

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).