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ADMINISTRATIVE HEARINGS UNDER THE FEDERAL CONSTITUTION

GEORGE E. HALE*

In that vast domain of government which is the province of administrative law, classification is still haphazard. But, through continued acquaintance, certain processes are beginning to appear familiar and we may refer to them by surnames. Among these is the administrative hearing which precedes action of a judicial character. Usually the holding of the hearing is constitutionally required; it is not given as a matter of grace: that is, the administrative action is not merely the delivery of a gift from the government nor of an advisory character.

The subject of this paper is the constitutional requirements of such a constitutional hearing. Most of the requirements derive from the admonition to observe due process of law. This, of course, is a mere standard and some will question whether it is possible or desirable to particularize it. It can be argued that the forms of administrative action are diverse and that no good purpose is served by an attempt to lay down rules of universal application under the standard. Despite diversity of subject matter, however, there are important similarities in widely separated types of administrative action. There are universals as well as particulars; and, where particulars are founded in reason, comparison may be suggestive.

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1 This paper summarizes a study made in 1937-8 at the Harvard Law School in Professor Felix Frankfurter's seminar on administrative law. Acknowledgment for helpful suggestions and encouragement is due Mr. Justice Frankfurter, Messrs. Henry M. Hart, Jr., Abraham H. Feller, William B. Hale, Ernest S. Ballard, William Du Bose Sheldon and James P. Johnson. Mr. Henry Molner kindly read proof.


3 No attempt will be made to include here discussion of hearings which precede purely 'legislative' action by administrative agencies. Of course, at times distinction may be difficult.

4 In order that the administrative determination may be endowed with a measure of finality.

5 Under the Federal Constitution alone. Only cases in the Supreme Court of the United States are cited.
In dealing with constitutional doctrine, horizons should extend beyond the reported decisions. Courts must and do pass upon the wisdom of executive and legislative action. Hence, they should take account of everything that assists in the formulation of wisdom. Much help can be derived on this subject, for instance, from the actual practices of administrative tribunals and the results thereof. Indeed, until there is some acquaintance with the forms of administrative action as they have naturally developed, it is scarcely possible to grasp the problems of procedure at all. Again, the sciences of politics and psychology may offer important suggestions. Lastly, it may be important for a court to know something about the purpose of the administrative authority, and thus to familiarize itself with the basic economic problems which have been entrusted to administrative hands. But reference to all such knowledge, incomplete though it may be, is beyond the compass of this brief paper.

**Notice**

First in time is "notice". Although the constitutional requirement is often referred to as "notice and hearing", perhaps implying some separability, the warning of the trial to come is a fit starting point for analysis of the hearing. Its form and content may have important effects upon subsequent matters.⁶

Four chief problems have been raised in regard to the requirement of notice: the sufficiency of actual notice, the method by which notice is to be given (personal service, publication or otherwise), the time which must elapse after notice and before hearing, and the contents of the notice. These matters will be examined in order.

**Actual Notice.** If the giving of notice for an administrative hearing is overlooked, it may still be possible to find that the proceedings followed due process of law. For, if the party to be affected knows of the contemplated hearing, whether through diligence or accident, it seems that the requirement of notice may be dispensed with. In two earlier cases, the court seems vaguely to have relied upon actual notice to sustain administrative proceedings which otherwise would have been invalid for

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want of notice. Then a recent decision squarely states that actual notice, plus acquiescence by participation in the hearing, validates the administrative determination.

Due process typically emphasizes form rather than substance. Thus, if proper steps are taken to secure personal service in a civil action, the fact that the sheriff fails to make service and perjures his return does not render the judgment void. And there is at least some authority suggesting that, in judicial procedure, actual notice will not suffice. But it is difficult to be shocked by authority holding actual notice sufficient in administrative proceedings. Due process does insist upon form, but, of course, the form insisted upon must be purposeful. Indeed, it is difficult to understand why a different rule should apply in judicial proceedings.

Method of Notice. A number of devices may be utilized to give notice. In forcefulness—that is, in the likelihood that they will result in actual notice—they range from a mere clause in a statute setting the time and place of hearing to the personal service usual to judicial proceedings. In between are a variety of devices such as notice by mail and by publication. Certain factors in the nature of the proceeding, especially their regularity, as to time and persons affected, are important in this connection. While no court has indicated such a classification, the following division of administrative proceedings into four categories is hazarded:

First, those in the nature of annual real property taxes, of wide application and general familiarity. Second, those proceedings which are somewhat less regular as to time, but almost equally well known, such as examinations for admission to a

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5. Northwestern Bell Telephone Co. v. Nebraska Commission, 297 U. S. 471 (1936); but see Security Trust Co. v. Lexington, 203 U. S. 323 (1906). Acquiescence by participation is perhaps less important than it might seem at first sight since there is a possibility that one who has actual notice and yet fails to participate would be caught by the doctrine of exhaustion of administrative remedies.
8. In some administrative hearings, particularly those of a non-adversary character, notice may be unnecessary. Attorney General's Committee on Administrative Procedure on Veteran's Administration at 11 (76 Cong. III, Sen. Doc. 188, Part 2) [hereafter cited as 'A. G.'s Committee on Veterans' Administration', 'A. G.'s Committee on Federal Trade Commission', etc.].
profession. Third, those wholly irregular, but commonly attended with publicity, such as special assessments. Fourth, those in which there is neither regularity nor widespread publicity, such as the proceedings of the Federal Trade Commission.

As to the first category, which is defined to include administrative proceedings of definite regularity as to time and persons affected and which are given widespread publicity, it is clearly established that the mere mention in the statute book of the matter suffices for notice.11 Granting that such notice may be of little assistance beyond aid in verifying suspicions and that the rule derives largely from long unopposed custom,12 there seems no great injustice in requiring a degree of diligence from taxpayers.13 For this category includes a large number of tax matters and it must be rare that the property owner or income earner does not know that the government is his profit-sharing partner.

Second, as to proceedings less regular in time but almost equally well known, it seems also established that mere statutory notice suffices. This is the result which has been reached in cases involving the regulation of public utility rates14 and the registration and licensing of physicians.15 In view of the notoriety of such matters among the group specially affected, it is difficult to quarrel with this result.

Third, as to proceedings which are without regularity as to time but are attended by publicity. The special assessment is a good example: while it may be levied at any time, the proceedings are often generally known, not only because the daily press reports such matters but also because the improvement

12"per Fuller, C. J. in Palmer v. McMahon, 133 U. S. 660 at 669f (1890); see McGehee, *Due Process of Law*, at 239.
13At times the degree of diligence required is not slight. It seems to be incumbent upon taxpayers to keep track of all adjournments of administrative hearings. Earnshaw v. United States, 146 U. S. 60 (1892); Lander v. Mercantile Bank, 186 U. S. 458 (1902).
frequently is of a visible and tangible nature geographically near the land to be assessed.

In this category it is clear that notice by publication suffices. Some doubt must be expressed, however, as to the efficacy of a mere notice in a statute. There are decisions hinting that it is enough, but the matter is clouded. And it would seem preferable for courts to require notice by publication in this category of cases.

Fourth, as to proceedings both without regularity as to time and unattended by publicity. Here the prime example is found in the proceedings of an administrative tribunal which is given authority to correct practices general to an industry, profession or to all business enterprises. Probably the device of notice by registered mail employed by the Federal Trade Commission is valid, albeit the question is undecided. Such a determination would accord with the sentiment that such notice must be given "as the nature of the proceeding admits." But it seems doubtful whether notice by publication is enough in this category. Proceedings of this type bear a strong resemblance

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17 Thus, in North Laramie Land Company v. Hoffman, 268 U. S. 276 (1925) the statute granting eminent domain powers to county commissioners provided that within a certain period after the commissioners' appraisal of the land the owner could obtain a hearing in court. It further provided that the proceedings of the board of commissioners were to be published. Thus by the combination of publication of the appraisal and the provision for hearing in the statute the landowner could secure notice. The statute was an integral part of this notice. Held, constitutional. Cf. Hagar v. Reclamation District, 111 U. S. 701 (1884), which may involve an administrative determination without finality, which is also true of North Laramie Land Company v. Hoffman, supra. Later citations of Hagar v. Reclamation District confuse rather than clarify: Kentucky Railroad Tax Cases, 115 U. S. 321 at 336 (1885); Phillips v. Commissioner, 283 U. S. 589 (1931); Fallbrook Irrigation District v. Bradley, 164 U. S. 112 at 174 (1896); Hodge v. Muscatine County, 196 U. S. 276 at 280 (1905). The matter is further obfuscated by language to the effect that less is required when the proceedings are akin to actions in rem. McGehee, Due Process of Law, at 55.


to the ordinary judicial law suit, where personal service is the rule. Perhaps the judicial practice should be less exacting, but it is hard to see any reason for a difference.

Interval Between Notice and Hearing. To enable a party notified to be present at the hearing and to prepare his case, it is clear that notice must precede hearing by some period of time. Short intervals, however, have not been found invalid although it has been intimated that a matter of hours will not suffice. There seems no reason to believe that a different rule is or should be applied than that which obtains in judicial proceedings. Much should depend, of course, upon the subject matter of the hearing. It may take months adequately to prepare the presentation of evidence bearing on public utility rates while a few days may suffice for a hearing looking to the revocation of a pawnshop license.

Contents of the Notice. A distinction should be drawn, in discussing the required contents of the notice, between the necessity of naming the party to be notified and that of describing the action contemplated. For, if the party is seriously misnamed, the whole notice may be vitiated; while, if the action is merely vaguely described, the party is at least aware of the danger ahead. Even in the absence of authority,

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22 As in judicial proceedings (Jacob v. Roberts, 223 U. S. 261 (1912)) a secondary method of notice may be resorted to in case the primary method fails. Thus, if personal service proves impossible, the substitute method of publication suffices. McMillen v. Anderson, 95 U. S. 97 (1877) seem. And probably, as in judicial proceedings (see Holmes, J., in McDonald v. Mabee, 243 U. S. 90 at 92 (1917)), the substitute method employed must be the next best.

23 Campbell v. Olney, 262 U. S. 352 (1923) (twenty days); Bellingham Bay Railway v. New Whatcom, 172 U. S. 314 (1899) (ten days; re-assessment of levy for special improvements); cf. Earnshaw v. United States, 146 U. S. 60 (1892).

24 See United States ex rel. Turner v. Fisher, 222 U. S. 204 at 208 (1911); See also Brewer J., dissenting, in United States v. Tuck, 194 U. S. 161 at 178 (1904); United States v. Toy, 198 U. S. 253 at 268 (1905).


26 Particularly when notice is by some means other than personal service.

then, it is safe to assert that a serious misnomer would render notice void.

Mere vagueness of the complaint as to the action contemplated is regularly held harmless, although, of course, there must be a limit to permissible vagueness. The administrative desire to keep the complaint broad and vague is, however, understandable if not always wholly commendable.

A somewhat different question is raised when the notice is misleading. If the complaint states that hearing will be held looking to action A, and the real purpose is to take action B, there may be deception of a seriously prejudicial character. Clearly such a result should be held invalid. In the single case where the problem has been presented to the Supreme Court, however, the deception was held to be of such slight consequence that the order could stand.

Under the Packers and Stockyards Act the Secretary of Agriculture has powers to fix prices of livestock "market agencies." Certain stockyards commission men filed (pursuant to statute) with the secretary a schedule of rates known as tariff number one; before any action had been taken by the secretary as to these rates, they were increased in what was termed tariff

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**Notes:**


2. It is difficult to know what to make of the Japanese Immigrant Case (Yamataya v. Fisher) 189 U.S. 86 (1903). It is said in the opinion that there was adequate "informal" notice (189 U.S. at 101) but no such assertion is made even in respondent's brief (at 3). The notice was in English, which the alien did not understand. Held, that the proceedings were valid. Cf. Van Vleck, The Administrative Control of Aliens, at 99f.


number two. Thereupon, the secretary issued a complaint advising the commission men that a hearing would be held. The commission men contended that, from the wording of this complaint, they were led to believe that only the rates of tariff number two were in question and that, in fixing rates below those of tariff number one, the secretary had denied them due process of law.\textsuperscript{33} In an opinion by Mr. Justice Brandeis,\textsuperscript{34} the court refused to hold the notice void. It will be noted that the case does not squarely raise the problem stated: It was not a question of doing A or doing B, but of finding an appropriate level for rates.

**PRESENTATION OF EVIDENCE**

At the hearing itself a number of problems will arise as to the manner in which evidence may be presented. The type and number of witnesses and documents which may be offered; the assistance of compulsory process; the availability of an oral hearing; presumptions and burden of proof; rules of evidence and opportunity to attack evidence (the hearsay rule)—such are the matters to be discussed under this heading.

*Opportunity to Introduce Evidence.* It has been said that "the crucial fact in determining whether the hearing was unfair must doubtless be the denial of opportunity to present evidence."\textsuperscript{35} And this proposition is well understood in practice if not buttressed by an overwhelming mass of direct authority.\textsuperscript{36}

\textsuperscript{33} So far as here material, the complaint read: "it appearing to the Secretary of Agriculture that . . . [the commission men] have filed a new schedule of rates and charges known as Tariff No. 2 . . . stating new rates and charges, several of which are materially different from and greater than those set forth in their schedules now on file . . . notice . . . is hereby given that a hearing upon the reasonableness and lawfulness of the said schedule of rates and charges will be held . . ." Record at 19f.

\textsuperscript{34} Tagg Brothers & Morehead v. United States, 280 U. S. 420 (1930).


\textsuperscript{36} See State Railroad Tax Cases, 92 U. S. 575, at 609 (1875); Londoner v. Denver, 210 U. S. 373, at 386 (1908) (Fuller, C. J., and Holmes, J., dissenting); Baltimore & Ohio Railway v. United States, 298 U. S. 349, at 368f. (1936); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, at 225f. (1938) (Butler and McReynolds, J. J., dissenting; Reed and Black, J. J., concurring specially). As to judicial proceedings, the rule is clear. Saunders v. Shaw, 244 U. S. 317 (1917); see American Surety Company v. Baldwin, 287 U. S. 156, at 168 (1932); Georgia Railway & Electric
Indeed, it is difficult to conceive of a more fundamental error in
administrative hearings than the exclusion of relevant evidence.
Notwithstanding the soundness of this last proposition, there
appear to be certain types of administrative hearings to which
it does not apply. This, for instance, appears to be the rule
applicable to the valuation of property for the assessment of
tariff duties, and there is room for the belief that a similar rule
obtains in the administrative control of aliens. If such is the
case, it is perhaps worth noting two things about the administra-
tive hearings in question. First, the persons dealt with—tax-
payers and aliens—are accustomed to a half measure of due
process. Traditionally, procedure is summary in tax matters
upon the theory that the government's need for revenue is so
great that justice must come second. And aliens are thought of
as present or entering by mere suffrance. Second, in these cases,
there is frequently real evidence which assumes dominant
importance. In customs proceedings, for example, a view of the
goods themselves speaks more eloquently than any amount of
testimony; and, in the exclusion of an alien, a laboratory test
may display unsound health so dramatically that no amount
of other evidence would be material.

In connection with the general rule that there must be

Company v. Decatur, 295 U. S. 165, at 171 (1935); Dohany v. Rogers,

Auffmordt v. Hedden, 137 U. S. 310 (1890); see Origet v. Hadden,
155 U. S. 228, at 236 (1894); Freund, Administrative Powers,
States Customs Court, to which, of course, all evidence may be
presented.

The following authorities present a confused picture: Ekiu v.
United States, 142 U. S. 652 (1892); Japanese Immigrant Case
(Yamataya v. Fisher), 189 U. S. 86 (1903); United States v. Toy, 198
U. S. 253 (1905) (see dissent of Brewer and Peckham, J. J.); United
States v. Tuck, 194 U. S. 161 (1904); followed in Yow v. United
States, 208 U. S. 8 (1908). It is not wholly clear that due process
protection extends to the exclusion and expulsion processes, par-
ticularly in the absence of a claim of citizenship. Cf. Fat v. White,
253 U. S. 454 (1920); Tod v. Waldman, 266 U. S. 113 (1924). See
also Van Vleck, The Administrative Control of Aliens, at 158f, and
the cases cited above.

Of course irrelevant and repetitious evidence may be excluded.
There must be a limit to individual argument if government is to go
on—per Holmes, J., in Bi-Metallic Investment Company v. State
Board, 239 U. S. 441, at 445 (1915).
opportunity to present evidence a difficulty arises when only a vicarious hearing is granted.\textsuperscript{40}

If there has been a previous hearing on the same issues between the same parties and no new circumstances are shown, a second hearing should not be necessary.\textsuperscript{41} Nor should another hearing be required when only the formal grounds of controversy differ.\textsuperscript{42} But the matter is more troublesome when B demands a hearing on evidence substantially identical to that just considered in a hearing granted to A. Suppose A and B are carriers serving the same geographical area; must an administrative tribunal sitting to fix the rates of B listen to a mass of evidence which it has sifted thoroughly in the hearing afforded A? Perhaps the answer to this question may be found in calling this type of proceeding quasi-legislative, and, hence, not governed by the rules applicable to quasi-judicial hearings. But suppose a proceeding before the Federal Trade Commission: A is a manufacturer; it is shown that A grants commissions to the salesmen employed by retail dealers who sell A’s wares. Admitting the granting of commissions, A introduces evidence in an attempt to establish that its action does not constitute an “unfair trade practice”. This evidence is carefully weighed by the commission which determines, however, that the practice is unfair. Now a complaint issues against B, a second manufacturer, alleging the same action. Must B be permitted to introduce at its hearing the same evidence put forth by A to prove that the practice is not unfair?\textsuperscript{43}

\textit{Power to Compel Testimony; Affording Process.} Whatever doubts may remain as to the constitutional power of an administrative tribunal to compel testimony when acting in a quasi-legislative capacity,\textsuperscript{44} it now seems clear that such a power

\textsuperscript{40} No attempt will be made here to discuss the question of necessary parties to administrative proceedings.

\textsuperscript{41} And so held. Meeker v. Lehigh Valley Railway, 236 U.S. 434 (1915); Georgia Public Service Commission v. United States, 283 U.S. 765 (1931); Alabama v. United States, 283 U.S. 776 (1931).

\textsuperscript{42} Manufacturers’ Railway v. United States, 246 U.S. 457 (1918).

\textsuperscript{43} The decisions furnish no direct answer. Perhaps the solution lies in a distinction between something like questions of pure fact and of fact-law-discretion. See the hint of Holmes, J., in United States v. Baltimore & Ohio Southwestern Railway, 226 U.S. 14 at 20 (1912).

\textsuperscript{44} Lilienthal, \textit{Power of Governmental Agencies to Compel Testimony} (1926) 39 Harv. L. Rev. 694.
may be exercised when the tribunal acts quasi-judicially.45 Such power, however, at least as to federal agencies remains subject to the prohibition upon unreasonable searches and seizures46 and the privilege against self-incrimination of the Fourth and Fifth Amendments.47 While the latter amendment sounds as if it might apply only to criminal trials, it has been construed to include civil judicial actions48 and apparently also extends to administrative proceedings.49 Presumably the extent and scope of the privilege are the same as in judicial proceedings.50

A more vital question today is whether a party to an administrative hearing is entitled, as of right, to the assistance of compulsory process in securing evidence. As to matters regarding taxation51 and control of aliens,52 it appears that there is no obligation to afford process. But, in the remaining fields of administrative action, less subject to a tradition of summary procedure, the matter is doubtful. In several cases53 the court

45 Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894) (Brewer and Jackson, JJ., dissenting; Field, J., taking no part). Doubt remains as to whether the administrative authority itself may punish for contempt. id. at 485.


48 See Corwin, op. cit. supra note 47, at 2f, collating the authorities.


51 Palmer v. McMahon, 133 U.S. 660 (1890).


53 Louisville & Nashville Railway v. Finn, 235 U.S. 601 (1914) (argument dismissed on grounds that no actual prejudice was shown—an opinion subject to serious question in view of modern notion
dallied with this matter. Finally, the issue was more squarely presented.54

A proceeding was instituted looking to the revocation of a physician's license. There was no provision for compulsory process and the physician, whose license had been revoked, complained thereof. The statute, however, did provide for the taking of depositions, and a general statute authorized officers taking depositions to compel the attendance of witnesses. It was held that there had been no denial of due process. Mr. Justice Stone's opinion, however, is unsatisfactory in that there is no discussion of the earlier authorities and particularly in that it displays a confused notion of the necessity of some type of compulsory process. To some55 it has suggested that the absence of the power to compel testimony by deposition would be fatal to the proceedings.

Much will depend upon the nature of the administrative proceeding in this matter. It seems possible that, in some fields of administrative action, the availability of compulsory process is vital to adequate defense.56 In others, there may be little likelihood that lack of process will result in prejudice.57 On the whole, it would seem desirable that parties be afforded process since it may prove valuable and should constitute little impairment of administrative effectiveness.58

Must the Hearing Be Oral? Normally a hearing is conceived of as an oral affair; but it seems possible to think of a hearing as simply an opportunity to submit paper testimony.59 There are hints in some authorities that the hearing must be that procedural requirements are independent of substantive results. Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Washington ex rel Oregon Railway v. Fairchild, 224 U.S. 510 (1912) (no showing that compulsory process actually unavailable).

55 e.g., Freund, Note (1927) 21 Ill. L. Rev. 493.
57 Cf. the Walter-Logan Bill (S. 915, 76 Cong.) sec. 4 (c); Note (1940) Compulsory Process in Administrative Proceedings, 25 Iowa L. Rev. 646.
58 This, of course, would raise a good many questions, such as affording an opportunity to attack evidence, considered elsewhere herein.
oral and in others that it need not be. In still other cases the matter is buried beneath other questions which appeared to be of greater importance.

No doubt considerable savings of time could be effected if oral hearings were dispensed with; and, as the burden of administrative tasks increases, this may appear an attractive method of clearing crowded dockets. It is, therefore, unfortunate that there is so little guidance in the authorities. A good argument can be made for the requirement of oral hearing on the ground that it is a more effective safeguard of private rights, particularly in that it embodies confrontation.

**Burden of Proof.** Occasionally statutes or administrative regulations provide that the burden of proof in an administrative proceeding shall rest upon one of the parties. Or, the same result is achieved by creating a presumption that certain facts exist. Thus, it is possible to place one of the parties in a position of relative advantage at the hearing. But apparently this has not been thought objectionable from a due process standpoint.

Two cases are of particular interest. After certain taxes, levied as part of the general program of the Agricultural Adjustment Act of 1933 had been declared unconstitutional, the Congress made provision for the refunding of the illegal exactions. Under the Revenue Act of 1936 it was provided

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63 See Albertsworth, _Judicial Review of Administrative Action by the Federal Supreme Court_ (1921) 35 Harv. L. Rev. 127, at 131; Walter-Logan Bill (S. 915, 76 Cong.) sec. 4 (a), (e). The amount of publicity which the administrative action receives may serve as a counterweight. The expulsion of an alien might be accomplished arbitrarily without inviting public scorn; over assessment of property for tax purposes, however, must meet a considerable body of informed criticism when listed publicly.
that, if the refund of processing taxes were disallowed by the commissioner of internal revenue, the taxpayer must proceed before an administrative board of review, created by the act. This board was to consist of nine officers or members of the department of the treasury, selected by the secretary. In this proceeding it was provided that the burden of proof was upon the taxpayer to establish that he had not "passed on" the tax (if "passed on" the taxpayer was to be denied recovery). Furthermore, it was provided that, if the taxpayer's "margin" (of profit) were smaller during the period of the tax, this was to be prima facie evidence that the tax had not been "passed on", and, if not, that the tax had been shifted. A taxpayer, alleging the unconstitutionality of the act, brought suit against the collector. In Anniston Manufacturing Company v. Davis, Chief Justice Hughes refused to construe the statute as requiring that the taxpayer meet the burden of proof where it is impossible to establish whether or not the tax was "passed on" and declared that, so construed, the act was valid.

As to the presumptions, these were declared to be not wholly irrelevant and the court said that their effect could not be determined until resort had been had to the administrative proceeding. While the constitutionality of these presumptions thus remains open to contest upon the part of a taxpayer who has exhausted the statutory remedy, it should be noted that the attack upon them in the Anniston case was vigorous. For it was contended that, owing to the nature of the circumstances, it would be impossible to prove the incidence of the tax (i.e., what prices would have obtained had the A.A.A. never come into existence). Furthermore, it was pointed out that the taxpayer's margin might have increased or remained the same for reasons wholly unrelated to the incidence of the tax and therefore, that the combination of presumption and burden of proof rendered it impossible for the taxpayer to recover the tax illegally collected.

62 A majority, speaking through Hughes, C.J., held the suit premature and declared that the adequacy of the administrative remedy must be tested in practice. McReynolds, J., dissented. Stone and Cardozo, JJ., concurred specially.
63 Relying on United States v. Jefferson Electric Company, 291 U.S. 386 (1934) in which, unfortunately, this precise point received no consideration.
Under the Inland Waterways Corporation Acts\(^7\) the Interstate Commerce Commission directed rail carriers to establish through routes and joint rates with a barge line at specified rates and divisions. These had been fixed at *ex parte* proceedings. The statutes then permitted the railways to file a complaint and to be heard as to the divisions and rates prescribed. A burden of proof was placed upon them to show that the order was unlawful or unreasonable. These provisions were sustained in *United States v. Illinois Central Railroad*\(^7\) but four justices concurred merely on the ground of a failure to exhaust the administrative remedy.\(^7\) Certainly the presumption here is unusual: it directs the trier of fact to stand by a decision made without a hearing unless the complainant can, to the satisfaction of the trier, show the previous decision to have been wrong.\(^7\) In sustaining the statute, the majority relied on a dictum in the *New England Divisions Case*,\(^7\) which in turn relied upon two cases which may be said to establish the "rational connection" rule as to presumptions in judicial proceedings.\(^7\) This rule states that it is no denial of due process to set up a presumption which is rationally connected with a proven fact.\(^7\) Thus, from the proven fact of the derailment of a train, a presumption may arise of negligence upon the part of the carrier's servants. The presumed fact is regarded as rationally connected with the proven fact. In *United States v. Illinois Central Railroad*, however, the court is dealing with a different type of presumption. For here the proven fact is that the commission has considered the matter and reached a decision; the presumed fact is that the decision is reasonable. Between the two lies conscious human judgment rather than a chain of acts and circumstances. The "rational connection" rule, as developed in the earlier cases, did not apply to such a situation and, if the requirement

\(^{72}\) Op. cit. supra note 64.  
\(^{73}\) Stone, Brandeis, Roberts and Cardozo, J.J., Sutherland, J., delivered the opinion of the majority.  
\(^{75}\) New England Divisions Case, 261 U.S. 184 at 199 (1923).  
\(^{77}\) And vice versa. Manley v. Georgia, 279 U.S. 1 (1929).
of hearing is to retain vitality, the decision may well be questioned. It is one thing to presume that a derailment is caused by someone's negligence; it is quite another to presume that someone's _ex parte_ decision is reasonable.78

Aside from the special situations presented by these two cases, there seems little objection to presumptions under the rational connection rule.79 While some hardship may result80 the same effect can be obtained simply by the licensing system. For instance, instead of empowering a board to order employers to desist from "unfair labor practices," the legislature could require that all employers secure a license and that no license be granted unless the employer show himself not to be engaged in such practices. Thus, the burden of action and proof is thrust upon the employer.81 Again, it is difficult to see why administrative procedure should be more constitutionally restricted than judicial procedure.82

**Rules of Evidence**—There has been considerable discussion in legal periodicals83 as to whether the rules of evidence known to actions at law should be applied in administrative hearings. From a constitutional point of view, however, only a few of the rules have been examined to determine whether failure to abide by them vitiates the hearing. It is of course well understood that some of the rules may be dispensed with.84 But which ones? Often statutes and courts declare that the "technical"

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78 Query, if this decision may be wholly supported on the ground that the administrative action was quasi-legislative.
79 Morgan, _Federal Constitutional Limitations Upon Presumptions Created by State Legislation_, Harvard Legal Essays (1934) at 323.
81 Does this argument prove too much? Could the legislature provide that, from the issuance of a complaint by the administrative tribunal, a presumption would arise that the employer were guilty of unfair labor practices? Is this like United States v. Illinois Central Railroad, cited _supra_ note 64.
82 Two differences may be noted between an administrative proceeding and an action at law which may be relevant in this connection. First, an administrative proceeding is not necessarily adversary in character. Second, an administrative determination is often a matter of degree (of cents per kilowatt hour, for example) rather than a judgment (that the fee of Blackacre is in A.).
83 _e.g._, Wigmore, _Administrative Boards and Commissions: Are the Jury Trial Rules of Evidence in Force for Their Inquiries?_ (1922) 17 Ill. L. Rev. 263
84 _See e.g._ Crowell v. Benson, 285 U.S. 22 at 48 (1932).
rules of evidence do not apply to administrative proceedings, a statement which fails to supply answers to all problems.

The authorities as to specific rules may be summarized in short compass. An administrative tribunal may determine the qualifications of one appearing before it as an expert witness. It appears probable that standards of credibility may be created; that is, that a party be required to produce a certain number or kind of witness. There is nothing to indicate that witnesses need be sworn, that documents need be verified, or that the best evidence rule obtains.

It is difficult to say in which direction the authorities point on the admissibility of prejudicial evidence, but there is every reason to suppose that illegally obtained evidence is inadmissible. This is the rule obtaining in judicial proceedings and there seems no reason to make a distinction. It may be argued, however, that the rule whereby involuntary confessions are excluded under the Fifth Amendment does not apply to administrative tribunals.

From the constitutional point of view, it should be clear

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**Ting v. United States, 149 U.S. 693 (1893); Sing v. United States, 100 U.S. 486 (1901) (proceedings before United States commissioners; requirement that party produce white witnesses).


**Tun v. Edsell, 223 U.S. 673 (1912) (evidence that other immigrants making claim of citizenship similar to that of petitioner had been found guilty of fraud does not vitiate hearing—questionable decision); see Lung v. Patterson, 186 U.S. 168 at 176 (1902); Morgan v. United States, 298 U.S. 468 at 480 (1936).


*71* Weeks v. United States, 232 U.S. 383 (1914); cf. 4 Wigmore, Evidence, secs. 2183, 2184. Of course this rule is inapplicable to state agencies so far as the federal constitution is concerned. See Weeks v. United States cited *supra* at 398.

On the ground that administrative proceedings are always civil (as opposed to criminal) in character. Ting v. United States, 149 U.S. 698 (1893); see Bilokumsky v. Tod, 263 U.S. 149 at 157 (1923).
that the rules of evidence (aside from the hearsay rule) are not obligatory. In certain proceedings, where fundamental facts are strongly in issue and emotions strained, the hearing takes on the aspect of a criminal trial. For such hearings great formality may be desirable; but the matter should rest in legislative discretion.94

Hearsay—Attacks upon Evidence—Separate consideration must be given the hearsay rule, since it has a fundamental importance lacking in the other prescriptions. That is, the introduction of hearsay evidence deprives an opponent of an opportunity to attack the testimony by the time-honored method of cross-examination.

It cannot be said that the court has been oblivious of the desirability of allowing attacks upon evidence.95 But in one field of administrative action after another exclusion of relevant evidence has seemed too high a price to pay for due process of law.96 In none of these cases, however, was the hearsay admitted shown to have substantially prejudiced the opponent.97 And the tenor of the opinions does not suggest that no attention need ever be paid to the hearsay rule. In the latest case the hearsay rule was cleverly incorporated into the "substantial evidence" rule.98 Chief Justice Hughes declared:

"It will be noted that some of the exclusionary rules, such as those last discussed, are designed for purposes unrelated to the proper conduct of the hearing. For instance, one reason that involuntary confessions are excluded is to discourage "third degree" methods. On the general subject see Stephens, Administrative Tribunals and the Rules of Evidence, at 92 ff.; Stephan, The Extent to Which the Fact-finding Boards Should be Bound by the Rules of Evidence (1938) 24 A.B.A.J. 630.


For instance, in Spiller v. Atchison, Topeka & Santa Fe Railway, cited supra note 96, it was not seriously contended that the evidence introduced was inaccurate. It consisted of extracts from original books of entry which would have filled a freight car.

Which requires that an administrative determination must be supported by substantial evidence if it is to pass judicial review.
"The companies urge that the Board received remote hearsay and mere rumor. The statute provides that the rules of evidence prevailing in courts of law and equity shall not be controlling. The obvious purpose of this and similar provisions is to free administrative [230] boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. . . . But this assurance of a desirable flexibility in administrative proceedings does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute evidence."

This, perhaps, is as neat a solution of the problem as could be found.

**THE PROCESS OF DETERMINATION**

Constitutional requirements are not satisfied by the mere proper conduct of a hearing. In making a decision the administrative tribunal is still held within bounds. Its action must be based on evidence introduced at the hearing and incorporated into the record; it cannot disregard evidence; in some cases it must make formal findings of fact; lastly, it must decide upon principle and not arbitrarily.

_A Basis in Evidence Incorporated into the Record—_While some doubt may be entertained in the fields of taxation and control of aliens, it is reasonably clear as to the mass of ad-

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190 Expansion of the _business entry_ exception to the hearsay rule might have been another. Obviously the basic facts in issue before administrative tribunals vary enormously in difficulty of proof. Some matters, which might be termed "continuing facts," are rarely the subject of serious dispute. In this category belong such issues as the distance between two geographical points. A second category of facts may include those which lie in the past but which are certified by records made contemporaneously. In ascertaining the cost of a public utility's property, for instance, the books of the corporation, its cancelled checks, the records of the bank upon which the checks were drawn and so forth often establish matters reasonably conclusively. A third category may include facts lying in the past as to which no record was made contemporaneously. Thus, the precise conduct of the parties just before the occurrence of an automobile accident is not recorded. It is in this third category that controversy flourishes, and if additional safeguards are thought necessary in the conduct of administrative hearings, they might well be confined to proceedings involving this category of facts.

194 Valuation of property for tax purposes involves comparisons of an intangible character with other property not always readily susceptible to incorporation in a record.

ministrative proceedings that administrative action may only be based upon evidence received at the hearing and incorporated into a written record. The requisite quantum of evidence is, of course, a matter pertaining to the scope of judicial review. But it may be pertinent to note here that in certain types of proceedings typical evidence—a representative sample of the facts—will suffice to support an administrative order. Thus, in rate making, it is not essential that evidence be introduced as to every commodity upon every conceivable route.

Whatever may be the practice before administrative tribunals, then, the constitutional theory is plain; an administrative tribunal must act only on information presented to it at a hearing. Which raises the issue of judicial notice—call it official or administrative notice or what you will. Ohio Bell Telephone Company v. Public Utilities Commission involved a rate regulation proceeding. The crucial issue was the value of the company's property. After nearly a decade of proceedings the commission, in 1934, valued the property as of 1925. No objection was made to the method by which the commission arrived at this figure. To bring the valuation down to date, however, resort was had to certain "price trends." The commission alleged that the "trend of land valuation was ascertained from examination of the tax value in communities where the

23 This doctrine was first enunciated in the important dictum in Interstate Commerce Commission v. Louisville & Nashville Railway, 227 U.S. 88 at 91f. (1913), and was followed in Philadelphia Railway v. United States, 240 U.S. 334 (1916); Chicago Junction Case, 264 U.S. 258 (1924); Brimstone Railway v. United States, 276 U.S. 104 (1923); United States v. Baltimore & Ohio Railway, 293 U.S. 454 (1935); West Ohio Gas Company v. Public Utilities Commission, 294 U.S. 63 (1935); see also Crowell v. Benson, 239 U.S. 22 at 48 (1912); Florida East Coast Railway v. United States, 234 U.S. 167 at 185f. (1914); Louisville & Nashville Railway v. Finn, 235 U.S. 601 at 606 (1914); New York v. United States, 257 U.S. 591 at 600 (1922); New England Divisions, 261 U.S. 184 at 203 (1923); Morgan v. United States, 293 U.S. 468 at 480 (1936). Some of these cases proceed partly on the ground that the commission's orders must find a basis in evidence somehow; it is believed that they also support the proposition that this evidence must be presented at the hearing and incorporated into the record. See generally, Davison, Use of Public Documents and Reports in Administrative Proceedings (1940) 25 Iowa L. Rev. 555; cf. Walter-Logan Bill (S. 915, 76 Cong.) sec. 4(b).


25 Cf. e.g. A.G.'s Committee on Federal Communications Commission at 29.

26 301 U.S. 292 (1937).
A company had its largest real estate holdings... for building trends resort was had to price indices of the Engineering News Record, a recognized magazine in the field of engineering construction... labor trends were developed from the same sources.” Reference was also made to the findings of a federal court sitting in another state as to price levels in the sales of apparatus by the Western Electric Company to the operating corporation. These findings were not in evidence but had been received by stipulation for certain limited purposes. The other evidence of “price trends” was not in evidence in any form. By the use of these data the commission fixed the value of the company’s property for the intermediate years as follows, expressed in relation to the 1925 valuation figure:

<table>
<thead>
<tr>
<th>Year</th>
<th>Valuation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1925</td>
<td>100%</td>
</tr>
<tr>
<td>1926</td>
<td>98.73</td>
</tr>
<tr>
<td>1927</td>
<td>95.7</td>
</tr>
<tr>
<td>1928</td>
<td>95.0</td>
</tr>
<tr>
<td>1929</td>
<td>96.3</td>
</tr>
<tr>
<td>1930</td>
<td>92.2%</td>
</tr>
<tr>
<td>1931</td>
<td>88.6</td>
</tr>
<tr>
<td>1932</td>
<td>76.8</td>
</tr>
<tr>
<td>1933</td>
<td>79.1</td>
</tr>
</tbody>
</table>

As a result of this computation, the company was found to have collected excess earnings of some thirteen million dollars. It made seasonable objection to the use of the data but the commission refused a petition for rehearing on the grounds that it took judicial notice of the “price trends.” Mr. Justice Cardozo, speaking for a unanimous court, commented:

"An attempt was made by the commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. Indeed, decisions of this court were cited... as giving support to the new doctrine that the values of land and labor and building and equipment, with all their yearly fluctuations, no longer call for evidence. Our opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. They take judicial notice that there has been a depression, and that decline of market values is one of its concomitants... How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves... Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence... Such at least is the general rule, to be adhered to in the absence of exceptional conditions. Here the contention would be futile that the precise amount of the decline in values was so determinate or notorious in each and every year between 1925 and 1933 to be beyond the range of question... to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

307 301 U.S. at 300f.
It is difficult to find fault with the views expressed by Mr. Justice Cardozo. Nevertheless, it may be observed that there is a growing demand that administrative procedure be expedited and it is possible that increased use of judicial notice would help clear crowded dockets. It may be argued that administrative bodies are expert tribunals appointed by law and informed by experience and that they should be permitted to notice all facts about which there is a general and harmonious understanding, not only in the community generally, but among the experts in its field. Just as courts do not take evidence as to the law of their jurisdictions, so the Securities & Exchange Commission should be able to take notice, for instance, of the general state of the stock market. In practice, administrative tribunals appear to do just this, if not a good deal more—a state of affairs, which, however, throws doubt on the hope that a reasonable extension of the doctrine of judicial notice would expedite hearings.

There is another method by which hearings might be expedited and the rule that all evidence must be introduced at the hearing avoided. This is the doctrine of incorporation by reference. Thus, it should be possible to take care of a good many (especially, formal) matters of proof through citation of material in the files of the tribunal, provided that the citation is sufficiently specific and seasonable to allow rebuttal.

A danger of this short-cut, however, is that the tribunal will slip into a delegation of discretion or a vicarious hearing. It is

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36See e.g., Smith, Practice and Procedure before the Interstate Commerce Commission (1937) 5 Geo. Wash. L. Rev. 404, at 453 ff.
37It need hardly be said that a degree of notice is inevitable. Michael and Adler, The Trial of an Issue of Fact (1934) 34 Col. L. Rev. 1224, 1462.
38Note (1934) 44 Yale L.J. 355.
39Per McKenna, J., in Illinois Central Railway v. Interstate Commerce Commission, 206 U.S. 441 at 454 (1907).
40It will be noted that Mr. Justice Cardozo does not expressly prohibit this taking of notice. His use of the rule as applied in courts merely responded to the citation of cases to which he referes.
42A. G.'s Committee on Bureau of Marine Inspection and Navigation at 14.
permissible for an administrative tribunal to rely on evidence introduced at another hearing when the parties and issues were the same.\textsuperscript{116} But, at the other pole, the conclusions of another administrative tribunal cannot sustain an order. In \textit{Chicago, Milwaukee, St. Paul & Pacific Railway v. Public Utilities Commission} an error of this type was found. The Interstate Commerce Commission had authorized (but not directed) a reduction in interstate rates on logs. No action was taken by the carrier. Thereupon, the state commission issued an order requiring the railway to show cause why it should not reduce its intrastate rates on logs to the level authorized by the Interstate Commerce Commission for interstate shipments. At the hearing the railway introduced evidence tending to show that the rates were already so low that the traffic was carried at a loss. In ordering a rate reduction, the state commission relied on various facts, perhaps chiefly the findings of the Interstate Commerce Commission. A unanimous court held this procedure a denial of due process of law.\textsuperscript{118} This decision is sound but there remain open many intermediate degrees of vicarious hearing, the validity of which remains to be tested.\textsuperscript{119}

\textit{Disregarding Evidence—}A lawyer familiar with judicial procedure would not be surprised to learn that the record of an administrative hearing must incorporate all the evidence, whether favorable or adverse\textsuperscript{120} to the administrative determination. But it might occasion some astonishment for him to learn that special treatment is required of adverse evidence. It is apparently\textsuperscript{121} law, however, that an administrative tribunal may not disregard evidence submitted it.\textsuperscript{122} Thus, in \textit{Northern Pacific Railway v.}

\textsuperscript{116} Alabama v. United States, 283 U.S. 776 (1931).
\textsuperscript{117} 274 U.S. 344 (1927).
\textsuperscript{118} See 274 U.S. at 352.
\textsuperscript{119} Could the basic facts introduced in evidence before the I.C.C. have been incorporated by reference in the principal case instead of the findings (ultimate facts)? Would it make a difference if the carrier had been a party to the I.C.C. proceedings? Could the I.C.C. decision properly be cited in the commission's opinion? As a proposition of law? As a proposition of fact-law-discretion?
\textsuperscript{120} Pat v. White, 253 U.S. 454 (1920).
\textsuperscript{121} Qualification is necessary for it may be possible to explain the authorities on the well known principle that administrative action must find support in substantial evidence.
Department of Public Works, the administrative authority issued an order reducing rates on logs carried within the state. At the hearing the carrier introduced evidence that the proposed rates would not be productive of a fair return. This evidence was ignored by the tribunal; no attempt was made to explain or rebut it in the order reducing rates. Mr. Justice Brandeis wrote an opinion for a unanimous court, holding the procedure invalid.

It may not even be necessary that the evidence be presented at the hearing. It may suffice that the matter disregarded is of such general and common understanding that the resulting order is patently irrational. Again, the same rule seems to be applied when a rehearing is requested in order to present such evidence, and the rehearing is denied. Later authorities indicate, at least, that the rule will be extended no farther. Indeed, it seems probable that further extension of the rule would thrust an undue burden on administrative tribunals. It is certainly enough that they must take account of evidence adverse to their determinations.

Findings of Fact—Few points of constitutional law are so shrouded in mystery as the origin of the doctrine that an administrative tribunal must make written findings of fact. The presence of findings requirements in statutes and lack of precision in the opinions make the search for beginnings arduous.

Probably the first hint in the Supreme Court is found in cases arising out of the administrative control of aliens some two


Query, whether such account must be taken in findings of fact, a written opinion or elsewhere. In most cases, one suspects, the administrative tribunal is expected to take account of the evidence in its determination.
decades ago. Relying on one of his own opinions in a rate case, in which he had cited an Illinois rate case based on a statute requiring the making of findings, and upon his own statement that such requirement accords with general principles of constitutional government, Chief Justice Taft nourished the doctrine to full growth in holding that, where the statute required the commissioner to find certain facts as a prerequisite to action, he must make such a finding in the record. Later the same doctrine was applied in a subsequent rate case. But in a later opinion by Mr. Justice Stone in a rate case a different result was reached without reference to the above cases. And again the celebrated decision of the Court in *Panama Refining Co. v. Ryan* Chief Justice Hughes (writing the opinion) held that there was a constitutional requirement of findings in administrative action of a clearly legislative character; and another case decided the same day affirmed the doctrine as to administrative proceedings of a more judicial character. Mr. Justice Brandeis wrote the opinion in this last case. Along with a half-hearted attempt to put the decision on statutory grounds, he distinguished between findings which are a mere aid to judicial review and "essential" and "quasi-jurisdictional" findings, which are constitutionally required. In the next case, Mr. Justice Brandeis was unable to agree with the majority that the findings rose to this latter dignity; that is, were "quasi-jurisdictional." This circumstance alone should throw

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129 See *Mahler v. Eby*, 264 U.S. 32 at 44 (1924) ("we put this conclusion not only on the language of the statute but also on general principles of constitutional government").
133 See *Williston, Some Modern Tendencies in the Law* at 86.
134 Except Mr. Justice Cardozo.
136 Presumably to be exercised without hearing.
some doubt on the soundness of the doctrine.\textsuperscript{140} Apparently, however, it is still with us.\textsuperscript{141} About all that may be said is that findings must be made on quasi-jurisdictional (i.e., important) matters in quasi-judicial administrative proceedings—provided, the court does not again change its mind.\textsuperscript{142} 

Of course, it is impossible to lay down a specific rule as to the requisite precision of findings. It seems,\textsuperscript{143} however, that something must be spelt out beyond mere "conflicting inferences."\textsuperscript{144} 

\textit{The Role of Principle}—In making its determination upon the basis of evidence and findings, an administrative tribunal must, of course, exercise its reason. It must use its own judgment: it may not delegate its power of decision.\textsuperscript{145} Nor may others exercise its powers by coercion or fraud.\textsuperscript{146} Irrational, arbitrary or whimsical decisions are invalid as an abuse of discretion.\textsuperscript{147} It is, therefore, evident that principles of some kind must underlie every valid administrative determination. The questions open for debate relate to the nature of these principles, whether they must be articulated in an opinion, and whether certain pertinent rules developed in judicial proceedings must be applied.

Apparently the doctrine of \textit{res judicata} is not a constitutional requirement of administrative proceedings.\textsuperscript{148} A shadow

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\textsuperscript{142} Apparently the requirement no longer obtains as to quasi-legislative action. Pacific States Box & Basket Company v. White, 296 U.S. 176 (1935).
\textsuperscript{143} Atchison, Topeka & Santa Fe Railway v. United States, 295 U.S. 193 (1935).
\textsuperscript{144} \textit{Per} Cardozo, J., in United States v. Chicago, Milwaukee, St. Paul & Pacific Railway, 294 U.S. 499 at 510 (1935).
\textsuperscript{146} See \textit{e.g.} Chicago, Burlington & Quincy Railway v. Babcock, 204 U.S. 583 at 592, 596 (1907).
\textsuperscript{147} Atlantic Coast Line v. Wharton, 207 U.S. 328 (1907) \textit{semble}; \textit{see} Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 at 143f. (1940).
of doubt was cast upon the earlier authorities by the *Arizona Grocer's case*. Here the Interstate Commerce Commission had issued an order to the effect that a certain rate was unreasonable to the extent that it exceeded ninety-six cents. Four years later the commission reconsidered the matter and sought to fix a maximum of seventy-one cents retroactively, awarding reparation for the intervening period. This action was held invalid. But the doubt thus created was dispelled by a later decision, limiting the authority of the *Arizona Grocer's case* and stating that it rested only upon statutory grounds.

Nor is *stare decisis*, as known to courts of law, a requirement of administrative action. Many administrative tribunals are frankly created in an experimental spirit which would be defeated by the strict application of these doctrines. In practice it is found impossible to apply them satisfactorily. But a modified application seems not only desirable but necessary. In the long run, at least, we cannot be content with determinations based on mere "hunch" or worse. Law, in an administrative tribunal, need not have a static content, but it must not be whimsical. Fundamentally, *stare decisis* is a shorthand method of exercising reason: it shows that the tribunal has given the matter at hand consideration, and, after examination of the views of others, approved a given decision and held it to be controlling. This process gives assurance of reasoned results. On the other hand, there is an equal assurance if the authority is examined, and rejected for specified causes.


It will be noted that problems of *res judicata* shade into those of judicial review and collateral attack.


West Ohio Gas Company v. Public Utilities Commission involved proceedings to fix gas rates in two nearby towns served by the same utility company. As to each town, the question was raised whether property of the company situated in the outlying parts of the municipalities to be served should be included in the valuation for the rate base. It happened that if such outlying property were included the utility would secure a higher rate in one town than in another, and vice versa if the property were excluded. Without assigning a reason therefor the commission adopted different rules for the two towns so that in each case the utility received the lower rate. This action was condemned as an exercise of arbitrary power, Mr. Justice Cardozo reprimanding the administrative agency sharply. It is submitted that the decision is sound and supports the suggestion just made, namely, that departures from the rule of stare decisis should be explained.

It is abundantly clear, however, that an administrative tribunal need not prepare an opinion in all cases. As Mr. Justice Holmes declared in a case where the lack of opinion was complained of:

"The action does not seem to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."

One may agree with the justice and also appreciate that the task of preparing opinions would consume much of the administrator’s precious time. Yet there are weighty reasons for hoping that the preparation of opinions will soon become administrative practice, if no more.

Two interesting questions remain. First, suppose a plainly
indefensible reason to be given for an administrative determination which could otherwise be supported by valid reasons in the record. It is ordered that an alien be expelled, and the reason assigned is that he has red hair. On this matter the authorities are not clear. Since the invalid reason casts suspicion on the determination, it would seem wise at least to return the matter to the administrative tribunal for reconsideration.

Second, the administrative action may be perfectly regular upon its face and yet a reviewing court feel sure that the tribunal's real motives were concealed. A board of health has power to regulate the sale of milk. It proscribes a paper container for milk, assigning as a reason that it is not sufficiently sanitary. There is no evidence in the record to support the order. Yet there is also evidence in the record to the effect that paper containers are sanitary. A reviewing court feels certain that the real reason behind the board's action is a fear that paper containers will throw milk wagon drivers out of employment. Yet the jurisdiction of the board of health does not extend to such matters. Little assistance is derived from the authorities. The same problem has been met in passing upon the validity of statutes, although perhaps the most positive suggestion that can be made on this subject is that tolerance allowed legislators, directly responsible to the electorate, may be unsuitable for administrators.

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PERSONNEL AND ORGANIZATION

There remain problems of personnel and organization. Who must represent parties to administrative hearings? Who may conduct the hearing? Who is to make the decision? Without pausing to examine the doctrine of separation of powers, which appears nearly to have fallen into desuetude, we may examine three principal questions: the requisite personnel of the hearing, the necessity of oral argument, and the delegation of decision.

Personnel—An administrative agency, like a purely executive officer, may be charged by statute with the enforcement of legislative policy. An atmosphere may be created whereby an administrative officer feels responsible for a situation. Can it be argued that this mixture of governmental powers makes the officer a judge in his own cause, and thus prevents him sitting in judgment upon an administrative tribunal?

It is clear, if unadjudicated, that it would be improper for an administrative officer to hold any kind of pecuniary interest in the cause upon which he sits. The tribunal must be impartial. Personal animosity toward a party to an administrative proceeding should also cause disqualification. But it is equally clear that mere distaste for a party by reason of his membership in some social, economic, or racial group is not grounds for disqualification. Such a requirement would bring the wheels of administrative justice to a standstill. Nor may the fact that an administrative officer is elected by persons who would benefit from action adverse to a given party (as, in public utility rate making) give rise to disqualification. Again, there is nothing to suggest that the fact that administrative officers have participated in a preliminary investigation, leading to a decision to

366 Cf. (1938) 51 Harv. L. Rev. 1101.
367 Spring Valley Water Works v. Schottler, 110 U.S. 347 (1884) (Field, J, dissenting); cf. Home Telephone Company v. Los Angeles, 211 U.S. 265 (1908) (municipality vested with power to regulate rates was itself a consumer; held, valid). Query: the validity of “influence” exercised by legislators over administrative determinations.
issue a complaint, prevents them sitting in judgment.\textsuperscript{168} There is some doubt, however, as to whether it is permissible for a business competitor to exercise discretionary judgment over another's affairs.\textsuperscript{169}

Frequently employees of administrative agencies are put on the witness stand to testify in a hearing.\textsuperscript{170} While there may be certain dangers in this practice, it does not appear to have been raised as a constitutional question.\textsuperscript{171} No doubt the general abolition of the disqualification for interest in judicial proceedings would provide an appropriate analogy.

Little can be made, therefore, of the argument that an administrative adjudication is invalidated because the administrators act in their own cause. It appears equally clear that even federal administrative tribunals may dispense with the jury trial requirement of the Seventh Amendment.\textsuperscript{172} This result has been reached even as to administrative orders closely resembling money judgments on the ground that they were not "suits at common law."\textsuperscript{173} Apparently sufficient doubt is felt about the matter, however, that the draftsmen of the Interstate Commerce Act did not provide for the direct administrative award of reparation.\textsuperscript{174}

It is now settled that in judicial proceedings, at least those of a criminal character, due process requires that the parties

\textsuperscript{168} This is frequently the practice. A. G.'s Committee on Federal Communications Commission at 22f; on Bureau of Marine Inspection and Navigation at 11; on Division of Public Contracts at 12 cf. Walter-Logan Bill (S. 915, 76 Cong.) sec. 4 (a).


\textsuperscript{170} See e.g. 4 Sharfman, The Interstate Commerce Commission at 199.

\textsuperscript{171} Raised below but not on appeal in Passavant v. United States, 148 U.S. 214 (1893).

\textsuperscript{172} Murray's Lessee v. Hoboken Land & Improvement Company, 59 U.S. 272 (1856); Auffmordt v. Hedden, 137 U.S. 310 (1890); see also Wickwire v. Reinecke, 275 U.S. 101 at 105 (1927).

\textsuperscript{173} See National Labor Relations Board v. Jones & Laughlin Corporation, 301 U.S. 1, at 48 (1937). As to eminent domain proceedings, see Blair, Federal Condemnation Proceedings and the Seventh Amendment (1927) 41 Harv. L. Rev. 29, collating the authorities.

\textsuperscript{174} Presumably on the theory that such suits were cognizable at common law. See Miller, The Necessity for Preliminary Resort to the Interstate Commerce Commission (1932) 1 Geo. Wash. L. Rev. 49, at 77; cf. Meeker v. Lehigh Valley Railway, 236 U.S. 412 (1915).
have an opportunity to be represented by counsel. It is difficult to understand why a different rule should obtain as to administrative hearings. The law, however, appears to be otherwise, even as to those administrative proceedings which bear a strong resemblance to criminal trials. At least, once the practice of holding an alien, sought to be expelled, incommunicado (so that he could not secure counsel or prepare his evidence) has been approved.

Great hardship and patent unfairness may result from a refusal to permit representation by counsel. It is submitted that the opportunity to be represented by counsel should be a requirement of due process of law and that the authorities to the contrary should be reconsidered. If at times lawyers are found to encumber the administrative process unduly, some remedy other than their own total exclusion should be found. It is unnecessary to remark upon the practice of holding persons incommunicado.

Argument and Tentative Findings—Apparently there is no constitutional requirement that argument be permitted before an administrative tribunal; and, if granted, the argument may be written instead of oral. If the hearing is held before a trial examiner it is not imperative that he submit tentative findings of fact to the parties as basis for argument before the

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176 Auffmordt v. Hedden, 137 U.S. 310 (1890); Origet v. Hedden, 155 U.S. 228 (1894) *seem*.
178 United States v. Tuck, cited supra note 177. Mr. Justice Holmes, writing the majority opinion, strangely asserts that jailing the alien did not impede him in the presentation of his defense.
180 Auffmordt v. Hedden, 137 U.S. 310 (1890); Home Telephone Company v. Los Angeles, 211 U.S. 265 (1908) *semble*; but see Londoner v. Denver, 210 U.S. 373 at 386 (1908); Morgan v. United States, 304 U.S. 1 at 18 (1938).
tribunal itself.\textsuperscript{182} There is, therefore, a good deal of permissible flexibility in arranging for posthearing consideration of the evidence.

But at some point the issues must be brought to focus. Whether in the complaint, by the submission of proposed findings of fact or by oral argument or briefs, there must be an opportunity to know upon what matters the determination will turn. This is the doctrine of the celebrated second \textit{Morgan} case.\textsuperscript{183} This case involved a proceeding by the Secretary of Agriculture looking to the fixing of rates charged by livestock commission men. Of course, the complaint stated merely the general purpose of the proceedings. At the hearing before a trial examiner an enormous mass of evidence was introduced. Despite the request of the commission men, no tentative report of findings of fact was prepared by the examiner. The commission men submitted a brief and later a "sketchy" oral argument was had before the acting Secretary of Agriculture. No brief was presented upon behalf of the government.

After the argument, tentative findings were prepared by counsel for the government and submitted to the secretary along with a report, which summarized the government’s evidence. The secretary also was supplied with the commission men’s brief, a copy of the record and transcript of the argument. After some examination of these documents, he conferred with his subordinates, including government counsel, out of the presence of representatives of the commission men. He then issued an order, having made some changes in the proposed findings of fact.

This is the procedure which the court found defective. The Chief Justice said:\textsuperscript{184}

\begin{quote}
"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government
\end{quote}


\textsuperscript{183} Morgan v. United States, 304 U.S. 1 (1938). The decision could be placed upon purely statutory grounds.

\textsuperscript{184} 304 U.S. at 18f. Black, J., dissented (without opinion). Cardozo and Reed, JJ., took no part.
proposed and to be heard on its proposals before it issues its final command."

This doctrine may be compared with the rule that evidence must be subject to attack.\textsuperscript{185}

Focusing of the issues is the essence of the requirement and of course there will always be room for debate as to whether this has been accomplished in a given administrative proceeding. It should be possible, however, to distinguish broadly between those which center on a few specific facts and those which involve broad investigations of economic and sociological data, just as we distinguish between trover for a bay horse and an equitable accounting on the part of trustees for vast numbers of investments.\textsuperscript{186}

\textit{Delegation of authority}—It is common practice to delegate the task of holding an administrative hearing, including such tasks as ruling upon the admissibility of evidence, to an employee of the administrative agency. Such a person, frequently not a member of the administrative tribunal, is often called a "trial examiner." While authority is meager, this delegation would appear to be constitutionally valid.\textsuperscript{187} It is, of course, supported by the analogy of reference to a master in chancery or referee in bankruptcy.

Delegation of the task of conducting a hearing is commonplace in both judicial and administrative proceedings. Whether the duty of decision may be delegated is quite another matter, and whether administrative determinations must be the result of personal discretion or mere nominal action is a question going to the heart of administrative procedure. It was the view of our leading student of administrative law that while judicial action must be personal, the volume of business forces delegation upon administrative officers, many of whom may also have other tasks.\textsuperscript{188} This view likens administrative tribunals to the regular


\textsuperscript{186} Morgan v. United States, 304 U.S. 23 (1938) (rehearing denied).


\textsuperscript{188} See Freund, Administrative Powers at 31f.
executive departments of government and is in accord with the notion that they should not be allowed to become a "headless fourth branch" of authority.\(^{159}\)

When this question came before the House of Lords in the celebrated case of *Local Government Board v. Arlidge*,\(^{190}\) it was held that in administrative determination the nominal authority need not take actual personal or mental cognizance of a case, but might assume responsibility for conclusions vicariously reached.\(^{191}\) For many years the issue was dormant in the United States. Occasionally there were decisions on the subject in the United States Supreme Court but they were isolated cases, not referring to one another, and not creative of doctrine. Some suggested that the British view would prevail\(^ {192}\) whereas others implied that personal action would be required of administrators.\(^ {193}\) Many of these authorities related to "service" functions of government or action in the ten executive departments of government and none of them were even cited\(^ {194}\) in the great case which settled our law, the first decision in *Morgan v. United States*.\(^ {195}\)

Power was conferred upon the secretary of agriculture to fix the prices charged by livestock commission men by the *Packers & Stockyards Act*.\(^ {196}\) A bill was brought seeking an injunction against the enforcement of the rate order. A hearing

\(^{159}\) See Report of President's Committee on Administrative Management (1937) at 40f.

\(^{190}\) A. C. 120 (1915).

\(^{191}\) Freund, *Administrative Powers* at 160.


\(^{194}\) Strangely enough, *Local Government Board v. Arlidge* cited *supra* note 182, was not even mentioned in the government's brief and only receives casual mention in the opinion.

\(^{195}\) 296 U.S. 468 (1936).

\(^{196}\) *Packers & Stockyards Act of 1921*, 42 Stat. 159 at 166, 7 U.S.C.A. sec. 211: "Whenever after full hearing ... the Secretary is of opinion that any rate ... is or will be unjust ... the Secretary may determine and prescribe what will be the reasonable rate ... ." It will be noted that the words "after full hearing" permit the resting of the decision in *Morgan v. United States* upon statutory grounds. *But cf.* 42 Stat. at 168, 7 U.S.C.A. sec. 402 (secretary may prosecute an inquiry in person or by such agents as he may designate).
had been properly held but, the bill alleged, oral argument had been made to an assistant secretary of agriculture whereas the secretary himself signed the order reducing the rates of the commission men. It was further alleged, on information and belief, that the secretary himself not only had not heard the arguments but had given no consideration to the transcripts thereof or the evidence taken before the trial examiner. On demurrer, a unanimous court held this procedure invalid. The rule was enunciated that he who decides must hear, the Chief Justice declaring:197

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

When the case reached the court a second time light was shed on how much personal attention must be given the matter by an administrator,198 but the precise amount of assistance which may be rendered him remains open to further clarification.199

Despite the rude jolt which this decision gave many administrative agencies which had framed their procedure upon the pattern of nominal action200 and the burden which it places upon the administrative process,201 there are many arguments in its favor. Personal consideration, as opposed to anonymity, may be an important safeguard against arbitrary action. Divorce of purely executive from adjudicatory tasks may result from this rule and this should insulate the administrative determination from political pressure.202

197 298 U. S. at 480f.
198 See Morgan v. United States, 304 U.S. 1 at 17f. (1938).
199 E.g, may attorneys in a "review division", who have heard neither evidence nor argument, summarize the record and make proposed findings of fact? See 298 U.S. at 481f.
200 Cf. A. G.'s Committee on Division of Public Contracts at 15f, 20. Is the Walter-Logan Bill (S. 915, 76 Cong.) constitutional in providing that determinations of appeal boards shall be subject to modification of the agency concerned (sec. 4 (b))?
201 Enforced delegation may add substantially to the cost of government, for instance. See generally, Stason, Administrative Tribunals—Organization and Reorganization (1938) 36 Mich. L. Rev. 533.
202 Cf. Wallace, Letter in New York Times of 8 May 1938 at E 8, intimating that the whole procedure considered in Morgan v. United
tions, too, may play a part. In subjecting the citizenry to new forms of government control it may be advisable to go to considerable lengths at first in affording safeguards against arbitrary action. Thus protection is afforded against hasty or overzealous administrators and the persons affected are made to feel that their interests are not wholly disregarded. As the control becomes a commonplace it may be possible to expedite procedure without losing co-operation.

* * *

An administrative hearing could be conceived of as a far more summary proceeding than these authorities require. It could consist merely of an opportunity to make an oral statement to a deputy official, upon whose desk lay a file of information collected by clerks. But for better or worse, the courts insist upon an adversary proceeding, not essentially dissimilar from their own: an administrative hearing, as described herein, is neither so solemn as a criminal trial nor so casual as an investigation by a committee of the legislature.

To friends of the administrative process these procedural requirements may seem unduly burdensome. It may appear to them that matters of substance are sacrificed for the preservation of rigid, technical rules of due process. We must not forget, however, that "there are very precious values of civilization, which ultimately, to a very large extent, are procedural in their nature." And if hearings are somewhat less expeditious than would be the case under a more summary system we may remember that, "It takes space to feel, it takes time to know, and great organisms as well as small have to pause, more or less, to possess themselves and to be aware."

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States cited supra note 195 was initiated by political pressure. See Landis, The Administrative Process at 101f.

203 Cf. A. G.'s Committee on Railroad Retirement Board at 22.

204 Address of Mr. Justice Frankfurter (1938) 12 U. Cin. L. Rev. 260 at 276.

205 James, preface to Altar of the Dead.