Administrative Law--Judicial Review--Due Process

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army outweigh the first amendment argument that the returning of
draft cards is a protected vehicle of speech.\(^{39}\)

Furthermore if statutorily authorized regulations are eventually
formulated, they will have to be sufficiently narrow in scope and
clear in meaning so as to set up standards by which the legality of a
"delinquency" declaration can be judged. "And the regulations, when
written, would be subject to the customary inquiries as to infirmities
on their face or in their applications . . . ."\(^{40}\) Thus, even regulations
sanctioned by Congress would probably be challenged on the ground
that they had a punitive effect on the exercise of constitutional rights.

No matter what the future holds, the Gutknecht decision repre-
sents a triumph over an overbroad, discretionary administrative power
—a vindictive sort of power used to silence those who would dare to
confront the System.

[Thus] courts are beginning to evidence a belief that the current
administrative procedure of the System is inadequate to guarantee
full protection of all those affected by it. The issue will no longer
be settled by urging the courts to respect the sanctity of the
Selective Service; constitutional questions have superseded more
administrative considerations . . . . [I]f Congress fails to fill the
gap in the statutory structure, the courts will undoubtedly con-
tinue to assume an innovative role in an effort to prevent adminis-
trative abuse, by the Selective Service and others, of basic con-
stitutional liberties.\(^{41}\)

\(^{J.}\) Gary Bale

Administrative Law—Judicial Review—Due Process.—Susan Hohnke
was arrested and indicted on July 22, 1966 for the unlawful possession
of lysergic acid diethalamide [hereinafter LSD], classified in Ken-
tucky as a narcotic drug\(^1\) by a regulation promulgated by the State

\(^{39}\) Accord, United States v. Kime, 188 F.2d 677 (7th Cir. 1951), United
States v. Hertlein, 143 F. Supp. 742 (E.D. Wis. 1956). In these lower federal court
cases the legality of the regulations forbidding nonpossession of draft cards was
upheld.


\(^{41}\) Jones, Draft Reclassification for Political Demonstrators—Jurisdictional

\(^1\) The unlawful possession of a narcotic drug is prohibited in Ky. Rev. Stat.
Board of Health. On July 25, 1967, before the qualification of jurors had been completed, defendant moved the trial court to set a date for a hearing whereby she would offer evidence that the State Board of Health had acted improperly in determining LSD a narcotic drug since it did not possess addictive-sustaining qualities as defined in the statute. The trial court denied defendant's motion whereby she proffered the evidence by an avowal. The court refused to accept this evidence into the record. There was no administrative procedure outlined by the legislature to review an action of the State Board of Health. Defendant was found guilty of the unlawful possession of LSD and she appealed. Held: Vacated and remanded. Due process of law requires acceptance of the evidence, either at a separate hearing or when proffered by avowal, to determine the validity of an administrative regulation. Hohnke v. Commonwealth, 451 S.W.2d 162 (Ky. 1970).

It is by now elementary that judicial review of the validity of an administrative regulation must be afforded to satisfy the demands of due process. The attitude of the courts in general is that due process will be satisfied if there is either a hearing by the administrative agency, made subject to judicial review, or an adequate review of the administrative decision via a hearing in court. Due process does not require any specific time for the review as long as there is an opportunity for a hearing and judicial determination before substantial rights are affected. The Courts has shown much concern as to the

2 KRS § 210.010 (14) (1934) defines a “narcotic drug” as:
‘Narcotic Drugs’ includes coca leaves, opium, isonipecaine . . . and any drug having addiction-forming or addiction-sustaining liability similar to morphine or cocaine which is designated by regulation of the State Board of Health as a narcotic drug.

3 An avowal is defined in BLACK'S LAW DICTIONARY 173 (rev. 4th ed. 1968) as:
An open declaration. Purpose is to enable the court to know what the witness would have stated in answer to the question propounded, and to inform the court what the interrogator would prove contrary to the testimony given at trial.

4 Yakus v. United States, 321 U.S. 414 (1944). In granting judicial review to decide whether the Emergency Price Control Act of 1942 was an unconstitutional delegation to the Price Administrator of a legislative power of Congress to control commodity prices in time of war, the Court stated that any action of the Administrator “is reviewable in this Court and if contrary to due process will be corrected here.” Id. at 434.

5 See Missouri ex rel. Hurwitz v. North, 271 U.S. 40 (1926); McRae v. Robbins, 151 Fla. 109, 9 So.2d 284 (1942); State ex rel. Legget v. Jensen, 318 S.W.2d 353 (Mo. 1958).


legality of the acts of an administrative agency. In determining whether the agency has acted beyond the scope of the authority granted to it by statute, the courts have granted judicial review even though there was no statutory provision specifically requiring a hearing.\(^8\) A few courts have gone as far as to grant judicial review of an agency’s determination even though such review was specifically prohibited by the governing statute.\(^9\) In general, a majority of the courts, both federal and state, have not hesitated to question the findings of an administrative agency where they deem review necessary.

The law of judicial review of administrative agencies in Kentucky has moved from a somewhat restrictive approach to one more in line with this majority view. The Kentucky Court of Appeals has basically limited the scope of its review to questions of law.\(^10\) Thus, review has not been granted based on the agency’s specific findings of fact, but has been restricted to the manner in which such results are reached. Furthermore, there has been a considerable change in the Court’s approach in granting review where there is no specific statutory requirement providing for a hearing to test an agency’s findings. Decisions have progressed from a denial of review, absent a statutory provision,\(^11\) to a granting of review if there was a threatened invasion of constitutional rights,\(^12\) to the present attitude reflected in *Trimble County Board of Supervisors v. Mulkin*,\(^13\) that the Court will grant review of an administrative finding where the legislature has failed to define the scope of review. Thus, a party is entitled to some form of hearing to determine the validity of an administrative regulation.

The primer of the basic precepts accepted in Kentucky for the judicial review of administrative decisions is *American Beauty Homes Corporation v. Louisville & Jefferson County Planning & Zoning Commission*.\(^14\) There the Court of Appeals laid down three basic situations

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\(^9\) See *Harmon v. Brucker*, 355 U.S. 579 (1958). See also *Ross v. Wilson*, 308 N.Y. 605, 127 N.E.2d 697 (1955) where the New York Court of Appeals made a finding of the State Commissioner of Education subject to judicial review despite a New York statute which made a decision of the State Commissioner “not subject to question or review in any place or court whatever.” *Id.* at —, 127 N.E.2d at 704.


\(^11\) *Hatch v. Fiscal Court*, 242 S.W.2d 1018 (Ky. 1951).

\(^12\) *Pritchett v. Marshall*, 375 S.W.2d 253 (Ky. 1963); *Kendall v. Beiling*, 295 Ky. 782, 175 S.W.2d 489 (1943); *Commonwealth ex rel. Merfeldith v. Frost*, 295 Ky. 137, 172 S.W.2d 905 (1943).

\(^13\) 438 S.W.2d 524 (Ky. 1968).

\(^14\) 379 S.W.2d 450 (Ky. 1964).
in which judicial review will be granted: (1) if the agency has acted beyond its granted power, (2) if procedural due process has been denied, or (3) if the agency's action is not supported by substantial evidence.\(^\text{15}\) To best explain these principles, each must be examined more thoroughly. First, the Court may determine whether an administrative agency has acted in exercise of its statutory powers.\(^\text{16}\) Any action beyond the scope of authority granted would be arbitrary and unreasonable within the prohibition of the Kentucky Constitution.\(^\text{17}\) Secondly, in the interest of fairness, a party who is affected by an administrative order is entitled to procedural due process.\(^\text{18}\) For example, administrative proceedings which do not afford a party an opportunity to be heard could be classified as arbitrary and unreasonable.\(^\text{19}\) Finally, administrative action is arbitrary when it is clearly erroneous, that is, when it is unsupported by substantial evidence, and there is no room for difference of opinion among reasonable minds.\(^\text{20}\) The Court in *McKnelly v. Gaddis*\(^\text{21}\) referred to substantial evidence as evidence which is competent and having probative value. Since each of these terms is somewhat nebulous, this appellation seem to refer to

\(^{15}\) *Id.* at 456.


Administrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency. The power to make regulations is not the power to legislate in the true sense, and under the guise of regulation legislation may not be enacted. . . . A rule which is broader than the statute empowering the making of rules cannot be sustained. Administrative authorities must strictly adhere to the standards, policies, and limitations provided in the statutes vesting power in them. Regulations are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined. *Id.* at 566, 211 S.W.2d 428-29.

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. *See* Bd. of Educ. v. Chattin, 376 S.W.2d 693 (Ky. 1964); Bower v. Meyer, 255 S.W.2d 490 (Ky. 1953); Young v. Eldridge, 243 S.W.2d 483 (Ky. 1951); Thomson v. Tafel, 309 Ky. 753, 218 S.W.2d 977 (1949); Southeastern Greyhound Lines v. Pendleton, 309 Ky. 372, 217 S.W.2d 962 (1949). *See also* 2 Am. Jun. 2d *Administrative Law* § 617 (1962).

\(^{17}\) KY. CONST. § 2 states:

Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority. *See* Bd. of Educ. v. Chattin, 376 S.W.2d 693 (Ky. 1964); Bower v. Meyer, 255 S.W.2d 490 (Ky. 1953); Young v. Eldridge, 243 S.W.2d 483 (Ky. 1951); Thomson v. Tafel, 309 Ky. 753, 218 S.W.2d 977 (1949); Southeastern Greyhound Lines v. Pendleton, 309 Ky. 372, 217 S.W.2d 962 (1949). *See also* 2 Am. Jun. 2d *Administrative Law* § 617 (1962).

\(^{18}\) Kentucky Alcoholic Beverage Control Bd. v. Jacobs, 269 S.W.2d 189 (Ky. 1954).

\(^{19}\) American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n, 379 S.W.2d 450, 456 (Ky. 1964).

\(^{20}\) Thurman v. Meridian Mut. Ins. Co. 345 S.W.2d 635, 639 (Ky. 1961).

\(^{21}\) 309 Ky. 698, 702, 218 S.W.2d 1, 3 (1949).
a method for the Court to allow itself some discretion in examining the evidence found in each particular situation.

In the instant case, the Court did not find a need to examine the present Kentucky law on the subject of judicial review. Rather, it thoroughly discussed the serious nature of this case and the "crucial point," that is, the status of LSD, which would go undetermined if no review were granted.22 The Court, without mentioning the case, founded its approach to the review sought by appellant upon two of the three basic rules of American Beauty, whether the administrative agency has acted within its granted power and with substantial evidence to support its decision. Consequently, on the issue of whether the State Board of Health may have exceeded its powers granted by the legislature, the Court limited its reasoning to the following discussion:

Does LSD possess "addiction-forming or addiction-sustaining liability similar to morphine or cocaine?"... There was no legislative grant of authority to so designate any drug not possessing those qualities... [I]f a drug does not possess those qualities, no matter how nefarious it may be, the Board has no power under KRS § 218.010 (14)23 to designate it as a 'narcotic drug.'24

The Court found it necessary to answer this question itself, finding sufficient grounds for deciding the appeal in the fact that appellant was not even allowed to raise this question to the trial judge. Thus, the majority relied solely on the principle of Yakus v. United States25 that judicial review must be granted to satisfy the demands of due process. In deciding the case on so broad a principle, the court reasoned as follows:

When the trial court denied the appellant the opportunity to adduce evidence, even by avowal, relating to this vital question (whether LSD is addictive), any vestige of judicial review was foreclosed. Clearly, no "due process" hearing or judicial review may be found in a proceeding in which even the opportunity for avowing evidence on such a crucial point is summarily denied.26

A three-judge minority attacked defendant's argument on two basic issues.27 First, the dissent cites Robertson v. Commonwealth28 on the proposition that defendant did not follow the proper procedure in

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22 451 S.W.2d at 166-68.
23 For the relevant language of KRS § 218.010 (14), see note 2 supra.
24 451 S.W.2d at 166.
26 451 S.W.2d at 166.
27 Dissenting opinion of Judges Reed, Osborne and Neikirk, 451 S.W.2d at 169-72.
28 269 Ky. 317, 107 S.W.2d 292 (1937).
making an avowal because she did not place her proffered evidence into the record for review on appeal. However, in Robertson there was no attempt to place evidence into the record by an avowal whereas in the instant case such an attempt was made. This content by the dissent seems weak in light of the recent case, Eilers v. Eilers,\(^2\) where the Court held that it was reversible error for a trial judge to refuse to allow evidence to be placed into the record by an avowal unless the proffered evidence is clearly inadmissible on all grounds. There is no mention that defendant's evidence was in fact clearly inadmissible. The dissent's second proposition is that the State Board of Health's determination could only be reviewed if the Board had no rational basis to classify LSD as a narcotic drug. The dissent limits its reasoning for this proposition by asserting that defendant had no grounds to attack the Board's findings because she could not prove such findings were without a rational basis. However, she attempted to present such proof but the trial judge refused to allow its presentation at a hearing or placement into the record.

In light of a subsequent legislative enactment removing LSD from the classification of a narcotic drug,\(^3\) the question is raised whether the Board did, in fact, lack "substantial evidence"\(^4\) in its initial classification of LSD. The case was decided correctly in view of the trend of the Kentucky courts towards an expansion of judicial review of administrative findings. The majority opinion stressed the importance of clarifying the exact status of LSD. However, an underlying problem which appears to concern the majority was the desire to correct the state of confusion which existed at the time in the law's treatment of LSD. The specific problem confronting the Court was that the classification of LSD by the Board of Health as a narcotic drug, which the defendant was attempting to challenge, was subsequently struck down by the Board itself in removing LSD from the status of a narcotic drug to that of a dangerous drug.\(^5\) The majority could have attacked

\(^2\) 412 S.W.2d 871 (Ky. 1967).

\(^3\) LSD was removed from the classification of a "Narcotic Drug," see note 2 supra, to that of a "Dangerous Drug" under KRS 217.725 (4) (1968) which states: Any drug which contains any quantity of a substance which has been designated by regulation of the State Board of Health as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; except that the Board shall not designate under this law any substance that is a narcotic drug as defined or designated in the Kentucky Uniform Narcotic Act or the regulations promulgated thereunder.

\(^4\) See, e.g., Greyhound Corp. v. Steele, 237 S.W.2d 833 (Ky. 1952); Blue Diamond Coal Co. v. Hensley, 314 Ky. 85, 234 S.W.2d 317 (1950); Newport Rolling Mill Co. v. Terrell, 310 Ky. 4, 219 S.W.2d 412 (1949).

\(^5\) See note 30 supra.
the administrative regulation on either arbitrariness, abuse of discretion, denial of due process, or lack of substantial evidence.33 Instead, it seemed to be calling for a final determination and classification of LSD so that the law could return to a position of stability.

The dissent, on the other hand, was more concerned with the harmful effects of drugs in general. The tone of the dissent was harsh, even going so far as to imply that since the penalties were similar regardless of whether LSD would be classified as a narcotic drug or a dangerous drug, conviction should be affirmed.34 Attempting to justify its conclusions by a thorough discussion of defendant's non-compliance with the Kentucky Rules of Criminal Procedure [hereinafter referred to as Criminal Rules], the dissent's major argument was that defendant's motion to dismiss was made too late because the jury had been partially selected and Criminal Rule 8.22 requires that a motion to dismiss be determined before trial. This rationale is somewhat confusing in light of Criminal Rule 8.20 which states that a motion of this type can be made any time before the plea is entered. Upon examination of the trial transcript, it is shown that defendant made the motion for an evidentiary hearing and one day later entered her plea. Thus, even though the motion to dismiss was not ruled upon until after the jury had been partially selected, it was made at the proper time. The dissent also contended that defendant did not comply with Criminal Rule 9.52 because, after her motion was overruled, she did not put evidence into the record by an avowal. As stated previously, an attempt to introduce such evidence was made.

These two opinions present quite contrasting approaches towards judicial decision making. The majority relied on broad principles of due process guarantees of liberty to settle the law with an emphasis on the policy considerations of having a stable and uniform law con-

33 See notes 16-18 and 20 supra and accompanying text, concerning arbitrariness, denial of due process, and lack of substantial evidence respectively.


34 Hohnke v. Commonwealth, 451 S.W.2d 162 (Ky. 1970) (dissenting opinion): The fact of the subsequent change in classification of LSD by the legislature is of less significance than the circumstances surrounding the defendant and the extent of her contact with this drug. In any event, the penalty inflicted was the minimum so far as confinement is concerned under either the "addictive drug" section or the "dangerous drug" section of the same act. Id. at 171.
cerning the status of LSD. The minority, however, relied more upon the technicalities of the administration of courts of law which restrict them from being courts of justice. It appears that the minority opinion was more concerned with the harmful effects of LSD and the need for very strict laws in regard to it. If these two manners of judicial opinion reflect the basic rationale for deciding a case of law, the question which must be answered is: should technical legal precedent be strained to further one policy over another policy backed only by general, and not direct, precedent? The answer is that precedent and policy must not be examined separately; but interwoven as the dominant and essential element of a principle of law.

Richard D. Pompelio

CORPORATIONS—FRAUDULENT PROXY STATEMENTS—SECURITIES EXCHANGE
Act of 1934, § 14(a). A management proxy statement soliciting minority votes for a proposed corporate merger was materially defective since it failed to disclose that the directors recommending the merger were controlled by the other party to it. Rescission of the merger was sought by plaintiffs who alleged violation of section 14(a), the proxy fraud provision of the Securities Exchange Act of 1934.

A federal district court held that a case of fraud had been established by showing (1) that the proxy defect was material, and (2) that the proxy votes were necessary for approval of the merger. However, the Court of Appeals for the Seventh Circuit reversed and held that if the

1 The materiality of the defect was found by the trial court as a matter of law on motion for summary judgment and affirmed by the Seventh Circuit Court of Appeals. 403 F.2d 429, 435 (7th Cir. 1968).
2 Electric Auto-Lite Company, of which plaintiffs were minority shareholders, had been under voting control of Mergenthaler Linotype Company, the other party to the merger, and all 11 of Auto-Lite's directors were nominees of Mergenthaler. The proxy statement told the minority shareholders simply that the directors recommended the merger without disclosing their relationship to Mergenthaler.
   It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78 f of this title.