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.[3] In fact, hearings have

[3] 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 deprival 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).

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 deprival of the right to free use of the mails [29] 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) 762.

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 food [46] 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 obeisance 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 untrammeled, 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 deprival 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 deprival 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., deprival 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] Brahy 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

1. 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.