Procedure Act of 1946 requires federal agencies to conform to most of these suggestions.

be interpreted to include and under another statute to exclude, those who by common-law tests are independent contractors.⁷ Only by the publication of interpretative statements can the public be advised in detail as to the requirements of the statute.

These first two functions of the administrative rule-making power, then, amount to little more than making available to all interested parties full information as to the methods of procedure and the standards of statutory interpretation which will be employed by the agency in making its decisions. The problem is relatively simple.

But greater difficulty is encountered in connection with a third function of administrative rules—i.e., enunciating administrative policies (as distinct from standards of legislative interpretation). In establishing these administrative policies (which, while perhaps in furtherance of a general legislative purpose, go quite beyond the realm of interpretation or construction and into the field of discretionary policy making) the agencies are ordinarily free to choose between the method of formulating a general policy in the form of regulations, and that of working out policy piecemeal by decisions in variant case situations.

In certain cases, the latter method serves important administrative purposes. In a new field, such as television, adjudication of a variety of cases may serve to clarify problems and avoid errors that might result from premature publication of a general rule. Further, the problems of policy presented to some agencies are too complex to permit of codification by quasi-legislation. For example, it would obviously be quite infeasible to provide by regulation under what circumstances

⁷ In *Walling v. American Needlecrafts* (C.C.A. 6th 1943), 139 F. (2d) 60, certain homeworkers were held to be employees under the Fair Labor Standards Act; but similar homeworkers were held not to be employees for purposes of Social Security taxes in *Glenn v. Beard* (C.C.A. 6th 1944), 141 F. (2d) 376; and *cf.*, *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

a new utility operation would be licensed as being justified by the public interest, convenience, or necessity.

In some circumstances, perhaps, there are justifiable reasons for keeping confidential the criteria of decision. In cases where the agency regulates conduct in a field where temptation is offered to stray from highest moral standards (the regulation of liquor traffic might be mentioned) it has been suggested that announcement of the furthestmost reaches of permissible conduct would encourage some licensees to go right to that boundary line where the legal merges with the illegal.

But ordinarily, after having attained experience in its field, an agency is able to reach rather definite conclusions on most policy matters. Sometimes, an agency's arrival at this stage is followed by the enactment of regulations. The National War Labor Board, for example, in the early days of its World War II creation, at first decided applications for wage increases on an *ad hoc* basis. As some experience was gained, general regulations and statements of policies were enunciated; and as these were tested in the course of daily case decisions, various amendments and refinements were devised, until after some two years' experience it became fairly possible to ascertain from the agency's rules what its ruling would be in various situations.

The difficulty arises in cases where the agency does not choose to promulgate its fully developed internal criteria as regulations. Then, those dealing with the agency are in the unenviable position of being unable to ascertain the basis on which cases will be decided. The practical difficulties of attempting to bring one's course of conduct into compliance with an administrative policy which must be complied with, but the terms of which can be only guessed, scarcely require elaboration.⁸ Lack of knowledge of these criteria, further, in-

⁸ Handler, "Unfair Competition," 21 *IA. L. REV.* 175, 259 (1936); Maslow, "Poor Food and Drug Laws," 2 *NAT. LAW. GUILD Q.* 25 (1939).

terferes with the settlement of controversies in the preliminary, informal stage and thus often makes necessary the conduct of formal judicial proceedings which might otherwise be avoided. There are still broader reasons for the promulgation of such internal administrative policies. If cases are determined on the basis of such a criterion, rather than by the exercise of judgment in the particular case, both the parties and reviewing court are in fairness and justice entitled to know it.⁹

Aside from statutory provision, such as Section 3 of the Federal Administrative Procedure Act of 1946, there is little authority to require the promulgation into interpretative rules of such internal criteria.¹⁰ But the cause of good administration is substantially furthered by the exercise of this function of the administrative rule-making powers.

3. Hearings in Connection with the Adoption of Rules

While the legal requirements as to giving notice and conducting hearings precedent to the promulgation of rules¹¹ are rather attenuated, save for specific requirements of occasional state statutes and the general requirement imposed on federal agencies by Section 4 of the Administrative Procedure Act, yet the actual practice recognizes the practical need of utilizing this device. There is general recognition that good administration requires an agency to obtain and consider the comments of all interested parties as to the contents of proposed rules.

It is further clear, and generally conceded, that the type of hearing which should precede the administrative promulgation of rules is quite different in character and scope than

⁹ Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 296.

¹⁰ But see *Heitmeyer v. Federal Communications Commission* (App. D. C. 1937), 95 F. (2d) 91.

¹¹ Discussed *supra*, Ch. 4.

the hearings conducted by legislative committees. The administrative agency, starting where the legislature left off, is necessarily concerned with minutiae that the legislature could not take time to consider; and there is accordingly a need for painstaking and detailed investigation, and assembling of facts, going far beyond the general statements and arguments of policy which are characteristic of legislative hearings on pending bills. Further, the fact that the administrative agency's personnel does not comprise a democratically elected group representing the diverse viewpoints of their constituents, but is rather an unrepresentative special interest group, further emphasizes the necessity of hearings. It is only in this way that the agency can obtain the breadth of view necessary to the most successful conduct of its work.

There are thus two prime objectives in the information-gathering activities that precede the adoption of rules by administrative agencies. The first is to assure wise administrative action. The second is to make sure that those whose interests will be directly affected by the rule are satisfied that their interests have received fair and adequate consideration. Granting opportunity to those primarily affected to participate in the rule-making process not only satisfies them of the fairness of the procedure, but is effective also to enlist their acquiescence and co-operation in carrying out the requirements of the rule as finally adopted.¹² Accordingly, the hearing procedures should be so devised as best to attain these two objectives.

The first step in the procedure should be, ideally, publication of notice of an intent to make a rule. This serves fair notice on those concerned, and gives them an opportunity to adjust themselves to meet new requirements. The giving of such notice, too, is frequently productive of suggestions which

¹² Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 297.

may be of value to the agency in the second step of the procedure, which is investigation.

Factual investigation by the agency, preparatory to the promulgation of a rule, is of all-embracing importance. Public hearings are not always productive of precise factual data; yet it is the duty of the agency to make sure that it has obtained full and accurate factual information as to all relevant factors. Only by careful investigation can this be achieved. Such investigation, further, often serves to formulate issues for further discussion.

After the information has been assembled, it is the best practice, wherever feasible, for the agency to publish a tentative draft of the proposed rule. This serves a fair warning of what may be expected, and serves to facilitate the execution of the next and crucial part of the task—exposing the proposal to the test of public criticism and comment, before the rule is formally put into effect.

The mechanics of this final step—obtaining participation in the actual rule-making process of those whose interests will be directly affected—must of course vary in different types of situations. In some cases, informal conferences may serve this purpose better than a formal public hearing. This may well be true where the group affected is small (as in the case of regulations of the Federal Reserve Board) or where the regulation involves primarily technical questions (as in the case of rules of the Federal Communications Commission relating to broadcasting, or the accounting rules promulgated by the Securities and Exchange Commission).¹³ The Administrative Procedure Act of 1946, Section 4, requires federal agencies to afford interested parties an opportunity to participate in the rule-making procedure at least to the extent of submitting written data, and further requires that there be

¹³ Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 64-68.

opportunity for oral participation where some other statute requires a hearing. An interesting device, sometimes employed very effectively by agencies operating in fields where broad arguments of social and economic policy are tempered by more or less technical considerations—as in the field of unemployment insurance—is that of an unofficial tripartite advisory committee. Composed so as to give equal representation to conflicting points of view—often industry, labor, and the public—it is the function of such a committee to work out technically acceptable solutions to problems complicated both by administrative difficulties and by emotional clashes between competing special interest groups. In devising rules by which it shall be determined, for example, whether an unemployed worker is “available for work,” or whether an employee injured at his job is “totally incapacitated,” such tripartite committees can frequently devise a formula which will be reasonably satisfactory to all affected groups and will at the same time be administratively feasible.

But even in cases where there is no unalterable need for a public hearing, it is still advisable to supplement informal conferences by such a hearing, in order to make sure that no one can justifiably complain that his special interests were overlooked. At some stage of the proceedings, therefore, a public hearing should be held in almost every type of case.¹⁴

The scope of such hearing, and the general manner of its conduct, is again a problem for the wise discretion of the individual agency. The practices of the federal agencies are discussed in the report of the Attorney General's Committee.¹⁵ Where the regulation involves many broad problems, incapable of reduction to precise issues, a general informatory hearing is perhaps necessary (as if, for example, the question

¹⁴ Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 301 *et seq.*

¹⁵ “Administrative Procedure in Government Agencies,” Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 111 *et seq.*

is whether a utility commission should extend its field of regulatory activity to fleets of trucks operated by private carriers, and if so, how many aspects of their operations should be regulated—whether the rules should extend only to safety requirements or whether they should cover also such matters as maximum hours, overtime pay, minimum wages, et cetera). In such cases, it is ordinarily impractical to do more than to give all interested parties an opportunity to present their arguments. On the other hand, where the affected group is small, or where the issues involved can be formulated in fairly definite terms, much more satisfactory results can be obtained by utilization of adversary hearings, where witnesses are examined and cross-examined, and opportunity is given for the filing of formal briefs and full oral argument. A prime example is that of public utility rate hearings, where a quasi-legislative function is carried out by quasi-judicial procedure.

Another significant method of assuring effective public participation in rule-making procedures is to afford interested parties a statutory right to petition the agency for the adoption of a proposed rule, or the amendment of an existing rule. Section 4 of the Administrative Procedure Act of 1946 provides this as to the federal agencies.

Employment of these successive steps—first, announcement of the intent to formulate a rule; second, investigation; third, issuance in draft form of a proposed rule; fourth, exposing the proposed rule to the test of public examination and criticism—has been demonstrated by experience to be in most cases the best method by which to insure wise administrative action, even though not a matter of legal requirement, except as specific statutory provisions may so enact. There are cases, to be sure, where some of the steps may be omitted, as in the adoption of purely procedural regulations, where an agency

can sometimes proceed with safety on the basis of its own knowledge. But departures from this model procedure should not be sanctioned unless the desirability of the departure is clear.

4. The Necessity of Findings

(a) *In absence of specific statutory provision.* Where the power of an administrative agency to make a certain type of order depends on the existence of particular facts, it is obviously necessary to determine that such facts exist before the order can properly be made. Initially and primarily, it is the duty of the agency to make its own finding and determination as to the existence of the requisite factual situation, before it takes any affirmative action.

As a matter of orderly procedure, it is obviously the preferable practice for the agency to make a formal determination and finding as to the existence of such facts, in support of its order. This has been laid down as a positive requirement in several cases wherein an administrative order or regulation has been held invalid because of the failure of the agency to make the necessary findings.¹⁶

Conversely, where the controlling statute does not condition the agency's regulatory power upon the existence of certain facts, there is no necessity for the agency to make any explanatory findings or declarations of policy in connection with the promulgation of its orders.¹⁷

Where the agency is authorized to make regulations of a generally applicable character, it is somewhat uncommon for

¹⁶ *Wichita Railroad & Light Co. v. Public Utilities Commission of State of Kansas*, 260 U. S. 48, 43 S. Ct. 51 (1922); *Mahler v. Eby*, 264 U. S. 32, 44 S. Ct. 283 (1924); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935); *United States v. Baltimore & O. R. Co.*, 293 U. S. 454, 55 S. Ct. 268 (1935). See annotation in 146 A. L. R. 209.

¹⁷ *Cf.*, *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 56 S. Ct. 159 (1935).

the legislature to condition the exercise of the power on the existence of particular facts. This requirement, as pointed out in the last-cited case, is more often found where the contemplated administrative order is directed primarily against a particular party or group. It is, therefore, sometimes said that when an agency acts in a legislative capacity by making a rule, regulation, or order of general application, it need not make findings. But it would seem that the distinction is not primarily the nature of the order; rather, it is a question as to what the legislature has required.

The requirement that express findings be made in support of the order, in those cases where the legislature has conditioned the agency's power to issue an order upon the existence of specified conditions, has been criticized,¹⁸ and there is some suggestion that the doctrine requiring findings may in time be dropped as an unnecessary safeguard against hasty or ill-advised administrative action.¹⁹ Tending in this direction are cases which insist that the doctrine may not be applied technically, so as to require a finding on every conceivable relevant factor,²⁰ and cases which hold that the proper remedy (in cases where the agency has failed to make the required findings) is not to set the order aside, but rather to remand it to the administrative agency and give it an opportunity to perfect its record by making formal findings.²¹

(b) *Statutory requirements.* Court-imposed requirements as to the making of findings to support administrative orders and regulations are far less rigorous than the requirement

¹⁸ 61 A. B. A. REP. 720, 775 (1936).

¹⁹ *Twin City Milk Producers Ass'n v. McNutt* (C.C.A. 8th 1941), 122 F. (2d) 564.

²⁰ *Andree & Seedman, Inc., et al. v. Administrator of Wage and Hour Division of United States Department of Labor* (App. D. C. 1941), 122 F. (2d) 634.

²¹ *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C.C.A. 7th 1941), 120 F. (2d) 258; *Twin City Milk Producers Ass'n v. McNutt* (C.C.A. 8th 1941), 122 F. (2d) 564.

quite often imposed by legislatures,²² providing that the rules and regulations issued by the agency must be based on definite findings, which must in turn be supported by evidence taken at a formal hearing. In this type of case, the findings concern not only the existence of a general factual situation on which the agency's power is conditioned, but must further demonstrate in detail the reasonableness of the order or regulation. Such provisions, it seems clear, require extensive participation in the rule-making procedure by the private parties affected (because they must have full opportunity to present evidence, cross-examine witnesses, et cetera) and further require clear and close thinking on the part of the administrative draftsmen, thus tending to promote carefully drawn rules. If it is necessary to have such statutory provisions to gain these results, the practice of putting such requirements into the statutes should be continued. But if, on the other hand, free public participation and careful, exacting administrative draftsmanship can be achieved without these requirements, there is but little need for their continuance. Such statutory requirements are burdensome, in requiring the application of the procedures of a judicial trial to administrative rule making. The effectiveness of these procedures is inevitably limited by distinctive characteristics of rule-making activities, where the issues are complex, numerous, and not clearly defined; where the interests of the parties concerned are so diverse as to be frequently incapable of alignment into classes; and where the final outcome involves essentially not a determination as to fact and law, but primarily a judgment as to the future consequences of proposed rules.

²² For example, Food, Drug and Cosmetic Act, 52 Stat. 1055, 21 U.S.C. § 371 (e); Agricultural Marketing Agreements Act, 50 Stat. 246, 7 U.S.C. § 608 (c); Bituminous Coal Act, 50 Stat. 75, 15 U.S.C. § 829; Fair Labor Standards Act, 52 Stat. 1064, 29 U.S.C. § 208.

5. Drafting of Rules

While it is not unusual for administrative agencies to consult with representatives of the parties primarily affected as to the actual drafting of the administrative rules (and this is frequently done by submitting for comment and criticism a tentative draft of a proposed rule), yet the actual formulation of the text of the rule is ultimately the sole responsibility of the agency.

Because of the greater necessity for close attention to minute detail, drafting of administrative rules and regulations presents difficulties which can often be avoided in legislative draftsmanship. There is a greater danger that some obscure but nonetheless important contingency will not be provided for; and to meet this danger, a practice has evolved of providing a deferred effective date. This gives those affected a grace period in which to adjust their affairs to meet the new requirements, and also gives an important opportunity to correct any oversights which may have occurred. Legislation providing for the deferred effectiveness of regulations having statutory effect (with appropriate exceptions to prevent undue delay in emergency situations) is to be recommended.²³

A somewhat more drastic provision which is occasionally encountered requires that the administrative regulations be laid before the legislature for its approval or disapproval. Several variants of this policy are found. It may be simply provided that the regulations be laid before the legislature for its information. As to this requirement, there is little room

²³ See "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 115. Sec. 4 of the Administrative Procedure Act of 1946 requires (in the case of federal agencies) that substantive rules (with some stated exceptions) must be published at least thirty days prior to the effective date, except "as otherwise provided by the agency upon good cause found and published with the rule."

for objection, although there is room for considerable scepticism as to the effectiveness of such procedure in encouraging legislative examination of the administrative activity; a more effective way of accomplishing this result would be to require the annual submission of detailed reports as to the agency's activities. Sometimes it is provided that the regulation shall be noticed for legislative review and possible amendment or annulment within a specified period. While of course the legislature always has this power, nevertheless such provision does have a very real effect, in that it brings the regulations before the legislative body, and facilitates the making of an attack by interested parties on the challenged regulation. A third type of proviso, far more stringent than the others, decrees that the regulation shall not remain in effect beyond a limited period unless within such period it is approved and ratified by the legislature. Where this requirement is adopted, no more than legislative procrastination is required to abolish a rule which might have met with overwhelming legislative approval.

While not unknown in American practice,²⁴ the theory of laying administrative regulations before the legislature has been far more popular in England than in this country. The English experience, particularly since the adoption of the Statutory Instruments Act of 1946,^{24a} has demonstrated the great practical effectiveness of this simple device.²⁵

²⁴ E.g., the Reorganization Act, 53 Stat. 562, 5 U.S.C. §§ 133 c-d.

^{24a} 9 & 10 Geo. VI, c. 36; 39 Hallis. Stat. 783.

²⁵ Under the English practice, a Statutory Instruments Committee in the House of Commons (or its counterpart in the House of Lords) examines administrative regulations to determine whether the special attention of Parliament should be directed thereto on the grounds (among others) that the regulation is not open to challenge in the courts, or appears to make unusual or unexpected use of the powers conferred, or purports to have unauthorized retrospective effect. The accomplishments of this Committee are discussed in a provocative article by J. A. G. Griffith, "Delegated Legislation—Some Recent Developments," 12 MODERN LAW REV. 297 (1949).

6. Publication of Rules

The unavailability of administrative rules and regulations (many of which have, to a substantial degree, the force and effect of laws), has long been a source of practical difficulty. As early as 1920, John A. Fairlie wrote an article²⁶ urging the adoption of a uniform system for publication of rules, regulations, and orders adopted by executive agencies in the federal government. His arguments attracted the attention of other writers, and the subject received growing attention in periodical literature during the ensuing fifteen years.²⁷ Attention was directed to the contrast between the situation in the United States, where it was often impossible to ascertain the provisions of a governing regulation except by discovery of the original thereof within the offices of the issuing agency,²⁸ and in England, where rather comprehensive requirements for advance publication of administrative rules had been in effect since 1893.²⁹

However, neither the growing literature on the subject nor the attention directed to the English situation led Congress to take any action. As late as 1933, the President rejected a suggestion by a group of government officials that a daily publication be instituted to print administrative rules, orders, and regulations.³⁰ The following year, however, official in-

²⁶ "Administrative Legislation," 18 MICH. L. REV. 181 (1920).

²⁷ See James H. Ronald, "Publication of Federal Administrative Legislation," 7 GEO. WASH. L. REV. 52 (1938) for a comprehensive survey of the studies which have been made. An outstanding article is that of Erwin N. Griswold "Government in Ignorance of Law—A Plea for Better Publication of Executive Legislation," 48 HARV. L. REV. 198 (1934).

²⁸ Erwin N. Griswold testified, for example, that in 1930 he found that certain Treasury Department bond regulations were available only in typed form in the Treasury Department's Bond Division. Hearings on H. R. 11337, 74th Congress, before subcommittee II of House Judiciary Committee, Feb. 21, 1936.

²⁹ See Cecil T. Carr, DELEGATED LEGISLATION (1921), 36; The English statute is 56 & 57 Vict., c. 66.

³⁰ Ronald, "Publication of Federal Administrative Legislation," 7 GEO. WASH. L. REV. 52, 65 (1938).

terest in the problem became at last aroused when it was discovered that a hapless individual had been arrested, indicted, and held in jail for asserted violation of an administrative regulation which had in fact (inadvertently, it appears, and without the knowledge of the prosecuting officials) been repealed prior to his arrest. The case involved a gentleman named Smith, who had been arrested for alleged violation of one paragraph of the N.I.R.A. Petroleum Code. The government appealed from an adverse decision in the lower courts, and shortly before the case was scheduled for argument in the Supreme Court, the Justice Department discovered that the paragraph in question had been dropped from the Code. The Justice Department moved, successfully, to dismiss the appeal.³¹ Upon the argument of another case at the next term of court, involving the same Code,³² the situation was referred to in the oral arguments, and Justice Brandeis extensively interrogated government counsel. Considerable newspaper publicity resulted, and in the same year the Federal Register Act was passed.³³

The Federal Register Act, providing for the publication of presidential proclamations and such "classes of documents as the President shall determine from time to time to have general applicability and legal effect" has resulted in making widely available the rules and regulations issued by federal agencies. It has not, to be sure, eliminated the difficulty of locating the particular regulation with which one may be concerned, but at least it is now possible to make the search in any well-equipped library.³⁴

³¹ *United States v. Smith*, 293 U. S. 633, 55 S. Ct. 345 (1934).

³² *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935).

³³ Act of July 26, 1935; 49 Stat. 500, 44 U.S.C. § 301.

³⁴ A very useful article, describing the most convenient methods of utilizing the wealth of administrative legislation printed in the *Federal Register*, is Wigmore, "The Federal Register and Code of Federal Regulations: How to Use Them—If You Have Them," 29 A. B. A. J. 10 (1943). In similar vein is Lavery, "The Federal Register—Its Present Day Meaning for the Practicing

The problem of locating the applicable regulations is facilitated by the publication of the Code of Federal Regulations, originally authorized by Section 11 of the Federal Register Act, and published periodically since 1939. In this publication, federal administrative regulations of current legal effect are codified under fifty titles, each of which is in turn divided into several parts.

Publication of the regulations of state agencies presents additional problems because in many states the promulgation of new regulations is comparatively infrequent, and the volume of new rules scarcely justifies frequent periodical publication. Provisions are found in several states for the publication of a state code, embracing all currently effective rules and regulations of state agencies; and in a number of instances, various expedients are adopted to make readily available, at quarterly or semiannual intervals, supplemental information.⁸⁵

Lawyer," 7 F. R. D. 625 (1948). Other articles discussing the details of the act are found in 49 HARV. L. REV. 1209 (1936); 4 GEO. WASH. L. REV. 268 (1936); 31 ILL. L. REV. 357 (1936).

⁸⁵ *California*, Government Code, §§ 11371, 11380, 11409; *Connecticut*, Public Act No. 67, 1945; *Indiana*, Annotated Statutes, § 60-1505 (Burns Supp. 1946); *Michigan*, Annotated Statutes, §§ 3.560 (7)-(18); *Minnesota*, Annotated Statutes, §§ 15.045-7; *North Dakota*, Revised Code, §§ 28-3203-3; *Ohio*, Gen. Code Ann. §§ 154-65; *Wisconsin*, Statutes, §§ 35.93, 227.03. See N. L. Nathanson, "Recent Statutory Developments in State Administrative Law," 33 IA. L. REV. 252 (1948).

CHAPTER 14

Legal Effect of Rules

1. The Problem

SINCE the bulk of an administrative agency's work is normally carried on within the framework of a more or less elaborate set of agency-created rules and regulations, questions frequently arise (both within the agency itself and in connection with judicial review of the agency's proceedings) as to the significance and legal effect of such rules and regulations. Such issues are raised in a variety of ways. The question may be as to the effect of a party's refusal to comply with a rule. Or it may, conversely, concern the results of voluntary compliance with an invalid rule. The inquiry may be as to the validity of a rule, as to the consequences of disregard of an admittedly valid rule, or as to the right of an agency to change its rules.

The legal effect of such rules and regulations depends on a variety of factors. The purpose of the rule, the authority on which it was issued, the reasonableness of a proposed application or nonapplication of the rule, and other similar factors, are all taken into consideration by the courts. But these factors are seldom isolated in judicial opinions, and many seemingly contradictory dicta may be found. Some care is required to determine what constitute the controlling elements of decision in any particular situation.

2. Status of Substantive Regulations as Laws

Perhaps the most frequently recurring question is whether or not a particular regulation, purporting to lay down a substantive requirement of conduct, has the force of law. In brief, it might be answered that the regulation has such effect

if it is upheld by the courts; but this answer, of course, merely avoids the real question: On what basis will the courts determine whether to uphold the regulation? Is it to be approached with the deference accorded legislation, or is it to be treated merely as a partisan interpretation of the legislature's mandate—an interpretation which the courts, in the exercise of their judicial prerogatives, are free to disregard?

While the cases appear to indicate some conflict of judicial thinking on this problem, most of the seeming inconsistencies of statement can be reconciled by making a distinction between the so-called legislative regulations and what may be termed interpretative regulations.¹ Thus, it is said that a legislative regulation has the force of law, while an interpretative regulation has no such force unless and until it is accepted by the courts as a correct interpretation of the statute.

However, this distinction oversimplifies the problem. It is really true of both types of regulations that they have legal effect in determining the rights of parties, unless they are invalidated by the courts. In the case of legislative regulations, the likelihood that the courts will set them aside is comparatively remote; and on the other hand, the courts not infrequently set aside regulations which are merely interpretative. The difference is based not on any inherent distinction between the two types of regulations, but is rather empiric.

¹ The courts do not often emphasize this distinction. It has been carefully developed, with some variety of phraseology, by several students. E.g., F. P. Lee, "Legislative and Interpretative Regulations," 29 GEO. L. J. 1 (1940); Fred T. Field, "The Legal Force and Effect of Treasury Interpretation," THE FEDERAL INCOME TAX (1921) 91; J. P. Comer, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES, Chs. II, V (1927); Alvord, "Treasury Regulations and the Wilshire Oil Case," 40 COL. L. REV. 252 (1940); Surrey, "The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes," 88 U. PA. L. REV. 556 (1940). For a general discussion of how regulations are interpreted by the Courts, see Newman, "How Courts Interpret Regulations," 35 CAL. L. REV. 509 (1947).

A legislative rule is one promulgated pursuant to a specific delegatory provision in the governing statute. The statute sets the general standard (always necessary in the case of delegation of legislative authority), authorizes the agency to determine the actual content of the law by regulation, and provides the sanctions which will result from nonconformance with the rule—or (what is really the same thing) sets a general rule and authorizes the agency to provide by appropriate regulations for exceptions to the rule.

Where the legislature has clearly delegated such authority, the only issues that can normally be raised as to the validity of the rule concern the questions whether it is *ultra vires* as exceeding the scope of the authority delegated, and whether it is violative of the due process guarantees. These issues are not often presented; and accordingly such regulations are normally treated on the same basis as legislative acts.

In some cases, it is clear that the legislature has authorized an agency to promulgate legislative rules of this type. Typical examples would be rate orders of the Interstate Commerce Commission, or regulations by the Department of Labor defining certain exemptions under the Fair Labor Standards Act.² Occasionally the statute specifically declares that the regulations shall have the force and effect of law.³ Sometimes, the statute provides penalties that will result from noncompliance with the regulations.⁴ Or similarly, the statute may make noncompliance with the regulations a

² Sec. 13 (a) provides in part that there shall be exempt from the overtime provisions of the law "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (*as such terms are defined and delimited by regulations of the Administrator*)." 29 U.S.C. §§ 201, 213.

³ E.g., Agricultural Adjustment Act, 7 U.S.C. § 610.

⁴ E.g., Naval Stores Act, 7 U.S.C. § 96; Cotton Standards Act of 1923, 7 U.S.C. § 60; Grain Standards Act of 1916, 7 U.S.C. § 85; Bituminous Coal Act, 15 U.S.C. § 830.

ground for revocation of permits or licenses.⁵ Conversely, the statute may authorize the making of regulations which will relax a statutory rule otherwise applicable.⁶ In all these cases, it is clear that the regulations issued pursuant to such express authority have, unless *ultra vires*, the same status substantially as a statute.

But the legislative intent is not always so clear. For example, in many cases the only express delegation of power to make regulations is the common bestowal of authority to make "such regulations as may be necessary or proper to carry out the provisions of this Act"—to adopt language which is approximated in many statutes. In many instances, regulations issued under such authority are not legislative. Normally, regulations issued under such authority relate merely to procedural details, having no significant substantive effect. If cast in the terms of substantive requirements, they must as a rule stand merely as the agency's interpretation of the meaning of statutory language, and cannot normally be accorded the status of the legislative type of regulation above discussed.⁷ In other cases, there is room for argument whether the intent of the statute is that sanctions shall attach only to violation of the statute, or as well to any violation of regulations issued under the statute.

In those cases where it does not clearly appear that power to promulgate a legislative regulation has been delegated, the courts usually treat the regulation on the same basis as in cases where there can be no doubt but that the regulation

⁵ E.g., Federal Communications Act of 1934, 47 U.S.C. § 151.

⁶ E.g., § 3 (b) of the Securities Act, 15 U.S.C. § 77 (c).

⁷ The distinction between legislative and interpretative regulations has not been crystallized in the cases; and the courts sometimes treat as legislative regulations what appear to be merely interpretative regulations—e.g., *Helvering, Commissioner of Internal Revenue v. Wilshire Oil Co., Inc.*, 308 U. S. 90, 60 S. Ct. 18 (1939). See tenBroek, "Interpretative Administrative Action and the Lawmaker's Will," 20 OREGON L. REV. 206 (1941); and comment, 56 HARV. L. REV. 100 (1942).

is merely interpretative. It can therefore fairly be said that unless the governing statute plainly gives legislative effect to the regulations, they shall be treated merely as interpretative.

While the term is somewhat deprecatory in its implications, it should not be taken as an indication that an interpretative regulation is without any significant legal effect. The vast majority of the rules and regulations issued by administrative agencies fall into this category; and their effectiveness is one of the greatest sources of administrative powers.

The principle has been stated frequently that such regulations are entitled to great weight as presumptively correct interpretations of the statute, and the tendency of the courts is to accord them ever-increasing respect. But they are not blindly accepted, and their persuasiveness or putative legal effect varies in accordance with several factors. It is said that such regulations may be considered only where the statute is ambiguous.⁸ Granting the ambiguity of the statute, the weight accorded the interpretative regulation depends in part on circumstantial indicia of trustworthiness. If the regulation is new,⁹ does not represent long administrative experience,¹⁰ and has not been generally acquiesced in,¹¹ it is accorded but little more weight than is granted to a well-written brief. On the other hand, where it appears that the agency's construction of a statute as exemplified in an interpretative rule or regulation represents expert knowledge

⁸ *Biddle v. Commissioner of Internal Revenue*, 302 U. S. 573, 58 S. Ct. 379 (1938); *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 51 S. Ct. 297 (1931); *Koshland v. Helvering, Commissioner of Internal Revenue*, 298 U. S. 441, 56 S. Ct. 767 (1936).

⁹ *Walling v. Swift & Co. (C.C.A. 7th 1942)*, 131 F. (2d) 249; *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 52 S. Ct. 275 (1932).

¹⁰ *United States v. Pleasants*, 305 U. S. 357, 59 S. Ct. 281 (1939); *Fleming v. A. H. Belo Corp. (C.C.A. 5th 1941)*, 121 F. (2d) 207.

¹¹ *United States v. Erie R. Co.*, 236 U. S. 259, 35 S. Ct. 396 (1915).

as to administrative needs and convenience,¹² and where it appears that the rule is of long standing and has received the acquiescence of interested persons,¹³ then, so long as the administrative interpretation is reasonable, it is given great and often controlling weight.¹⁴

There are sometimes found affirmative legislative indications of approval of the administrative construction—and this of course further inclines the courts to accept and enforce the regulation.¹⁵ In some cases, as in those last cited, such indication of legislative approval is realistic. In many other instances, decision is placed on the theory (which however fallacious logically, is a well-established legal fiction) that re-enactment of the statutory provision without change subsequent to the promulgation of the regulation indicates legislative approval of the regulation.¹⁶ But recognizing that legislative re-enactment is often accomplished without the existence of the regulation in question ever having been brought to the attention of the legislature, the courts do not hesitate to set aside an interpretative regulation deemed to be inconsistent with any reasonable interpretation of the statute, despite the re-enactment of the statute without change subsequent to the promulgation of the regulation.¹⁷

¹² *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 60 S. Ct. 51 (1939); *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 53 S. Ct. 42 (1932).

¹³ *United States v. Chicago, N. S. & M. R. Co.*, 288 U. S. 1, 53 S. Ct. 245 (1933); *Logan v. Davis*, 233 U. S. 613, 34 S. Ct. 685 (1914).

¹⁴ *Fawcett Machine Co. v. United States*, 282 U. S. 375, 51 S. Ct. 144 (1931); *Costanzo v. Tillinghast*, 287 U. S. 341, 53 S. Ct. 152 (1932).

¹⁵ *Alaska Steamship Co. v. United States*, 290 U. S. 256, 54 S. Ct. 159 (1933); *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 51 S. Ct. 510 (1931).

¹⁶ *Helvering, Commissioner of Internal Revenue v. Winmill*, 305 U. S. 79, 59 S. Ct. 45 (1938); *Hartley, Executor v. Commissioner of Internal Revenue*, 295 U. S. 216, 55 S. Ct. 756 (1935).

¹⁷ *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U. S. 39, 60 S. Ct. 51 (1939); compare *Helvering, Commissioner of Internal Revenue v. Wilshire Oil Co.*, 308 U. S. 90, 60 S. Ct. 18 (1939); and *Helvering, Commissioner of Internal Revenue v. Hallock*, 309 U. S. 106, 60 S. Ct. 444 (1940).

The doctrine is fundamentally one of convenience and must sometimes be disregarded—as where a complaisant legislature had thus “ratified” one interpretation on several occasions, and then without hesitation proceeded to “ratify” similarly a new and different interpretation, by again re-enacting the statute without change after a change in the administrative interpretation.¹⁸

In the case of interpretative regulations, then (and in this may be included all regulations other than those wherein the legislature has plainly delegated authority to prescribe legislative regulations, subject to a stated standard, and the violation of which is made subject to definite statutory sanctions), the substantive requirements of the regulation are considered as interpretations of the substantive requirements of the statute. So long as they represent an interpretation or construction of the statute which is acceptable to the courts, they have the force of law. But they lose all force and effect, *ab initio*, if held to be an incorrect interpretation, and are subject to judicial scrutiny on more issues than are true legislative regulations. Being vulnerable to attack on more grounds than are legislative regulations, interpretative regulations are more likely to be set aside than are those of the former type. This, essentially, is the difference in legal effect between legislative and interpretative regulations setting forth substantive requirements.

3. Status of Procedural Regulations

There is, of course, no question as to the power of an administrative agency to make rules of procedure to govern the normal conduct of the agency's tasks, subject always to

¹⁸ *Helvering, Commissioner of Internal Revenue v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 59 S. Ct. 423 (1939).

the condition that such rules cannot limit, extend, or otherwise control the agency's statutory jurisdiction and powers.¹⁹

The question as to the legal effect of such rules is not often raised. They are designed to control the process of adjudication within the agency; and parties to the proceedings within the agency ordinarily conform to the requirements of such rules for the obvious reason that the prospects of obtaining a desired result within the agency are jeopardized by nonconformance with its procedural rules. The rules are not ordinarily burdensome, but typically are loosely drawn; and substantial conformity therewith is all that is required.

While it is frequently said that rules of practice, pleading, procedure, and evidence promulgated by an administrative agency under proper legal authorization have the force and effect of law,²⁰ this is true in a limited degree only. Such regulations do not ordinarily affect or attempt to control the substantive rights of the parties; and indeed for this very reason are not ordinarily subject to judicial review.²¹ Noncompliance with such procedural regulations does not ordinarily constitute a violation of the controlling statute.²² While a party might in some cases be denied relief by the agency solely because of his disregard of its procedural rules, ordinarily substantial compliance therewith is all that is insisted upon. It would ill become administrative agencies, created in part for the purpose of avoiding the technicalities

¹⁹ *Board of Tax Appeals v. United States ex rel. Shults Bread Co.* (App. D. C. 1929), 37 F. (2d) 442; *Weaver v. Blair* (C.C.A. 3d 1927), 19 F. (2d) 16.

²⁰ See *Maryland Casualty Co. v. United States*, 251 U. S. 342, 349, 40 S. Ct. 155 (1920); *Red River Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 98 F. (2d) 282.

²¹ *Mallory Coal Co. v. National Bituminous Coal Commission* (App. D. C. 1938), 99 F. (2d) 399; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 58 S. Ct. 963 (1938).

²² *Chicago, I. & L. Ry. Co. v. International Milling Co.* (C.C.A. 8th 1930), 43 F. (2d) 93; *United States v. Eaton*, 144 U. S. 677, 12 S. Ct. 764 (1892).

of court procedure, to insist on any rigid formalities in their own practice; and it would seem that any overly strict insistence on procedural niceties which operated to deprive a party of a full and fair hearing would not be permitted, but could be corrected by application to the courts.

4. Criminal Penalties for Violation of Rules

The reluctance of the courts to permit the delegation of any extensive responsibilities to administrative agencies in the field of criminal law, has led to the imposition of stringent restrictions on the power of administrative agencies to promulgate regulations whose violation carries criminal sanctions.

While an agency may be empowered, in cases where a plain need for such delegation exists, to prescribe by regulation the particular acts which will constitute violations of a generally phrased statute that creates the crime and fixes the penalty,²³ agencies have not generally been permitted to adopt rules creating crimes or fixing penalties.²⁴

The reluctance of the courts to grant legal status to administrative rules carrying criminal sanctions is exemplified by the cases denying legal effect to traffic rules, governing the use of public streets, when prescribed by an administrative agency rather than by a municipal governing body.²⁵ This extreme view is not universally shared,²⁶ and it is diffi-

²³ *Yakus v. United States*, 321 U. S. 414, 64 S. Ct. 660 (1944); *United States v. Grimaud*, 220 U. S. 506, 31 S. Ct. 480 (1911); *In re Kollock*, 165 U. S. 526, 17 S. Ct. 444 (1897); *Musgrove v. Parker*, 84 N. H. 550, 153 Atl. 320 (1931); *Howard v. State*, 154 Ark. 430, 242 S. W. 818 (1922); *People v. Soule*, 238 Mich. 130, 213 N. W. 195 (1927).

²⁴ *United States v. Eaton*, 144 U. S. 677, 12 S. Ct. 764 (1892); *United States v. Maid* (D. C. Cal. 1902), 116 Fed. 650; *People v. Grant*, 242 App. Div. 310, 275 N. Y. S. 74 (1934).

²⁵ E.g., *City of Shreveport v. Herndon*, 159 La. 113, 105 So. 244 (1925); *Goodlove v. Logan*, 217 Iowa 98, 251 N. W. 39 (1933).

²⁶ See *Smallwood v. District of Columbia* (App. D. C. 1927), 17 F. (2d) 210; *Hamann v. Lawrence*, 354 Ill. 197, 188 N. E. 333 (1933).

cult to explain on logical grounds the reason for denying legal effectiveness to administrative rules carrying criminal penalties, although similar rules carrying civil penalties may be sustained.²⁷ The explanation must lie in an inherent conviction on the part of the courts that it is unwise to grant broad powers over civil liberties to agency officials who are subject to political pressures and are immune from the direct control of the electorate.

Disregard of an administrative regulation that carries penal sanctions may involve consequences of civil liability.²⁸ Similarly, a contract made in contravention of such a criminally-sanctioned administrative rule may be unenforceable as against public policy.²⁹

5. Effect of Reliance on Regulations and Problems of Retroactive Application

If a person challenges the validity of a regulation—either on the grounds that a legislative regulation is *ultra vires* or that an interpretative regulation is based on an incorrect interpretation of the statute—he is not without remedies to obtain a judicial determination of the correctness of his position. But it is not the ordinary case where a person affected by a regulation will choose to pursue this course. As to the vast majority of persons affected by a regulation, common prudence will require that he conform to the requirements of the regulation. If he does so, and the regulation is later held invalid, or is subsequently changed by the administrative agency, then what is his position?

If the regulation on which he relied is held invalid, it would seem he is in substantially the same position as one

²⁷ E.g., *Southern Ry. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665 (1909).

²⁸ See Clarence Morris, "The Relation of Criminal Statutes to Tort Liability," 46 HARV. L. REV. 453 (1933).

²⁹ See Walter Gellhorn, "Contracts and Public Policy," 35 COL. L. REV. 679, 696 (1935).

relying on an unconstitutional statute, or an erroneous opinion of counsel.

If the regulation is changed, his position is but little better.

If it is a legislative regulation, it is normally competent for the agency to amend its regulation, just as it is proper for a legislature to amend a statute; and there is normally nothing to prevent the amended regulation being applied in situations where it has retroactive effects. Ordinarily, administrative discretion is exercised in favor of preventing any harsh results from such retroactive application; and sometimes the statute makes particular provisions to this end. Occasionally, an agency is deemed to be estopped from applying retroactively an amended regulation or legislative determination.³⁰ But unless protection is provided in one of these particular methods, an individual who acted in reliance on the regulation may be substantially prejudiced by an amendment thereto.

When the regulation is interpretative, there is again no particular ground for denying the agency the power to change its interpretation. The doctrine of legislative "ratification" through re-enactment without change is not pressed to the logical extreme of concluding that such re-enactment freezes the interpretation, which becomes thereby a part of the law and incapable of change by the administrative agency. Agencies have on occasion taken the position that a new interpretative regulation, rather than the superseded one on which the individual relied, should be applied retroactively to a closed transaction.³¹

³⁰ *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 52 S. Ct. 183 (1932).

³¹ *Cf.*, *Lang v. Commissioner of Internal Revenue*, 304 U. S. 264, 58 S. Ct. 880 (1938); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U. S. 129, 56 S. Ct. 397 (1936).

While the courts have indicated disapproval of the retroactive application of regulations,³² there is but scant authority for denying the agency power to insist on a retroactive application. In *Helvering v. R. J. Reynolds Tobacco Co.*³³ it was held that after an interpretative regulation had been "ratified" by legislative re-enactment, and was otherwise valid, a new and different interpretative regulation could not be retroactively applied to the prejudice of an individual who had relied on the former interpretation. Broad extension of this principle would seem desirable.

The legislatures have in some measure met the situation. In several federal statutes, for example, protection is specifically provided for persons relying on the regulations of an agency, even though such regulations be later superseded or invalidated.³⁴

6. Agency Disregard for or Suspension of Rules

Questions arising in connection with the disregard by administrative agencies of their self-imposed rules³⁵ are no more than another manifestation of the ever-present problem of reaching a fair and workable compromise between the administrator's demand for extreme fluidity (permitting expeditious disposal of the agency's business) and the respondent's demand for static regularity (permitting him to ascertain in advance of administrative determination what his rights are and how they can be asserted). The administrator would be glad to have the privilege of refusing to follow a rule whenever, in the interest of achieving a particular result, it would be convenient to disregard it. Opposing counsel

³² *Miller v. United States*, 294 U. S. 435, 55 S. Ct. 440 (1935); *United States v. Davis*, 132 U. S. 334, 10 S. Ct. 105 (1889).

³³ 306 U. S. 110, 59 S. Ct. 423 (1939).

³⁴ E.g., Emergency Price Control Act of 1942, 56 Stat. 23; 50 U.S.C. App. § 901; Securities and Exchange Act of 1934, 48 Stat. 908; 15 U.S.C. § 78; Portal-to-Portal Act of 1947, 61 Stat. 84, Ch. 52; 29 U.S.C. Supp. I, § 251.

³⁵ Related questions are discussed *supra*, Ch. 8, p. 167, in connection with the procedural requirements of a fair trial.

would be equally delighted with a rule that any disregard by an agency of any of its rules, at any time and under any circumstances, would be a basis for invalidating the agency's determination.

The problem arises chiefly in connection with procedural rules. Rules of substance—whether legislative or interpretative—are either followed or changed. They cannot very well be simply disregarded or overlooked. But in the case of procedural rules, it is often expeditious for an agency simply to ignore a certain rule in some particular case and adopt therein a different procedure than that contemplated by the agency's rules.

The parties may waive compliance with the rules, and if the waiver is made voluntarily, with full knowledge of the situation, no difficulty arises.³⁶ Similarly, there can be no doubt as to the right to disregard minutiae of procedure in a particular case where to do so is necessary to reach a just result.³⁷ While not quite so clear, it seems that if it can be shown that a particular rule was established solely for the agency's own convenience, it may be waived by the agency.³⁸

At the opposite extreme, it is clear that an agency will not be permitted to adopt a special rule of procedure for the sole purpose of affecting the outcome of a particular case, or (with a conscious desire toward this end) willfully to ignore a rule in some particular case.³⁹

³⁶ *Cf.*, *Zigelhofer v. Reynolds*, 52 L. D. 38 (1927), where the Department of the Interior gave relief to a party who had been misled by a representative of the Department as to its rules of practice.

³⁷ *Board of Tax Appeals v. United States ex rel. Shults Bread Co.* (App. D. C. 1929), 37 F. (2d) 442; *Gillis v. Public Service Commission*, 105 Pa. Super. 389, 161 Atl. 563 (1932).

³⁸ *System Federation No. 6, et al. v. Chicago, R. I. & P. Ry. Co.*, 2 N. R. A. B. 178 (1937); *In the Matter of Emil Denemark, Inc.*, 2 F. C. C. 474 (1936); *cf.*, *Consumers Power Co. v. National Labor Relations Board* (C.C.A. 6th 1940), 133 F. (2d) 38.

³⁹ *Colyer v. Skeffington* (D. C. Mass. 1920), 265 Fed. 17, 47, rev'd on other points in *Skeffington v. Katzeff* (C.C.A. 1st 1922), 277 Fed. 129; *People ex rel. Cotton v. Leo*, 110 Misc. 519, 180 N. Y. S. 554 (1920), aff'd

Between these two extremes is a broad field where there is room to debate the wisdom and fairness of a disregard of procedural rules in a particular case, and where it is somewhat a matter of conjecture whether such disregard has affected private rights.

If it fairly appears that some prejudice might likely have resulted from such disregard of established rules, or that the departure caused great inconvenience to the parties or took them unfairly by surprise, the courts quite readily set aside the administrative determination. Particularly is this true where the rule was established to protect the interests of the parties appearing before the agency.⁴⁰

In many cases there appears a strong tendency to set aside administrative determinations because of a disregard of the agency's established procedural rules, even though there is no showing as to the likelihood that prejudice or serious inconvenience resulted. The dictum in *Bilokumsky v. Tod*⁴¹ that "one under investigation . . . is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law" has been applied quite literally. For example, in *Sibray v. United States*⁴² in releasing an alien detained in connection with deportation proceedings because of the Department's nonobservance of its procedural rule, the court declared "It is not within our province to speculate in any particular case what effect the disregard of those rules might or might not have."⁴³

194 App. Div. 921, 184 N. Y. S. 943 (1920). For an interesting example of an agency's voluntary adherence to this principle, see *In the Matter of Consumers Power Co.*, 6 S. E. C. 444 (1939).

⁴⁰ *United States ex rel. Ohm v. Perkins* (C.C.A. 2d 1935), 79 F. (2d) 533; *Erie R. Co. v. City of Paterson*, 79 N. J. L. 512, 76 Atl. 1065 (1910); *Mah Shee v. White* (C.C.A. 9th 1917), 242 Fed. 868; *Ex parte Radivoeff* (D. C. Mont. 1922), 278 Fed. 227.

⁴¹ 263 U. S. 149, 155, 44 S. Ct. 54 (1923).

⁴² (C.C.A. 3d 1922), 282 Fed. 795, 798.

⁴³ And see *United States ex rel. Chin Fook Wah v. Dunton* (D. C. N. Y. 1923), 288 Fed. 959.

But if it can be fairly shown that the failure to follow the agency's rules did not affect the result of the case, the failure may be excused. Thus, the same court which in *United States ex rel. Ohm v. Perkins*⁴⁴ set aside a deportation order because, in violation of departmental rules, one examiner had heard the testimony and another had submitted findings thereon, held in another alienage case that receipt of a doctor's report not prepared in conformity with the departmental rules was not fatal to the validity of the proceeding, where there was other evidence in the record which would justify the order.⁴⁵ In other cases, a plainly immaterial disregard of procedural rules or practices has been permitted.⁴⁶

The general approach of the courts to the problem, then, is that an agency desiring to change its procedural rules should do so in advance of the institution of proceedings in any case where the changed rules are to be followed. Disregard of established rules is ordinarily fatal, unless the agency can show a voluntary waiver of the rule, or can show that the disregard was necessary in order to reach a fair result and did not prejudice the rights of private parties, or that the rule was one adopted solely for the convenience of the agency and which the respondent had no right to rely on, or that the disregard did not affect the outcome of the case.

In deciding whether an agency has sustained this burden, courts are not unmindful that too rigid an application of the doctrine prohibiting disregard of procedural rules would encourage the tendency of some agencies to proceed almost

⁴⁴ (C.C.A. 2d 1935), 79 F. (2d) 533.

⁴⁵ *United States ex rel. Minuto v. Reimer* (C.C.A. 2d 1936), 83 F. (2d) 166.

⁴⁶ E.g., *Baitinger Elec. Co. v. Forbes*, 170 Misc. 589, 10 N. Y. S. (2d) 924 (1939).

without rules. The doctrine should not be pressed so far as to induce agencies to adopt the protective device of promulgating procedural rules so vague in nature as to make it impossible to show a violation of the rules. Such application of the doctrine would defeat its purpose, which is to guarantee that standards of administrative procedure should be equally as fair as those of court procedure.

CHAPTER 15

Validity of Rules and Regulations

1. Logical Criteria

LOGICALLY, the questions to be examined by the courts, in determining the validity of a rule or regulation adopted by an administrative agency, should depend on the type of regulation involved. In the case of a legislative regulation (i. e., one promulgated pursuant to a delegation of legislative power, the violation of which involves statutory sanctions) the queries would be: first, whether the regulation related to the subject matter on which power to legislate had been delegated; second, whether the regulation conformed to the standards prescribed in the delegatory statute; and third, whether the regulation was invalid on constitutional grounds, such as due process. The approach should be somewhat different, from a purely logical viewpoint, when an interpretative regulation is challenged. In such cases, the inquiry would be fundamentally a question as to whether the ruling correctly interpreted the statute, and involved with this issue would be a question as to whether the challenged ruling amounted to an attempt to exercise legislative powers which had not been delegated. If this were the case, the ruling involved would be held invalid as going beyond the sphere of interpretation and into that of legislation.

But in a field so surcharged with delicate questions of policy, and the balancing of competing claims and divergent governmental theories, the law cannot live on logic. The approach must be realistically pragmatic. While the decisions are ordinarily couched in maxims that set forth general "tests" as to the validity of regulations, yet these formal

criteria often express the result of a judgment rather than the means by which that judgment was reached. In interpreting and evaluating the decisions, the circumstances under which the rule was announced require as careful consideration as the rule itself. The general rules laid down in the decisions, like the maxims of equity, are not to be overlooked but still are not to be taken as touchstones to the decision of any particular case.

These general rules for the most part do not specifically recognize the distinction which logically should be made between legislative regulations and interpretative regulations. This is in part due to the traditional reluctance of many courts to admit that legislative functions may be delegated—any type of agency lawmaking is said, euphemistically, to be merely “administrative”—and is in part a result of the difficulty of differentiating between legislative and interpretative regulations. In many cases, where an agency has been granted some legislative powers, it is often a matter of conjecture whether a particular regulation was intended to be an exercise of such delegated legislative authority or merely an exercise of the agency’s broad implicit power to interpret, for purposes of its administrative activity, the statute under which it operates. However, despite the lack of formal acknowledgment of the fundamental difference between legislative and interpretative regulations, there is a practical recognition of this difference running through the cases.¹ A dictum or general rule laid down by the court in a case dealing with an interpretative regulation will often receive but lip service in a case involving a legislative regulation. The fundamental logical difference between these two types of rules or regulations must therefore be borne in

¹ There are, however, some cases where a seemingly illogical result was reached by treating as legislative an interpretative regulation, or vice versa. F. P. Lee, “Legislative and Interpretative Regulations,” 29 GEO. L. J. 1 (1940).

mind in examining the general rules as laid down by the courts.

2. General Tests of Validity

(a) *Exceeding authority conferred*. It is often said that a regulation is invalid if it exceeds the authority conferred by statute. This truism affords but a limited source of guidance, for of course the difficult question, always, is the determination of the outermost limits of the delegated authority. The rule has but little independent force except in cases where a power has been delegated to make legislative rules within a plainly limited sphere and subject to defined standards, and where the rule adopted exceeds this sphere or is contrary to the standards.² The rule may also be applied to cases where there has been no delegation of legislative power, and where a regulation issued as an administrative interpretation of the statute is found to go beyond the sphere of interpretation and into the forbidden realm of legislative regulation.³ In other types of cases, this general criterion is merely the characterization of a result arrived at by some more specific course of reasoning.

(b) *Conflict with statute*. In many cases, the conclusion that a regulation is invalid as exceeding the authority conferred on the agency by statute is premised on the fact that there is a conflict between the challenged rule or regulation, on the one side, and, on the other, provisions of the governing statute or the standard laid down therein as a guide to the exercise of the agency's rule-making powers. A good example of the application of this general principle to a legislative regulation is *Addison v. Holly Hill Fruit Prod-*

² E.g., *Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 27 S. Ct. 153 (1906).

³ E.g., *Work, Secretary of the Interior v. United States ex rel. Mosier*, 261 U. S. 352, 43 S. Ct. 389 (1923).

ucts, Inc.,⁴ where power had been delegated to an agency to define the "area of production" within a statutory provision exempting from the requirement of certain overtime wage payments individuals employed in the "area of production" in the canning or packing of agricultural commodities. Under the statute, the administrator was given legislative power to define the "area of production"; and he adopted a definition which excluded from the exemption canneries which employed more than a certain number of persons. Here, the general standard as laid down by Congress related to the geographical contiguity between the cannery and the growing areas; and the administrative agency's regulation was based on a policy completely at odds with this standard.

In cases where an interpretative regulation is thus in conflict with the court's interpretation of the statute, the conclusion of invalidity could be premised, in succinct terms, on the basis that the agency's interpretation of the legal meaning of the statute was wrong. Where this is so, the courts frequently invalidate an erroneous agency interpretation by saying that the regulation in question is invalid as being in conflict with the statute. Thus in *Helvering, Commissioner of Internal Revenue v. Sabine Transportation Co.*,⁵ the court declared in setting aside the challenged regulations that they "in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms."⁶

(c) *Extending or modifying statute.* In some cases, the conflict between the regulation and the statute appears because the regulation seeks to extend or modify the statute.

⁴ 322 U. S. 607, 64 S. Ct. 1215 (1944).

⁵ 318 U. S. 306, 311-312, 63 S. Ct. 569 (1943).

⁶ For similar cases, see *M. E. Blatt Co. v. United States*, 305 U. S. 267, 59 S. Ct. 186 (1938); *Koshland v. Helvering, Commissioner of Internal Revenue*, 298 U. S. 441, 56 S. Ct. 767 (1936); *Watts v. United States (C.C.A. 2d 1936)*, 82 F. (2d) 266; *United States v. Standard Brewery, Inc.*, 251 U. S. 210, 40 S. Ct. 139 (1920).

The cases above discussed⁷ as typical of the trend of many agencies to extend beyond allowable limits the policy of the governing statute, present examples of regulations held invalid on this ground. In many instances, interpretative regulations which carry interpretation to a point of legislation, have been thus held invalid. As the court said in *Merritt v. Welsh*,⁸ "If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department . . . to make new laws which they imagine Congress would have made had it been properly informed." This principle has been applied frequently. Thus, where a statute permitted duty-free importation of animals brought into this country for breeding purposes, and the customs officials undertook by regulation to limit the privilege to cases where the animals were of superior stock, adapted to improving the breed, this regulatory modification of the governing statute was held invalid.⁹ A similar result was reached where a statutory authorization permitting the cutting of timber on public lands for "domestic uses," was sought to be limited by regulations so as to exclude the cutting of timber for certain domestic purposes deemed undesirable;¹⁰ and again where an agency attempted by a general regulation to revoke outstanding permits without recourse to the statutory proceedings prescribed as a condition of the revocation of permits.¹¹ Not infrequently, regulations under the internal revenue laws have been held invalid as being attempts to add supplementary legislative provi-

⁷ Ch. 12, ns. 18-32.

⁸ *Merritt v. Welsh*, 104 U. S. 694, 704 (1881).

⁹ *Morrill v. Jones*, 106 U. S. 466, 1 S. Ct. 423 (1883).

¹⁰ *United States v. United Verde Copper Co.*, 196 U. S. 207, 25 S. Ct. 222 (1905).

¹¹ *Campbell, Federal Prohibition Administrator v. Galeno Chemical Co.*, 281 U. S. 599, 50 S. Ct. 412 (1930).

sions.¹² A regulation improperly restricting or narrowing a statute, or an agency's jurisdiction thereunder, would similarly be invalid.¹³

(d) *No reasonable relationship to statutory purpose.* In some cases the general policy of the regulation seems unrelated to the general policy of the statute, but neither direct conflict with the statute nor any clear extension of the statutory command can be shown. In such cases, at least if convinced that the challenged regulation produces burdensome and inequitable results, the courts may set it aside as bearing no reasonable relationship to the purpose of the governing statute and producing a result which is out of harmony with the statute and hence unreasonable.¹⁴ For example, where a statute authorized a state agency to make certain regulations to prevent a waste of oil reserves, and it was shown that certain proration orders issued under such authority were not effective to prevent waste but did produce untoward effects in compelling pipe-line owners to furnish a market to producers who had no pipe lines, the regulation was held invalid on these broad grounds.¹⁵ On a similar basis, regulations which attempt too rigidly to limit the degree of proof which will be required in various administrative proceedings, or to impose arbitrary tests where the statutory requirement is more flexible, may be held invalid.¹⁶ Again, a regulation is said to have no reasonable relationship

¹² E.g., *Helvering, Commissioner of Internal Revenue v. Credit Alliance Corp.*, 316 U. S. 107, 62 S. Ct. 989 (1942); *Taft v. Helvering, Commissioner of Internal Revenue*, 311 U. S. 195, 61 S. Ct. 244 (1940).

¹³ *Spiller v. Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 40 S. Ct. 466 (1920).

¹⁴ For statements of the rule, see dicta in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U. S. 129, 56 S. Ct. 397 (1936); *Fawcus Machine Co. v. United States*, 282 U. S. 375, 51 S. Ct. 144 (1931).

¹⁵ *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 57 S. Ct. 364 (1937).

¹⁶ *United States v. George*, 228 U. S. 14, 33 S. Ct. 412 (1913); *Lynch, Executrix v. Tilden Produce Co.*, 265 U. S. 315, 44 S. Ct. 488 (1924); *Miller v. United States*, 294 U. S. 435, 55 S. Ct. 440 (1935).

to the statute when it attempts to include what had, by apparent inadvertency, been omitted by the statute from the legislative scheme.¹⁷

(e) *Unreasonable and arbitrary regulations; violation of due process.* Where excess of authority cannot be predicated on the grounds that a regulation is in conflict with the statute, or improperly extends or modifies the statute, or has no reasonable relationship to the purpose of the statute (all of these being obviously closely related grounds), then a conclusion of invalidity must ordinarily be premised on the grounds that the challenged regulation is so unreasonable and arbitrary as to be unconstitutional.

As it is sometimes put, the regulation is invalid if it goes beyond what the legislature could authorize.¹⁸ If the regulation, had it been enacted as a statute by the legislature, would have been held unconstitutional on any of the grounds on which statutory enactments may be attacked, then the regulation must fall. A regulation which amounts to a deprivation of property without due process,¹⁹ or is unreasonably discriminatory²⁰ may be set aside on this basis. Or the court may by judicial construction limit the scope of a regulation on the grounds that it would be invalid unless so limited.²¹

3. Factors Underlying Decision

These general tests offer at best a basis for argument as to the validity or invalidity of a challenged regulation. Does the regulation conflict with the statute by altering its meaning; or

¹⁷ *Iselin v. United States*, 270 U. S. 245, 46 S. Ct. 248 (1926).

¹⁸ *Utah Power & Light Co. v. United States*, 243 U. S. 389, 37 S. Ct. 387 (1917).

¹⁹ *International Ry. Co. v. Davidson*, 257 U. S. 506, 42 S. Ct. 179 (1922).

²⁰ *Chicago, R. I. & P. Ry. Co. v. United States*, 284 U. S. 80, 52 S. Ct. 87 (1931).

²¹ *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117, 46 S. Ct. 215 (1926); *M. Kraus & Bros., Inc. v. United States*, 327 U. S. 614, 66 S. Ct. 705 (1946).

does it merely interpret and clarify an ambiguous statutory phrase? This question cannot be answered on a rhetorical basis; it often involves subtle judgments on deep-seated policy questions. Does the regulation "extend" the statute, or does it merely specify an application of the general legislative purpose which was implicit in the general language used by the legislature? This inquiry likewise is not purely logical; the answer depends largely on a judgment as to how broad a discretion should be vested in administrative agencies to implement vague statutory language. Is there a reasonable relationship between the terms of the regulation and the general statutory purpose? Appraisals of reasonableness are never based on logic.

In all but the plainest cases, the application of these general tests is at best highly debatable. The general tests do little more than define the actual issue which must be argued. Decision of this issue is to a large extent dependent on the particular factual details and social implications of each case. But there are some basic points of view which are ordinarily followed.

Implicit in many of the decisions cited above is a recognition of the doctrine that the scope of a particular agency's regulatory power must be determined by the character of the statute involved, and by the consequent practical need for giving a large degree of freedom of action to the administrative authorities. This principle was clearly enunciated in *United States v. Antikamnia Chemical Company*.²²

The statute involved in that case required that medicinal preparations should bear a label stating "the quantity or proportion of . . . acetanilid, or any derivative or preparation of any such substances contained therein." The manufacturer of certain pills which contained acetphenetidin, a derivative of acetanilid, marketed them with a label which

²² 231 U. S. 654, 662, 666, 34 S. Ct. 222 (1914).

stated the quantity and proportion of acetphenetidin contained. The manufacturer claimed that this constituted compliance with the statute, and that a regulation which further required him to specify on the label that the acetphenetidin was a derivative of acetanilid was invalid as extending the statutory requirement. The issue therefore was whether or not the regulation added to the law in providing that the label must state not only the name of the derivative (which the statute required) but also the name of the substance from which it was derived (as to which the statute was silent). In holding the regulation valid, the court pointed out that the purpose of the law was to warn the public of the presence of deleterious drugs in medicinal preparations; that a statement of the name of the derivative unaccompanied by an explanation of the substance from which it was derived would not accomplish this purpose, because while the public generally had some notion of the possible deleterious effects of acetanilid and would be warned by information that the medicine contained a derivative of acetanilid, yet the consumer would not be so warned if the label stated merely the name of the derivative and did not explain that it was a derivative of acetanilid. The extent of an agency's regulatory power, said the court "must be determined by the purpose of the Act and the difficulties its execution might encounter."

This practical doctrine of expediency is, then, a fundamental factor underlying judicial determination of the validity of administrative rules and regulations. Where the purpose of the statute is to vest broad discretionary powers in an agency, and where successful execution of the agency's task of administration so requires, a broad measure of autonomy will be accorded the agency; and there will be a tendency to view its regulations as in harmony with the statute and reasonable. Where, on the other hand, the statute does

not disclose a purpose of any such broad grant of power to the agency, and where no need can be readily seen for the extensive implementation of the statute through the medium of regulations, the courts will be more ready to discover a conflict between the statute and the regulation, or to hold that the regulation attempts to enlarge the statute, or is unreasonable.

A second factor is essentially historical. During the decade of 1930-1940, roughly, there developed (particularly in the federal courts, although the same trend can be seen in the decisions of many state courts) a much more wholehearted acceptance of administrative tribunals as respected and independent agencies of justice than had theretofore generally existed. This recognition of agencies as an integral part of the judicial system has led the courts to accord a more hospitable reception to challenged administrative regulations. Regulations which might have been held invalid in an earlier era are now likely to be upheld.

These two factors are interrelated. Recent statutes often pertain to fields of social control wherein the need for administrative discretion is obvious; and in such cases of course it is customary for the statute to lay down only broad standards, leaving significant details to be worked out through administrative rules and regulations of the agencies. Given this type of statute, and a judicial atmosphere of friendliness to the theory of administrative regulation, a challenged rule or regulation is quite likely to be held valid, unless plainly at odds with the statute or subject to clear constitutional infirmities.

The practical effect of these two factors can be seen by examining variant case situations.

Where a statute creates or recognizes private rights, and the purpose or effect of the regulation is to limit or restrict such rights, the courts were strongly inclined, until a few

years ago at least, to find the regulations invalid.²³ This attitude is still seen in the cases, but its rigor is considerably diminished, as may be illustrated by *National Broadcasting Co., Inc. v. United States*,²⁴ where the court in holding valid regulations which put many restrictions on the rights of radio broadcasting companies to effect intercompany affiliations, disposed of the claim that the regulations were arbitrary by saying that it did not have the technical competence to pass upon the wisdom of the regulations.²⁵

Regulations promulgated by agencies whose task is the conduct of public business have always received a more kindly reception than those that control or regulate the carrying on of private business, for in such fields as the preservation of public health, the administration of the postal system, and the regulation of the currency, the courts have long been ready to concede the need for broad administrative discretion. As the philosophy of committing broad powers to administrative agencies in the regulation of private business is coming to gain wider acceptance, this differentiation is becoming less noticeable.

The field of tax regulations could be made a separate study, so great are the number of cases passing on the validity of regulations issued under taxing statutes. For many years, it was in this field particularly that the courts were likely to hold regulations invalid. Any attempt to enlarge ever so minutely the plain requirement of the statute was held invalid. Partly this represented the philosophy that ambiguities

²³ E.g., *Campbell, Federal Prohibition Administrator v. Galeno Chemical Co., et al.*, 281 U. S. 599, 50 S. Ct. 412 (1930); *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117, 46 S. Ct. 215 (1926).

²⁴ 319 U. S. 190, 63 S. Ct. 997 (1943).

²⁵ With this decision may be compared the opinion in the earlier case of *Waite et al. v. Macy et al.*, 246 U. S. 606, 608-609, 38 S. Ct. 395 (1918), where the court in invalidating regulations which would have excluded certain types of tea from import, said, "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute."

in taxing statutes should be construed in favor of the taxpayer; and partly it resulted from the fact that the courts could see no need for relying on administrative discretion in this field. Tax statutes involved typical legalistic problems; and there was little in the nature of the problems involved to lead the courts to defer to the expert knowledge of an administrative body. But as the complexity and technicality of tax statutes has developed to a point where the study of them is almost a separate science, and as the style of draftsmanship of the tax statutes has changed so that the question of taxability often depends on a matter of technical judgment rather than on a juristic interpretation of legalistic language, there has been a corresponding change in the attitude of the courts.²⁶

But despite the hospitable reception which the courts now give challenged rules of administrative agencies, and despite the fact that statutes are now frequently so drawn as to make it clear that a wide measure of discretion must be allowed in the making of implemental regulations, still a regulation cannot stand which is plainly at odds with the legislative purpose, or plainly involves a usurpation of power, or is indubitably arbitrary and unreasonable.

²⁶ *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 64 S. Ct. 239 (1943).

PART FIVE

JUDICIAL REVIEW

CHAPTER 16

Availability and General Functions of Judicial Review

FOR a long time, it was believed by many that the courts should exercise a general superintending control over the actions of administrative agencies, and that the processes of judicial review should be relied on to correct any errors of administration. For various reasons, this has proved impractical, and it has become generally recognized that the function of the courts, in reviewing administrative determinations, must be for the most part limited to such matters as (1) checking excessive assumptions of power by the executive; (2) speaking the final word on important questions of statutory interpretation; (3) requiring fair procedure in administrative action; and (4) invalidating arbitrary or capricious administrative action. While the scope and effectiveness of judicial review vary widely in different case situations, so as to preclude the drawing of any categorical conclusions as to the purposes it may properly serve, yet the general trend of court decisions (except in cases where a statute prescribes a broad review) is in the direction of reducing the scope of review.

1. Practical Difficulties Limiting Effectiveness of Judicial Review

There are many purely practical considerations which limit the availability of judicial review as a general corrective for allegedly erroneous administrative action. In the first place, the number of administrative adjudications is so great as to preclude the possibility of court review in more than a small percentage of the cases decided. In the vast majority

of cases, the administrative determination must be the final one. Further, the expense incident to perfecting an appeal and obtaining judicial review is such that in many cases the parties cannot afford to take the case into court.

In certain types of cases, the delay involved in judicial review is a determining factor. Business transactions cannot always await the final outcome of time-consuming appellate procedures. In the fields of trade and finance, the situation which gave rise to the administrative order will often have been so changed during the course of six months or a year that the questions involved would have become moot before the court could pass judgment on the case. Then, too, the effect of administrative action cannot always be erased by a subsequent judicial reversal of the agency's determination. A stop order by the Securities and Exchange Commission, for example, or even a threat that such an order might be issued, effectively kills a proposed offering of securities; and a subsequent judicial determination that the order was improperly entered would never resurrect the deal.

Perhaps most important of the practical limitations on judicial review as a corrective device is the plain fact that the minutiae of a case cannot ordinarily be brought to the attention of the reviewing court. The records are so long, the factual situations so complex and technical, and the time available for argument so short, that it is impossible for the reviewing court to get more than the high lights of the questions actually fought out before the administrative agency. The details which perhaps should be controlling of the disposition of the particular case may be lost to sight. Slugging in the clinches may escape the referee's eye. The reviewing court often cannot obtain the intimate knowledge of the case which is requisite to fully informed consideration and judgment. Of course, the conclusive effect given to most of the

findings which have a factual aspect contributes to this difficulty. The reviewing court must consider the case in the light of the broad and general factual findings made by the agency, and these often tend to transform a case from a concrete practical situation to an abstract legalistic problem which does not reflect the hard realities involved.

2. Restraints on Judicial Action

(a) *Judicial self-restraint.* The doctrine that courts and agencies are to be regarded as co-ordinate instrumentalities of justice, sharing joint responsibilities to attain the ends sought by the legislature in passing a statute,¹ has had important effects in determining the availability and functions of judicial review.² It is fundamentally the attitude of the courts, rather than the provisions of statutes, which determines the actual scope of judicial review; and as both federal and state courts have come to grant increased respect to administrative determinations, the extent of review has been narrowed.

This tendency has had many repercussions. It can be seen in the increasing frequency with which courts, after holding an original determination invalid, remand the case for further consideration by the agency, rather than making a final decision.³ It can be seen in the tendency to treat as issues of fact what might well be considered as issues of law.⁴ It can be seen in suggestions that in some cases judicial review

¹ Cf., *United States v. Morgan*, 307 U. S. 183, 59 S. Ct. 795 (1939).

² Chamberlain, Dowling, and Hays, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942) 174; Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 (1938); Merrill, "Judicial Review of Administrative Proceedings, A Functional Prospectus," 23 *NEB. L. REV.* 56 (1944).

³ E.g., *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215 (1944).

⁴ E.g., *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 65 S. Ct. 829 (1945); *Gray v. Powell*, 314 U. S. 402, 62 S. Ct. 326 (1941).

should not be granted except as required by legislative mandate.⁵

There has developed, in short, a judicial disinclination to substitute the judgment of judges for the discretion of administrators. This has gone far to reduce the availability and limit the functions of judicial review.

(b) *Constitutional limitations.* Legislative attempts to provide extensive judicial review of administrative determinations have sometimes run afoul of the doctrine prohibiting courts from exercising nonjudicial powers. Particularly in the federal courts, there has been a consistent refusal to review what are deemed "administrative" questions.

One of the leading cases, illustrative of the problem, is *Federal Radio Commission v. General Electric Company*,⁶ where the matter involved was an administrative ruling reducing the permissible hours of service of a radio station. The lower courts, in accordance with the provisions of the applicable statute, revised the administrative order; but when review was sought in the Supreme Court, that court dismissed the writ of certiorari on the grounds that the question was purely administrative or legislative, and that thus no case or controversy within the judiciary article of the Constitution was presented. Somewhat similar rulings have been made as to review of certain issues in rate-making cases⁷ and trademark cases.⁸

But this doctrine does not, of course, bar judicial review of such questions as the "reasonableness" of an administrative order or whether it is "in conformity with law."⁹ The doc-

⁵ E.g., *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95 (1943).

⁶ 281 U. S. 464, 50 S. Ct. 389 (1930).

⁷ *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 S. Ct. 445 (1923).

⁸ *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 47 S. Ct. 284 (1927).

⁹ *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 53 S. Ct. 627 (1933); *Public Service Commission of Puerto Rico v. Havemeyer*, 296 U. S. 506, 56 S. Ct. 360 (1936).

trine proscribes review only in those cases where the court is asked to substitute its judgment for the discretion of an administrative agency on a question which is not to be settled by deductive legalistic reasoning.

Nor does the doctrine apply to the so-called federal legislative courts. Such bodies as the territorial courts, the Court of Claims and the Tax Court may be vested with some administrative powers.¹⁰ Similarly, the courts of the District of Columbia may be required to discharge administrative duties.¹¹

While appellate state courts have often refused to review the decisions of administrative agencies where only administrative questions were involved,¹² nevertheless the state courts have been less strict in their insistence that certain types of administrative determinations are nonreviewable. In the state courts, judicial review of rate-fixing proceedings, determinations granting or denying licenses to operate common carriers, and even tax assessments, has not uncommonly been permitted. The distinction between what will be reviewed, and what not, is largely historical; where a particular state court has long exercised its powers in a particular type of case, the issues involved, even though not strictly legalistic, are deemed "subject for judicial determination,"¹³ and the court will continue to decide such issues, even though from a purely logical viewpoint they might be deemed administrative in character.

3. Constitutional Right of Review

The decreasing significance of judicial review in the field of administrative law is nowhere better illustrated than in the

¹⁰ *Williams v. United States*, 289 U. S. 553, 53 S. Ct. 751 (1933); *American Ins. Co. v. Canter*, 1 Pet. (26 U. S.) 511 (1828).

¹¹ *O'Donoghue v. United States*, 289 U. S. 516, 53 S. Ct. 740 (1933).

¹² E.g., *Hodges v. Public Service Commission*, 110 W. Va. 649, 159 S. E. 834 (1931).

¹³ *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 18 How. (59 U. S.) 272, 284 (1855).

deterioration of the doctrines recognizing a constitutional right to obtain judicial review on certain types of issues. It has commonly been supposed that there existed an immutable right to obtain judicial review on questions of law, questions of jurisdictional fact, and questions of constitutional fact. The letter of the rule perhaps still stands; but its substance has been depleted to the extent that the rule is deprived of most of the significance long attributed to it.

(a) *Issues of law.* The commonplace that final decision on questions of law must be reserved for the courts traces back principally to the decision in *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*,¹⁴ holding invalid a state statute providing that an administrative determination as to the reasonableness of railroad rates should be final and not subject to judicial review. Such issue, the court said, was "eminently a question for judicial investigation." While the court was undoubtedly influenced by the apparent unreasonableness of the whole statutory scheme, under which there was no requirement of hearing and no provision for safeguarding private rights,¹⁵ and while therefore the decision does not really foreclose the question as to the permissibility of granting administrative agencies power to make final and nonreviewable determinations of legal issues, nevertheless it has commonly been supposed that the decision held exactly that.

It is undoubtedly true that the power of final decision on judicial matters involving private right cannot constitutionally be taken away from the courts; but this does not mean that the courts will review every such issue of law involved in an administrative determination.

Many types of administrative determination involving issues of statutory construction or other legalistic inquiries do

¹⁴ 134 U. S. 418, 458, 10 S. Ct. 462, 702 (1890). For a more modern view on the question as to the constitutionality of providing for administrative finality on questions of law, see comment: 26 CAL. L. REV. 683 (1938).

¹⁵ See Freund, THE POLICE POWER (1904) § 381.

not determine matters of absolute private right, but involve rather the granting or denial of some privilege. In such cases, it seems that the legislature may grant to administrative agencies the power to decide with finality issues of law.¹⁶ In this way, a variety of important legal issues may be removed from the sphere of judicial decision.

But far more significant, so far as concerns the extent of participation by the courts in matters committed originally to administrative decision, is the judicial doctrine that as a matter of comity or convenience, the courts will not concern themselves with every asserted error of law¹⁷ on the part of the agencies. It is not so much a matter of denial of the power of review, but rather a reluctance to exercise it. The administrative determination will be accepted, without close scrutiny, if it has "a reasonable basis in law."¹⁸ The courts hesitate to assert and exercise their power of judicial review, where the legislature has not expressly so required or authorized, unless the "type of problem involved and the history of the statute in question" indicate that judicial review should be supplied.¹⁹ In short, the courts will concern themselves only with the vital, fundamental questions of law involved in administrative determinations, and will often decline to review other issues which, although perhaps controlling of the result in the particular case, are not thought to have broad interest and significance.

Another path which has led to the diminution of effective judicial review has been by way of calling issues of fact what might with equal logic be deemed matters of law. The classic comment of Dickinson, pointing out that there is no fixed

¹⁶ *Van Horne v. Hines* (App. D. C. 1941), 122 F. (2d) 207; *Nolde & Horst Co. v. Helvering* (App. D. C. 1941), 122 F. (2d) 41.

¹⁷ *Dobson v. Commissioner of Internal Revenue*, 321 U. S. 231, 64 S. Ct. 495 (1944).

¹⁸ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 131, 64 S. Ct. 851 (1944).

¹⁹ *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95 (1943).

distinction between matters of fact and law, but that "The knife of policy alone effects an artificial cleavage,"²⁰ has been echoed by the Supreme Court.²¹ The general policy of judicial self-restraint has increasingly led the courts to characterize as issues of fact, and hence nonreviewable, issues which with equal logic, could have been deemed issues of law, and reviewable,²² had the courts desired to review them. Thus, questions as to the meaning of the term "employee," or the "appropriateness" of a formula employed in rate-fixing proceedings, are treated as presenting issues of fact.²³ Many issues of law, masquerading as matters of fact, thus escape judicial review.

While the power of the courts to review and settle issues of law must of course remain, yet the growing deference paid to administrative determinations has much diminished the extensiveness with which appellate courts probe into decisions which could be said quite properly to involve fundamentally issues of law.²⁴

The provisions of Section 10 (e) of the Federal Administrative Procedure Act of 1946 may have some effect to enlarge the scope of review of federal agency determinations, where the error alleged is predicated on what can fairly be termed a question of law; but it would appear that this statute does not deprive the courts of continuing to exercise judicial

²⁰ John Dickinson, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 55; and see Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 *HARV. L. REV.* 753 (1944); Brown, "Fact and Law in Judicial Review," 56 *HARV. L. REV.* 899 (1943); Isaacs, "The Law and the Facts," 22 *COL. L. REV.* 1 (1922); Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis," 58 *HARV. L. REV.* 70 (1944).

²¹ *Baumgartner v. United States*, 322 U. S. 665, 670, 64 S. Ct. 1240 (1944).

²² *Cf.*, Benjamin, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 347-349.

²³ *Colorado Interstate Gas Co. v. Federal Power Commission et al.*, 324 U. S. 581, 65 S. Ct. 829 (1945); *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

²⁴ *Cf.*, *Skidmore et al. v. Swift & Co.*, 323 U. S. 134, 139, 65 S. Ct. 161 (1944).

prerogatives in deciding how broad the scope of review should be. The implications of this section are uncertain.²⁵

(b) *Jurisdictional facts*. The ruling in *Crowell v. Benson*²⁶ (which held that an employer was entitled to a judicial trial *de novo* on the factual questions on which depended the jurisdiction of the United States Employees' Compensation Commission to make an award against him,²⁷ and which marked the zenith if not the birth of the doctrine that a right to judicial review *de novo* exists on all questions of jurisdictional fact) has in the intervening years lost much of the practical significance it was originally thought by many to possess as establishing a minimum standard of judicial participation in administrative adjudication.

The case appears, indeed, to have been a departure from the logic of many earlier cases²⁸ and must be taken to be greatly limited by, if it has not in fact been disregarded in, subsequent decisions. It can scarcely be reconciled with the decision in *Myers v. Bethlehem Shipbuilding Corporation*,²⁹

²⁵ There are two schools of thought as to whether § 10 (e) authorizes or requires the courts to broaden the scope of judicial review. The Attorney General has suggested that it merely restated the then existing law (letter dated October 19, 1945, addressed to Senate Judiciary Committee and printed as App. B, Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945)); but there is indication in the Congressional debates that a broader scope of review is intended. (Congressional Record, May 24, 1946, 5654, 5657.) That the act should be construed to enlarge the scope of review is forcibly argued by John Dickinson, 33 A. B. A. J. 434 (1947). For additional views, see Shine, "Administrative Procedure Act: Judicial Review 'Hotspot?'" 36 GEO. L. J. 16 (1947); Hinman, "Effect of the Administrative Procedure Act on Judicial Review of Administrative Action," 20 ROCKY MT. L. REV. 267 (1948). The courts have not yet settled the question. Compare *Snyder v. Buck* (D. C. D. C. 1948), 75 F. Supp. 902; *Olin Industries, Inc. v. National Labor Relations Board* (D. C. Mass. 1947), 72 F. Supp. 225; *United States ex rel. Trinler v. Carusi* (C.C.A. 3d 1948), 166 F. (2d) 457.

²⁶ 285 U. S. 22, 52 S. Ct. 285 (1932). Many volumes of commentary have been written about this case. See for example, 80 U. PA. L. REV. 1055 (1932); 46 HARV. L. REV. 478 (1933); 22 CORN. L. Q. 349, 515 (1937).

²⁷ Those jurisdictional facts being: (1) whether the accident occurred on navigable waters; (2) whether an employer-employee relationship existed.

²⁸ 80 U. PA. L. REV. 1055 (1932); Pound, ADMINISTRATIVE LAW (1942) 28.

²⁹ 303 U. S. 41, 58 S. Ct. 459 (1938).

in which it was held that a federal district court had no jurisdiction to entertain a suit raising a question as to whether the National Labor Relations Board had jurisdiction of contemplated proceedings; and its philosophy was essentially repudiated in later cases where, there being doubts as to whether an administrative agency had jurisdiction in the premises, the court remanded the case to that agency for further findings on the jurisdictional question.³⁰

Similarly, the decisions in the state courts indicate that no broader scope of review will be applied to determinations of jurisdictional fact than to other factual determinations.³¹

Judicial redetermination of the facts on which depends the jurisdiction of the administrative agency can no longer be regarded as an absolute legal right.

(c) *Constitutional facts*. Closely related to the jurisdictional fact doctrine is the principle that where the existence of a private right asserted under the Constitution depends on a finding of fact, there is a right to judicial review *de novo* of that issue of fact. This doctrine appeared to have been reaffirmed, by a divided court, as late as 1936.³² But its vitality has since largely disappeared, and the more recent decisions suggest judicial acceptance of the argument that there is no logical basis for distinguishing between ordinary facts and constitutional facts.³³ Even in cases where confiscation is asserted, and this of course is the typical case for the application of the rule requiring full judicial review of questions of constitutional fact, the courts have not in more recent years

³⁰ See, for example, *City of Yonkers et al. v. United States et al.*, 320 U. S. 685, 64 S. Ct. 327 (1944); *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 65 S. Ct. 749 (1945).

³¹ E.g., *Dimino v. Independent Warehouses, Inc.*, 284 N. Y. 481, 31 N. E. (2d) 911 (1940); *Miles v. Colegrove*, 258 App. Div. 1014, 16 N. Y. S. (2d) 988 (1940), *aff'd* 284 N. Y. 609, 29 N. E. (2d) 929 (1940).

³² *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720 (1936); *cf.*, *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527 (1920). For law review comment on the doctrines of these cases, see: 4 ILL. L. Q. 44 (1921); 43 HARV. L. REV. 1249 (1930); 40 HARV. L. REV. 1033 (1927); 27 W. VA. L. Q. 207 (1921); 36 GEO. L. J. 337 (1948).

³³ *Cf.*, Landis, *THE ADMINISTRATIVE PROCESS* (1938) 124.

always consented to review the facts involved. Here again, increased deference for the judgment of administrative agencies has been reflected in the decisions of the courts. Thus, where it was claimed by an oil producer that a state order limiting its production was confiscatory, the Supreme Court observed that the inquiry was one for determination by an administrative agency possessing expertness in the particular subject, and that it was not for the court to pass upon the propriety of the order, even though it might appear to the court that a different order would be wiser.³⁴

There can be no disagreement with the somewhat conservative expression of opinion by several members of the Attorney General's Committee on Administrative Procedure who observed that "in the future, fact issues involving due process, equal protection, and doubtless also other constitutional guaranties will in all probability no longer be subject to court review as a matter of constitutional right."³⁵

While of course the power of the courts to review questions of law, questions of jurisdictional fact, and questions of constitutional fact, cannot well be doubted, yet the courts no longer feel bound to review every issue which can be so described. Rather, the courts are inclined to limit review to those cases and those issues which are deemed to be particularly important or which are thought to be more suitable for judicial determination than for determination by an administrative agency. Conversely, where it is thought that the problem is more suitable for administrative handling, no searching review will be supplied even on these fundamental questions. Increasing deference for administrative determinations decreases the scope of judicial participation in administrative law.

³⁴ *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 60 S. Ct. 1021 (1940); 311 U. S. 614, 61 S. Ct. 66 (1940); 311 U. S. 570, 61 S. Ct. 343 (1941).

³⁵ "Administrative Procedure in Government Agencies," Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 210.

Utilization and Exhaustion of Administrative Processes as Conditions Precedent to Review

DISINCLINATION on the part of the courts to intervene in fields where judicial or legislative powers have been vested in administrative agencies is evidenced by the development of the doctrines requiring litigants to address their complaints initially to administrative tribunals, rather than to the courts, and further requiring them to exhaust all possibilities for obtaining relief through administrative channels before appealing to the courts.

In this connection, there have developed several interrelated doctrines, including (1) the rule of prior resort, sometimes called the principle of primary jurisdiction; (2) the requirement of exhausting all available administrative remedies before appealing to the courts; and (3) the principle of estoppel for failure to utilize administrative remedies.¹ While all of these related principles may be bound up in a single case, and are not always treated separately in judicial opinions, yet such separation is convenient for purposes of analysis and discussion.

1. The Doctrine of Prior Resort

During the last two decades there has developed in the federal courts a strong inclination to refuse jurisdiction of a case wherein the issues are such that they could have been presented in the first instance to an administrative body. Similar principles are followed in many state courts, but with

¹For a comprehensive general discussion, see E. B. Stason's article on "Timing of Judicial Redress from Erroneous Administrative Action," 25 MINN. L. REV. 560 (1941).

considerable variation from state to state, with occasional repudiation of the doctrine.²

The rule is frequently said to have been established in the *Abilene Cotton Oil* case.³ There, suit had been brought in the Texas state courts to recover reparations for allegedly excessive rates charged by the railroad. It was defended on the ground that no prior application had been made to the Interstate Commerce Commission for relief. The court held that this defense was valid—that the Interstate Commerce Act by implication (despite the act's declaration that none of its provisions should be deemed to abridge existing common-law remedies) barred resort to the courts until the Interstate Commerce Commission had been permitted to pass upon the reasonableness of the challenged rate.

The reasons for the rule are well stated in *United States Navigation Co. v. Cunard Steamship Co., Ltd.*⁴ In that case, plaintiff sought in the federal district court to enjoin an alleged restraint of trade, charging that the defendants had offered lower rates to shippers who agreed to ship none of their goods on plaintiff's vessels. A motion to dismiss was granted because the plaintiff had failed to resort first to the United States Shipping Board, the court suggesting that the inquiry as to whether the challenged combination was illegal would depend on many technical factors which might be better understood by the Commission than by the courts, and

² E.g., *Main Realty Co. v. Blackstone Valley Gas & Electric Co.*, 59 R. I. 29, 193 Atl. 879 (1937). In *Bell Telephone Co. of Pennsylvania v. Driscoll*, 343 Pa. 109, 21 A. (2d) 912 (1941), the court in effect refused to apply the doctrine where to do so would involve assertedly irreparable injury. The federal courts appear to give little consideration to this argument. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 S. Ct. 459 (1938); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 773, 67 S. Ct. 1493 (1947). Some of the state courts appear to apply the principle to newer agencies, but to adhere to established practices which in the case of some of the older agencies—e.g., local taxing boards—permitted more extensive judicial intervention.

³ *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350 (1907).

⁴ 284 U. S. 474, 52 S. Ct. 247 (1932).

pointing out that only by requiring the initial presentation of all such questions to the administrative agency could uniformity of ruling be attained.

There are, in other words, two reasons for the rule: first, to take full advantage of administrative expertness; and second, to attain uniformity of application of regulatory laws.

The rule is apparently one of general applicability. It has a long history in the railroad and shipping cases of the type wherein it was first promulgated,⁵ and has been extended into many other fields, including some not characterized by the technical complexities which underlay the development of the rule in the Interstate Commerce Commission cases where it originated. Among the fields of administrative activity to which the doctrine has been extended are those of trade regulation,⁶ labor disputes,⁷ and tax collection.⁸

Likewise, the rule has come to be applied not only to questions of a technical factual content but as well to issues of much broader character. It has been applied to issues of jurisdictional fact (which not long ago were thought to be exclusively for the courts),⁹ issues as to the unreasonableness of

⁵ *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 30 S. Ct. 164 (1910); *Pennsylvania R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456, 35 S. Ct. 896 (1915); *Director General of Railroads et al. v. Viscose Co.*, 254 U. S. 498, 41 S. Ct. 151 (1921); *Alabama & V. Ry. Co. v. Jackson & Eastern Ry. Co.*, 271 U. S. 244, 46 S. Ct. 535 (1926) [all of these cases, in fact, preceding the so-called birth of the rule in the *Abilene* case (1927), and being perhaps progenitors of the rule rather than instances of its application]; *Midland Valley R. Co. v. Barkley*, 276 U. S. 482, 48 S. Ct. 342 (1928); *Board of Railroad Commissioners of North Dakota v. Great Northern Ry. Co.*, 281 U. S. 412, 50 S. Ct. 391 (1930).

⁶ *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 54 S. Ct. 315 (1934); *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 54 S. Ct. 423 (1934).

⁷ *Newport News Shipbuilding & Drydock Co. v. Schauffler*, 303 U. S. 54, 58 S. Ct. 466 (1938); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 S. Ct. 459 (1938).

⁸ *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 57 S. Ct. 816 (1937); *United States v. Felt & Tarrant Mfg. Co.*, 283 U. S. 269, 51 S. Ct. 376 (1931).

⁹ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 S. Ct. 459 (1938).

administrative regulations,¹⁰ and some issues of law.¹¹ It has been held that an administrative officer could not be enjoined from enforcing an allegedly invalid administrative regulation without application first being made to the officer for modification of the objectionable rule.¹²

While there have been assertions that the doctrine has no application to "pure" questions of law¹³ (such as might be raised by an issue as to the legality of the statute under which an agency operates)¹⁴ there is but infrequently an opportunity to raise such a question. As distinctions between law and fact become constantly more blurred, and the enforcement of asserted legal rights comes to be conditioned largely upon administrative discretion, there are but few issues which the courts are likely henceforward to characterize as purely legal. Where the legal question is bound up with an administrative question, the rule of prior resort applies.¹⁵

The rule of prior resort will, it appears, be applied wherever the court believes (considering opportunities of utilizing technical competence and obtaining uniformity of rule) that the legislature intended the issues to be left to the administrative agency for initial determination.¹⁶ In an era of increasing respect for administrative adjudication, it can be expected that there will be but few cases where the courts will conclude there was no such legislative intention. Only where it can be convincingly shown that an alleged administrative remedy

¹⁰ *Ambassador, Inc. v. United States*, 325 U. S. 317, 65 S. Ct. 1151 (1945).

¹¹ *Texas & P. Ry. Co. v. American Tie & Timber Co., Ltd.*, 234 U. S. 138, 34 S. Ct. 885 (1914); *Aron v. Federal Trade Commission* (D. C. Pa. 1943), 50 F. Supp. 289.

¹² *P. F. Petersen Baking Co. v. Bryan*, 290 U. S. 570, 54 S. Ct. 277 (1934).

¹³ *Great Northern Ry. Co. et al. v. Merchants' Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477 (1922); and see discussion in *United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd.*, 284 U. S. 474, 52 S. Ct. 247 (1932).

¹⁴ See 35 COL. L. REV. 230, 234 (1935).

¹⁵ *Cf.*, Vom Baur, *FEDERAL ADMINISTRATIVE LAW* (1942) p. 199, § 219.

¹⁶ See opinion of Brandeis, J., in *Great Northern Ry. Co. et al. v. Merchants' Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477 (1922).

would be plainly inadequate¹⁷ will the courts excuse the requirement of prior resort to administrative remedies.

2. The Requirement of Exhausting Administrative Remedies

(a) *Historical basis of rule.* Not only must a question cognizable by an administrative agency be first presented to it, rather than to the courts, but there is a further requirement that the case must run the full gamut of administrative proceedings, before an application for judicial relief may be considered. This is the doctrine requiring exhaustion of administrative remedies. It means, in effect, that the administrative agency is entitled to the first and last word. It must be given an opportunity to speak first (this is the doctrine of prior resort), and it cannot be deprived of the power to pass upon the case until it has spoken its last word with reference thereto.

While this requirement of exhausting administrative remedies has a somewhat different historical background than the rule of prior resort, yet the two doctrines have developed into complementary parts of a general principle which ordinarily serves to preclude judicial consideration of a question while there remains any possibility of further administrative action.

The reasons for the rule requiring exhaustion of administrative remedies are basically the same as those which long ago led to the adoption of the familiar tenet of appellate practice that appeals may be taken only from a final judgment. If appeals to the courts were to be permitted while a matter was still pending before an administrative agency, the result would be productive of much confusion and delay. Piecemeal litigation would be permitted. Many unnecessary and even vexatious appeals would be taken. The work of the courts would be needlessly increased. Further, the taking of such

¹⁷ *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226 (1944).

interlocutory appeals would interfere with the most effective conduct of the work of the administrative agencies themselves.

Frequently, the rule has been applied in cases where equitable relief in the nature of an injunction is sought against an administrative agency,¹⁸ and in such cases the result is often premised on the maxim that equitable relief will not be granted where some other adequate remedy is available. But the reason for the rule goes further. It is applicable to proceedings at law as well as suits in equity.¹⁹

The rule is said to be of special force where resort is had to the federal courts to restrain the action of state officers,²⁰ and in such cases it is sometimes suggested that a fundamental

¹⁸ *Pittsburgh, C., C. & St. L. Ry. Co. v. Board of Public Works of West Virginia*, 172 U. S. 32, 19 S. Ct. 90 (1898); *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67 (1908); *Porter v. Investors Syndicate*, 286 U. S. 461, 52 S. Ct. 617 (1932).

¹⁹ *First Nat. Bank of Greeley v. Board of County Commissioners of County of Weld*, 264 U. S. 450, 44 S. Ct. 385 (1924); *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 57 S. Ct. 816 (1937).

²⁰ *Matthews v. Rodgers*, 284 U. S. 521, 52 S. Ct. 217 (1932); *Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky*, 290 U. S. 264, 54 S. Ct. 154 (1933). Sometimes, proceedings in the state courts to review and revise orders of state agencies are themselves administrative in character. In such cases, a review of the order of the state agency in the federal courts may not normally be had until the state courts have been appealed to [*Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67 (1908); *Porter v. Investors Syndicate*, 286 U. S. 461, 52 S. Ct. 617 (1932); 287 U. S. 346, 53 S. Ct. 132 (1932) (rehearing)], save possibly in cases where confiscation is presently in process and no relief to stay the confiscation may be had in the state courts [*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 43 S. Ct. 353 (1923)], or where other unusual circumstances are present [*City Bank Farmers Trust Co., Executor v. Schnader, Attorney General of Pennsylvania*, 291 U. S. 24, 54 S. Ct. 259 (1934)]. The problem of seeking relief in the federal courts from orders of state administrative agencies is further complicated by the provisions of the Johnson Act, 50 Stat. 738, 28 U.S.C. § 41 (1), limiting the jurisdiction of the federal district courts to grant injunctive relief in various types of cases where a plain, speedy, and efficient remedy may be had in the state courts. Still further complications arise from the tendency of the federal courts to extend the philosophy of the Johnson Act to cases where it does not in terms apply [as in the case of an application for a declaratory judgment—*Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 63 S. Ct. 1070 (1943)], and the general disinclination of the federal courts to pass upon cases involving action of state administrative agencies, where questions of state law are fundamentally involved. *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643 (1941).

basis of the rule is the principle that comity between different departments of government requires that the federal courts should stay their hand until the state administrative processes have been completed. But the doctrine applies with just as great rigor where the appeal is from an agency of the federal government to the federal courts. Comity is not alone the basis for the rule.

Again, it is sometimes said that the doctrine is related to the familiar principle that official acts will be presumed to be correct and lawful—that if an error is committed in the initial steps of administrative activity it will be corrected by the higher administrative authorities.²¹

But the real basis for the rule is that it constitutes a doctrine of self-limitation which the courts have evolved in marking out the boundary line between the powers of the courts and those of administrative agencies. While it is sometimes suggested that the rule is fundamentally one of discretion, and may be relaxed in the sound judgment of the trial court,²² yet such relaxation may be expected only in those cases, discussed below, where it is said that the rule does not apply. In general, it is to be considered a mandatory requirement—a rule of judicial administration, and not merely one governing the exercise of discretion.²³

(b) *Instances of application of rule. Administrative appeals.* It is very commonly held, in a wide variety of situations, that if the original administrative determination may be appealed to an appellate administrative agency (or to a lower court exercising administrative functions) such administrative

²¹ *Delaware & Hudson Co. v. United States*, 266 U. S. 438, 45 S. Ct. 153 (1925).

²² *Natural Gas Pipeline Co. v. Slaterry*, 302 U. S. 300, 58 S. Ct. 199 (1937).

²³ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, 58 S. Ct. 459 (1938); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 753, 67 S. Ct. 1493 (1947). See Berger, "Exhaustion of Administrative Remedies," 48 *YALE L. J.* 981 (1939), suggesting that the application of the doctrine should not be deemed discretionary.

remedies must be exhausted. Perhaps the most common instance of this application of the rule is in connection with state tax administration.²⁴ The rule has been frequently applied under similar circumstances in connection with decisions of the Interstate Commerce Commission.²⁵ It has been applied as to various state agencies.²⁶ In cases where further administrative appeals are provided for, the rule requiring exhaustion of administrative remedies appears clearly to be of general application, and one which may be invoked regardless of the nature or particular function of the agency involved, except as it may be modified by particular statutory enactment (*cf.*, Section 10 (c) of the Federal Administrative Procedure Act of 1946).

Administrative consideration continuing. It is even clearer that where the consideration of the case by the agency is still continuing, and no decision has as yet been reached, the courts will not normally interfere.²⁷

Where it is claimed tribunal has no jurisdiction. The claim that the agency is exceeding its jurisdiction in a pending case is not ordinarily, in the federal courts at least, enough to afford a basis to transfer the proceedings into the courts, prior to the completion of the administrative proceedings.²⁸ In the state courts, however, there is some tendency to hold that where the jurisdiction of the agency is challenged, resort may be had directly to the courts for a decision on this question.²⁹

²⁴ See, e.g., *First Nat. Bank of Greeley v. Board of County Commissioners of County of Weld*, 264 U. S. 450, 44 S. Ct. 385 (1924).

²⁵ E.g., *United States v. Illinois Cent. R. Co.*, 291 U. S. 457, 54 S. Ct. 471 (1934).

²⁶ E.g., *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 55 S. Ct. 7 (1934).

²⁷ *New Orleans v. Paine*, 147 U. S. 261, 13 S. Ct. 303 (1893); *Oregon v. Hitchcock*, 202 U. S. 60, 26 S. Ct. 568 (1906).

²⁸ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 S. Ct. 459 (1938); *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 47 S. Ct. 553 (1927); but *cf.*, *Waterman S.S. Corp. v. Land* (App. D. C. 1945), 151 F. (2d) 292.

²⁹ This is particularly true in tax cases. See, e.g., *Koch v. City of Detroit*, 236 Mich. 338, 210 N. W. 239 (1926).

Where unconstitutional administrative action is asserted.

There are some suggestions that where it can be shown that the prescribed administrative remedy fails to comply with the requirements of procedural due process, the rule does not apply,³⁰ but the cases are not clear enough to indicate that any substantial relaxation of the rule is to be expected on this basis. In the more common case, where the administrative action is claimed to be unconstitutional as applied to the particular facts of the case, it is usually held that the administrative remedy must be pursued to the end,³¹ and this holding seems to be fully in accord with requirements of orderly procedure and with the general principles on which the rule is founded.

Where underlying statute is assailed. Where it is claimed that the statute under which the agency is acting is itself unconstitutional, it may be that the question can be raised directly in the courts without first exhausting administrative proceedings.³² But this has not been clearly established.³³

(c) *When is administrative remedy exhausted?* Administrative proceedings frequently assume the character of a seamless web, which goes on and on and then starts over; and consequently questions sometimes arise, in connection with the requirement of exhausting administrative remedies, as to when this requirement has been satisfied.

Motions for rehearing. One of the most perplexing questions is whether the party seeking to appeal the administrative decision must file a motion for a rehearing of his case

³⁰ *Utley v. St. Petersburg*, 292 U. S. 106, 54 S. Ct. 712 (1934); *Munn v. Des Moines Nat. Bank* (C.C.A. 8th 1927), 18 F. (2d) 269; *Kansas City Southern Ry. Co. v. Ogden Levee Dist.* (C.C.A. 8th 1926), 15 F. (2d) 637.

³¹ *First Nat. Bank of Greeley v. Board of County Commissioners of County of Weld*, 264 U. S. 450, 44 S. Ct. 385 (1924).

³² *Buder v. First Nat. Bank in St. Louis* (C.C.A. 8th 1927), 16 F. (2d) 990.

³³ See *Gorham Mfg. Co. v. State Tax Commission of State of New York*, 266 U. S. 265, 45 S. Ct. 80 (1924); and Berger, "Exhaustion of Administrative Remedies," 48 YALE L. J. 981 (1939).

before the highest administrative body, before taking the case into the courts.

A comparatively early decision ³⁴ indicated that application for rehearing was not a condition precedent to judicial relief when the pertinent statute merely conferred the privilege of filing such a motion, but did not make it mandatory, and the granting of the motion was entirely within the discretion of the agency. A number of subsequent decisions followed this holding, and it was commonly supposed that if the agency had already passed on the specific contentions which would be advanced in the motion for a rehearing, it was unnecessary to take this formal step. But later decisions cast doubt on the rule so stated.³⁵ It is now said by the Supreme Court that while there is "no fixed rule" requiring the filing of such a motion, yet it is to be considered a condition precedent to the right to seek judicial review where such device would offer "a new opportunity to obtain critical administrative review of the question."³⁶ The controlling inquiry in each case thus becomes whether or not a motion for rehearing would result in the agency's giving to the question involved its further considered attention. If such would be the case, the motion should be filed. Whether such would be the case depends, of course, on many factors which cannot be foretold in advance. The only safe rule of practice, consequently, is to file such a motion where provision therefor is made (unless the controlling statute makes it unnecessary, as appears to be the case

³⁴ *Prendergast v. New York Telephone Co.*, 262 U. S. 43, 43 S. Ct. 466 (1923).

³⁵ *Red River Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 98 F. (2d) 282; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375, 58 S. Ct. 963 (1938); *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 58 S. Ct. 199 (1937); *Peoria Braumeister Co. v. Yellowley* (C.C.A. 7th 1941), 123 F. (2d) 637.

³⁶ *Levers v. Anderson*, 326 U. S. 219, 224, 66 S. Ct. 72 (1945), where the Supreme Court, reversing the lower court, held that on the particular facts involved, the application was merely a "normal, formal type of motion" and not a condition to judicial review.

in certain situations under Section 10 (c) of the Federal Administrative Procedure Act of 1946).

Indications of adverse decision. Normally, a justifiable belief that the agency will decide the case adversely to the litigant does not excuse going through with the administrative proceedings to their bitter end before seeking judicial review. Newspaper stories, declarations of counsel, or general statements by the agency as to its contemplated action are not normally enough to show that the final result of the administrative action is so well known as to make resort to the administrative process merely a waste of time.³⁷ But in rare cases, where it can be shown that the final decision has in fact been reached, and that nothing remains but the preparation and entry of the formal order, it may be held that resort to the courts is not premature, even though the administrative formalities have not been completed.³⁸

Unreasonable delay. If delay on the part of an agency in deciding a case is so long and unreasonable, and so productive of hardship as to evidence a complete disregard of a party's substantial rights, it may be considered that all effective possibilities of obtaining administrative relief have been exhausted, and an appeal to the courts permitted.³⁹

3. Estoppel by Reason of Failing to Exhaust Administrative Remedies

Ordinarily, when a petition seeking judicial redress of alleged administrative error is denied on the grounds that the petitioner has failed to exhaust his administrative remedy, it only means that the party must go back to the administrative agency and proceed to exhaust the remedies there available to

³⁷ *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 49 S. Ct. 282 (1929).

³⁸ *City Bank Farmers Trust Co., Executor v. Schnader, Attorney General of Pennsylvania*, 291 U. S. 24, 54 S. Ct. 259 (1934).

³⁹ *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587, 46 S. Ct. 408 (1926).

him. It occasionally happens, however, that after such an attempt to take the case into the courts has been rebuffed, the petitioner finds that it is too late to seek further administrative consideration of the case. The administrative remedies which he failed to exhaust in the first instance are no longer available. The unfortunate petitioner in such cases must go without relief. He is deprived of the chance to have a hearing on his claim, before either the administrative agency or the courts.

This is the so-called doctrine of estoppel for failure to exhaust administrative remedies. It amounts to no more than applying the usual doctrine in cases where the results may be disastrous.

The principle is dramatically illustrated by the decision in *National Labor Relations Board v. Fairchild Engine and Airplane Corporation*,⁴⁰ where the respondent undertook to prove certain facts by a witness who testified to them from hearsay. The trial examiner ruled that in view of the circumstances of the case the hearsay would not be received. At the conclusion of the day's hearings, late in the afternoon, respondent offered to produce on the following day a witness who could testify to the facts in question from personal knowledge. The trial examiner refused to continue the hearing to permit this to be done; and the record was closed without this evidence; and the Board made a finding against respondent. On proceedings brought to enforce the order of the Board, the Court held that while this action of the trial examiner was arbitrary and unreasonable, still no relief could be afforded, because of the failure of the respondent to apply for leave to introduce additional testimony.⁴¹ Accordingly, an

⁴⁰ (C.C.A. 4th 1944), 145 F. (2d) 214.

⁴¹ Since such application could have been made directly to the court, it might be said that there was involved something more than a failure to exhaust an administrative remedy; but the case really falls within the same principle.

order was entered enforcing the Board's order. It was too late for respondent to obtain any relief from arbitrary administrative action.

The doctrine of estoppel is savagely harsh. There is some doubt to what extent it applies outside of cases where strong reasons of public convenience require that a final and unsailable determination be speedily reached. Typical of this category, of course, are tax cases, where the constant pressing need for the prompt collection of the public revenues is so dominant a factor in judicial thinking. It is in tax cases that the doctrine has most frequently been applied. A leading case is *First National Bank v. Board of Commissioners of Weld County*,⁴² where the taxpayer's complaint was that its property had been assessed far above market value, while property of other taxpayers had been assessed not in excess of market value. In this type of case, of course, an assessment is ordinarily deemed void. But in the reported case, the taxpayer had neglected to appeal to the state tax commission or the state board of equalization; and a demurrer to its action to recover the excess taxes paid was upheld on the grounds that it had failed to exhaust administrative remedies which were available. After the defeat in the lawsuit, it was too late for the taxpayer to go back to the administrative authorities to obtain relief.

Even in tax cases, there are decisions which refuse to apply the doctrine where resort to the administrative remedy would be plainly futile or inadequate,⁴³ or where the tax statute was void.⁴⁴

⁴² 264 U. S. 450, 44 S. Ct. 385 (1924).

⁴³ *Montana Nat. Bank of Billings v. Yellowstone County of Montana*, 276 U. S. 499, 48 S. Ct. 331 (1928); *Munn v. Des Moines Nat. Bank* (C.C.A. 8th 1927), 18 F. (2d) 269.

⁴⁴ *Buder v. First Nat. Bank in St. Louis* (C.C.A. 8th 1927), 16 F. (2d) 990. See E. B. Stason, "Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies," 28 MICH. L. REV. 637 (1930).

But despite the association of the estoppel rule with tax cases, and the fact that even in that field the doctrine is not unswervingly applied where the resulting inequities would shock the judicial conscience, it cannot be assumed that the doctrine is limited to the tax field. It has been applied in other situations and is seemingly of general application.⁴⁵

⁴⁵ See *Johnson v. United States* (C.C.A. 8th 1942), 126 F. (2d) 242; and *Leebern v. United States* (C.C.A. 5th 1941), 124 F. (2d) 505.

CHAPTER 18

The Scope of Judicial Review

A. FACTORS AFFECTING SCOPE OF REVIEW

THE factors determining the scope and extent of judicial review of administrative decisions are essentially temporal in nature, varying with the attitude of the particular court, the subject of the administrative activity, the reputation of the particular tribunal involved, the method by which review is obtained, and other elements which vary widely from case to case. Any specific conclusions as to what questions will be considered by the reviewing court must be reached on the basis of a detailed study of cases involving a particular agency.

But this does not mean that the forest must be examined tree by tree. Out of the confusing welter of decisions there appear certain broad trends—certain indications of the factors which influence courts in their determination of the extent to which they will review decisions of administrative agencies. Analysis of these factors affords some guide—only tentative, but still of practical value—in determining the scope of review likely to be afforded in a situation involving a new agency or a new issue, as to which there has been no direct pronouncement defining the scope of review.

In viewing the decisions for purposes of such horizontal classification, the question is not so much the precise extent to which the courts will review the correctness and validity of factual inferences or statutory interpretations made by the Interstate Commerce Commission or by the Federal Trade Commission or some other agency; but rather the inquiry is *why* the courts examine more searchingly the rulings made by one agency than those made by another. If the reason can

be discovered, some basis will be afforded for predicting the extent to which the courts will review rulings to be made by new tribunals whose decisions will be subjected to judicial scrutiny in future years.

1. Methods of Review

The extent of review is often controlled by limitations inherent in the procedural method by which the question is presented to the reviewing court.¹

(a) *Statutory methods of review.* Where the statute setting up the agency makes specific provision for judicial review of the agency's determinations, the statutory method is ordinarily exclusive, and courts will but seldom permit the employment of any other procedural device (such as a writ of mandamus, or petition for certiorari) as a means of bringing the administrative determination into court for purposes of review.²

While the statutes seldom prescribe the scope of review (except in terminology so vague as to leave the determination of the actual extent of review to the courts) yet the fact that the statutory method is exclusive often operates indirectly to limit the scope of review. The statutory method may be inappropriate for the raising of certain questions that could be raised if other procedural devices were available.

So far as the statute does set out some indication of the permissible scope of review, it is controlling, subject only to constitutional requirements which preclude vesting in the

¹ The general problem is thoroughly discussed by E. B. Stason, "Methods of Judicial Relief from Administrative Tribunals," 24 A. B. A. J. 274 (1938); and McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 CAL. L. REV. 129 (1940).

² Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 58 S. Ct. 963 (1938); United Employees Ass'n v. National Labor Relations Board (C.C.A. 3d 1938), 96 F. (2d) 875; Arrow Distilleries, Inc. v. Alexander, 306 U. S. 615, 59 S. Ct. 489 (1939), aff'g (D. C. D. C. 1938), 24 F. Supp. 880; Securities and Exchange Commission v. Andrews (C.C.A. 2d 1937), 88 F. (2d) 441.

courts revisory powers so broad as to amount to a delegation of administrative duties,³ and which preclude depriving the courts of the power to review constitutional questions and essential questions of statutory construction.⁴

(b) *Common-law methods of review.* In appropriate cases—usually, where no specific statutory method is provided⁵—relief may be had by virtue of the common-law writs of certiorari, mandamus, or prohibition; or by their statutory counterparts. Where such method of review is employed, the extent of relief is governed primarily by the limitations inherent in these procedural devices.

Certiorari. Certiorari is not ordinarily available in the federal courts as a device to review administrative orders.⁶ In the state courts, it is probably the most commonly employed device to review orders of state tribunals; and while the questions which may be raised on certiorari proceedings vary widely in different states, depending on the effect of statutory modifications of the common-law scope of the writ, yet in general the extent of review available on certiorari proceedings is somewhat circumscribed. It is of course effective to raise questions as to the jurisdiction of the agency; and the general tendency in the state courts is to hold that when the writ is directed to an administrative agency, the court is enabled to pass upon (a) questions of law appearing on the face of the record, and (b) claims that the adminis-

³ *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 50 S. Ct. 389 (1930); *Williams v. United States*, 289 U. S. 553, 53 S. Ct. 751 (1933); *Courter v. Simpson Construction Co.*, 264 Ill. 488, 106 N. E. 350 (1914).

⁴ *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932); *cf.*, *Otis Elevator Co. v. Industrial Commission*, 302 Ill. 90, 134 N. E. 19 (1922).

⁵ Or where the statutory method of review does not cover the particular situation involved. *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938); *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, 59 S. Ct. 409 (1939).

⁶ *Degge v. Hitchcock*, 229 U. S. 162, 33 S. Ct. 639 (1913); *Public Clearing House v. Coyne*, 194 U. S. 497, 24 S. Ct. 789 (1904).

trative order is plainly irregular or illegal.⁷ Questions as to the weight of the evidence, of course, cannot be reviewed on certiorari proceedings.

The availability of judicial relief by way of a writ of certiorari is also limited by the doctrine that certiorari will lie only where the decision of the agency is judicial in character, rather than legislative or purely administrative. On the question as to when the agency's determination is to be described as judicial, there is of course a contrariety of opinion. Thus, denial of a certificate of convenience and necessity to a public utility has been described as judicial;⁸ while the revocation of such a certificate has been described as nonjudicial.⁹ The conclusion in each case is apparently affected by (a) the court's judgment as to the desirability of reviewing a particular type of determination; and (b) by the availability of other methods of review—the courts being inclined to permit the use of the writ where no other method of review would be open. Many of the state court decisions (but not all of them) can be reconciled on the basis that where the agency is required to grant a hearing and there consider a claim of legal right, the proceeding will be deemed reviewable by certiorari; and conversely the writ is not usually available where the agency is not required to grant a hearing.

Mandamus. In the comparatively few cases where mandamus is available to review agency determinations, the area of review is closely circumscribed by the nature of the writ. It is available as a means of compelling an officer or agency

⁷ *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444 (1872); *Jackson v. People*, 9 Mich. 111 (1860); comment, "Review of Acts of Non-Judicial Bodies by Certiorari," 19 *IA. L. REV.* 609 (1934).

⁸ *People ex rel. Steward v. Board of Railroad Commissioners*, 160 N. Y. 202, 54 N. E. 697 (1899).

⁹ *People ex rel. Keating v. Bingham*, 138 App. Div. 736, 123 N. Y. S. 506 (1910); *Southeastern Greyhound Lines v. Georgia Public-Service Commission*, 181 Ga. 75, 181 S. E. 834 (1935).

to perform a purely ministerial act where refusal to perform it violates a clearly established legal right, and it can be utilized to compel an agency to assume jurisdiction over a case which it is the duty of the agency to decide;¹⁰ but it can seldom if ever be employed as a means of raising any other question of law. It does not reach questions of fact decided by the administrative agency.

Its only substantial function, then, is to compel an agency to perform its clear legal duty; and if any doubt is raised as to the existence of a strict and undoubted legal right in the petitioner to the claimed relief, the writ may be denied.¹¹ Thus, mandamus is unavailable where the act which petitioner seeks to compel the agency to perform is one involving some measure of discretion. A modicum of discretionary power is sufficient to render nugatory mandamus proceedings. Thus, where the requested administrative action involves the construction of a statute, the action of the agency is said by the federal courts, at least, to involve a measure of discretion, making mandamus unavailable.¹² Many of the state courts, however, will review some issues of statutory construction on mandamus.

Where the agency performs a judicial function, the courts will not, on mandamus proceedings, direct the agency as to what decision to make on a legal question involved in the administrative proceeding.¹³

Even where a strict legal right on the part of the petitioner can be shown, relief may be denied on the basis that mandamus is an equitable remedy, which should not be granted

¹⁰ *Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474, 32 S. Ct. 556 (1912).

¹¹ *United States ex rel. Girard Trust Co. v. Helvering*, 301 U. S. 540, 57 S. Ct. 855 (1937). See Sherwood, "Mandamus to Review State Administrative Action," 45 MICH. L. REV. 123 (1946), for a general discussion of the availability of mandamus to review administrative proceedings.

¹² *United States ex rel. Hall v. Payne*, 254 U. S. 343, 41 S. Ct. 131 (1920); *Thomas v. Vinson* (App. D. C. 1946), 153 F. (2d) 636.

¹³ *People ex rel. McCabe v. Matthies*, 179 N. Y. 242, 72 N. E. 103 (1904).

unless the inconvenience to the government is more than counterbalanced by a resulting substantial benefit to the petitioner.¹⁴ On similar grounds, relief by mandamus is ordinarily denied where it can be shown that some other assertedly adequate remedy is available.¹⁵

In the federal courts, the usefulness of this writ is further impaired by the circumstance that (save for the courts of the District of Columbia, which have inherited some of the common-law powers of the Maryland courts)¹⁶ the district courts have no general original power to issue writs of mandamus, but may grant the writ only in aid of already acquired jurisdiction,¹⁷ or as empowered by statute in specific cases. The writ is rarely available to review determinations of federal agencies, for the state courts may not issue the writ against federal officers.¹⁸

Prohibition. The writ of prohibition, where available, raises only the single question as to whether the agency, in connection with the performance of a judicial function, is unlawfully assuming a power it cannot legally exercise, because beyond its statutory jurisdiction. It will not issue to prevent the performance of executive or ministerial functions,¹⁹ in the absence of specific statutory provisions, such as are found in a few states. It is unavailable in the federal courts.²⁰

¹⁴ United States *ex rel.* Greathouse v. Dern, 289 U. S. 352, 53 S. Ct. 614 (1933); Matter of Dr. Bloom Dentist, Inc. v. Cruise, 259 N. Y. 358, 182 N. E. 16 (1932).

¹⁵ United States *ex rel.* Frey v. Robertson (App. D. C. 1933), 63 F. (2d) 457; United States *ex rel.* Carroll Electric Co. v. McCarl (App. D. C. 1925), 8 F. (2d) 910.

¹⁶ Kendall v. United States, 12 Pet. (37 U. S.) 524 (1838). See Miller, "Control of the Interstate Commerce Commission by Mandamus," 4 GEO. WASH. L. REV. 118 (1935).

¹⁷ Bath County v. Amy, 13 Wall. (80 U. S.) 244 (1871); Labette County Commissioners v. United States, 112 U. S. 217, 5 S. Ct. 108 (1884).

¹⁸ M'Clung v. Silliman, 6 Wheat. (19 U. S.) 598 (1821).

¹⁹ Lodge v. Fletcher, 184 Mass. 238, 68 N. E. 204 (1903); Butler v. Selectmen of Wakefield, 269 Mass. 585, 169 N. E. 498 (1930); and cases cited in annotation, 115 A. L. R. 3; 159 A. L. R. 627.

²⁰ 34 COL. L. REV. 899, 905 (1934).

(c) *Collateral attack*. The extremely limited scope of review which may be obtained by means of the common-law writs, and their unavailability in many types of situations, has rendered it necessary to employ various methods of collateral attack as a means of reviewing administrative determinations, in cases where no statutory method of review is provided or where the method of review provided by statute is inadequate. The usual methods of collateral attack employed are (1) bills for injunction; (2) damage actions against administrative officers; (3) actions for restitution; and (4) actions for declaratory judgments.²¹

Bills for injunction. Not infrequently, statutory provisions authorize the filing of a bill for injunction to review particular agency determinations, and in such cases, the scope of review is determined on the same basis as in other instances where review is by statutory method. So far as the statute specifies the extent of review which is to be had, the statute is controlling. To the extent that the statute is silent as to the intended breadth of review, the question is one for the courts, to be determined in accordance with the general principles discussed *infra*.

Only where there is no such statutory provision does an application for injunctive relief assume the true character of a collateral attack. In such instances, it must usually be shown, in order to sustain the bill, that the agency action complained of is void rather than merely erroneous,²² that

²¹ While perhaps not strictly a method of collateral attack, petitions for declaratory judgment have recently become available as an effective method for raising questions as to the jurisdiction of an agency and as to the validity of agency rules. See cases collected in note: Stason, *THE LAW OF ADMINISTRATIVE TRIBUNALS*, 2d ed. (1947) 599-601; and 149 A. L. R. 349. For law review comment, see Borchard, "Declaratory Judgments in Administrative Law," 11 N. Y. U. L. Q. REV. 139 (1933); Ellingwood, "Declaratory Judgments in Public Law," 29 ILL. L. REV. 1, 174 (1934); Martin, "The Declaratory Judgment Act in Public Law Controversies," 7 GEO. WASH. L. REV. 514 (1939); Davison, "Administrative Legislation," 34 ILL. L. REV. 651 (1940).

²² *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975 (1901).

irreparable injury would be suffered,²³ and that there is no adequate remedy at law.²⁴

A bill for an injunction may be utilized, typically, to review an assertion that a statute is unconstitutional, or that enforcement of a particular order will result in a deprivation of due process. It is employed frequently in tax cases. However, application of general doctrines of equity as to the availability and functions of injunctive remedies circumscribes the utility of this device as a means of obtaining a general review of the fairness, justice, or legal correctness of the determinations of administrative agencies.

Damage actions against administrative officers. Historically, the basic common-law remedy for the protection of an individual against illegal official action was a private action for damages. In such a case, if the plaintiff could show that the action of the officer was a private wrong (not justifiable under the statute), he was entitled to recover damages. The issue thus presented was whether or not an officer was legally entitled to do what he did do in the particular case—whether the law authorized his conduct under the circumstances. Obviously, the scope of review in such an action was necessarily limited. Because of these obvious inadequacies of this common-law remedy, indeed, it became largely displaced by the familiar bill for an injunction. However, the remedy is still available, and is occasionally used.²⁵

The older cases allowed recovery quite freely, not only for action under an unconstitutional statute, but also in cases where, because of a mistaken determination of fact, the officer took some action not authorized by the statute. Thus, where an officer was authorized to destroy diseased cattle, and (on finding cattle to be diseased) destroyed them, but a jury later

²³ *California v. Latimer*, 305 U. S. 255, 59 S. Ct. 166 (1938).

²⁴ *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267 (1932).

²⁵ *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 59 S. Ct. 366 (1939).

found that the cattle had not in fact been diseased, it was said that the officer had killed cattle which were not diseased, and had hence committed a wrong which could not be justified under the statute, and was therefore liable in damages.²⁶ But the results of this doctrine were unsatisfactory. The danger of an administrative official subjecting himself to substantial personal liability—if a jury, trying the factual question *de novo* (and often on less complete evidence than that on which the officer acted) should determine the factual question differently than the officer had—was an obvious deterrent to vigilant administrative enforcement. Further, the theory of according greater weight to the jury's fact finding than to the factual determination of the administrative officer was completely at odds with fundamental tenets of the doctrine of administrative *expertise*. Consequently, as a means of avoiding the harsh results of the rule, some courts developed a theory that where the administrative function is judicial in character (or quasi-judicial, as it has been commonly called), the administrative officer is exempt from liability so long as he acts within his jurisdiction and in good faith.²⁷ Sometimes it is said that the immunity is available only where no property right is invaded, but the courts have gone far, in order to protect an officer, in finding this requirement satisfied.²⁸

Actions for restitution. Closely related to the damage action is a private suit seeking restitution of moneys collected by an administrative officer or agency, which are alleged to have been improperly collected. The typical case is the suit to recover taxes paid under protest.

²⁶ *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942 (1904).

²⁷ See note, 34 MICH. L. REV. 113 (1935); *Raymond v. Fish*, 51 Conn. 80 (1883); *Beeks v. Dickinson County*, 131 Iowa 244, 108 N. W. 311 (1906); *Williams v. Rivenburg*, 145 App. Div. 93, 129 N. Y. S. 473 (1911).

²⁸ For example, it was held in *Wasserman v. City of Kenosha*, 217 Wis. 223, 258 N. W. 857 (1935), that revocation of a building permit did not invade any property right, and that therefore an officer who revoked the permit was not liable for damages.

At common law, there was doubt whether such an action could be maintained unless the actions of the administrative officer were void, rather than merely erroneous.²⁹ In most of the states, and under various federal statutes, these actions are now controlled by specific statutory provision, and the question as to the scope of review is primarily a question as to what the statute provides.

2. "Facts" v. "Law" as a Criterion of Review

The classical dichotomy (asserting that the courts should judicially review questions of law passed on by administrative agencies, but should not review their determinations of fact, beyond ascertaining whether the determinations are supported by substantial evidence) is of little use as a working tool. One cannot predict the scope of review which will be accorded by ascertaining whether the question involved is one of law or of fact.

The basic reason for this, as pointed out in the classic statement of Dickinson,³⁰ is that there is no fixed distinction between questions of fact and questions of law, but "The knife of policy alone affects an artificial cleavage." What would be considered in many connections as a question of law—e. g., a question as to whether, on stated facts, the relationship between two parties is that of employer and employee or independent contractor,³¹ or a question of reasonableness³²—may be treated as a question of fact to eliminate judicial review, where considerations of policy dictate such results. On the other hand, determinations which are labeled findings of fact, may be treated as involving questions of law,

²⁹ *United States Trust Co. of New York v. Mayor, etc., of City of New York*, 144 N. Y. 488, 39 N. E. 383 (1895).

³⁰ Dickinson, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 55.

³¹ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

³² *Trust of Bingham v. Commissioner of Internal Revenue*, 325 U. S. 365, 65 S. Ct. 1232 (1945).

and subject to review.³³ The distinction, as the Supreme Court has said, "is often not an illuminating test and is never self-executing."³⁴ Judges may often disagree as to whether a question is one of fact or of law; and the disagreement reflects merely different judgments as to the proper extent of review.³⁵

Even if it can be agreed that a certain issue is one of fact or of law, the question as to the actual scope of review is still unanswered. As to whether a factual determination is supported by substantial evidence, judges of a court often disagree, the disagreement representing different philosophies as to the proper scope of review. And where the question is one of law, there still remains the question as to whether the court should ascertain merely whether the decision has "a reasonable basis in the law" or whether the court should determine the law question independently. Judgment on all these points reflects no logical distinctions but represents rather a delicate balancing of many imponderable policy factors. As it is well stated by Justice Brandeis:³⁶ ". . . in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the court has refused to be governed by a rigid rule. It has

³³ *Baumgartner v. United States*, 322 U. S. 665, 671, 64 S. Ct. 1240 (1944), where the court pointed out that the determination of the so-called ultimate facts "implies the application of standards of law," and declared that in such cases "the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court." *Cf.*, *Williams v. North Carolina*, 325 U. S. 226, 236, 65 S. Ct. 1092 (1945), where the court said, "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact."

³⁴ *Baumgartner v. United States*, 322 U. S. 665, 671, 64 S. Ct. 1240 (1944).

³⁵ *E.g.*, majority and dissenting opinions in *Gray v. Powell*, 314 U. S. 402, 62 S. Ct. 326 (1941).

³⁶ Concurring opinion, *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 81, 56 S. Ct. 720 (1936). How such considerations may affect the scope of review is pointed out in *McDermott*, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 A. B. A. J. 453 (1939).

weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action . . . and formal, deliberate, quasi-judicial decisions. . . . It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision. . . . It has enquired into the character of the administrative tribunal provided and the incidents of its procedure."

Whether the question be one of fact or law, the scope of review does not depend on any logical or mechanical classification of the issue under one category or the other. Rather, the extent to which the court will review the agency's determination depends on more vital factors. These factors reflect the court's judgment as to the appropriate spheres of administrative and judicial activity. The judgment on this ultimate question is based not on logic but on experience and philosophy.

3. Conduct of Public Business v. Regulation of Private Business

The distinction between the regulation of private business and the conduct of public business furnishes a criterion capable of fairly definite and objective application as a basis on which to predict the scope of judicial review that will be afforded.

Where the purpose of the administrative tribunal is to discharge a function which is essential to the perpetuation of government itself, far different considerations apply than where the tribunal's purpose is to regulate the conduct of private business enterprise.

In administrative determinations which are incidental to the conduct of the public business, there are many cases where

the sovereign's free will is unfettered—where decisions do not determine legal rights, but merely establish the extent of a privilege which the government is free to grant or deny, as in public lands and veteran's pension cases, or the granting of licenses to establish businesses of the sort which the government may regulate to the point of extinction, like saloons and public dance halls.³⁷ In other instances, legal rights are to a larger degree involved, but the need for a prompt determination of the dispute is more impelling than the need for a detailed reconsideration of each case. Thus, in immigration matters, the courts have been willing to sacrifice some doubts as to the correctness and justice of individual determinations because of the practical necessity for the speedy disposition of such cases.³⁸ In tax cases and customs cases, the courts, recognizing the overwhelming public interest in the prompt collection of the public revenues in order to permit the uninterrupted operation of governmental processes, accord a large degree of finality to administrative decisions.³⁹

On the other hand, where the incidence of the administrative function falls primarily on the conduct of private business, the administration's demands for autonomy are less persuasive. The courts have clearly recognized a need for more extensive review where administrative determinations directly affect the operation of business enterprise.⁴⁰ In this

³⁷ *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 S. Ct. 698 (1903); *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 S. Ct. 12 (1888); *Wilson v. Eureka City*, 173 U. S. 32, 19 S. Ct. 317 (1899); *State of Kansas v. Sherow*, 87 Kan. 235, 123 Pac. 866 (1912); *State ex rel. Port Royal Mining Co. v. Hagood*, 30 S. C. 519, 9 S. E. 686 (1889); *McMillan v. Sims*, 132 Wash. 265, 231 Pac. 943 (1925).

³⁸ *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566 (1920); *Van Vleck, THE ADMINISTRATIVE CONTROL OF ALIENS* (1932) Ch. V.

³⁹ *Passavant v. United States*, 148 U. S. 214, 13 S. Ct. 572 (1893); *Stason, "Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies,"* 28 MICH. L. REV. 637 (1930).

⁴⁰ *West v. Chesapeake & Potomac Telephone Co. of Baltimore*, 295 U. S. 662, 55 S. Ct. 894 (1935); *Norfolk & W. Ry. Co. v. United States*, 287 U. S. 134, 53 S. Ct. 52 (1932); *Federal Trade Commission v. Klesner*, 280 U. S. 19, 50 S. Ct. 1 (1929).

field, overly drastic restrictions of judicial review might serve ultimately to impair rather than foster the effectiveness of governmental processes; a reasonably broad review helps to maintain public confidence in the fairness of the administrative activity.

There are some agencies which neither carry on the necessary business of government nor regulate the actual operation of private business, but are rather charged with the duty of enforcing a general rule of conduct prescribed by statute. Thus, the National Labor Relations Board does not actually regulate industry (as the Securities and Exchange Commission regulates the investment banking business and some corporate reorganizations) but merely insists that industry in the conduct of business shall not transgress certain standards of behavior prescribed by Congress. Where such is the nature of the agency's task, it impinges less substantially on the conduct of private affairs. It does not regulate, but merely polices. In such cases, the trend is in the direction of a narrowing scope of review.

4. Legislative v. Judicial Powers

Another guide which is of some assistance in predicting the scope of review which will be allowed in particular cases is based on the distinction between those administrative functions which are basically of a legislative character and those which are essentially judicial in nature. Administrative agencies act in three fields: (a) those which are traditionally deemed executive or administrative; (b) those in which the agency makes rules analogous to legislative enactments; and (c) those in which the determinative functions resemble so closely the processes of the constitutional courts that frankness compels the application of the adjective "judicial."

So far as the action is purely executive or ministerial, judicial review may be limited to a determination that the

agency has kept within its statutory powers and has followed statutory procedure.⁴¹ The field of executive action is traditionally one for comparatively unbridled administrative discretion.

Where, however, the agency fulfills a function that is traditionally legislative, less freedom from control is permitted. A standard must be set up by which the agency's acts are to be measured. The courts must determine whether a proper standard has been set up, and whether the agency has complied with that standard.⁴² The judicial approach is somewhat similar to that employed when a statute is attacked on constitutional grounds—highest respect is shown for the legislative or administrative determination, but the courts must intervene when the bounds imposed by the enabling enactments are overreached.

When the agency exercises judicial powers, it passes on questions intimately associated with personal rights of liberty and property, presented in a form readily susceptible to judicial consideration. Judicial review is likely to be granted at least to the extent of passing on vital issues of statutory construction, scrutinizing claims that the agency has violated those ordinary decencies of judicial procedure that constitute the requirements of procedural due process;⁴³ determining whether it has decided cases on the basis of matters not before the agency or on preformed opinions;⁴⁴ and deciding whether its findings are supported by substantial evidence.

⁴¹ *Small v. Moss*, 279 N. Y. 288, 18 N. E. (2d) 281 (1938); *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 50 S. Ct. 389 (1930).

⁴² *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935); *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928).

⁴³ *Saxton Coal Mining Co. v. National Bituminous Coal Commission* (App. D. C. 1938), 96 F. (2d) 517; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913).

⁴⁴ *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 55 S. Ct. 462 (1935); *Tri-State Broadcasting Co. v. Federal Communications Commission* (App. D. C. 1938), 96 F. (2d) 564.

5. Discretionary Powers

If an administrative agency is in fact endowed with truly discretionary powers, judicial review of its discretionary acts may properly be denied.⁴⁵ An act of free discretion, referable to no fixed standard except governmental desire, is not appropriate for judicial review.⁴⁶

But instances are uncommon where an agency exercises pure and untrammelled discretionary powers. Rarely is an agency of the government granted discretionary powers as broad as those of its principal. Usually, the delegated discretion is limited to interstitial legislative powers—to the determination, within stated limits, of the proper means of executing a stated legislative purpose. In such cases, review is appropriate to determine whether the agency's discretion was controlled by improper considerations—whether its discretion was abused.⁴⁷

Control of discretion is not typically a judicial function, nor is there promise of any assured gain to be derived from superimposing the discretion of the judge upon that of the administrator. Rather, the problem of controlling the scope of administrative discretion is fundamentally political; it is for the legislature, primarily, to determine the breadth of discretionary power to be vested in a branch of the government which is comparatively free of popular control. The most that the courts can do is to ascertain that the administrative action has not exceeded the limits of the delegated discretion.

⁴⁵ *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 48 S. Ct. 587 (1928); *City of Chicago v. Kirkland* (C.C.A. 7th 1935), 79 F. (2d) 963. See Treves, "Administrative Discretion and Judicial Control," 10 MOD. L. REV. 276 (1947).

⁴⁶ *People ex rel. Keating v. Bingham*, 138 App. Div. 736, 123 N. Y. S. 506 (1910). Provisions allowing review in such cases may be unconstitutional. *Norwalk Street Railway Company's Appeal*, 69 Conn. 576, 37 Atl. 1080 (1897).

⁴⁷ *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 32 S. Ct. 22 (1911); *City of Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555 (1916).

Hence, when an agency asserts that its decision is non-reviewable, because reached in the exercise of its discretionary power, the first task of the reviewing court is to determine to what extent the agency's powers are discretionary.⁴⁸ The court must then ascertain whether the agency has exceeded these limits. If it has stayed within the area of delegated discretion, there is no further question presented.

6. Character of Administrative Procedure

Because of the duty of the courts to review assertions that the course of proceedings adopted by an agency constituted a deprivation of procedural due process, the scope and extent of review is affected indirectly by the character of the agency's procedure. The more summary the administrative procedure, the more searching must judicial review be in order to permit the court to determine whether perfunctory adherence to customary forms masks arbitrary or capricious action. Similarly, where investigatory, prosecuting, and adjudicatory powers are combined in a single agency—and particularly where they are not rigidly divided between separate departments of that agency—searching inquiry may be required to determine whether there has been any infringement of the guaranties of fair procedure.⁴⁹

Conversely, where the determination is based on evidentiary findings, made after a formal hearing at which there was afforded ample opportunity to present testimony and meet the arguments of the adverse party—where the procedure is essentially that of a legislative court—the inclination of the courts is to probe less deeply. In other words, the

⁴⁸ *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 S. Ct. 595 (1904); *Yudelson v. Andrews* (C.C.A. 3d 1928), 25 F. (2d) 80; *Baltimore & O. R. Co. v. Brady* (C.C.A. 4th 1932), 61 F. (2d) 242.

⁴⁹ It has been suggested that § 10 (3) (5) of the Administrative Procedure Act authorizes the determination *de novo* by the reviewing court of the facts pertinent to any relevant question of law, in cases where the agency's determination was not based on a statute-required hearing. See Congressional Debate, "The Congressional Record," May 24, 1946, 5654, 5657.

character of the administrative procedure affects the scope of judicial review to the extent that suspicions of arbitrary or careless administration prompt the courts to examine carefully the fairness of the procedures adopted.

Aside from this, the character of the administrative procedure may affect the scope of judicial review in another way. If the procedure is such as to beget lack of confidence in the probable correctness of the administrative determination, there is an inclination to allow a fuller review. Thus, it has been suggested that the doctrine according great weight to administrative findings of fact "has and should have" little bearing on certain findings of the Patent Office because of the *ex parte* nature of the particular proceedings, allowing interested parties but a limited opportunity to be heard.⁵⁰

7. Experience of Agency

Both in legislative and judicial spheres of administrative activity, the experience of the particular agency is a factor which plays some part in judicial determination as to the proper extent of review. The greater experience an agency may possess, the greater confidence will be indulged by the courts in its decisions. The high quality of performance demonstrated by the Interstate Commerce Commission had won for its determinations the respect of the courts even before the Federal Trade Commission, for example, was organized.⁵¹ The latter body was, for a time, viewed somewhat with mistrust by the courts.⁵² In earlier days, for ex-

⁵⁰ Opinion of Frank, J., concurring in *Aero Spark Plug Co. v. B. G. Corporation* (C.C.A. 2d 1942), 130 F. (2d) 290, 294.

⁵¹ E.g., *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 S. Ct. 700 (1907); *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913).

⁵² It is said that some ten years after the creation of the Federal Trade Commission, one appellate judge confessed that when reviewing a determination of the Interstate Commerce Commission, it was always his inclination to affirm; and that when reviewing a determination of the Federal Trade Commission, he entertained some predisposition toward reversal. 24 A. B. A. J. 285 (1938).

ample, the courts were inclined to insist that its factual inferences would be accepted only if they were "reasonable" or "legitimate" or "necessary," and there was considerable readiness to find the inferences unreasonable;⁵³ and similarly, it was declared that what constituted unfair competition was a question for the courts rather than for the agency.⁵⁴ But in more recent years, as the courts have come to repose more confidence in the Commission, its inferences have been more readily accepted without review,⁵⁵ and the courts give far greater weight to the Commission's determination as to the propriety or impropriety of a given trade practice.

The successful experience of an administrative agency is the best criterion of its true expertness; and the pleas that the expert knowledge of an administrative body should not be jettisoned, carry far greater weight where the asserted expertness has been demonstrated.⁵⁶

8. Miscellaneous Factors Affecting Likelihood of Fair Trial

The continued insistence of the courts on the maintenance of standards of fair play in administrative procedure has led reviewing judges to probe somewhat more deeply in cases where factors are present which may make it difficult for the

⁵³ *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 651, 51 S. Ct. 587 (1931); *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U. S. 52, 61, 47 S. Ct. 255 (1927).

⁵⁴ *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572 (1920); *Federal Trade Commission v. Curtis Pub. Co.*, 260 U. S. 568, 43 S. Ct. 210 (1923).

⁵⁵ *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 65 S. Ct. 971 (1945); *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 54 S. Ct. 423 (1934).

⁵⁶ *Cf.*, the discussion in *Skidmore et al. v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161 (1944), as to the reasons for giving weight to an interpretative opinion of the Wage and Hour Division; and the reasons given in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 156, 64 S. Ct. 474 (1944), for refusing to follow the construction given a statute by the Office of Price Administration.

agency to observe high standards of fairness.⁵⁷ Political pressure is present in varying degrees in different tribunals. Its significance, where present, is reflected by the frank statement of President Roosevelt's Committee on Administrative Management:

" . . . the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of the judicial work. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights." ⁵⁸

Where the danger of improper political motivation is apparent, it is to be expected that judicial review will be somewhat more searching.

Opportunities for reaching an unbiased decision are in some fields rendered difficult by the highly subjective character of the inquiry. As has been wisely said, "The more indefinite the standard, the greater is obviously the temptation to use the law as a weapon." ⁵⁹ A familiar example of the difficulty of applying vague standards is found in the fields of economic legislation, operating in terms of fraud, discrimination, monopoly, unreasonable charges, and similar concepts. In fields where technical competence plays a large part, and where a reasonably objective test is to be applied, administrative conclusiveness is more readily conceded than in fields where more judgment and less cold fact are in-

⁵⁷ "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 52, 56 S. Ct. 720 (1936).

⁵⁸ Sen. Doc. No. 8, 75th Cong., 1st Sess. (1937) 68.

⁵⁹ Freund, *GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923) 31.

volved, and where distinctions between findings of fact and conclusions of law are almost obliterated.

B. SCOPE OF REVIEW ON APPEALS FROM DETERMINATIONS OF SPECIFIC AGENCIES

Decisions laying down rules as to the extent of review on appeals from the determinations of various particular agencies illustrate the application of the general factors above discussed.

1. Workmen's Compensation Cases

The field of workmen's compensation presents a middle ground, so far as concerns the scope of judicial review of administrative determinations. Factors which in other types of cases prompt the courts to examine with care the agency's factual inferences are here lacking; but there are also absent the factors which in some cases are effective to eliminate review of issues involving questions that could be described as issues of law.

Workmen's compensation commissions are engaged essentially in administering a social insurance program, the costs of which are widely spread. The administrative activity does not bear so directly or so oppressively on private affairs as in cases where, for example, an agency undertakes to regulate the trade practices of some particular industry. In some respects, the task of the compensation commissions is coming to be viewed as the discharge of one of the normal functions of government—like carrying mail or policing highway traffic. To the extent that the function is thus coming to be considered as the conduct of the public business, there is a growing tendency in the courts to restrict the scope of judicial review. On the other hand, the compensation awards remain a direct burden on the individual employer or his insurance carrier, and a broader scope of review is granted than in cases

where a purely public program is being carried out which does not directly impinge on private rights of person or property.⁶⁰

(a) *Factors tending toward broad review.* There are present in this field a number of factors which militate toward a substantial degree of judicial review. Thus, in the first place, the compensation commissions exercise a function which is typically judicial—determining contested issues of fact and law by hearing evidence and interpreting a governing statute. The tendency to grant broader review where the agency exercises judicial functions is thus operative in cases of this type. Secondly, the compensation commissions typically have but a small measure of discretion—when the facts are found, the decision must be based on the provisions of the controlling statute. There is thus but little occasion to restrict review on the principle that judicial respect and deference must be accorded the judgment of the agency in matters involving discretion. Thirdly, the law questions presented have a non-technical background; courts feel themselves on familiar grounds in considering such questions as the meaning of “dependent,” the significance of the phrase “arising out of and in the course of employment,” the definition of “engaged in trade or business,” and the like. Consequently, courts are more ready to impose their own judgments than in fields where the controlling statutes and regulations are cast in the terminology of a complex, technical field.

(b) *Factors tending toward narrow review.* On the other hand, there are also present factors which disincline the courts to probe extensively into the intrinsic correctness of the administrative determination. For one thing, the courts exhibit

⁶⁰ *Cf.*, the suggestion in *Crowell v. Benson*, 285 U. S. 22, 50, 52 S. Ct. 285 (1932), indicating that a narrower scope of review would have been afforded, had the matter related solely to the conduct of public business. For a general survey of the scope of review in workmen's compensation cases, see Horowitz, “Modern Trends in Workmen's Compensation,” 21 IND. L. J. 473 (1946).

some tendency toward viewing it as socially desirable to sustain the grant of compensation unless the decision is plainly erroneous. The fact that the amount involved in the individual case is not large likely contributes somewhat toward acceptance of this philosophy. There is little in the character of the administrative procedure to create concern or alarm. Judicial-type hearing procedures are usually employed, and there is seldom any serious question presented as to the granting of a fair trial. Even where this point is urged, the courts hear it with considerable scepticism.⁶¹ There is usually but little if any political motivation in the functioning of compensation commissions, nor are such agencies often exposed to questionable pressures. These factors likewise incline the courts to accept the administrative determinations as presumptively fair and just. Finally, the long experience and demonstrated expertness of compensation commissions operate to create judicial respect for the administrative determination.

(c) *Fact and law*. In reconciling these opposed tendencies, the courts have been inclined to accept without critical examination determinations which are purely factual or based on inferences as to the facts, but at the same time to describe as issues of law and grant full review to issues of statutory interpretation and application which in other types of cases might be deemed nonreviewable issues of fact. Thus, the question as to whether an individual is an employee or an independent contractor is ordinarily deemed a reviewable question of law in compensation cases; whereas in unfair labor practice cases it may be deemed a question of fact.⁶²

⁶¹ E.g., *County of Los Angeles v. Industrial Accident Commission*, 202 Cal. 437, 261 Pac. 295 (1927); *King v. Alabam's Freight Co.*, 40 Ariz. 363, 12 P. (2d) 294 (1932), holding that the mere fact that the testimony given before a referee had not been transcribed when the award was made did not indicate that the Commission did not consider the testimony, since there was no proof that the Commission did not have the stenographer read the untranscribed testimony.

⁶² *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

Decision on all ordinary questions of litigation facts is reserved almost exclusively for the commissions. It is frequently said, for example, that the court must view the evidence in the light most favorable to sustain the findings, and all presumptions are to be indulged in favor of the validity of orders granting compensation.⁶³ Doubts as to whether the award is supported by evidence should be resolved in favor of the injured employee.⁶⁴ Even if the findings of the commission are inconsistent, it is enough if some of the findings sustain the award.⁶⁵

Likewise, the agency's inferences from established primary facts are ordinarily accorded the same conclusiveness as is granted the agency's findings as to the primary facts.⁶⁶

It was in this field, to be sure, that the doctrine as to judicial review *de novo* of "jurisdictional facts" was established in *Crowell v. Benson*⁶⁷ but the validity of this doctrine, and its vitality even in the federal courts is open to serious doubt; and several state courts, both before and after this decision, have considered jurisdictional facts on the same basis as other factual questions.⁶⁸

Because of the comparatively long time that workmen's compensation commissions have been functioning, there may

⁶³ *Sloss-Sheffield Steel & Iron Co. v. House*, 217 Ala. 422, 116 So. 167 (1928); *Crutcher v. Curtiss-Robertson Airplane Mfg. Co.*, 331 Mo. 169, 52 S. W. (2d) 1019 (1932); *Hackley-Phelps-Bonnell Co. v. Industrial Commission*, 173 Wis. 128, 179 N. W. 590 (1921).

⁶⁴ *Liberty Mut. Ins. Co. v. Hoage* (App. D. C. 1933), 65 F. (2d) 822.

⁶⁵ *Southern Pacific Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 Pac. 822 (1918).

⁶⁶ *Goldsworthy v. Industrial Commission*, 212 Wis. 544, 250 N. W. 427 (1933); *Noto v. Hemp & Co.*, 231 Mo. App. 982, 83 S. W. (2d) 136 (1935); *Ginsberg v. Burroughs Adding Machine Co.*, 204 Mich. 130, 170 N. W. 15 (1918).

⁶⁷ 285 U. S. 22, 34, 52 S. Ct. 285 (1932).

⁶⁸ *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35 (1915); *County of San Bernardino v. State Industrial Accident Commission*, 217 Cal. 618, 20 P. (2d) 673 (1933); *O'Hara's Case*, 248 Mass. 31, 142 N. E. 844 (1924); *Matter of Dimino v. Independent Warehouses, Inc.*, 284 N. Y. 481, 31 N. E. (2d) 911 (1940); *Matter of Miles v. Colegrove*, 258 App. Div. 1014, 16 N. Y. S. (2d) 988 (1940), *aff'd* 284 N. Y. 609, 29 N. E. (2d) 929 (1940).

be found in this field a series of decisions regarding judicial review, which extend over a period of years and illustrate the changing trend of the courts. Thus, many early cases insisted that where the facts were such as to support equally an inference justifying an award or an inference denying it, it was the duty of the agency to make the inference which denied the award.⁶⁹ Early attempts of the legislatures to change this result by enacting "presumption statutes" to aid the compensation claimants were in some instances blandly disregarded by the courts.⁷⁰ But by the time of the decision of the Supreme Court in *Del Vecchio v. Bowers*,⁷¹ sustaining the validity of, and giving substantial effect to such presumption statutes, there had developed a tendency (which under the Supreme Court's decision became a binding requirement) to grant a much larger degree of freedom to the compensation commissions to make such inferences as they choose.

2. Taxation

(a) *Determinations involve conduct of public business.* The overwhelming necessity of the prompt collection of the public revenues is a brooding omnipresence in the judicial consciousness, when courts are reviewing administrative determinations in tax matters. The exercise of the power of taxation (which has been characterized by the Supreme Court as an "imperious necessity of all government, not to be restricted by mere legal fictions")⁷² through administrative agencies, is the outstanding example of the principle that where an agency is conducting the public business, the courts will review the administrative determinations less rigorously than where an agency is regulating private business.

⁶⁹ *Chaudier v. Stearns & Culver Lumber Co.*, 206 Mich. 433, 173 N. W. 198 (1919); *Sparks v. Consolidated Indiana Coal Co.*, 195 Iowa 334, 190 N. W. 593 (1922). Several state courts still follow this rule.

⁷⁰ *Joseph v. United Kimono Co.*, 194 App. Div. 568, 185 N. Y. S. 700 (1921).

⁷¹ 296 U. S. 280, 56 S. Ct. 190 (1935).

⁷² *Tyler v. United States*, 281 U. S. 497, 503, 50 S. Ct. 356 (1930).

In few fields is the scope of judicial review more narrow than in that of taxation. The slowness of the courts to interfere in cases involving collection of governmental revenue is illustrated by the vigorous application in tax cases of the principles requiring complete exhaustion of all possible administrative procedures, before the courts will even take jurisdiction over the controversy. In tax cases (though perhaps not in all other types of cases), this principle of prior resort is applied, even though the alleged error is one that would render the administrative determination void.⁷³

(b) *Treatment of factual questions and inferences.* None of the important factual questions determined by agencies administering tax laws can be effectively reviewed in the courts. In cases involving *ad valorem* taxes, the underlying factual issue is usually that of the true value of the property; but this question of valuation is ordinarily deemed nonjudicial, the courts refusing to review the question unless it can be established that the assessors committed fraud or adopted fundamentally wrong methods of valuation.⁷⁴ Partly for the reason that assessments are often fixed on bases other than the taking of testimony, some courts even refuse to consider whether or not there was any evidence at all to support the administrative conclusion as to value.⁷⁵

In many excise tax cases, decision turns primarily on an inference to be made from somewhat ambiguous circumstances; and in such cases the principle is met that it is the

⁷³ Stason, "Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies," 28 MICH. L. REV. 637 (1930); among recent general discussions of the scope of review in tax cases, see Dwan, "Administrative Review of Judicial Decisions: Treasury Practice," 46 COL. L. REV. 581 (1946); Gordon, "Reviewability of Tax Court Decisions," 2 TAX L. REV. 171 (1947); Heidenreich, "Scope of Judicial Review of Decisions of the United States Tax Court," 29 MINN. L. REV. 186 (1945).

⁷⁴ See Luce, "Assessment of Real Property for Taxation," 35 MICH. L. REV. 1217, 1239 (1937); cases collected in Cooley on TAXATION, 4th ed. (1924), §§ 1612, 1645.

⁷⁵ Board of Commissioners of County of Finney v. Bullard, 77 Kan. 349, 94 Pac. 129 (1908).

function of the tax authorities, and not of the courts, to draw inferences from the facts and to choose between conflicting inferences.⁷⁶

Where decision rests fundamentally on a factual question, the suggestion is made that there is no warrant for the expenditure of any great amount of judicial energy in discovering the truth;⁷⁷ and references are constantly found, both in state and federal decisions, to the greater expertness of the administrative officials in determining the difficult factual problems involved in taxation matters.

(c) *Treatment of questions of law.* Even where the controlling issue is clearly a question of law, the attitude of judicial abstinence is adhered to. In the famous *Dobson* case⁷⁸ the Supreme Court criticized the lower federal courts for interfering too readily with the determinations of the administrative authorities in the taxation field, and indicated that even though the question involved was one of law, the decision was not to be reversed so long as the administrative decision on the law question was reasonable.⁷⁹ Similarly, it has been suggested that the court's function, on review of a tax case, is limited to corrections of "obvious errors";⁸⁰ that the courts should reverse only for a "clear cut mistake of law";⁸¹ and that the administrative decision should be ac-

⁷⁶ *Wilmington Trust Co. v. Helvering*, 316 U. S. 164, 62 S. Ct. 984 (1942); *Commissioner of Internal Revenue v. Scottish American Inv. Co., Ltd.*, 323 U. S. 119, 65 S. Ct. 169 (1944).

⁷⁷ *Commissioner of Internal Revenue v. Scottish American Inv. Co., Ltd.*, 323 U. S. 119, 65 S. Ct. 169 (1944).

⁷⁸ *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 496-498, 64 S. Ct. 239 (1943).

⁷⁹ For an analysis of this decision, see Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944). Congressional disapproval of some phases of the decision is indicated in the 1948 Revenue Act (I.R.C. 1141 (a)).

⁸⁰ *Slee v. Commissioner of Internal Revenue* (C.C.A. 2d 1930), 42 F. (2d) 184.

⁸¹ *Smith's Estate v. Commissioner of Internal Revenue* (C.C.A. 3d 1944), 140 F. (2d) 759.

cepted so long as it has "reasonable basis in the law."⁸² About the most that can be said is that the administrative decision on law questions is not controlling, if clearly erroneous.⁸³

The courts have, to be sure, reserved to themselves the right to speak with finality on issues of law, but unless the question is one of broad general interest the courts are likely to accept, without critical re-examination, the conclusion of the agency. The point will not necessarily be considered *de novo* merely because it involves an issue of law.

The state courts, partly because many of them have not reached the wholehearted acceptance of the doctrine (which is characteristic of the federal courts) that administrative agencies should be recognized as co-ordinate agencies of government, and partly because tax cases coming before them do not involve so many subtle technicalities as do many of the cases arising under the federal tax laws, are on the whole inclined to review tax cases somewhat more intensively than do the federal courts. But even in the state courts, the old aphorism to the effect that doubts as to the collectability of a disputed tax should be resolved in favor of the taxpayer, has been quite effectively displaced by the attitude that the demand of the administrative agency for the payment of the tax should be respected unless the agency can be shown to be wrong.

(d) *Role of discretion and expert judgment.* Another reason for the strict limitations imposed by the courts on the extent of judicial review in the tax field lies in the circumstance that the decisions of the tax agencies are not strictly judicial. In large measure their functions are execu-

⁸² *Smith v. Helvering*, Commissioner of Internal Revenue (App. D. C. 1944), 141 F.(2d) 529.

⁸³ *Cf.*, *Hormel v. Helvering*, Commissioner of Internal Revenue, 312 U. S. 552, 556, 61 S. Ct. 719 (1941), where a footnote to the opinion says that the Board's rulings on questions of law are "not as conclusive as its findings of fact."

tive and ministerial, and this is often asserted as a basis for restricting the scope of review.⁸⁴ As one court put it, practical business experience and common sense are the best guides in administering tax laws.⁸⁵ Many of the questions involved are not deemed to be peculiarly within the special competence of the judges. Thus is effect given to the general principle that where a substantial measure of executive autonomy is involved in the operations of an agency, the scope of review will be restricted.

The principle that less review will be permitted where discretion is involved, is likewise reflected in cases passing on the proper scope of judicial review in the tax field. It is frequently pointed out that the courts should not interfere unless there has been a clearly arbitrary and unreasonable exercise of discretion by the taxing officials.⁸⁶ In many cases, the administrative officials are vested with a large measure of real discretion—a classical example being that where the tax collector was permitted to decide which of alternative bases was to be used to measure the tax.⁸⁷ In other cases, what is really involved is not so much discretion as the exercise of judgment. Thus, the determination of value is said to be a matter of discretion.⁸⁸

⁸⁴ *Daffin v. Scotch Lumber Co.*, 226 Ala. 33, 145 So. 452 (1933); *Mannings Bank v. Armstrong*, 204 Iowa 512, 211 N. W. 485 (1926); *In re Opinion of the Justices*, 87 N. H. 492, 179 Atl. 357 (1935).

⁸⁵ *In re Harleigh Realty Company's Case*, 299 Pa. 385, 149 Atl. 653 (1930).

⁸⁶ E.g., *Rowley v. Chicago & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55 (1934); *Chicago Great Western Ry. Co. v. Kendall*, 266 U. S. 94, 45 S. Ct. 55 (1924); *Kinderman v. Harding*, 345 Ill. 237, 178 N. E. 71 (1931); *City of Birmingham v. Oakland County Supervisors*, 276 Mich. 1, 268 N. W. 409 (1936); *Alfred J. Sweet, Inc. v. City of Auburn*, 134 Me. 28, 180 Atl. 803 (1935).

⁸⁷ *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551, 48 S. Ct. 587 (1928).

⁸⁸ E.g., *Meridian Highway Bridge Co. v. Cedar County*, 117 Neb. 214, 220 N. W. 241 (1928); *Colorado Tax Commission v. Midland Terminal Ry. Co.*, 93 Colo. 108, 24 P. (2d) 745 (1933).

There can also be plainly seen, in tax cases, the operation of the principle that where an agency through long experience has gained true expertness in its field, the extent of review will be narrow. The Supreme Court has more than once had occasion to refer to the tax administrators' "practical knowledge of the intricate details incident to tax problems."⁸⁹ Again, conceding candidly that the subject is "so complex as to be the despair of judges," the court has bluntly suggested that the administrative agency "is relatively better staffed for its task than is the judiciary."⁹⁰ Likewise in matters of state taxation, the state courts recognize and defer to the long experience of the administrative authorities. The practical knowledge of assessors as to property values, and their experienced judgment in choosing the proper method for assessment of utility, mining, or industrial properties, are effective deterrents to broad judicial review.

(e) *Confidence in fairness of administrative procedure.* The procedures adopted by the taxing authorities are ordinarily fair, and there is but seldom occasion for the courts to examine critically the course of the administrative proceedings, in order to determine whether due process has been denied. The Tax Court, in the field of federal taxation, has long been recognized as furnishing a model of proper administrative procedure. As the Supreme Court had occasion to summarize, this agency "is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. . . . Individual cases

⁸⁹ *Burnet v. S. & L. Building Corp.*, 288 U. S. 406, 415, 53 S. Ct. 428 (1933).

⁹⁰ *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 498, 64 S. Ct. 239 (1943).

are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts.”⁹¹ Similarly, the state courts have frequently recognized the general fairness of the procedures employed by the tax collectors, and have been content sometimes to rest decision on the presumption that the officers performed their duties properly.⁹²

In summary, nearly all the factors above discussed as tending to affect the scope of judicial review, operate to restrict the scope of review in tax cases. The field involves the conduct of public business, a matter in which the courts are always reluctant to interfere. The administrative agencies exercise functions which are largely executive or ministerial, rather than purely judicial. They are vested with an important measure of discretion. Their procedures are fair. The agencies through long experience have developed true expertness. The questions involved are not such as to fall peculiarly within the particular competence of the courts.

3. Federal Trade Commission

Nearly all of the considerations which have prompted the courts narrowly to circumscribe the scope of review in tax cases may be seen in inverse operation in Federal Trade Commission cases, where the scope of review has traditionally been very broad. The various factors which affect judicial determination of the proper scope of review—the public or private sphere of the agency’s activities, the character of its

⁹¹ *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, 498-499, 64 S. Ct. 239 (1943).

⁹² *Golden Gate Bridge and Highway District v. Felt*, 214 Cal. 308, 5 P. (2d) 585 (1931); *Daly v. Fisk*, 104 Conn. 579, 134 Atl. 169 (1926); *People ex rel. Carr v. Immanuel Herald Publishing House*, 323 Ill. 574, 154 N. E. 439 (1926); *Kelly v. Wisconsin Tax Commission*, 203 Wis. 639, 234 N. W. 701 (1931).

functions (whether legislative or judicial), the extent of its discretionary powers, the experience of the agency, and the character of its procedure—have influenced the courts to probe searchingly in Federal Trade Commission cases, just as they have influenced the courts to limit the scope of review in tax cases.

For this reason, an examination of the cases wherein the courts have determined the proper scope of review of Federal Trade Commission orders is interesting as a means of further illustrating the operation of the deep imponderables which play so large a part in determining the scope of review of administrative orders. Further, an examination of the cases involving judicial review of Federal Trade Commission orders has an independent value because it illustrates how completely the attitude of the courts toward the determinations of a particular agency may change over a period of a decade. In the case of this particular agency, the change in judicial attitude may be ascribed in part to the recent broad trend of respect for administrative adjudication and the gradual adaptation of judicial doctrine to this new phenomenon,⁹³ but it is in part at least due to the fact that as the agency has gained experience and improved its administrative techniques, it has been granted greater deference than was formerly accorded.⁹⁴

(a) *Regulation of private business.* One of the primary factors accounting for the attitude which the courts have dis-

⁹³ Countryman, "The Federal Trade Commission and the Courts," 17 WASH. L. REV. 1, 83 at 96 (1942); Davison, "The Place of Federal Trade Commission in Administrative Law," 8 GEO. WASH. L. REV. 280 (1940); Daniels, "Judicial Review of Fact Findings of Federal Trade Commission," 14 WASH. L. REV. 37 (1939).

⁹⁴ E.g., while in earlier cases the courts freely amended the form of the Commission's orders, in 1944 we find the Fourth Circuit Court of Appeals declaring, in response to a claim that an order was so broad that it might operate *in futuro* to prohibit lawful conduct, "Of course the influence of changed business conditions must be taken into account in reaching a decision; but there is no reason to believe that the Federal Trade Commission will fail in its duty in this respect." *American Chain & Cable Co. v. Federal Trade Commission* (C.C.A. 4th 1944), 139 F. (2d) 622.

played in reviewing Federal Trade Commission decisions is the fact that the Commission is not conducting public business, like tax collection, but is rather engaged in as far-reaching regulation of private business as has been undertaken by any governmental agency. Restrictions as to the price at which a manufacturer may sell, the discounts he may give, the forms of advertising a seller may employ, and the like, all reach to the very heart of private business operations; and all involve matters which had been traditionally subject to few controls. In such fields, the courts are reluctant to grant administrative agencies a free rein. This can be illustrated, of course, by earlier cases which imposed severe restrictions even on the right of the Commission to obtain information.⁹⁵ It can be seen in the courts' repeated characterization as questions of law issues which might be deemed questions of fact—e. g., the question as to what methods of competition are unfair, and the question as to whether a proceeding involves the public interest. It can be seen in the readiness of the courts to substitute their notions as to proper remedy for those of the Commission. While the general attitude of distrust toward any agency seeking to intermeddle in private affairs was of course far stronger a decade ago than it is now, nevertheless the impulse to watch with care administrative regulation of purely private business still remains. It has been recognized by the Supreme Court, in an opinion pointing out that decisions as to the scope of the Interstate Commerce Commission's jurisdiction could not be relied upon as establishing like powers for the Federal Trade Commission, for the reason—*inter alia*—that there is so wide a difference in the nature of the enterprises which these two agencies affect.⁹⁶ In regulating railroads, the Interstate Com-

⁹⁵ Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336 (1924); Federal Trade Commission v. Baltimore Grain Co. (D. C. Md. 1922), 284 Fed. 886, aff'd 267 U. S. 586, 45 S. Ct. 461 (1924).

⁹⁶ Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 353, 61 S. Ct. 580 (1941).

merce Commission is exercising a function which has been recognized as a responsibility of government. It has come to be thought of as a part of the public business. But regulating the sales methods of a vendor of penny candy bars is a different matter.

(b) *Adequacy of administrative procedure.* A second factor which in the past made for comparatively broad review of decisions of the Federal Trade Commission was a lack of confidence on the part of the courts in the fairness of the agency's procedures. In former years, there was perhaps some basis for such suspicion. The courts were not unaware, for example, that proceedings against a respondent were frequently inspired by the complaint of a competitor, who wished to utilize the agency as an ally in a private competitive struggle. The practice under which the agency's staff assistants prepared the Commission's findings also gave rise to doubts. Further, the form of the findings in many cases did not inspire confidence—witness the conclusion reached in 1924 by one writer that in a number of cases (1) the Commission's findings failed "to give an adequate account of respondent's defense, or even to mention the evidence given in respondent's behalf" and (2) that the "frequently obvious attempt to frame findings with a view to the legal result desired, rather than as a mirror of events and circumstances"⁹⁷ contributed in a substantial degree to the scant respect paid by the courts to the Commission's findings. Such cavalier treatment of the testimony was alluded to in court opinions.⁹⁸ While the Commission has gone far toward eliminating much of the basis for criticism on such grounds, the courts still find occasion to point out defects. In one case, for example, the Commission was taken

⁹⁷ Henderson, *THE FEDERAL TRADE COMMISSION* (1924) 140, 162-63.

⁹⁸ *L. B. Silver Co. v. Federal Trade Commission of America* (C.C.A. 6th 1923), 289 Fed. 985; *Curtis Pub. Co. v. Federal Trade Commission* (C.C.A. 3d 1921), 270 Fed. 881, *aff'd sub nom.* *Federal Trade Commission v. Curtis Pub. Co.*, 260 U. S. 568, 43 S. Ct. 210 (1923).

to task for its opposition to a request by respondent that the trial examiner's report be certified as part of the record, and the court pointed out that the variance between the findings of the Commission and those of the trial examiner detracted from the claim that the findings of the Commission were supported by substantial evidence.⁹⁹ The apparent reluctance of the Commission in some cases to submit to judicial review has been the subject of judicial comment.¹⁰⁰

Despite the fact that such criticisms continue to appear occasionally, nevertheless the courts (accepting the philosophy of the new administrative freedom) are in recent years more ready to grant enforcement of the Commission's orders. In one case, for example, the court criticized the refusal on the part of the Commission to furnish respondent with a bill of particulars, remarking that the Commission should in fairness have done so; but the court still held that it could not be established that the refusal of the bill of particulars was prejudicial and accordingly determined that the order should be enforced.¹⁰¹

(c) *Experience and expertness of agency.* In the earlier days of the Commission's history, there was considerable skepticism as to the true expertness of the Commissioners. This was referred to in both leading discussions of the work of the Commission prior to 1935.¹⁰² This attitude was unquestionably an important factor in many court decisions.

In the course of time, this attitude has to a large extent at least disappeared, and the Commission is recognized as a body of experts, duly informed by experience, whose judg-

⁹⁹ Kidder Oil Co. v. Federal Trade Commission (C.C.A. 7th 1941), 117 F. (2d) 892.

¹⁰⁰ American Drug Corp. v. Federal Trade Commission (C.C.A. 8th 1945), 149 F. (2d) 608.

¹⁰¹ E. B. Muller & Co. v. Federal Trade Commission (C.C.A. 6th 1944), 142 F. (2d) 511.

¹⁰² McFarland, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION (1933) 176-177; and Henderson, THE FEDERAL TRADE COMMISSION (1924) 328.

ment is to be respected. But the courts still are more willing to displace their judgment for that of the agency in the case of this Commission than in the case of many other administrative tribunals, and for the reason that the formulae and concepts with which the Federal Trade Commission works fall within the particular competence of the courts. The judges have apparently felt ¹⁰³ that only the courts are fully qualified to work with such formulae. Questions relating to unfair trade practices and unreasonable restraints of competition do not possess the baffling technicalities of the rate problems handled by the Interstate Commerce Commission, nor the newness and strangeness of the labor relations problems handled by the National Labor Relations Board. They are questions as to which the courts feel themselves on familiar ground. Consequently, there has never developed quite the respect for administrative *expertise* that other agencies have enjoyed.

(d) *Role of discretion.* In complaint proceedings, there is usually a rather narrow issue involved: Has the respondent violated a particular section of the statute? In determining this question, there is comparatively little room for the exercise of discretion. Rather, it is a matter of determining whether specified charges have been proved, and this is determined as a result of comparatively formal, court-like proceedings. This lack of opportunity for wide exercise of administrative discretion has served to broaden the permissible scope of judicial review.

In one phase of the procedure, however, there is a large amount of discretion involved. This is the matter of determining what remedy shall be adopted, in cases where a violation of the law has been established. Shall a respondent, for example, be completely enjoined from using a particular

¹⁰³ As suggested by Thurman N. Arnold, *THE BOTTLENECKS OF BUSINESS* (1940) 99.

trade name which infringes on the rights of another and is deceiving to the public, or shall he simply be required to add an explanatory statement, to wipe out the likelihood of deception? Here, increasing respect is being shown for the determinations of the Commission, although several of the circuit courts of appeal have exhibited considerable reluctance toward yielding their former prerogative of freely revising the form of the Commission's orders,¹⁰⁴ and there still remains a noticeable readiness to find that the Commission has abused its discretion in this regard.¹⁰⁵

(e) *Lack of legislative power.* The functions of the Federal Trade Commission have been regarded primarily as judicial, rather than legislative. This again has served to permit a broad scope of review. The tendency of the courts to treat nearly all of the ultimate issues before the Commission as questions of law rather than of fact has of course served to accentuate this trend.

(f) *Treatment of questions of law and fact.* As a result of the fact that (because of the operation of the various factors above described) the courts have been inclined to

¹⁰⁴ E.g., see the concurring opinion in *Parke, Austin & Lipscomb v. Federal Trade Commission* (C.C.A. 2d 1944), 142 F. (2d) 437, 442, pointing out that "Until recently this court would have regarded itself as competent to modify an order which imposed a restraint broader than the necessities of the case required"; and see *Herzfeld v. Federal Trade Commission* (C.C.A. 2d 1944), 140 F. (2d) 207, 209, where it was said: "Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. . . . Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of the courts, which are not similarly endowed."

¹⁰⁵ In *Federal Trade Commission v. A. P. W. Paper Co., Inc.*, 328 U. S. 193, 66 S. Ct. 932 (1946), it was held that the Commission lacked the power to prohibit a manufacturer's use of the words "Red Cross" and the Greek Red Cross emblem in the sale of its product. In *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 66 S. Ct. 758 (1946), the court, while recognizing that the Commission had broad latitude to exercise its own judgment in shaping its order, reversed an order which prohibited the use of a trade name because the record did not show that the Commission had considered whether some change short of complete excision would have satisfied the ends of the act.

probe deeply when reviewing determinations of the Federal Trade Commission, issues which might well have been described as issues of fact (and hence closed to review) have been described as reviewable issues of law. Thus, the determination of the Federal Trade Commission as to the fairness of a trade practice is deemed a question of law for the courts; whereas the determination by the Interstate Commerce Commission as to the fairness of a preferential rate is deemed a question of fact. The difference is not logical, but empiric. It is accounted for by some difference in the attitude with which the courts view determinations of the Federal Trade Commission and those of the Interstate Commerce Commission.

This tendency to treat many of the issues decided by the Federal Trade Commission as issues of law has of course broadened the scope of review.

But even the Commission's decisions on the facts have not, until the last decade, been accorded the respect paid the factual determinations of other agencies. Thus, one student of the Commission has concluded that up to 1930 the courts had, in reviewing Commission orders, determined the sufficiency of the pleadings, determined what should constitute proofs, and what conclusions should be drawn from the evidence; and that in fact in only two instances during the decade from 1919 to 1929 did the Supreme Court express or approve a real deference to the Commission's findings.¹⁰⁶ Another student observed somewhat earlier that not a single case could be found in which it could be said that the findings of the Commission had in any way affected the decisions of the courts.¹⁰⁷

During this earlier period, the courts had no difficulty in determining that the findings of the Commission were not supported by substantial evidence, and hence could be dis-

¹⁰⁶ McFarland, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933) 32, 96.

¹⁰⁷ Henderson, *THE FEDERAL TRADE COMMISSION* (1924) 336.

regarded. But two decisions of the Supreme Court in 1934¹⁰⁸ insisted that a more generous treatment must be accorded the findings of the Commission. Since that time, the courts have been cautious in disturbing the findings of the Commission on pure issues of litigation facts, but even in such instances, refusal to accept the findings of the Commission is sometimes encountered.¹⁰⁹

Where the conclusion of the Commission rests on inference, rather than an issue of primary fact, the courts have been more ready to review the reasonableness of the inference than has been true in cases involving other agencies. In *Federal Trade Commission v. Pacific States Paper Trade Association*,¹¹⁰ it was said that the inferences *reasonably* drawn from the facts were for the Commission, thus implying the existence of a somewhat broad power in the courts to determine the reasonableness of the inference. In *Federal Trade Commission v. Raladam Co.*,¹¹¹ the phrase used was "necessary inference." This led several of the courts of appeal to conclude that where the finding rested on inference, the court was free to disregard the Commission's conclusion, if it could be deemed in any way unreasonable or not a necessary inference.¹¹² Recently, the Supreme Court has indicated that

¹⁰⁸ *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 54 S. Ct. 315 (1934), and *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, 54 S. Ct. 423 (1934).

¹⁰⁹ In *Gelb v. Federal Trade Commission* (C.C.A. 2d 1944), 144 F. (2d) 580, for example, a finding based on the opinion of a single expert, overlooking opposed testimony which was in part uncontradicted, was set aside as being without substantial support in the evidence.

¹¹⁰ *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 273 U. S. 52, 63, 47 S. Ct. 255 (1927).

¹¹¹ *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 651, 51 S. Ct. 587 (1931).

¹¹² See, e.g., *Dearborn Supply Co. v. Federal Trade Commission* (C.C.A. 7th 1944), 146 F. (2d) 5, where the facts had been stipulated, but an order based on inferences not included in the stipulated facts was held to be without support in the evidence; and see *Raladam Co. v. Federal Trade Commission* (C.C.A. 6th 1941), 123 F. (2d) 34, rev'd in *Federal Trade Commission v. Raladam Co.*, 316 U. S. 149, 62 S. Ct. 966 (1942).

a greater respect must be paid the Commission's inferences, remarking in *Corn Products Refining Co. v. Federal Trade Commission*¹¹³ that the "weight to be attributed to the facts proved or stipulated, *and the inferences to be drawn from them* [italics added], are for the Commission to determine, not the courts." But even in that case, the court took pains to point out that "We cannot say that the Commission's inference here is not supported by the stipulated facts," thus indicating that there still remains some readiness to inquire whether the facts do support the inference.

Thus, it must be concluded that even on issues of fact, the findings of the Commission received for many years but scant deference from the courts. While the trend is clearly in the opposite direction, there still remains considerable reluctance on the part of some of the courts of appeal, at least, to accord the Commission's findings on the facts a full measure of respect, particularly in cases where the finding rests on inference.

On many of the issues decided by the Commission, full review is permitted because of the readiness of the courts to treat as issues of law what might be characterized as issues of fact. Thus, questions as to whether the public interest is involved in a proceeding, whether a trade practice is unfair, whether a practice fosters monopoly, or amounts to an interference with competition, have been deemed matters of law for the courts.

Here again, the present trend is toward a narrower scope of review. While still recognizing the early established doctrine¹¹⁴ that what is an unfair method of competition is a question for the courts, the decisions are coming to emphasize

¹¹³ *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 739, 65 S. Ct. 961 (1945).

¹¹⁴ *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 S. Ct. 572 (1920).

the great weight to be given to the findings and experienced judgment of the Commission in determining this question.¹¹⁵ Similarly, the rule reserving to the courts the determination as to whether public interest is involved,¹¹⁶ is coming to be tempered by the readiness of the courts to accept the finding of the Commission that the requisite public interest is present.¹¹⁷

4. Interstate Commerce Commission

(a) *Judicial recognition of agency's expertness.* Recognition that the Interstate Commerce Commission exercises true expertness in passing on complex and technical problems led the courts, at a comparatively early period, to adopt a self-denying attitude in reviewing the determinations of this agency. There is probably no agency which enjoys in greater degree the confidence of the courts, and for this reason, the scope of review available in the courts is very narrow.¹¹⁸ Long ago, the Supreme Court characterized this agency as a "tribunal appointed by law and informed by experience."¹¹⁹ The respect thus indicated for the ability and fairness of the Commission has not lessened through the years. More re-

¹¹⁵ *Hastings Mfg. Co. v. Federal Trade Commission* (C.C.A. 6th 1946), 153 F. (2d) 253.

¹¹⁶ *Federal Trade Commission v. Klesner*, 280 U. S. 19, 50 S. Ct. 1 (1929).

¹¹⁷ *E. B. Muller & Co. v. Federal Trade Commission* (C.C.A. 6th 1944), 142 F. (2d) 511; *Parke, Austin & Lipscomb v. Federal Trade Commission* (C.C.A. 2d 1944), 142 F. (2d) 437.

¹¹⁸ It was not always thus. Before the turn of the century, courts determined the case *de novo* when the Commission applied for enforcement of its order, and the courts without hesitation substituted their judgment for that of the Commission on matters of fact, law, and policy. See 1 Sharfman, *THE INTERSTATE COMMERCE COMMISSION* (1931) 23 *et seq.* The passage of the Hepburn Act of 1906 (34 Stat. 584) had much to do with the change of attitude. For an excellent detailed history of changing judicial attitudes toward the decisions of the Commission, see 2 Sharfman, *THE INTERSTATE COMMERCE COMMISSION* (1931) 384-452; and McFarland, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION* (1933); Tollefson, "Judicial Review of the Decisions of the Interstate Commerce Commission," 5 *GEO. WASH. L. REV.* 503 (1937).

¹¹⁹ *Illinois Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454, 27 S. Ct. 700 (1907).

cently the court pointed out that "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."¹²⁰ Similarly, the court has reversed lower courts for redetermining "administrative" questions passed on by the Commission.¹²¹

The great respect of the courts for the demonstrated expertness and fairness of the Commission could be illustrated in many ways. It was no accident which led the courts to formulate with reference to this agency's decisions the primary jurisdiction doctrine (since applied to other agencies) which requires that initial resort be had to the agency for a determination of an otherwise justiciable question which could be presented to the agency.¹²² It is commonplace that for many years the Interstate Commerce Commission fared better in the courts than did other agencies. Nor is this fact merely of historical significance. A general disposition to accord the Interstate Commerce Commission's determinations greater weight than that of newer and less experienced agencies can be seen in many recent cases.¹²³

This respect for the ability and impartiality of the Commission, coupled with the fact that it works in a field so technical and complex as to be the despair of the uninitiated, are probably the two predominant factors which have induced the courts to limit very narrowly the available scope of review.

(b) *Legislative nature of determinations.* Many years ago, the Supreme Court declared the rate-making functions of the Interstate Commerce Commission to be legislative,

¹²⁰ *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 548, 62 S. Ct. 366 (1942); and see *Levinson v. Spector Motor Service*, 330 U. S. 649, 67 S. Ct. 931 (1947).

¹²¹ *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938).

¹²² *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350 (1907).

¹²³ *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503, 64 S. Ct. 1129 (1944); *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 64 S. Ct. 474 (1944); *Hecht Co. v. Bowles*, 321 U. S. 321, 64 S. Ct. 587 (1944).

rather than judicial,¹²⁴ and the Court has more recently taken occasion to observe that the rate-making process is essentially empiric.¹²⁵ Many of the other functions of the Commission fall within the same category, in that the agency is changing existing conditions by making a new rule to be applied thereafter rather than investigating, declaring, and enforcing liabilities as they stand on past facts, under laws already existing. Thus, in making regulations as to the assignment of railroad cars between competing prospective users, or deciding whether to compel the fixing of joint or through rates, or defining the scope of operations to be permitted under "grandfather clauses" (permitting long established carriers in a given field to continue certain operations without qualifying for a license under a subsequently adopted law), or deciding whether "need is found . . . to establish for private carriers . . . maximum hours of service of employees,"¹²⁶ the Commission is functioning rather in the field of delegated legislation than that of delegated adjudication.

The possible scope of judicial review is always more narrow, where the administrative determination is legislative. Further, where an agency's activities are predominantly in the legislative field, and where a legislative element creeps into activities which also bear some indicia of judicial proceedings, there is a tendency to deny review of matters which might otherwise be deemed to be reviewable by the courts as involving questions of law.

These factors account in large part for the very restricted scope of review which is available in the courts when orders of the Interstate Commerce Commission are challenged. The courts often conclude that the inquiry involved is essentially

¹²⁴ *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226-227, 29 S. Ct. 67 (1908).

¹²⁵ *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 62 S. Ct. 366 (1942).

¹²⁶ Sec. 204 (a) (3) Motor Carrier Act, 49 Stat. 546, as amended, 49 U.S.C. § 304.

legislative, or (as it is euphemistically called) "administrative," and hence the function is said to be "reserved for the Commission," and one in which the court is accordingly not at liberty to consider the soundness of the agency's reasoning or the wisdom of its determinations.¹²⁷

(c) *Conduct of public business.* The functions of the Interstate Commerce Commission have not been viewed as involving the regulation of private business. Control of common carriers and other like utilities has been viewed as something much more closely related to the conduct of public business. While the actual operation of railroads has been made a function of government only in emergency periods, yet this industry has long been deemed to be one "affected with a public interest," and hence subject to a much greater degree of governmental control than those industries which until recently at least were deemed to be more or less purely the private affairs of the individual entrepreneurs. As the Supreme Court recently put it, ". . . the owners of . . . railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."¹²⁸

Since the regulation of railroads and other carriers by the Interstate Commerce Commission has thus been regarded as a matter closely akin to the conduct of the public business, the general principles which operate to restrict the scope of judicial review in cases where administrative agencies are merely conducting the public business, are applicable on review of Interstate Commerce Commission orders. The determinations of this Commission are thus viewed in a different light than those of such agencies as the Federal Trade Commission or the Securities and Exchange Commission,

¹²⁷ *Assigned Car Cases*, 274 U. S. 564, 47 S. Ct. 727 (1927); *Noble v. United States*, 319 U. S. 88, 63 S. Ct. 950 (1943).

¹²⁸ *Marsh v. Alabama*, 326 U. S. 501, 506, 66 S. Ct. 276 (1946).

whose activities in large measure involve the regulation of what has been called purely private business. The tendency to restrict judicial review, where the matter involved is the conduct of the public business, has been another factor influencing the very narrow scope of review of decisions of the Interstate Commerce Commission.

(d) *Discretion*. As is always true where an agency exercises substantial legislative powers, the determinations of the Interstate Commerce Commission involve a large measure of discretion. And always, where the role of discretion looms larger, the scope of review becomes smaller. The courts have not infrequently had occasion to allude to the importance of giving free rein to the Commission's discretion. Thus, where the question was as to the propriety of prescribed accounting methods, the court observed that it was "without power to usurp its [the Commission's] discretion and substitute our own."¹²⁹ Again, where it was claimed that the controlling statute in effect required the Commission to adopt a different hearing procedure than had been employed, the court declared that it was not "at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than the courts."¹³⁰ Further, the court has recognized that because of the discretionary nature of the Commission's determinations, it is at liberty to make successive decisions which appear inconsistent. The court has thus pointed out that "Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases."¹³¹

¹²⁹ *Norfolk & W. Ry. Co. v. United States*, 287 U. S. 134, 141, 53 S. Ct. 52 (1932).

¹³⁰ *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671, 691, 63 S. Ct. 1296 (1943).

¹³¹ *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 359, 56 S. Ct. 797 (1936).

Thus, the important part that discretion plays in the Commission's determinations has been another factor which militates for restricted judicial review.

(e) *Character of procedure.* Proceedings before the Commission are marked by a degree of regularity (if not formality) strongly reminiscent of judicial proceedings. The Commission's rules are not unlike rules of court. It has its own roster of practitioners (specially admitted to practice before the Commission) who are mostly specialists in the field. Its practices as to the holding of hearings and as to the technique of decision making are well established. All of its standards of procedure have long been hailed as models for other agencies to follow. There has been little if any suggestion of bias or partiality on the part of the members of the Commission or its staff. The agency is comparatively isolated from political pressure. That its officers have special competence and ability, in a field where there is a real need for technical competence, is never challenged.

All of these factors further serve to disincline the courts to probe deeply into the fairness and reasonableness of the Commission's decisions.

(f) *Questions of fact and law.* Since all of the criteria on which the scope of review normally depends (absent statutory regulation) recommend, in the case of the Interstate Commerce Commission, that only a narrow review should be permitted, it is not surprising that in addition to being ready to find "substantial support" in the evidence for any challenged findings of fact, the courts show a readiness to describe as issues of fact matters which might otherwise be deemed questions of law. Thus, such questions as—(1) whether a rate is unreasonable or discriminatory;¹³²

¹³² *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 46 S. Ct. 500 (1926).

(2) whether a preference is undue and unreasonable;¹³³ (3) whether a difference in rates constitutes an "unjust discrimination";¹³⁴ (4) whether the statutory term "transportation" includes yardage service;¹³⁵ and (5) whether the statutory term "deficit" should be construed one way or another¹³⁶—have all been deemed to be questions of fact, on which the determination of the Commission is conclusive, unless it can be plainly shown that the determination was entirely without support in the record.

Why the reasonableness or fairness of a trade practice is a question of law, as to which the determination of the Federal Trade Commission is only advisory, whereas the question as to the reasonableness or fairness of a rate differential is a question of fact, as to which the determination of the Interstate Commerce Commission is conclusive, is a question which presents logical difficulties but which can be easily answered in the light of practical experience. And the life of the law, as the profession has been reminded by one of its masters, has been experience, not logic.

The courts have not insisted that there must be any showing of the reasonableness of the inferences of fact reached by the Interstate Commerce Commission. Rather, the court has recognized that the Commission may be presumed to be able to draw inferences that are not obvious to others.¹³⁷

Even where it cannot be disputed that the issues involved present questions of law, within the proper competence of the courts, there has been great respect paid to the wisdom of the Commission. In at least one case, for example, the

¹³³ *United States v. Louisville & N. R. Co.*, 235 U. S. 314, 35 S. Ct. 113 (1914).

¹³⁴ *L. T. Barringer & Co. v. United States*, 319 U. S. 1, 63 S. Ct. 967 (1943).

¹³⁵ *Swift & Co. v. United States*, 316 U. S. 216, 62 S. Ct. 948 (1942).

¹³⁶ *Butte, A. & P. Ry. Co. v. United States*, 290 U. S. 127, 54 S. Ct. 108 (1933); noted in 33 MICH. L. REV. 120 (1934).

¹³⁷ *O'Keefe v. United States*, 240 U. S. 294, 36 S. Ct. 313 (1916).

Supreme Court asked the Commission for advice as to the meaning and application of its order.¹³⁸ And not long ago the court observed that "Only where the error is patent may we say that the Commission transgressed."¹³⁹ Fundamental questions of statutory interpretation and the like are of course reserved to the courts, particularly where the question affects the jurisdiction or powers of the Commission. Except in such cases, the courts are disinclined to make an independent determination of what might be termed questions of law unless the case be one where it appears that the question is not "technical," and where the inquiry "would, in all respects, be like that commonly made by courts when called upon to construe and apply any other document."¹⁴⁰

In all respects, therefore, the complex and technical nature of the problems handled by the Interstate Commerce Commission, and likewise the demonstrated competence of the Commission in its special field, have been the keystone in the determination by the courts as to the scope of judicial review of its determinations. Any inquiry closely related to factual considerations is likely to be deemed a nonreviewable question of fact, and only those issues which are largely divorced of technical character are deemed reviewable questions of law.

5. National Labor Relations Board

The National Labor Relations Board operates largely in a field unknown to the common law. In determining, for example, what unit is appropriate for collective bargaining

¹³⁸ *Illinois Commerce Commission v. Thomson*, 318 U. S. 675, 63 S. Ct. 834 (1943).

¹³⁹ *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 62 S. Ct. 722 (1942).

¹⁴⁰ *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 299 U. S. 393, 398, 57 S. Ct. 265 (1937); and see *Interstate Commerce Commission v. Northern Pac. Ry. Co.*, 216 U. S. 538, 30 S. Ct. 417 (1910), where the court declared that the mere preference of customers for a particular route could not, as a matter of law, be taken as a basis for a determination that any other route was unreasonable and unsatisfactory.

purposes (considering such issues as whether the several plants of a single company should bargain jointly or separately, whether skilled tradesmen should be represented by the same union as unskilled factory help, and the like), and similarly in determining what remedies are appropriate to eradicate the effectiveness of a prior unfair labor practice, the Board is dealing with problems quite unfamiliar to the courts. The National Labor Relations Act ¹⁴¹ created whole congeries of rights and remedies for labor unions which had been previously without substantial judicial recognition. It is not surprising, therefore, that the courts should show but little inclination to substitute their judgment for that of the Board on such matters. The courts have no established legal standards by which to judge the propriety of the Board's action, in many types of cases.

On the other hand, in carrying out the varied tasks imposed upon it by the statute, the Board has had to face many questions involving statutory interpretation and certain basic constitutional questions, on which the courts feel themselves to be on familiar grounds. As to these issues, the courts have evinced a willingness to grant full review.

Thus, judicial review of determinations of the National Labor Relations Board stands on somewhat different footing than in the case of either the Federal Trade Commission or the Interstate Commerce Commission. The tendencies and basic principles which influence the courts in determining the scope of review remain much the same, but their application leads to somewhat different results. The courts are, on the whole, probably less willing to reverse the National Labor Relations Board than the Federal Trade Commission; on the other hand, the National Labor Relations Board has

¹⁴¹ 49 Stat. 449, 29 U.S.C. § 151 *et seq.* Note that the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Supp. I, § 141, has limited the Board's power in many respects, and has narrowed its discretion in determining what constitutes an appropriate bargaining unit.

not enjoyed the immunity from extensive judicial supervision that has long been accorded the Interstate Commerce Commission.

(a) *Regard for expertness of agency.* Very frequently, proceedings before the Board involve difficult questions as to an employer's motive. Whether a certain course of action does or does not constitute an unfair labor practice often depends upon an employer's intent. Thus, granting an increase in pay is ordinarily proper. But if an increase is granted during a union's organizational campaign, it may appear to have been calculated to discourage organization, and thus to constitute an unfair labor practice. Such would be the case, for example, if the announcement of the pay increase were linked with a public reminder that it is not necessary to join a union in order to get a pay raise at that plant.¹⁴² In its evaluations of the tangled web of contradictory evidence so often encountered in hearings on charges of unfair labor practice, the Board is credited with an expert ability to discover the truth. Similarly, when the question concerns the remedy which in the particular case will be most efficient to carry out the underlying purpose of encouraging collective bargaining, deference is paid to administrative experience. Further, the National Labor Relations Act is construed as having been intended to leave a great deal to the judgment of the Board. Thus, the Supreme Court has declared that "The Act . . . entrusts to an expert agency the maintenance and promotion of industrial peace . . . factors outside our domain of experience may come into play."¹⁴³

Similarly, in upholding an order requiring restitution of dues checked off to a company dominated union, as against the argument that the order in question violated common-law

¹⁴² E.g., *National Labor Relations Board v. W. A. Jones Foundry & Machine Co.* (C.C.A. 7th 1941), 123 F. (2d) 552.

¹⁴³ *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194-195, 61 S. Ct. 845 (1941).

principles of estoppel, the court declared that the Board was not compelled to observe conventional legal principles in fashioning its order, and observed: "Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge."¹⁴⁴

The court has likewise said, in sustaining the validity of a Board ruling prohibiting the enforcement of a company rule which forbade any solicitation on company premises, that one of the purposes of the Congress in creating the Board ". . . is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject."¹⁴⁵

Again, in sustaining as a finding of fact the determination by the Board that newspaper distributors who by common-law tests might have been deemed independent contractors should be treated as employees for purposes of the act, the court pointed out: "Everyday experience in the administration of the statute gives it [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries . . . and with the adaptability of collective bargaining for the peaceful settlement of . . . disputes. . . . The experience thus acquired must be brought frequently to bear. . . . determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board."¹⁴⁶

But judicial respect for the Board's informed knowledge does not go so far as in the case of the Interstate Commerce Commission. On such questions as to whether employees discharged for engaging in illegal activities retain the benefits

¹⁴⁴ *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 543, 63 S. Ct. 1214 (1943).

¹⁴⁵ *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 800, 65 S. Ct. 982 (1945).

¹⁴⁶ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111 at 130, 64 S. Ct. 851 (1944).

of the statute,¹⁴⁷ or whether the Board's order may be permitted to go further than the immediate necessities of the case require,¹⁴⁸ or whether stipulated facts may be deemed to be an unfair labor practice,¹⁴⁹ the courts do not show a slavish acceptance of the conclusions of the Board, but rather determine the questions for themselves.

(b) *The role of discretion; legislative and judicial powers.* In refusing to review the Board's decision as to the appropriateness of a particular bargaining unit or the propriety of a particular remedy, the courts not infrequently refer to the fact that as to such matters, the Board exercises a broad measure of discretion. Thus, where one labor organization claimed that the Board's choice of a bargaining unit discriminated unfairly against its members, the court observed that the matter was one which "involves an exercise of discretion on the part of the Board."¹⁵⁰ Again, where the question involved the propriety of an order requiring that wages be paid retroactively to men who had never been hired, the court said, "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."¹⁵¹

But inasmuch as the functions of the National Labor Relations Board are primarily judicial in nature and involve but little legislative prerogative, the degree of discretion

¹⁴⁷ National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490 (1939).

¹⁴⁸ National Labor Relations Board v. Express Pub. Co., 312 U. S. 426, 61 S. Ct. 693 (1941).

¹⁴⁹ Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678, 64 S. Ct. 830 (1944).

¹⁵⁰ International Association of Machinists; Tool and Die Makers Lodge No. 35 etc. v. National Labor Relations Board, 311 U. S. 72, 82, 61 S. Ct. 83 (1940).

¹⁵¹ Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 194, 61 S. Ct. 845 (1941).

enjoyed is more limited than that possessed by the Interstate Commerce Commission in exercising its broad legislative powers. Thus, in one case, the court, after conceding that the authorization of the Board to determine the remedy is broad, yet insisted that this discretion "has its limits," and held that nothing in the act conferred upon the Board discretionary power to order reinstatement of seamen who had struck in violation of the federal mutiny statute.¹⁵² In a somewhat similar case, the court declared that "whatever discretion may be deemed to be committed to the Board, its limits were transcended" by an order requiring the reinstatement of former employees who had engaged in a sit-down strike.¹⁵³

The extent to which the Board's powers are discretionary varies with the type of proceeding. In selecting the unit which shall be used for collective bargaining, it exercises a large measure of discretion, and review is accordingly narrowed. But in deciding whether an unfair labor practice has been committed, or whether in order to effectuate the policy of promoting the bargaining power of unions it may condone illegal activities, the Board's activity is judicial, rather than discretionary, and a broader scope of review is permitted.

(c) *Public interest involved.* In carrying out its duties, the National Labor Relations Board cannot quite be said to be engaged in the conduct of the public business, in the sense that such observation can be made of the tax collector or the customs inspector or the immigration officer. But, on the other hand, neither can the National Labor Relations Board be viewed as an agency which regulates private business in the sense that the Federal Trade Commission restricts merchandising practices or the Securities and Exchange Commission controls the activities of brokers and investment

¹⁵² *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 62 S. Ct. 886 (1942).

¹⁵³ *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 258, 59 S. Ct. 490 (1939).

bankers. Its functions are much more closely related to the conduct of the public business than to the regulation of private business, for the Board does not exercise any superintending control over the methods which the entrepreneur shall employ in running his business. It only insists that in running it, he must not discourage union activities among his employees. It does not undertake to fix hours, or wages, or prices, or trade practices, or employment conditions. Neither does it require disclosure of confidential information. Its function is merely that of a policeman, enforcing a more or less well defined rule of conduct. As the Supreme Court has put it, the function of the Board is to facilitate the "Attainment of a great national policy," which, it is judicially recognized, is to be sought "through expert administration in collaboration with limited judicial review."¹⁵⁴

In other words, the courts take the attitude that it has become a part of the public business of the country to police labor relations to the extent, at least, of effectively discouraging unfair labor practices. There is thus a tendency to trim the scope of judicial review to the restricted scope customarily available where the administrative agency is merely conducting the public business.

(d) *Fairness of administrative procedure.* The National Labor Relations Board does not enjoy, as does the Interstate Commerce Commission, the benefits of a general or unanimous judicial conviction that its attitude is unbiased and its procedures carefully designed to assure fair treatment to the parties respondent. The Supreme Court from time to time has had occasion implicitly to criticize some of the attitudes and procedures of the Board. Thus, it has been necessary for the court to remind the Board that it does not

¹⁵⁴ *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 188, 61 S. Ct. 845 (1941).

have power to impose penalties.¹⁵⁵ Again, the Board has been cautioned that it does not have warrant to issue a general injunction against any violation of the statute, where the evidence disclosed only a limited violation and there was no basis shown for anticipating further attempts to violate the law.¹⁵⁶

The Board has been found guilty of exhibiting an excess of zeal, with the pointed observation that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. . . . and it is not too much to demand of an administrative body that it undertake this accommodation [of one statutory scheme to another] without excessive emphasis upon its immediate task."¹⁵⁷

The opinions of the Board have not been regarded as models of clarity. In one case, the Supreme Court complained, in remanding a case for further consideration by the Board, that "From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers. . . . The administrative process will best be vindicated by clarity in its exercise."¹⁵⁸

In another case, while the majority of the court sustained the Board in its refusal to admit or consider certain evidence which two of the parties to a Board proceeding wished to introduce, a minority protested bitterly against the unfair-

¹⁵⁵ Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7, 61 S. Ct. 77 (1940).

¹⁵⁶ National Labor Relations Board v. Express Pub. Co., 312 U. S. 426, 61 S. Ct. 693 (1941).

¹⁵⁷ Southern Steamship Co. v. National Labor Relations Board, 316 U. S. 31, 47, 62 S. Ct. 886 (1942).

¹⁵⁸ Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 196-197, 61 S. Ct. 845 (1941).

ness of this refusal to consider matters which might have been of importance.¹⁵⁹

In another case, refusal to receive evidence was criticized by the court as unreasonable and arbitrary.¹⁶⁰

In the earlier days of the Board's history, protests were frequently made against the practice which it was alleged the Board then followed, whereby decisions were sometimes actually made by "review attorneys" who had not heard the testimony. Similarly, it was claimed the Board entered orders without having familiarized itself with the contents of the record on which the order was based. These complaints were frequently considered by the courts of appeal,¹⁶¹ and they were sufficiently numerous to raise considerable doubt as to the fairness of the Board's earlier procedures. Similarly, attacks were frequently made, and sometimes with success,¹⁶² upon the unfair conduct of trial examiners, and their demonstrated bias and prejudice.

The doubts thus engendered had some influence (for a time, at least) in persuading the courts to probe more searchingly when reviewing orders of the National Labor Relations Board than when considering orders of such agencies as the Interstate Commerce Commission. As with developing

¹⁵⁹ *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 61 S. Ct. 908 (1941).

¹⁶⁰ *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938).

¹⁶¹ *National Labor Relations Board v. Cherry Cotton Mills* (C.C.A. 5th 1938), 98 F. (2d) 444; *Botany Worsted Mills v. National Labor Relations Board* (C.C.A. 3d 1939), 106 F. (2d) 263; *Consolidated Edison Co. of New York v. National Labor Relations Board* (C.C.A. 2d 1938), 95 F. (2d) 390; *Cupples Company Manufacturers v. National Labor Relations Board* (C.C.A. 8th 1939), 103 F. (2d) 953; *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 59 S. Ct. 301 (1939); *National Labor Relations Board v. Biles Coleman Lumber Co.* (C.C.A. 9th 1938), 98 F. (2d) 16.

¹⁶² *Montgomery Ward & Co. v. National Labor Relations Board* (Union of Ward Employees) (C.C.A. 8th 1939), 103 F. (2d) 147; *National Labor Relations Board v. Phelps* (C.C.A. 5th 1943), 136 F. (2d) 562; *Inland Steel Co. v. National Labor Relations Board* (C.C.A. 7th 1940), 109 F. (2d) 9.

years the Board gained a maturity of judgment, and corrected many of the conditions which led to this criticism of its fairness, there has of course been a corresponding lessening of this earlier inclination to extend the scope of review.

(e) *Review of questions of fact.* While the Supreme Court on occasion¹⁶³ and the courts of appeal not infrequently¹⁶⁴ found that there was no vestige of substantial evidence to support the findings of the Board and accordingly refused to accept its factual findings, and while the courts have had not infrequent occasion to reiterate, in reviewing findings of the Board, that mere uncorroborated hearsay or rumor does not constitute substantial evidence,¹⁶⁵ yet any examination of the decisions makes it equally clear that very little evidence is required to meet the test of "substantiality" which prior to the recent amendment of the statute rendered the Board's factual findings conclusive.¹⁶⁶ Further, in those cases where it was believed that administrative experience

¹⁶³ E.g., *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 59 S. Ct. 501 (1939).

¹⁶⁴ E.g., *Bussmann Mfg. Co. v. National Labor Relations Board* (C.C.A. 8th 1940), 111 F. (2d) 783; *National Labor Relations Board v. Goshen Rubber & Manufacturing Co.* (C.C.A. 7th 1940), 110 F. (2d) 432; *National Labor Relations Board v. International Shoe Co.* (C.C.A. 8th 1940), 116 F. (2d) 31; *Magnolia Petroleum Co. v. National Labor Relations Board* (C.C.A. 5th 1940), 112 F. (2d) 545; *Martel Mills Corp. v. National Labor Relations Board* (C.C.A. 4th 1940), 114 F. (2d) 624.

¹⁶⁵ *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1938); *Appalachian Electric Power Co. v. National Labor Relations Board* (C.C.A. 4th 1938), 93 F. (2d) 985; *Interlake Iron Corp. v. National Labor Relations Board* (C.C.A. 7th 1942), 131 F. (2d) 129.

¹⁶⁶ E.g., *National Labor Relations Board v. Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 63 S. Ct. 905 (1943); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 57 S. Ct. 648 (1937); *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 61 S. Ct. 358 (1941). Note that the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. Supp. I, § 141, broadens the courts' power to review issues of fact. *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456 (1951). See Iserman, "The Labor Management Act: New Law as to Evidence and the Scope of Review," 33 A. B. A. J. 760 (1947); George, "Evidence in NLRB. Cases in the Supreme Court," 30 CORN. L. Q. 350 (1945).

attributed trustworthiness to a determination which could be treated as either a question of law or fact, the courts have treated as questions of fact issues which would probably be considered reviewable as questions of law, were it not for the trust reposed in administrative *expertise*. Thus, the question as to whether or not, on undisputed facts, a relationship was one of employer-employee or of independent contractorship was treated as a question of fact;¹⁶⁷ and similarly the question as to whether the activities of a fraternal insurance association substantially affect commerce, so as to come within the Board's jurisdiction, has been treated (despite the doctrine thought to permit independent review of questions of jurisdictional fact) as a question for the Board to decide.¹⁶⁸

The various factors above discussed which have persuaded the courts to review somewhat broadly those determinations by the Board which have a legalistic background have occasionally prompted the courts to examine critically inferences made by the Board from established primary facts. Thus, where it was thought a particular order might have been entered without giving due consideration to the employer's constitutional rights of free speech, the Supreme Court pointed out that it was doubtful whether the Board's finding of coercion was based solely on an announcement made by the company's president (in which case constitutional limitations would have vitiated the order) or whether it was based on a whole congerie of circumstances; and the court held that the findings of the Board were so ambiguous and doubtful that its inference could not be sustained. The court remanded the case to the Board for further consideration.¹⁶⁹

¹⁶⁷ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944).

¹⁶⁸ *Polish National Alliance of United States of America v. National Labor Relations Board*, 322 U. S. 643, 64 S. Ct. 1196 (1944).

¹⁶⁹ *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. Ct. 344 (1941).

On the other hand, cases are much more frequent where the court's respect for the Board's particular experience in the complexities of labor relations has led it to sustain without inquiry the inference made by the Board from proved facts. The court has held, for example, that the Board need not show that there is evidence to support its inference that a rule against solicitation of any sort on company premises is an unfair labor practice.¹⁷⁰ Not infrequently, the Supreme Court has emphasized that Congress entrusted to the Board, and not to the courts, the drawing of inferences from inconclusive factual showings. The court has recognized that in unfair practice cases, the lack of positive evidence is natural; ¹⁷¹ and it has more than once reversed courts of appeal for substituting their judgment for that of the Board as to the inference to be drawn from disputed facts.¹⁷²

(f) *Questions of law.* In those fields where it is felt that administrative competence and experience should be a controlling factor in decision, the courts have been satisfied if the Board's conclusion has a "reasonable basis in the law." Even if the law question might have been otherwise determined by the court, the administrative decision will not be upset unless it is patently wrong. In this connection, the courts have stressed the points (1) that where the question is one which arises initially in agency proceedings, it acquires a somewhat factual tinge even though it might otherwise be deemed purely a law question; and (2) that *application* of statutory language to given facts, as distinguished from pure *interpretation* of the statutory language, is rather for the

¹⁷⁰ Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793, 65 S. Ct. 982 (1945).

¹⁷¹ National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., 315 U. S. 685, 62 S. Ct. 846 (1942).

¹⁷² E.g., National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 597, 61 S. Ct. 358 (1941); National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U. S. 105, 62 S. Ct. 960 (1942); National Labor Relations Board v. Waterman Steamship Corp., 309 U. S. 206, 60 S. Ct. 611 (1940).

Board than for the court. Thus, the court has said, "Undoubtedly questions of statutory interpretation, especially when arising for the first instance in judicial proceedings, are for the courts to resolve. . . . But where the question is one of specific application of a broad statutory term in a proceeding which the agency administering the statute must determine initially, the reviewing court's function is limited."¹⁷³ Again, the court has pointed out that ordinarily determination of what constitutes an unfair labor practice is for the Board as part of its task of "applying" the act's general prohibitory language in the light of infinite combinations of events which might be charged as violative of the act.¹⁷⁴ Still again, the question as to whether or not it is appropriate for the Board to order an employer to bargain with a union representing only a minority of his employees, where the union's majority status was lost because of the employer's unfair labor practices, was treated as a question for the Board.¹⁷⁵ While this could be viewed as presenting only a law question, yet it is obvious that such questions of interpretation are peculiarly susceptible to considerations of informed administrative judgment.

But the courts find somewhat more frequently in the case of the National Labor Relations Board than in the case of the Interstate Commerce Commission, perhaps, that the question involved is not controlled by considerations of specialized knowledge, and that accordingly the question falls within the peculiar competence of the courts and should be fully reviewed and redetermined as presenting questions of law. Thus, where the question was whether the term "employee" could be extended to include former employees dis-

¹⁷³ *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130-131, 64 S. Ct. 851 (1944).

¹⁷⁴ *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 65 S. Ct. 982 (1945).

¹⁷⁵ *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512, 62 S. Ct. 397 (1942).

charged for unlawful conduct, the court had no hesitancy in reviewing and reversing the Board's conclusion.¹⁷⁶ And while as above noted, the determination as to whether or not an unfair labor practice has been committed is ordinarily considered a question for the Board, yet where that question is presented on clearly established facts, it is treated as a question of law.¹⁷⁷

The division of justiciable questions between unreviewable issues of fact and fully reviewable issues of law is, in other words, somewhat different in the case of this agency than in the case of either the Interstate Commerce Commission or the Federal Trade Commission. The differences can be accounted for largely by differences in the types of issues involved, and in the varying applicability of the general principles which influence the courts toward either broad or narrow review.

¹⁷⁶ *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490 (1939).

¹⁷⁷ E.g., *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U. S. 678, 64 S. Ct. 830 (1944).

APPENDIX

Administrative Procedure Act¹

AN ACT to improve the administration of justice by prescribing fair administrative procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE

Sec. 1. This Act may be cited as the "Administrative Procedure Act."

DEFINITIONS

Sec. 2. As used in this Act—

(a) *Agency*.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories,

¹ Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. § 1001.

The following amendments, which have excluded from the operation of the Act particular administrative agencies or particular administrative functions, were enacted prior to January 1, 1951:

Act of August 8, 1946, c. 870, Title III, § 302, 60 Stat. 918 (relating to various functions of the Federal Housing Expeditors);

Act of August 10, 1946, c. 951, Title VI, § 601, 60 Stat. 993 (likewise relating to certain functions of the Federal Housing Expeditors);

Act of March 31, 1947, c. 30, § 6 (a), 61 Stat. 37 (relating to the administration of Sugar Controls);

Act of June 30, 1947, c. 163, Title II, § 210, 61 Stat. 201 (relating to the Housing and Rent Act of 1947);

Act of March 30, 1948, c. 161, Title III, § 301, 62 Stat. 99 (relating to the Housing and Rent Control Act of 1947, as amended in 1948);

Act of February 26, 1949, c. 11, 63 Stat. 7 (relating to the Export Control Act);

Act of September 8, 1950, c. 932, Public Laws 774 (relating to functions exercised under the Defense Production Act of 1950);

Act of September 27, 1950, c. 1052, Public Law 843 (relating to proceedings for the exclusion or expulsion of aliens).

or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) *Person and Party*.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) *Rule and Rule Making*.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means

agency process for the formulation, amendment, or repeal of a rule.

(d) *Order and Adjudication*.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) *License and Licensing*.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) *Sanction and Relief*.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) *Agency Proceeding and Action*.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the

whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) *Rules*.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) *Opinions and Orders*.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) *Public Records*.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly

concerned except information held confidential for good cause found.

RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice*.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures*.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement

of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) *Effective Dates*.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) *Petitions*.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) *Notice*.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons

are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) *Procedure*.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) *Separation of Functions*.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities

or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) *Declaratory Orders*.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

Sec. 6. Except as otherwise provided in this Act—

(a) *Appearance*.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) *Investigations*.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to sub-

mit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) *Subpenas*.—Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) *Denials*.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) *Presiding Officers*.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or

designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) *Hearing Powers*.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) *Evidence*.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanctions shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record*.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by Subordinates*.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without

having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

Sec. 9. In the exercise of any power or authority—

(a) *In General.*—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) *Licenses.*—In any case in which application is made for a license required by law the agency, with due regard to

the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review*.—Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action*.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction.

Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts*.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim Relief*.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review*.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and

(B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to section 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as

amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

CONSTRUCTION AND EFFECT

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

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