ADMINISTRATIVE LAW - REQUIREMENTS OF "FULL HEARING"

Collins E. Brooks
University of Michigan Law School

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The late Professor Ernst Freund once wrote, "A judicial hearing involves two things: that the party be heard as to his own case and that he hear the case against him." Were the words "quasi-judicial" to be substituted for the word "judicial" in Dr. Freund's definition, it would be difficult more concisely to paraphrase the two decisions of the United States Supreme Court in the case of *Morgan v. United States*.

Fifty suits, later consolidated for purposes of trial, were started by certain market agencies of the Kansas City Stockyards to enjoin the enforcement of an order of the United States Secretary of Agriculture fixing maximum commission rates to be charged by those agencies for buying and selling livestock at the Kansas City Stockyards. The secretary acted pursuant to the Packers and Stockyards

1 Freund, Administrative Powers over Persons and Property 161 (1928).
2 298 U. S. 468, 56 S. Ct. 906 (1936); 304 U. S. 1, 58 S. Ct. 999 (1938).
The suits were brought, and twice appealed to the Supreme Court, on the ground that the market agencies had been denied the full hearing provided for by the act.

The first appeal arose on a motion to strike. Appellants had alleged that the secretary, in making his order, had failed to consider the evidence presented at the hearing, which was had before an assistant secretary, and had not heard or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs. The government moved successfully in the lower court to strike these allegations. On appeal, the Supreme Court held that the allegations should not have been struck, but that they constituted a good cause of action, saying, through Chief Justice Hughes:

"The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

On the retrial, the government called in the secretary and various of his assistants to testify as to his procedure in considering the evi-

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3 42 Stat. L. 159 at 166, § 310, 7 U. S. C. (1934), § 211: "Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."


5 298 U. S. at 480-481.
dence. On the basis of this testimony, the lower court held his consider-
ation had been sufficient, and dismissed the suit. Again the plaintiffs
appealed, and again the Supreme Court sustained their contentions,
this time on the ground that they had not been informed adequately
of the government’s contentions against them. It was shown that the
government presented no brief, that the oral argument before the
assistant secretary was general and sketchy, and that the secretary
had accepted the findings of the trial examiner after an ex parte dis-
cussion with his assistants in the Department of Agriculture without
affording appellants an opportunity to examine those findings. More
specifically, appellants were not permitted to examine the findings
until they were served with the secretary’s order fixing rates. The
Court, again speaking through Chief Justice Hughes, said:

“But what would not be essential to the adequacy of the hearing
if the Secretary himself makes the findings is not a criterion for a
case in which the Secretary accepts and makes as his own the
findings which have been prepared by the active prosecutors for
the Government, after an ex parte discussion with them and with­
out according any reasonable opportunity to the respondents in
the proceeding to know the claims thus presented and to contest
them. That is more than an irregularity in practice; it is a vital
defect.”

The two decisions unquestionably help our understanding of the
procedural requirements for a “full hearing,” but the term still remains
somewhat nebulous; no absolute is yet in sight. Perhaps no absolute is
attainable, but it is hoped that a short discussion of these decisions,
together with pertinent observations to be found in other cases and
writings, may serve still further to define the concept of “full hearing”
and to suggest possible minimum requirements consonant both with
the public interest and with the private interests involved. The


\[^{6} 304 U. S. 1, 58 S. Ct. 999 (1938).\]

\[^{7} 304 U. S. at 22. Justices Cardozo and Reed not participating, Justice Black
dissenting.\]

\[^{8} \text{One interesting definition is given in Ungar v. Seaman, (C. C. A. 8th, 1924)
4 F. (2d) 80 at 82, as follows: “Indispensable requisites of a fair hearing, according
to these fundamental principles, are that the course of proceedings shall be appropriate
to the case and just to the party affected; that the accused shall be notified of
the nature of the charge against him in time to meet it; that he shall have such an oppor­
tunity to be heard that he may, if he chooses, cross-examine the witnesses against him;
that he shall have time and opportunity, after all the evidence against him is produced
and known to him, to produce evidence and witnesses to refute it; and that the
decision shall be governed by and based upon the evidence at the hearing.”}

See also, Berkson, “Due Process Requirements of a Fair Hearing in a Rate
Proceeding,” 38 Col. L. Rev. 978 (1938); 80 Univ. Pa. L. Rev. 878 (1932).\]
discussion will center around three questions: first, as to consideration of evidence by the deciding tribunal; second, as to hearing or reading of argument by that tribunal; and, third, as to the right of a party to know the contentions made against him.

I.

It seems clear from the language used in the first Morgan decision that the deciding tribunal, be it a commission or a head of a department of the government, must, in order to satisfy the requirements for a full hearing, consider the evidence in some fashion. But the question remains, to what extent must it do so? In the Morgan case, for example, the transcript of testimony taken at the hearing consisted of some ten thousand printed pages, and there were at least another thousand pages of technical exhibits. Must the secretary read through this entire record, page by page? If so, it would seem that much of the value of the administrative form of procedure—speedy and efficient disposition of controversies between private parties and governmental agencies—must be lost. Dispelling this possibility, the Court said in the first decision:

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. The duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

Clearly, if the tribunal hears, or reads a complete transcript of, all of the testimony, and hears or reads the argument, an adequate hearing is given. From the language quoted above, it appears that some of this burden may be delegated. But how much? The decisions have con-

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9 But see United States v. Standard Oil Co. of California, (D. C. Cal. 1937) 20 F. Supp. 427 at 448, where it is said: "Nor will the courts inquire into the 'extent of his investigation [that by the Secretary of the Interior in regard to public lands] and knowledge of the points decided, or as to the methods by which he reached his determination.'" The court cited De Cambra v. Rogers, 189 U. S. 119 at 122, 23 S. Ct. 519 (1903).

10 298 U. S. 468 at 481, 56 S. Ct. 906 (1936).
sistantly upheld the right to delegate the taking of testimony. In United States v. Standard Oil Company of California, it was said:

"Executive officers may rely on the assistance of others. Even where the duty 'to hear' in the first instance is imposed on the head of a department, the evidence may be heard by others."

It is standard practice to make use of so-called "trial examiners" in administrative proceedings. The Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, the Federal Radio Commission, not to mention a host of others, all make use of this device. If we may accept the dictum of the Court at its face value, it would seem that even more duties might be delegated to assistants—those of sifting and analyzing the evidence. Yet there is considerable authority for the proposition that the deciding tribunal must consider the evidence and make its decision on the basis of that evidence. In the Chicago Junction Case, for example, it was said by the Court:

"The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it."

Again, in Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., the Court said:

"Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions on the evidence."


13 Fletcher, "The Interstate Commerce Commission," in Freund, The Growth of American Administrative Law 42 at 66 (1923); Interstate Commerce Commission, Rules of Practice, Rule X (a) and (c), Rule XIV (d) (1) (1936).


16 See Practice and Procedure Before the Federal Radio Commission, Subtitle D, § 4 (1930). This commission has now been superseded by the Federal Communications Commission.

17 264 U. S. 258 at 265, 44 S. Ct. 317 (1924).

And in *Interstate Commerce Commission v. Louisville & Nashville R. R.*\(^1\), the Court used the following language:

"the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless."

Beyond these statements, and those of the *Morgan* case quoted above, little help has been found. Assistants may sift and analyze evidence, but the deciding tribunal must consider the evidence and base its decision thereon. Is it possible still to protect the interest of private parties? It is suggested that a fair solution might be found in allowing competent subordinates to analyze and sift the evidence and prepare an abstract for the use of the deciding tribunal where the latter is unable practicably to do so for itself, but further in insisting that both parties have the opportunity to examine the abstract or analysis thus prepared, with the right to file exceptions thereto and to argue them, either orally or by briefs, before the tribunal. It is believed that in this way the tribunal may be saved considerable time and labor, thus expediting its handling of cases, and yet at the same time, the parties may be assured that all important evidence has been considered by the tribunal. In view of the strong language in the second *Morgan* decision, it is now clear that an abstract prepared by the government and adopted ex parte by the tribunal does not satisfy the statutory requirement.

2.

In addition to the matter of considering evidence, the question whether or not the deciding tribunal must hear argument merits consideration. It is clear that a party entitled to a hearing is entitled to argue his case. In the *New England Divisions Case*\(^2\) it was said:

"A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step to be taken."

Again, in *Londoner v. City and County of Denver*,\(^3\) which involved the right of a landowner to a hearing in regard to taxes imposed by the board of public works of the city of Denver, it was said:

"If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the


\(^{20}\) 261 U.S. 184 at 200, 43 S. Ct. 270 (1923).

\(^{21}\) 210 U.S. 373 at 386, 28 S. Ct. 708 (1908).
tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. 29

The cases offer little help as to whether the right to argue, thus established, includes the right to argue before the ultimate deciding tribunal. 22 Probably the right to argue orally before the tribunal is not a requisite to a full hearing. But must the tribunal afford an opportunity to the party either to argue orally or to submit briefs? In Lewis Publishing Co. v. Wyman, 28 it was held that the Postmaster General need hear neither evidence nor argument on the question of a revocation of a second class mailing permit. The reasoning of the court was based on the fact that the heads of the various departments of government have statutory authority to prescribe rules and regulations for the conduct of the officers and clerks and the distribution and performance of its business. 24 However, the case may be distinguished, in that the regulation of the postal system is more legislative in character than is the regulation of rates where the statute provides for a full hearing. The second class mailing privilege is well named. It is, fundamentally, a privilege, granted by the government, and it does not approach so nearly the status of a right or of property as does the amount of commission a market agency may charge for sales of livestock. Where a full hearing is provided for by the statute, the courts have treated regulation of rates more nearly like a quasi-judicial than a quasi-legislative function. In that distinction may be found, it is believed, the difference in requirements essential to a fair hearing. 25

It is true that both the Interstate Commerce Commission and the Federal Trade Commission allow oral argument before the full commissions prior to a final decision on the report of the trial examiner. 26 But whether such procedure is an essential requisite of a full

22 See 80 Univ. Pa. L. Rev. 878 at 880 (1932).
23 (C. C. Mo. 1907) 152 F. 787.
25 While the Court in the Morgan case recognized that in so far as the action of the secretary regulated rates it resembled a legislative function, it pointed out that because of the peculiar requirements of the statute under which the rates were to be fixed, the proceeding was essentially quasi-judicial. See the first opinion, 298 U. S. at 380.
26 Fletcher, “The Interstate Commerce Commission,” in Freund, The Growth
hearing has not, to the knowledge of this writer, been decided. The statement often found in the cases, that a hearing must be afforded at some stage of the proceedings, might lead to the conclusion that so long as the party entitled to a hearing is permitted to argue orally or in writing at some stage of the proceeding, but not necessarily before the deciding tribunal, the hearing is adequate. That may be the ultimate conclusion of the courts, and were we to assume that the examiner is always entirely free from bias, and that his decision or findings represented the conclusions of an impartial, judicial mind, then it would seem that such a position is defensible. But the criticisms of Lord Chief Justice Hewart and of Henderson return to mind. For when the trial examiner is intimately connected with, and responsible to, the prosecuting division of the administrative body, a certain amount of bias is hardly escapable, and argument before him may indeed amount to an empty privilege.

The Court adverts, in the first opinion in the Morgan case, to the principle that the statutory requirements relate to substance, and not
to form.\textsuperscript{30} If this be true, and the cases furnish no basis for doubt, then it is believed that the party entitled to a hearing should also be entitled to argue in such a manner as to assure that the argument will carry its proper weight in the ultimate decision by which he is to be bound. Clearly the simplest and most effective method of insuring such a result is to insist that the argument must be heard or read by the ultimate deciding tribunal. It would seem that such a requirement would not unduly burden that tribunal, whether it be a board or commission, or an individual as in the \textit{Morgan} case. When all is said and done, the question must really be determined by balancing the public interest in a speedy and efficient determination of the issues involved, against the private interest in freedom from arbitrary and autocratic control or deprivation of property. It is submitted that an argument either oral or written, before the ultimate tribunal, subject to such limitations of time or space as are consonant with the spirit of "fair play"\textsuperscript{81} and the practical considerations of administration, would be the happiest solution.

3.

The second decision left unanswered the questions raised above. It did, however, lay down in unmistakable terms the rule that a party entitled to a hearing is entitled thereby to know the contentions of his opponent and to meet them. It is believed that the precise rule has not before issued from our highest tribunal, although it was clearly implicit in, and reasonably to be expected from, the decisions in numerous other cases decided both by that and other federal, and by state, courts.

The English case of \textit{Local Government Board v. Arlidge}\textsuperscript{32} is believed to be the only case directly contra, and it has been the subject of considerable criticism, both here and in England.\textsuperscript{33} In that case

Examiner. It seems almost inevitable that an examiner should be to some extent influenced in the conduct of a case by the fact that his superior officer is the responsible head of the division which gathered the facts leading up to the complaint."

\textsuperscript{80} 298 U. S. at 478: "we cannot say that that particular type of procedure was essential to the validity of the hearing. The statute does not require it and what the statute does require relates to substance and not form."

\textsuperscript{81} "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary elements of fair play." Chief Justice Hughes, in the second decision in the \textit{Morgan} case, 304 U. S. at 14.

\textsuperscript{32} [1915] A. C. 120.

\textsuperscript{88} See also, The King v. Inspector of Leman Street Police Station, [1920] 3 K. B. 72; Errington v. Minister of Health, [1935] 1 K. B. 249; Jennings, "Courts and
the local Borough Council issued a closing order with respect to plaintiff's house. The order was entered after an ex parte investigation and without notice and hearing. Plaintiff was allowed an appeal to the Local Government Board, but was not allowed to argue orally nor to see the report of the government inspector, which furnished the bases for the ultimate decision. The House of Lords upheld this action, arguing that in quasi-judicial proceedings, the tribunal was not bound to approximate the procedure followed in courts of law, but was at liberty to exercise its power in accordance with the ordinary standards employed in departmental affairs. It seems clear, however, that in view of the due process clauses in our federal and state constitutions, such a decision could never be handed down in this country.

The right to hear the case against one may be said clearly to be implied from the numerous decisions, both state and federal, guaranteeing the party entitled to a hearing the right to argue and present his case, and to cross-examine adverse witnesses and inspect documents offered against him and offer evidence in rebuttal.

Since substance and not form is to be the criterion, it is difficult to perceive how there is much value in arguing and presenting one's case if he is to be denied the right to know the case against him. Else why the emphasis in modern pleading on preventing surprise? Why the provision in the Federal Constitution that an accused person shall be informed of the accusation against him? It seems indisputable that the right to present and argue one's case is little more than a mere sham unless he is informed of the contentions he must overcome by that argument.

Likewise, the arguments supporting, and the theory behind, the right to cross-examine adverse witnesses apply potently to indicate that no hearing is adequate which does not entitle a party to be informed of his opponent's contentions. In Farmers' Elevator Co. v. Chicago, Rock Island & Pacific R. R., a state public utilities com-

Administrative Law—The Experience of English Housing Legislation, 49 Harv. L. Rev. 426 (1936), where the English cases are discussed.

84 See, for example, Sabre v. Rutland R. R., 86 Vt. 347, 85 A. 693 (1913); Fallbrook Irrigation District v. Bradley, 164 U. S. 112 at 171, 17 S. Ct. 56 (1896); Londoner v. City and County of Denver, 210 U. S. 373, 28 S. Ct. 708 (1908); Lower Kings River Reclamation District v. Phillips, 108 Cal. 306 at 314, 39 P. 630, 41 P. 335 (1895).


86 Amendment VI.

87 266 Ill. 567 at 573, 107 N. E. 841 (1915).
mission sought to compel the construction of certain physical railroad connections. The commission had “an investigation” made, and based its decision thereupon. In declaring the hearing invalid, the court said:

“Allowing the testimony to be heard by the commission, or one of its members, without any opportunity to cross-examine the witnesses presenting it, amounts to a practical denial of the vital part of the hearing required by this statute. The words ‘public hearing’ before any tribunal or body, by the accepted definitions of lexicographers and courts, mean the right to appear and give evidence and also the right to hear and examine the witnesses whose testimony is presented by opposing parties. . . . The finding of the commission was not based upon the evidence heard by it or one of its members, but clearly upon the investigation that it caused to be made. . . . Furthermore, an order of this nature must be based upon the evidence presented in the public hearing, with a full opportunity to cross-examine witnesses and present, if desired, evidence in rebuttal, and not upon an *ex parte* examination. In no other way can the interested party maintain his rights or make his defense.”

Manifestly, the language is precisely applicable to the situation in hand. Any party entitled to a hearing should be entitled to know the case against him. In no other way can he maintain his rights or make his defense. In the same vein is *Interstate Commerce Commission v. Louisville & Nashville R.R.*, where the following language appears:

“But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could the jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the findings.”

88 Ibid., 266 Ill. at 573-574.
89 227 U. S. 88 at 93-94, 33 S. Ct. 185 (1913).
The words of the late Justice Cardozo in the case of Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, are a propos:

"The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

Applying the same thought to the question at issue, how easy it would be for the tribunal to say to a justly astounded petitioner, "Your case was well presented, your evidence seemingly convincing, but in a little private discussion we had with the government attorneys, who argued against you ex parte, we were convinced that the decision should be thus and so!"


It is submitted, then, that the implications of these cases clearly pointed the way to the second decision in the Morgan case. Of its wisdom and soundness there can be little doubt.

In summary, it is believed that the essential requirements of a full hearing should include the following. First, the consideration of the evidence by the deciding tribunal in one of three ways: either taking the testimony itself where the amount is small and time not too pressing; or, reading of the entire transcript of the testimony where such procedure is feasible; or, either of the first two being impracticable, allowing the trial examiner, or the assistant who takes the testimony, to prepare an abstract of the salient points of evidence for the consideration of the tribunal, subject, however, to the right of either party to file and argue exceptions thereto before the deciding tribunal. Second, the right to a full hearing should include a right to argue, orally or by brief, before the deciding tribunal, subject to such limitations of time and space as the tribunal may require, consistently with ample opportunity to each party to present adequately its case. And third, full hearing should, and parenthetically it may now be said that it clearly does, include the right to know both evidence and argu-

40 301 U. S. 292 at 303, 57 S. Ct. 724 (1937).
41 86 Vt. 347, 85 A. 693 (1913).
42 265 U. S. 274, 44 S. Ct. 565 (1923).
ment used against one, with a fair opportunity to rebut that evidence and argument before the tribunal makes its final decision. It is believed that such a hearing would admit of speedy, effective, and efficient disposition of matters coming before administrative tribunals, and at the same time would protect adequately the private interests involved."

Collins E. Brooks

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