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DECLARATORY RULINGS IN ADMINISTRATIVE AGENCIES

By ALAN R. VOGELER*

INTRODUCTION

With its first important beginning in this country, perhaps, in the establishment of the Interstate Commerce Commission in 1887,¹ governmental control of business and society has steadily increased. In the year 1940 there were fifty-one federal agencies with rule making power each devoted to the regulation of some phase of our national economy.² With the advent of the war crisis, many more phases of our normal life have become subject to direct governmental supervision.

That the administrative agency is a necessary adjunct to the modern American civilization we are struggling to preserve few persons will be heard to deny.³ In a complex, highly industrialized society such as ours, a body which employs some of each of the executive, judicial and legislative powers is a neces-

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¹ Act approved Feb. 4, 1887, 24 Stat. 379 (1887), 49 U. S. C. A. secs. 1-2 (1940). The first administrative agency was the Bureau of Customs, established in 1789. Act of July 31, 1789, 1 Stat. 29. The Bureau of Internal Revenue was established in 1862. Act of July 6, 1862. Since, however, these agencies regulated matters which were granted to be necessary functions of the federal government and outside of state control, it can hardly be said that they are the antecedents of the present administrative hierarchy.


³ The recent Walter-Logan bill sponsored by the American Bar Association attempted to limit the authority of administrative agencies and widen the scope of judicial review of their actions. But even the Association declared that administrative boards were a necessity. Report of Administrative Law Committee, (1939) 25 A. B. A. Jour. 113. But see the remarks of Governor Slaton of Georgia, ibid, p. 94.
sity if we are to have a well-ordered society in time of peace as well as war.

However, it is evident that we have not yet reached a Utopia. There are admitted faults within the superstructure of this administrative regulatory system. It needs renovation in order to correct and facilitate its operations, not only to make it a more efficient system solely for the sake of better government, but also to enable it to successfully compete with conflicting ideologies and methods of totalitarian government which have enveloped such large sections of the world. This paper will point out one of the deficiencies of our present democracy and suggest a remedy.

One of the outstanding criticisms of a government which has so many autonomous agencies within it is that as a consequence it is difficult for one to know just what the law is in regard to specific actions. Doubly difficult is it to attempt to determine in advance what legal effect a contemplated course of action will engender. Laws are increasing with greater rapidity than the agencies which administer them. As Mr. Justice Stone said in 1916:

"To the overwhelming quantity of legislation are due many of the existing evils of our legal system. It loads down the machinery although it steadily multiplies that machinery. Of even more serious import is the perpetual adding of new and the changing of old laws upon every conceivable subject, until the whole mass is beyond the power of the human mind to grasp or comprehend, or the power of the government to enforce."

There is hardly a field of economic endeavor today which is not in some way responsible to or under direct control of an arm of the federal government. Aside from the control of war production and prices by the War Production Board and the Office of Price Administration, agriculture is supervised and regulated by the Surplus Marketing Administration and various other bodies, labor relations by the National Labor Board, labor

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5 Letter of the Attorney General to the President, Attorney General’s Committee Report, p. 251 (1941).

6 Comments on Herbert Spencer’s Sins of Legislators, The Man Versus the State, p. 239, (1916) ed. by Truxtun Beale.
standards by the Wages and Hours Division, transportation by the Interstate Commerce Commission, banking by the Federal Deposit Insurance Corporation, investments, securities, exchanges and public utilities by the Securities and Exchange Commission. These are but a few of the many administrative boards which daily exert a tremendous influence on the life of the individual citizen.

But yet, despite the fact that these agencies are such an important medium for the functioning of our government, we have in very few cases made any provisions for giving the individual any assurance of knowing what the law is in regard to his prospective conduct until he has acted at his peril. It is neither efficient nor desirable that persons should have to leap in the dark, only to discover after they have landed that their leap was ill-advised.

Outside the field of administrative law, this difficulty has been somewhat overcome by the technique of the declaratory judgment. When a real controversy exists as to the rights of one party against another, it is possible to obtain in advance of action a binding statement of the rights of the parties. As Borchard says,7

"One of the exceptionally valuable functions of a declaratory action lies in the fact that it enables not only the individual to raise the question of the validity of governmental action without purporting first to violate an order and expose himself to penalty, but it enables the administration itself to raise the question of its own powers, when challenged, without running the risks entailed by precipitate action on the assumption of legality."

Something of the declaratory judgment idea is needed in the field of administrative law. There should be no reason, for example, for a corporation to reorganize under the belief that such consolidation entails no distribution of taxable income, only to discover later that the reorganization renders the stockholders liable for so much tax that it would have been more practicable to have abandoned the plan.5 There should be some method by which any person planning action which might be subject to regulation by an administrative authority could obtain in advance from that agency a binding declaration of the proper

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7Borchard, Declaratory Judgments, (1934) p. 591.
course to pursue, and the prospective resultant liability or legal effect.

With the passage of declaratory judgments statutes, the last few years have seen both federal and state courts provided with a device to furnish guidance and promote certainty in many fields of legal relationships, where previously parties had been forced to proceed at their own risk. A declaratory judgment obtainable from a court, however, is not the solution to uncertainty in the field of administrative law.

Herman Oliphant, late General Counsel of the Treasury Department, said in 1938 that one of the major problems of our present system is the improvement of administrative processes and techniques. Oliphant stated that the basic aspect of the problem is the need for letting the citizen know what is expected of him by the government at the time when he needs to know in order to carry on his business with reasonable assurance.

Citing various examples of unnecessary hardships occasioned by the lack of authoritative advance knowledge, Oliphant averred that the declaratory ruling would be useful in almost all kinds of tax cases, and especially helpful in disposing of those questions which affect in the same way many different taxpayers similarly situated. Without doubt such a procedure would aid greatly in relieving taxpayers from the uncertainties which now face them.

However, the declaratory ruling technique is not only useful in the field of taxation, but also in nearly every field wherein advance determination of the rights of the parties will result in the prevention of costly errors on the part of citizens. As will be pointed out, advisory rulings or opinions are at present rendered by several administrative agencies. These include the Securities and Exchange Commission, the Federal Alcohol Administration, the Post Office Department, the Bureau of Customs and the Federal Power Commission. Other agencies such as the Packers and Stockyards Division of the Department of Agriculture, the Federal Trade Commission, the Social Security Administration and the Department of Justice have varied techniques to be noted later (in a subsequent article) which are

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*Attorney General's Committee Report, p. 30 (1941)

** (1938) 24 A. B. A. Jour. 7.

***See Attorney General's Committee Report, pp. 30-33 and citations (1941).
designed to inform the individual of his rights and liabilities in advance, and to give him either a go-ahead or a stop signal on anticipated conduct.

These various devices have been given different names, but for our purpose all of them may be termed "advisory rulings." At the outset we must distinguish between these advisory rulings and what have been called "administrative regulatory orders." The regulatory order is issued by an agency to implement a statute usually after a hearing and consultation with representatives of all interested parties. It affects entire groups or classes of the public, and emanates under statutory standards such as "public necessity", "reasonable rates" and the like. It is in the nature of a statute itself.

The advisory ruling, on the other hand, is issued in response to inquiry from one or a few members of the affected public concerning proposed conduct. There may or may not be a hearing, and even if there is one, the resulting order is not intended as a blanket endorsement or prohibition of similar conduct on the part of other members of the public. These advisory rulings have helped somewhat to dispel the cloud of unknown possible legal consequences, but they are not completely satisfactory.

In most cases the ruling is not binding on the agency which issues it, but carries within itself a notice that the opinion is merely advisory. Thus the government is free to change its position after the individual has acted in reliance on the ruling, and no remedy is available. Of course, in the usual case the agency will probably not alter its stand, since before it has consented to give an advisory ruling it has considered carefully both the subject and the law governing it. Nevertheless, on occasion, administrative tribunals have changed their positions much to the detriment of the person affected. The requisite of certainty can be achieved only if provision is made for the proper issuance of a declaratory ruling which will be binding on the agency issuing it.

See Blachly and Oatman, Federal Statutory Administrative Orders, (1940) 25 Iowa L. Rev. 582, in which they classify orders of administrative agencies into ten different categories.

Ibid at 585.
PART I

FEDERAL ALCOHOL ADMINISTRATION

We will now consider the various administrative agencies which at present issue "advisory rulings" and the technique and procedure used. The first of these is the Federal Alcohol Administration.

This agency was established in 1935, and its purpose was stated to be "to further protect the revenue derived from distilled spirits, wine, and malt beverages, to regulate interstate and foreign commerce and enforce the postal laws with respect thereto, to enforce the 21st amendment, and for other purposes." Prior to its establishment its functions had been administered by the Federal Alcohol Control Administration, which had been set up under the authority of the National Industrial Recovery Act.

Until 1940, the agency was a division of the Treasury Department and was headed by an Administrator appointed by the President. But pursuant to the provisions of the Reorganization Act of 1939, the President in June, 1940, abolished the Administration and the office of Administrator and transferred their functions to the Bureau of Internal Revenue. Thus although the machinery for enforcement of the provisions of the Federal Alcohol Control Act has been shifted for reasons of economy to another agency, the same type of supervision is being pursued.

As expressed by the Administrator,

"Congress has vested in the Administration the responsibility of regulating the business conduct of the alcoholic beverage industries, in the public interest. The activities of the administration constitute a relatively new field of federal endeavor. Since the passage of the Federal Alcohol Administration Act, the Federal Government has played a larger part in controlling the legalized liquor traffic from the social standpoint than ever before in the history of the country."
The Act places the alcoholic beverage industry under the control of the Administration by the use of the permit system. All members of the industry, with the exception of brewers, retailers and state monopolies, are required to obtain permits,\textsuperscript{19} which are effective so long as the permittee complies with the provisions of the Act, the 21st Amendment, and all federal statutes pertaining to liquor.\textsuperscript{20}

The parts of the Act with which we are most concerned are sections 5(e) and 5(f). These sections empower the Administrator to issue regulations relating to the advertising and labeling of distilled spirits. Section 5(e) also provides that a certificate of label approval issued by the Administration must be produced before liquor will be released from customs custody. And it is the practice of the internal revenue officers to prohibit the bottling of alcoholic beverages unless the bottler produces a certificate of label approval or a certificate of exemption from labeling.\textsuperscript{21}

These certificates of label approval are in effect advance advisory rulings declaring that the submitted label fulfills all the requirements of the statutes and of the regulations issued under them. That such procedure is one of the major activities of the Administration is attested by the fact that as of December, 1939, approximately 512,000 label applications had been acted upon. Of these, 378,000 were approved, and 35,000 were granted certificates of label exemption.\textsuperscript{22} This task is performed by the Label Section, in cases where a question arises as to the correctness of the interpretation of the regulation by the Label Section examiners, the aid of the Legal Division is invoked.\textsuperscript{23}

To the present time, seven general Regulations relating to labeling and advertising have been issued.\textsuperscript{24} Under these regulations questions have naturally arisen from time to time, the answers to which are sought by application to the Administration.

\begin{itemize}
\item \textsuperscript{19} Sec. 203.
\item \textsuperscript{20} Sec. 204 (d)
\item \textsuperscript{21} Mono. No. 5, Attorney General's Committee on Administrative Procedure, (1940) "Federal Alcohol Administration", p. 4.
\item \textsuperscript{22} Gaguine, \textit{The Federal Alcohol Administration}, (1939) 7 G. Wash. L. Rev. 949, 953; (1940) Annual Report, Federal Alcohol Administrator, pp. 8-9.
\item \textsuperscript{23} Gaguine, supra n. 22, at 954.
\item \textsuperscript{24} These regulations are lengthy and detailed. They are set out in 27 C. F. R. Chap. I, pp. 1-82.
\end{itemize}
tion in the form of letters. In one such instance, distillers desired to know whether the words "appetizer" and "aperitif" could be used in labels and ads. This question arose as a result of the Administration's often expressed opinion that any advertisement which created the impression that the consumption of alcoholic beverages would contribute to the mental and physical well-being of the consumer or that such beverages could be consumed without detrimental effects, was prohibited under the Act.25

In an opinion released in the Federal Register and circulated to the industry, Administrator Alexander stated, "The Administration takes this occasion to advise the industry that objection will not be voiced to the use, under the following conditions, of the words 'aperitif' and 'appetizer' in the advertising of alcoholic beverages." The release then listed two detailed conditions under which the use was proper and gave several examples of both proper and improper usage.26

"On the other hand, any statement which would tend to give the words 'aperitif' or 'appetizer' a meaning broader than that which indicates merely the appropriate time or method of consumption, would be prohibited. For example, it would be improper to state that any particular brand will 'stimulate the appetite', or 'promote the flow of gastric juices', or to make any other similar statement which tends to give the impression that the product has medicinal value, or that its consumption would have a beneficial effect upon the human system."

Again, Section 41(a)(2) of Regulations No. 5 prohibits the appearance on labels of statements which are disparaging of competitors' products.27 Various wholesalers had secured certificates of label approval for, and were distributing beverages with the words "not artificially colored" and "not artificially flavored" thereon. Upon complaint to the Administration, a determination was made that such statements were in fact dis-

26 Ibid: "In line with the views above expressed, it would be regarded as permissible to state that 'it may be used at any time of day, but is particularly appropriate as an appetizer before meals or at the cocktail hour', or that 'it is especially good as an aperitif before dinner'."
27 Section 205 (f) (5) of the Act authorizes the Administrator to issue such regulations "as will prohibit statements that are disparaging of a competitor's products." Section 41 (a) (2) of Regulations No. 5 also gives examples of such proscribed statements: "Contains no neutral spirits"; "Matured naturally—not heat treated"; "Not a compound, but a delicious distilled dry gin"; "Should not be confused with imitations that are made from neutral spirits"; "Contains no headaches"

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paraging within the meaning of the Regulation. As a result, the Administration issued a release to all bottlers of distilled spirits informing them that such statements could not *thereafter* be used on labels.\(^2\) Thus bottlers were in effect granted amnesty for previous good-faith conduct, and by revising their labels and securing new certificates of approval, could avoid liability for violation of the Regulation.

Of course, if distillers wish to disregard these regulations or advisory rulings they may do so and resist prosecution for violation by averring the invalidity of the regulation in the federal courts.\(^3\) But if they comply, they have assurance that they are free from any liability. For the Administration, in all cases where it has reversed a prior-held position, has not undertaken the prosecution of any action to penalize distillers who acted in reliance on the former ruling prior to notice of the change published in the Federal Register.\(^4\) As a matter of fact, comparatively few orders of the Administration have been contested in the courts,\(^5\) since the judiciary is reluctant to interfere with properly exercised administrative discretion.\(^6\)

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\(^2\) 3 F. R. 521 (1938).

\(^3\) Section 204(h).


\(^5\) For example, see Atlanta Beer Distributing Co. v. Alexander, 93 F. 2d 11 (CCCA 5th 1937), cert. den. 58 S. Ct. 645, in which denial by the Administrator of a license on the ground of probable violation of the law by the applicant was held not reviewable in view of evidence to support the finding. The court stated it was not vested with administrative power to determine whether a permit should be granted and couldn't substitute its judgment for that of the Administrator.

\(^6\) Other cases involving rulings of the Administrator include Arrow Distilleries Co. v. Alexander, 109 F. 2d 397 (CCA 7th 1940), in which the Act was held valid and an order of the Administrator suspending a permit for selling misbranded liquor was affirmed, there being evidence to support it, as against a contention by appellant that the order was a result of a determination by the Administrator alone that appellant had violated a federal liquor statute (26 U. S. C. A. sec. 1208) by falsifying certain records, and that the Administrator did not have the power to make such determination without a prior criminal trial. Thus the Administrator was able to determine, independent of a court determination, that a violation of the statute had occurred, and this determination by him was not dependent on any prior or subsequent court determination upon a criminal indictment charging the same offense. In Jameson & Co. v. Morgenthau, 25 F. Supp. 771 (1938), the court upheld an order of the Administrator pursuant to Regulations No. 5 refusing to allow the release of whiskey from customs custody because of alleged misbranding. (Decree vacated on other grounds, 307 U. S. 171 (1939).)
The supervision of advertising as well as of labeling by the Alcohol Administration also entails the issuance of what are in effect advisory rulings. In cases of minor irregularities in advertising, the usual procedure of the Administration is to write a letter to the advertiser, suggesting necessary revision in advertisements to be used in the future. By the use of this method offending advertisements are corrected within a short period of two weeks or less, since the advertisers usually comply with the proposed revisions suggested. In the year 1939 nearly 2,000 cases were closed in this manner by the Administration.33

Where the violation is more serious, the Administration has in conformity with section seven of the Act accepted offers in compromise, which are contingent upon a proof that the objectionable advertising has been discontinued and a stipulation that future advertising will omit the violative material.34

The Administrator has stated that the agency will not approve or disapprove any advertising material in advance of publication.35 But actually, a system of ‘preventive enforcement’ is used by which the legality of proposed advertising matter is commented upon. In 1939, 1,109 informal conferences were held with members of the industry or their advertising agents at which proposed advertising campaigns were discussed. As a result, several campaigns which the Administration felt were violative of the statute were revised or abandoned.36 The

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33 (1940) Annual Report, Federal Alcohol Administrator, p. 12.
34 Ibid.
35 Ibid. at p. 17.
36 "This type of 'preventive enforcement' has resulted in the prevention of a large number of advertising campaigns which would have been objectionable nature if they had been allowed to appear in print. The following are examples of proposed campaigns which were abandoned or completely revised after criticism by the Administration:

1. Two campaigns for spirit blends which were developed around the theme that the products were aged, but which failed to indicate that 20% of the product was aged whiskey and 80% of it was neutral spirits.
2. Two campaigns regarding the merits of 'aged rum' when neither of the products was entitled to claim age , and a third rum campaign developing the theme that rum which did not state age on labels and in advertisements was an inferior product.
3. Four beer campaigns featuring the tonic and invigorating qualities of the product and the fact that it would not have any deleterious effects upon the consumer.
4. A whiskey campaign developed around the theme that by choosing the right whiskey you can enjoy yourself without a headache.
Administration in 1938 wrote 4,006 letters in criticism of published advertising and commenting upon advertising copy submitted in advance of publication.37

The submission of proposed advertising to the Administration seems peculiarly adaptable to the technique of binding declaratory rulings. Certainly the facts to which such a ruling might be applied are fixed and certain, consisting solely of a copy of the proposed advertisement. If a ruling were issued on submission of an ad, it would be comparatively simple to determine whether the ruling had been violated, since the published advertisement could be compared side by side with the submitted copy.

Another phase of the activities of the Federal Alcohol Administration which leads to the issuance of “advisory rulings” is its enforcement of the provisions of the Act dealing with unfair competition and trade practices. Among other statutory proscriptions are “tied houses,” which can be induced, among various ways, by the extension to a buyer of a period of credit greater than usual.38 The Administrator was given power to determine the usual credit period of the industry and then issue regulations incorporating such determination.39 Due to the fact that the industry was an infant one because of the recent repeal of the 18th Amendment, the Administrator waited to issue his regulation until a customary and usual credit period had been established, and then provided that it should not take effect for one year.40

Subsequent to the date of issuance and prior to the effective date, the Administration received numerous inquiries asking for a fuller explanation of the Regulation and seeking information as to whether certain practices would be considered as violative of its provisions. As a result, the Administration

5. A campaign which by the use of testimonials of famous athletes was likely to be interpreted as an implication that their athletic prowess was connected with the consumption of whiskey.” (1940) Annual Report, Federal Alcohol Administrator, p. 17.

37 (1939) Annual Report, Federal Alcohol Administrator, p. 5. The Report does not indicate how many of this total were written in regard only to advertising copy submitted in advance. However, a table in the Report indicates that 2,981 advertisements were “presented and reviewed” at 1,323 conferences with industry members or their advertising agents.

38 Sec. 205(b) (6)

39 Ibid.

40 3 F. R. 2809 (1938).
issued a digest of interpretations of the regulation. This release termed the answers to the inquiries therein "rulings," and stated that the opinions expressed were subject to revision or modification at any time. The substance of the rulings was given in question and answer form, 27 separate situations being covered. A typical excerpt is as follows:

"2. Do the regulations prohibit a wholesaler from continuing to sell alcoholic beverages to a retailer who has not paid his bills within 30 days, or to deal with such retailer upon a cash or c. o. d. basis?

"No. They don't prohibit selling to a retailer who is in arrears, providing, of course, that the wholesaler does not induce the retailer to deal with him by offering him credit for more than 30 days."

Such advisory interpretations have been invaluable to the alcoholic beverage industry. But the system is not completely adequate. For example, another excerpt from the same release says in answer to the question of what extension of credit will result in inducing purchases by a retailer:

"Whether or not a particular extension of credit results in the inducement prescribed by the statute can not be decided by the Administration in advance."

The Administration was probably acting wisely by refusing to give a specific answer and a definite commitment to such a general, hypothetical question. But there appears to be no logical reason why the Administration could not decide in advance whether a specific proposed extension of credit would violate the regulation.

Without a provision for a binding declaratory ruling there remains the possibility that after an advertisement or a trade practice has informally been found to be not violative of any statutory or regulatory provision, the Administration may, for any reason it deems expedient, determine that in fact the action was proscribed and act accordingly. In such a case the distiller would be without relief in the courts unless he could prove that the Administrator had proceeded on a mistake of law, refused to hear relevant evidence, or acted arbitrarily or capriciously to the prejudice of the defendant.

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41 FR 1950 (1939).
42 Ibid.
Little change would be required in the present procedure to establish in the Federal Alcohol Administration a system of declaratory rulings. The present system of "informal conferences" and "comments" on proposed advertising and of "advisory rulings" on trade practices would have to be supplanted with a statutory procedure providing for the issuance of a ruling that would, for a specified time at least, be binding on the Administration.

A provision would also be required that a dissatisfied applicant could immediately appeal to the courts an unfavorable declaratory ruling. Without this latter assurance, the applicant would be faced with the alternative of abandoning his proposed conduct or proceeding with it and facing withdrawal of his permit. If he fairly believes that the Administration is in error, he should be entitled to have that question decided without subjecting himself to the risks entailed by a violation of the order. A scheme of declaratory rulings in the Federal Alcohol Administration seems not only desirable and beneficial, but also one that could be easily instituted.

The Post Office Department

A field in which the courts have left a great amount of discretion in the administrative agency regulating it is the postal service. This may be due to the judicial doctrine that the use of the mails is a privilege, and not a constitutional right. Thus, in Bates & Guild Co. v. Payne, the court said.

46 See Mono. No. 5, Attorney General's Committee on Administrative Procedure, (1940) "Federal Alcohol Administration", pp. 21-22.
47 U. S. v. Wright, 78 U. S. 648 (1870) "The statute did not prescribe rules to govern the action of the Postmaster General, nor did it seek to interfere with the judicial discretion of the officer. It is not competent for a court or jury to revise his decision, nor is it re-examinable elsewhere, as there is no provision in the law to that effect. It may be safely laid down as a general rule that where a particular authority is confided to a public officer to be exercised by him in his discretion, upon an examination of facts his decision upon these facts is absolutely conclusive as to the existence of those facts". But see School of Magnetic Healing v. McAnulty, 187 U. S. 94 (1902) in which a determination by the Postmaster General that defendant was conducting a fraudulent enterprise was overruled by the Supreme Court, two Justices dissenting, on the ground that his finding was not supported by evidence; and Hurley v. Dolan, 297 F. 825 (1924), where the court said the finding of the Postmaster General was "clearly wrong", having been based on a false report of the solicitor.
48 194 U. S. 106 (1903).
"We think there is some discretion left in the Postmaster General with respect to classification of publications and that the exercise of such discretion should not be interfered with unless the court be clearly of the opinion that it was wrong. We think (his) decision should not be made subject to judicial investigation in every case in which one of the parties thereto is dissatisfied.

"While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final."

This doctrine has resulted in much freedom for the Postmaster General in the supervision of the postal laws—both in excluding matter from passage through the mails and in classifying mailable material. Many items have by statute been excluded from the mails, including lottery matter and matter which is obscene, libelous or indecent, treasonable or fraudulent, as determined by the Postmaster General. Matter which is mailable has been placed by Congress in four classes with varying rates, with the Postmaster General being authorized to determine the proper class for each item. It is the determination by him whether submitted matter is prohibited and its proper classification if not which has given rise to much of the litigation involving the postal department.

One of the most interesting of these cases is *Houghton v Payne*. Houghton, Mifflin Co. published novels by well-known authors in separate paper-bound volumes, one novel being issued monthly, and all being printed under the general title, "River-side Literature Series." From 1888 to 1902 these novels had been classified as periodicals, but in 1902 a new Postmaster General placed them in class three as miscellaneous printed matter subject to a higher rate. He in effect issued a declaratory ruling stating that hereafter, these publications would be deemed to be class three matter, regardless of how they had been classified in the past. The Supreme Court affirmed a denial of an injunction to the publisher to prohibit enforcement of the new classification, stating that the action of the Postmaster

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52 194 U. S. 88 (1903).
General consisted merely of the revocation of a license. The fact that prior officials had placed the material in class two was held to have no effect, the Postmaster General was free to classify the matter according to his proper determination.\textsuperscript{52}

In \textit{Bates & Guild Co. v Payne},\textsuperscript{53} a similar case decided at the same time, the Court, following the same reasoning advanced in the Houghton case, also denied a bill to compel recognition by the Postmaster General of Plaintiff's right to have an alleged periodical admitted as second class mail.\textsuperscript{54}

There are limitations upon the power of the Postmaster General to make fraud determinations\textsuperscript{55} and to classify mailable matter.\textsuperscript{56} But within his proper sphere, the Postmaster General has a great amount of discretion, and certainly has the power to issue advisory rulings. Up to the present time, eight volumes of advisory opinions have been issued by the Solicitor's Office of the Postal Service.\textsuperscript{57} These opinions for the most part are inter-departmental, answering inquiries received from local postmasters and other postal officials concerning routine office problems. Some opinions have been given private parties, however, as will be noted below, and many individuals have submitted their problems in advance to the local postmasters, who in turn have sought an opinion from the Postmaster General.\textsuperscript{58}

\textsuperscript{52} As a matter of fact, there had been much agitation during the fourteen year period for Congress to place this kind of publication in Class 3 by statute. Congress had not done this. Accord: Smith v. Payne, 194 U. S. 104 (1903).\textsuperscript{53} 194 U. S. 106 (1903).


\textsuperscript{55} E.g., School of Magnetic Healing v. McAnnullty, 187 U. S. 94 (1902) in which a fraud determination was reversed by the court on the ground that the case concerned a matter of belief, and not fraud in fact.

\textsuperscript{56} E.g., U. S. v Atlanta Journal Co., 210 F 275 (1913), holding that where Congress provided that publishers of second class publications could send sample copies of such as second class for 1¢ a pound, the Postmaster General had no authority to issue a regulation limiting the amount of such samples to 10% of the weight of the publications. And see Payne v Railway Pub. Co., 20 App. D. C. 581.

\textsuperscript{57} Opinions, Assistant Attorney General, Post Office Department, vols. 1-8.

\textsuperscript{58} See Mono. No. 13, Attorney General’s Committee on Administrative Procedure, (1940) “Post Office Department”, pp. 88-91.
This latter type of ruling is not regarded as conclusive by department officials if occasion arises requiring the Department's taking action against the mailer, even though there is no allegation of deviation from the proposed material. In cases where the Department finds the submitted matter plainly cannot be transmitted through the mails, the ruling is considered as in the nature of a final judgment.\(^{59}\)

In one advisory opinion, the Solicitor said, "This office may give opinions and advice only to the Postmaster General and to officers of the Postal Service upon questions of law arising in the course of the service."\(^{60}\) But it is obvious that this restriction is one of form only, since individuals evade it by submitting their problems to local officials who forward them to the Solicitor. And in some cases, the Solicitor will issue the opinion directly to the individual, or order a copy of the opinion to be given to the party interested.\(^{61}\)

An E. C. Webb of Boston, desirous of knowing whether he could use the name "United States Registering Company" for a business he was about to establish, inquired of his local postmaster whether there would be any objection from the Postal Service to the use of such name. The local official forwarded the inquiry to the Solicitor, who ruled:\(^{62}\)

"The Post Office Department has on numerous occasions taken exception to the use of any name for a corporation of such character as reasonably to convey the impression that such enterprise is connected with it in some manner. The use of the name here proposed would be misleading, and could not fail to result in much confusion and misunderstanding. In my opinion, this Department should not only object to the use of this name, but would have ground for holding that the company adopting it was using false and fraudulent pretenses in carrying on its business."

Similarly, in a letter to the 1st Assistant Postmaster General, the Solicitor gave the following opinion in regard to the proposed use by the Interstate Accident and Relief Association in certain advertising matter of the letters "U. S. M." as part of a cut representing a U. S. mail carrier.\(^{63}\)

"The use of any device which may convey the impression that the advertisement has some connection or association with the Post..."
Office Department is objectionable, for the reason that it is misleading and calculated to convey to the public a false impression. The use by a private concern of the letters "U. S. M." in connection with advertising amounts, in my opinion, to a false representation, and it should not be permitted."

In another instance, a library society sought to determine whether it was a member of that class of organizations designated by the act of July 16, 1894, as "professional societies" and thus entitled to send its publications through the mail at the second class rate. The society addressed an inquiry to the 3rd Assistant Postmaster General, who forwarded it to the Solicitor, with an explanation of the organization of the group, its charter and its purposes. The Solicitor in an advisory opinion stated, 64

"A library association whose object is the promotion of library interests of the country by exchanging views, reaching conclusions, and inducing cooperation, and whose charter and bylaws indicate that it is not a money-making organization is a professional society within the terms of the act and its publications should be admitted to the second-class mailing privileges extended by such act.

"The occupation in which learning and scientific methods are applied to the conduct of public libraries is included within the word 'profession.'"

The most outstanding example of circumstances in which a private individual was by the use of advisory opinions enabled to conform his conduct to the statutes governing use of the mails is represented by two opinions issued by the Solicitor in 1916. 65 The Postmaster at Chicago submitted a letter explaining the practice of the Chicago Insurance Exchange, maintained by the Chicago Board of Underwriters, in using a messenger service in the Insurance Exchange Building. The letter was an elaborate explanation of the system then in use, the legality of which was questioned in view of Sections 1289 and 1290 of the Postal Regulations. 66 The Solicitor stated that

64 4 Opns. Asst. Atty Genl., P O. D. 102 (1906)
66 Postal Laws and Regulations, Postmaster General (1913) secs. 1289-1290; Postal Laws and Regulations, Postmaster General (1932) secs. 1710-1711. "Whoever shall establish any private express for the conveyance of letters or packets by regular trips or at stated periods over any post route which is or may be established by law shall be fined, (etc.) Nothing in this chapter shall be construed to prohibit the conveyance of letters by private hands without compensation, or by special messenger employed for the occasion only." See also, 18 U. S. C. A. sec. 309, and 39 C. F. R. 19.2.
the legality of the service depended on the answers to three
questions whether the relation to each other of the parties to
the business was within contemplation of the statute, whether
the system was a "private express for the conveyance of letters
or packets", and whether it was for the conveyance of letters
"by regular trips or at stated periods over any route which is
or may be established by law" Proceeding to answer each of
these questions in the affirmative, the Solicitor said,

"In conclusion, it is my opinion that the messenger service here-
treated of is operated in violation of law and should be dis-
continued.

"Regarding their request for suggestions as to the manner in
which the messenger service might be readjusted to comply with the
law, you will please advise counsel for the clearing house that this
office is precluded by regulation from giving opinions or advice to
the public generally."

Nevertheless, a note at the end of the opinion stated that a copy
was enclosed for the use of the general counsel of the under-
writers.

Despite the fact that the Solicitor said he could not give
advice or opinions to the public generally the board of under-
writers must have been able to use the opinion as a basis for
reorganizing the messenger service to comply with the law.
For two months later an opinion was issued by the Solicitor
to Robert W Childs, counsel for the underwriters, in answer
to a letter from Childs. This letter had stated that upon receipt
of the prior opinion, the manager of the clearing house immedi-
ately undertook to eliminate the objectionable features referred
to, and it also gave a detailed outline of the manner in which
the service was to be operated in the future, "if such a plan
comes within the requirements of the law" After quoting the
letter, the opinion of the Solicitor concluded,

"As described by you the modified messenger service now being
conducted by the clearing house of the Chicago Board of Under-
writers appears not to be in violation of the private express statute
as was the original service in operation by the clearing house, and
the postmaster at Chicago, Ill., and the chief inspector of this
department has been so advised."

By the device of the advisory ruling the Board of Under-
writers had been able to conform the operation of the messenger
service to the requirements of the statutes, and thus escape

\[7\ Opmn. Asst. Atty. Genl., P O. D. 403, 408 (1916).\]
possible liability which would have resulted had it been unable to make use of this advance opinion.

In another case involving the private express statutes, the Solicitor rendered an opinion determining that the *proposed* use by a bank of armored cars to carry mail from the post office to bank customers, when the armored car agency had been authorized to receive the mail for the addressees, would not be a violation of the statute.\(^6^9\) And over the course of years numerous opinions have been given concerning proposed action by private individuals.\(^7^0\)

This policy is an admirable one, but it does not solve all the difficulties. If rulings given in advance are adverse to the applicant, the only methods at present by which he can test their validity are by seeking an injunction against the local official\(^7^1\) or by doing the prohibited act and subjecting himself to liability. If rulings given in advance are favorable to the applicant, due to their lack of binding force he still is not insured against a change of position by the Post Office Department, even though this possibility might be remote.\(^7^2\)

The refusal of the Post Office Department to issue binding declaratory rulings where fraud statutes are involved may well be justifiable, since the variation of details between legality and illegality may often be quite shadowy.\(^7^3\)

But in questions where the facts are not likely to change, a provision should be made for the issuance of declaratory rulings. These should be granted upon application in the

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\(^7^1\) But see Appleby v. Cluss, 160 F. 984 (1908) to the effect that if a fair hearing has been granted and evidence adduced to support the order, an injunction will not lie. Accord: Leach v. Carlile, 258 U. S. 138 (1922), Nu Fung Ho v. White, 259 U. S. 276 (1922), Aycock v. O'Brien, 28 F. 2d 817 (1928).

\(^7^2\) See Houghton v. Payne, 194 U. S. 88 (1903), where a classification was suddenly altered after 14 years.

\(^7^3\) See Mono. No. 13, Attorney General's Committee on Administrative Procedure, (1940) "Post Office Department", pp. 89-91.
DECLARATORY RULINGS

proper case, and should be made binding on the department at least for a stated period of time. With provision also made for testing the validity of the declaratory ruling immediately in the courts, a great burden would be lifted from those who now are unable to secure a binding determination of their prospective rights and liabilities and are desirous of so doing.

THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission was not established until 1934, but its powers have continually been increased by Congress until it now administers five important statutes. These include the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, and the Investment Company Act of 1940.

The Commission is another agency which has adopted the practice of giving advisory rulings in regard to the interpretation of the statutes it administers and the regulations it promulgates under them. This policy is both a progressive and an advantageous one. As the Commission has said:

"The advisory service afforded by the Commission has been designed for the benefit of those seeking assistance in their endeavor to comply with the Acts. But the Commission has likewise benefitted. Through correspondence and conferences incident to the rendering of advisory legal opinions, the Commission has itself obtained invaluable factual information which has provided the basis upon which existing rules and regulations have been improved and which has materially aided the Commission in the promulgation of new rules and regulations."

Advisory opinions were particularly necessary in the case of the statutes administered by the Securities and Exchange Commission, since the change in business methods brought about by them was so marked and because a definite policy of administration was still in the formative stage.

The general plan of the first of these statutes, the Securities Act of 1933, is to require registration of all securities with

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the Commission that are sold or offered for sale in interstate commerce. A prerequisite to registration, without which sale in interstate commerce is forbidden, is compliance with the requirements set out by the statutes or by the Commission under appropriate statutory authorization. Certain transactions are specifically exempted from the statutory requirements, and the Commission is given authority to exempt from registration other transactions in regard to which it finds that enforcement of the act is not necessary in the public interest.81

Due to the technicality of the enterprise which Congress was attempting to control by that statute, it was only natural that many questions should arise among members of the investment field whether certain transactions were to be considered as part of the practices which were subject to Commission control, or whether they could be classified as exempt transactions. One of the first of these questions was the subject of a release in December, 1933, in which a broker had sought to learn whether "voting trust certificates" were to be considered as "securities." The Commission said:82

"There can be no question but that voting trust certificates are subject to the provisions of the Securities Act of 1933. The definition of the term 'security' contained in section 2(1) of the Act expressly includes a 'voting trust certificate.'"

Again, an issuer of bonds carrying a conversion privilege desired to know whether the issuance of such bonds was to be considered a "sale" or "offer to sell" the stock into which the bonds were convertible. He sent an inquiry to the Commission, which replied:83

"The issuance of (such bonds), under Section 2(3) of the Act does not constitute a 'sale' or 'offer to sell' the stock into which the bonds are convertible only if the conversion 'right cannot be exercised until some future date.' According to your letter, the con-

82 S. E. C. Release on Securities Act No. 97, part 1 (1933).
83 S. E. C. Release on Securities Act No. 97, part 2 (1933). Thus release similarly contained the answers to a total of 15 questions which had been received by the Commission.
version privilege attached to the proposed bonds may be exercised at any time after the bonds are issued. For this reason the issue of bonds will involve an offer of the stock which will require immediate registration of the latter."

It is interesting to note that these questions regarding the application of the act were answered by personal letter to the inquiring party, but were later published by the Commission as an official release. This suggests that the Commission realized the value of advisory opinions not only as a way of solving the problems of individual brokers, but also as a basis for a precedent upon which action could be based in the future. As a matter of fact, all releases by the Commission which are in the nature of advisory opinions or interpretations of the various statutes or regulations promulgated thereunder consist of the publication of excerpts from letters to private individuals who had sought advice from the Commission concerning proposed action.

Not in all cases, however, will the Commission issue an opinion which may be used as a basis for future action. Quite often the release as published states that the opinion is that of an official attached to the Commission, "and is not to be taken as an expression of the views of the Commission." Or in some situations where an inquiry has been received, a release will be issued merely stating general policy in regard to the proposed transaction, and making no definite ruling concerning it. For example, where an issue of $1,766,000 of Preferred Stock was to be offered to twenty-five offerees, a question arose as to whether this would be considered a "public offering", and inquiry made of the Securities and Exchange Commission to ascertain that fact. The General Counsel in a letter to the inquirer published later as an official release, after stating that it was undesirable for issuers to attempt to avoid registration by offering securities to an insubstantial number of persons, concluded:

"Any opinion which I might render in connection with the proposed offering might, I fear, be availed of by the issuer or by an initial purchaser as a means of satisfying a dealer, at a later date, that he might purchase the securities in question and market them."

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84 S. E. C. Release on Securities Act No. 748 (1936). And see S. E. C. Releases on Securities Exchange Act No. 1411 (1937) and No. 1462 (1937) containing opinions by the Director of the Trading and Exchange Division, with the notation, "The foregoing is an expression of opinion by the Director and is not a ruling of the Commission."

without risk of violating the Act. You will appreciate that my opinion would not actually have this effect, since in the case of each transaction there would be involved matters of fact on which I am not in a position to express an opinion.

"Accordingly, it seems a much wiser policy for me not to express an opinion in the situation which you present as to whether a public offering is involved."

More often, though, the opinion gives a categorical answer and seems to be intended as a basis for a line of decision in similar cases. Thus a release under the Public Utility Holding Company Act of 1935 reads as follows:86

"The Securities and Exchange Commission today announced an opinion of its General Counsel, Allen E. Throop, regarding the application of Sec. 6(a) of the Public Utility Holding Company Act of 1935 to the issuance of bonds and stock certificates in lieu of securities which have been lost, stolen or destroyed. The opinion of the General Counsel is as follows:

"'It is my opinion that this section is not applicable to the issuance of bonds or stock certificates in lieu of those lost, stolen, or destroyed.'"

And even when such a sentence as the one quoted above disclaiming Commission authority for the opinion is included in the release, it would appear that the issuance of the opinion by the Commission itself as an official release lends credence to the theory that the opinion of the General Counsel or whoever it might be does represent the Commission's views, and is thus in the nature of an authoritative declaratory ruling.

Many advisory rulings issued by the Securities and Exchange Commission have been concerned with the Securities Act of 1933,87 but all of them are by no means confined to interpretations of that act. Rulings have been issued under each of the statutes administered by the Commission. Thus, Section 16 of the Securities Exchange Act of 193488 requires monthly reports from persons and corporations of ownership of 10% or more of equity securities of any firm listed on a national exchange. A question arose whether such reports were required

87 See the following S. E. C. Releases on the Securities Act: No. 70 (1933), No. 86 (1933), No. 97 parts 1–15 (1933), No. 131 (1934), No. 285 (1935), No. 296 (1935), No. 312C (1935), No. 401 (1935), No. 464 (1935) No. 538C (1935), No. 646 Class C (1936), No. 748 (1936), No. 802 (1936), No. 828 (1936), No. 929 (1936), No. 1235 (1937), No. 2029 (1939).
if corporation securities held were not listed, and inquiry sent to the Commission, which ruled: 89

"Where no securities of a corporation are listed or admitted to unlisted trading privileges on any national securities exchange, Section 16 does not require reports from such a corporation or from its officers, directors, or stockholders as to holdings of or transactions in its stock."

Also arising under this same statutory provision was the question whether reports should be made where the stock is held in the name of the wife of the officer or director. A letter was correspondingly sent to the Commission, which replied: 90

"The mere fact that a wife, as a bookkeeping matter, keeps the securities in her separate estate is not conclusive in determining whether her husband is the beneficial owner within the meaning of Section 16(a). The husband would appear to be the beneficial owner if he has the power to vest or re-vest in himself the full legal and equitable title without payment of other than a nominal consideration."

Similarly, questions arising under many of the provisions of the Securities Exchange Act of 1934 have been answered by the device of advisory rulings. 91

The Public Utility Holding Company Act has also been the subject of requests for interpretation addressed to the Commission. One such letter presented the question whether a reorganized holding company could acquire control of more than one integrated system if such control could not ultimately be retained by the reorganized company under the provisions of Section 11. 92 In reply the Commission stated: 93

"There is nothing in the terms of the Act which would prevent the Commission from sanctioning the acquisition by a reorganized company of several integrated systems in different localities or regions if the result of the acquisitions were merely to bring together under common control companies or properties previously under common control and no others, particularly if the acquisition by the new reorganized company would facilitate and protect investors in the ultimate segregation, divestment of control, reorganization or liquidation of the properties which may later be required under Section 11."

89 S. E. C. Release on Securities Exchange Act No. 68 (1934)
91 See the following S. E. C. Releases on Securities Exchange Act: No. 253 (1935), No. 461, Pts. 1–4 (1936), No. 1411 (1937), No. 1462 (1937)
93 S. E. C. Release on P U. H. C. Act No. 54 (1935). For other releases containing advisory rulings, see the following S. E. C. Releases on P U. H. C. Act: No. 156 (1936), No. 508 (1937), No. 590 (1937), No. 1093 (1938).

K. L. J.—4
Until May, 1941, only one advisory ruling had been issued under the Investment Company Act of 1940, but it is to be expected that more will be forthcoming as the occasion arises. That ruling involved the necessity for the registration under section 7(b) of the Act of so-called “orphan trusts”, the Sponsors or distributors of which are no longer functioning. The General Counsel said, 94

“According to your letter, the sponsors and distributors of the securities of all of these trusts, for various reasons, are no longer functioning on behalf of such trusts. However, by the terms of the indentures creating such trusts they are to continue for a substantial number of years.”

The release continued with the General Counsel explaining that since there were contractual duties to be carried out under the indentures, it was his opinion that the trusts must be registered. It is to be noted, however, that the release contains no statement that the foregoing opinion is that of the General Counsel and is not the opinion of the Commission.

The adoption of the policy of issuing advisory rulings by the Securities and Exchange Commission is a step forward in the improvement of its procedure. But the problem cannot be entirely solved until there is some binding force placed upon these opinions. At present, reliance on the advisory ruling might be greatly to the applicant’s detriment. In one case, for example, a stock broker obtained from a member of the Commission’s legal staff in the New York office an opinion that certain plans for boosting the price of stocks listed on the market were not illegal. 95 In partial reliance upon this opinion, the broker manipulated a pool in motion-picture stock, raising the price to his own profit. He was prosecuted by the Commission for this manipulation. In dismissing a defense allegation that the practice was legal because the New York counsel had so stated, the court said, 96

“The fact that a member of the legal staff had informed defendants that their practice was not a violation of the law does not bind the Securities and Exchange Commission nor bar prosecution. A representative of the Commission could not give defendant an indulgence to do something that was illegal, even though the illegality could be learned only after the act was done, and thus bar the Commission from proceeding under the Securities Exchange Act.”

96 Ibid, at p. 607.
But there is no reason why what the court here decries can not be done with the proper statutory authority. A person subject to regulation by the Securities and Exchange Commission should be able to obtain in advance from that agency a binding declaratory ruling which will settle between the party and the Commission all the rights in the particular transaction proposed. Such a statute should include a provision allowing an applicant to immediately appeal to an appropriate court a declaratory ruling unfavorable to him.

Although the immediate task of the Commission might be increased because of the necessity of issuing declaratory rulings binding upon itself, this increase would be equalized by the decrease in the number of prosecutions instituted for violation of the statutes. Most important, the problem of the individual who at present does not know which way to jump would be solved.

THE FEDERAL POWER COMMISSION

The final agency we will consider which at present has a procedure for the issuance of what are in effect "declaratory rulings" is the Federal Power Commission. This agency was established in 1920, and as then constituted consisted of the Secretaries of War, Agriculture, and the Interior. It soon appeared, however, that the work was too much to be carried on solely by these officials, and in 1930 the Commission was reorganized as an independent agency with five commissioners and its own staff of employees.

The Commission has general authority to license the construction or operation of any project necessary or convenient for the development and improvement of navigation and for the development and utilization of power affecting "any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce." Authority is also given to conduct investigations concerning the power industry and the utilization of power, to determine the actual legitimate cost of any licensed project, and to do other less important routine tasks. As a federal district court has put it:

100 16 U. S. C. A. sec. 797(a), (b), (c), (d), (f), (g).
"That purpose was to vest in the Power Commission the authority to grant permits for and to exercise supervision over the construction and operation of projects in the navigable waters of the United States, and to furnish an opportunity to persons contemplating the erection of dams or other structures to have it determined in advance of such construction whether the proposed structure was one over which the Commission would seek to exercise control."

Section 27 of the Federal Water Power Act provides that every person or corporation intending to construct a power project on any stream over which Congress has control by virtue of the commerce power other than navigable streams, shall file with the Federal Power Commission a declaration of intention that such project is contemplated for construction. Upon this filing the Commission is authorized to make an investigation to determine whether the interests of interstate or foreign commerce would be affected by the project. If the Commission finds they would be so affected, the applicant must obtain permission from the Commission to proceed further. But if a finding is made that no interests of interstate or foreign commerce are affected, the applicant may proceed without further resort to the agency.¹⁰²

This statutory section is the basis upon which the Commission has in the past twenty years acted upon over 150 declarations of intention. It may be noted that the filing of a declaration was not made compulsory until 1935. As a result, many projects have been constructed which the owners probably believe to be outside of federal regulation and for which no license exists. At present the Commission is investigating several hundred projects which are allegedly operating without appropriate authority.¹⁰³

But where a declaration of intention is filed, we have a perfect opportunity for the issuance of what is in effect a declaratory ruling. Where the finding of the Commission is that no interests of interstate or foreign commerce are affected, the Commission does not attempt to control further the construction of the power project. The applicant has a binding statement that his project is outside the scope of federal regulation.

Although it might be thought by some that the agency would take every opportunity possible for bringing a power project within its jurisdiction, such has not been the case. The figures show that less than half of the projects for which a declaration of intention has been filed were determined to be within the jurisdiction of the Commission.\textsuperscript{104} As Commissioner Manly said in 1934,\textsuperscript{105}

"No agency of this government has more scrupulously respected the rights of states in the interpretation of its jurisdiction; yet there are those who still seek to picture the Federal Power Commission as an invader, stretching its arms over streams that are far beyond its legitimate province.

"The record speaks for itself. If the commission were seeking arbitrarily to amplify its jurisdiction to the uttermost limit the record would show that it had sought to assert its jurisdiction, if not in all, at least in a majority of such cases.

"124 such declarations of intention have been filed; 'no jurisdiction' was the finding in 62 cases. Jurisdiction was taken in only 49 cases."

Where the Commission determines that it has no jurisdiction over the proposed project, the determination is of course final as far as the government is concerned, since the Commission alone will be the moving party in enforcing the Federal Water Power Act. It is not likely that such a determination would be contested by an applicant either, because freedom from federal control is supposedly to his advantage.

When a determination is made, however, that due to the navigability of the stream or the effect of the project on interstate or foreign commerce a license is required, the decision may be appealed, but findings of fact made by the Commission are conclusive if supported by substantial evidence.\textsuperscript{106} Since the recent decision by the Supreme Court in \textit{U S. v Appalachian Electric Power Co.}\textsuperscript{107} that stream is "navigable" when reasonable improvements will render it navigable, it may be expected that few determinations of navigability by the Commission will be reversed by the courts, because it is not difficult to present evidence that almost any stream is susceptible of sufficient improvements to make it navigable.\textsuperscript{108}

\textsuperscript{107} 61 S. Ct. 291, 9 U. S. Law Week 4069 (1940).
\textsuperscript{108} See Note, (1941) 39 Mich. L. Rev 976, especially at 990-996.
Heretofore, however, the typical Commission finding upon declarations of intention was in the following form:\textsuperscript{109}

"Whereas C. M. Hamrick has filed a declaration of intention to construct a water-power project on Cane River in Yancey County, North Carolina; and it appearing:

(1) That the project works would consist of a log dam about 5 feet high, creating a pool 700 feet long, located about 12.3 miles above the mouth of the river, and a 10 horsepower turbine for use in operating a gristmill;

(2) That Cane River at the location of the proposed dam is neither used nor suitable for use for purposes of navigation, and that no improvements for navigation have been either made or authorized by the United States;

(3) That the project as planned will be without appreciable pondage or storage and will have no effect on the navigability of any navigable waters of the United States.

Now, therefore, having considered said declaration of intention, together with reports, correspondence, and other information pertaining thereto, the Commission finds:

That the interests of interstate or foreign commerce would not be affected by such proposed construction."

But even should fewer projects in the future be considered as outside the scope of Commission authority, it is reasonable to believe that advisory rulings in the above form will not disappear.

Thus, power projects are submitted in advance to the Commission, which in many cases will find the absence of facts upon which its jurisdiction depends. The declarant is enabled to determine in advance whether he is subject to federal control. He is not faced with the prospect of learning later that a completed power plant has been built without proper authority. Here, as a matter of practice, statutory approval is being granted in advance of the construction of the power project. This procedure is nothing more than a declaratory ruling, the advantage of which as administered in this field of federal regulation testifies to the desirability of introducing this procedure in the other administrative agencies wherever possible.

DECLARATORY RULINGS

THE BUREAU OF INTERNAL REVENUE

It is the established policy of the Commissioner of Internal Revenue not to comply with requests for rulings on future transactions, except where the Internal Revenue Code specifically provides for such advance determination. The latest pronouncement to this effect is contained in I. T. Mim. 4963, which provides in part as follows:

"Rulings will be made on prospective transactions only where the law or regulations provide for a determination by the Commissioner of the effect of a proposed transaction for tax purposes, as in the case of a transfer coming under the provisions of sections 1250-1253 of the Internal Revenue Code, or an exchange coming under the provisions of section 112(i) of the Internal Revenue Code, or in connection with the execution of a closing agreement under the provisions of section 3760 of the Internal Revenue Code with respect to a taxable period ending subsequent to the date of the agreement. The Commissioner will exercise his discretionary power to enter into a closing agreement for a taxable period ending subsequent to the date thereof, only where such exercise is in the interests of a wise administration of the revenue system. The established policy of the Bureau in not complying with requests for rulings on prospective transactions will continue to be followed except in the instances hereinabove provided.

The exceptions enumerated in the foregoing ruling pertain to the determination by the Commissioner in advance whether a proposed transfer to a foreign corporation is part of a plan to avoid income tax. Apart from these exceptions, taxpayers have no way of learning with certainty the amount of their tax liabilities. This, to say the least, is not a commendable situation.

Possibly the most striking example of this uncertainty and the confusion attendant upon it are the cases arising from the purchase by Henry and Edsel Ford of the minority stock of the Ford Motor Company. The pertinent facts in these cases are briefly as follows.

In 1919, the Fords, who owned 58½% of the Ford Motor Company stock, negotiated for the purchase of the remaining 41½%. The minority stockholders were all either original stockholders when the company was organized in 1905 or their heirs. They were unwilling to sell unless their tax liability for the profits from the sale could be ascertained. This, in effect, depended upon the value on March 1, 1913, of the com-

1939-2 C. B. 459.
pany's stock. The sellers would be taxable only upon the increase in value since that date. Ford's agent thereupon wrote to the Commissioner of Internal Revenue asking for a ruling determining the March 1, 1913, value. After an exhaustive and competent investigation, the Commissioner on May 19, 1919, wrote to Ford's agent as follows.

"* * * In reply you are advised that while ordinarily it is not the practice of the Bureau to determine such questions in advance of actual transactions, in view of all of the particular circumstances surrounding this case, the Bureau feels justified in departing from that practice and you are accordingly informed that upon consideration of the figures shown by the books and returns of the company, it is disposed to regard $9,489.34 as a fair valuation of the stock on March 1, 1913, and one which should be used in computing any profits made by the sale.

(Signed) Daniel C. Roper
Commissioner."

Upon the basis of this ruling, the purchase price of the stock was set at $12,500 a share and the sale consummated.

Mr. Roper went out of office on March 21, 1920, and subsequently David H. Blair became Commissioner on May 26, 1921. After numerous conferences between the minority stockholders and the Bureau touching upon the question of the proper year for taxability of a dividend paid in 1919 by court order, and after much discussion within the Bureau of the propriety of disturbing Mr. Roper's ruling, and after much public agitation and senatorial inquiry into the matter, the Commissioner in March, 1925, asserted a deficiency against all of the stockholders, based upon the contention that the proper March 1, 1913, value of the Ford Motor Company stock was $2,634 a share. This would have increased the stockholders' profits approximately $7,000 per share. The stockholders naturally contested the deficiency and appealed to the Board of Tax Appeals, which finally determined in 1928 that the proper value of the stock on the pertinent date was $10,000 a share, indicating that the stockholders had overpaid their 1919 income taxes.

It is, of course, impossible to ascertain the amount of money spent by the government and by the stockholders in this series of cases, but a fair estimate would put it in the millions. In addition to this, the loss of time and discomfort occasioned to all parties concerned must have been enormous. If the Comms-
sioner's deficiency had been sustained, the additional tax on Mr. Couzens alone would have been over $10,000,000. Further, it is quite probable if such a low valuation had originally been placed upon the stock for March 1, 1913, the minority stockholders would never have made the sale.

Yet all this costly litigation, uncertainty, and inconvenience could have been avoided if the ruling of Commissioner Roper in 1919 had been final and binding upon the government. There seems to be no logical reason why it could not have been. All the facts which were necessary to determine the 1919 value were available and were presented to the Commissioner when the original investigation was made. Expert accountants surveyed the books and records and made a general study of the automotive field as of the date in question, and the ascertainment of value was based upon sound principles. A redetermination by the succeeding Commissioner could only have been made by a reexamination of all the facts which had already been presented in the first survey. No new facts were brought to light, and the situation necessarily remained unchanged. And yet the Board of Tax Appeals held that although it was perhaps unethical for the subsequent Commissioner to change his position to the detriment of the taxpayers, there was nothing in the statutes to prevent it. The advisory ruling was in no sense binding upon the Bureau.

The final result in the foregoing cases was favorable to the taxpayers. Yet, other cases have not had such a fortunate conclusion.

In Angostura-Wupperman Corp. v. U S., plaintiff sought to recover Internal Revenue Taxes on alcohol claimed to have been erroneously and illegally collected. Plaintiff is the maker of Angostura Bitters, which contain about 45% of alcohol. The bitters are used as a flavoring extract and a digestive stimulant and are not fit for beverage purposes. Prior to 1937, plaintiff manufactured its product in the United States and purchased here for that purpose tax-paid alcohol. In 1937, plaintiff was induced to move its plant to the Virgin Islands, upon the assur-

— Perhaps it should be noted that litigation concerning the taxability of the 1919 transaction is still continuing. See U. S. v Kales, — U. S. —, 62 S. Ct. 214, 86 L. Ed. 192 (Dec. 8, 1941), aff'g. 115 F (2d) 497 (1940).

ance that bitters made in the Virgin Islands would not have their alcohol content taxed under the United States Internal Revenue Code. As the court states.

"In several instances thereafter arising, the Commissioner of Internal Revenue ruled that the bitters were not subject to the Internal Revenue Tax on distilled spirits, and in one instance, in February, 1938, an Internal Revenue Tax of about $9,000, which had been imposed on a shipment of Angostura Bitters from the Virgin Islands was refunded to the plaintiff by the Internal Revenue Bureau."

In November, 1939, however, the Commissioner changed his ruling and levied a tax on a shipment arriving in that month. Although the present litigation involved only two shipments in February and March, 1940, the Commissioner asserted a tax retroactively upon all shipments since 1937, the validity of which also depended upon the instant decision. After finding that the imports were subject to tax, the court said.

"It may very well be that plaintiff was persuaded to transfer its business from Norwalk, Connecticut, to the Virgin Islands in the hope of saving the United States Internal Revenue Tax on the alcohol content of Angostura Bitters it manufactured, but that does not estop the Government from now asserting the tax if under a statute enacted by Congress a tax was imposed. Likewise, the rulings of the Internal Revenue Bureau on imports of Angostura Bitters in June and July, 1937 are not binding upon the Government. Even a ruling from the Treasury Department would not be conclusive. Helvering v. New York Trust Co., 292 U. S. 455, 468; Helvering v Wilshire Oil Co., 308 U. S. 90."

Unless, as is quite unlikely, the District Court decision is reversed, the Wuppermann company will have learned at quite some expense that reliance upon Government rulings concerning taxes does not prevent the retroactive change of the rule so as to assert tax liability for a transaction which all parties concerned had previously agreed was not subject to taxation.

It is not intended to state here that the adoption in the Bureau of Internal Revenue of a binding declaratory ruling technique would remedy all the ills of the administration of our tax system. Various and more competent authorities have pointed out numerous defects and suggested varying remedies.116

declaratory rulings

The writer believes, however, that no change in the administration of the tax laws would be so helpful to the taxpayers as a method by which they could learn in advance how the taxing authorities would regard certain transactions. Of course, as is pointed out in the final report of the Attorney General's Committee on Administrative Law at page 71:

"The declaratory ruling is not feasible in every circumstance in which doubts may be present. A necessary condition of its ready use is that it be employed only in situations where the critical facts can be explicitly stated, without possibility that subsequent facts will alter them. This is requisite to avoid later litigation concerning the applicability of a declaratory ruling which an agency may seek to disregard because, in its opinion, the facts to which it related have not remained unchanged."

Thus, any declaratory ruling procedure in the Internal Revenue Department should be safeguarded to provide for in-applicability in case of later change in circumstances, and also to insure that the procedure will not become the means by which tax counsel may bombard the Treasury Department with hypothetical situations in an endeavor to learn how close to the line they can come without disadvantageous tax results. Such safeguards could be provided either by statutes or by regulation of the Commissioner somewhat similar to paragraph 4 of I. T. Mm. 4936.

The tentative draft of the Internal Revenue Administrative Code provides in section 4171 that the Commissioner may enter into a closing agreement regarding tax liability "in re-

\[\text{References and footnotes omitted for brevity.}\]
spect of any internal revenue tax for any taxable period.” In view of the policy and history of the bureau, it is unlikely that such provision was intended to apply to future transactions. Yet its language is that broad, and interpretation to include prospective tax periods would be a step in the right direction.

If reason supports the applicability of declaratory rulings in any administrative agency, the writer feels that nowhere is this reasoning more compelling than in regard to the Bureau of Internal Revenue. With Federal taxes mounting steadily from depression levels and with war costs putting the ceiling out of sight, any device which would enable tens of millions of taxpayers to ascertain in advance their tax liability for proposed transactions should be greatly appreciated.