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NOTES

SOME ADMINISTRATIVE IMPLICATIONS OF THE MORGAN DECISIONS

WALLACE MENDELSON*

Pursuant to provisions of the Packers and Stockyards Act,¹ Secretary of Agriculture Hyde in 1930 directed an inquiry into the matter of the reasonableness of the rates charged by the marketing agencies in the Kansas City Stockyards. As a result of that inquiry a rate order was issued in May 1932. But because of altered economic conditions the order was vacated in July 1932 and, after a rehearing before Assistant Secretary Tugwell, a new rate order was signed and issued on June 14, 1933 by Secretary Wallace. Fifty commission men then sought a permanent injunction in a Federal District Court against the enforcement of the order attacking principally on the merits, but also alleging inter alia that the statutory requirement of a "full hearing" had not been satisfied because the Secretary (whom Congress had charged with the rate making responsibility) had not himself heard or read the evidence or argument submitted and that his sole information in the proceedings had been derived from consultation with his departmental employees. The court granted a temporary restraining order prohibiting the enforcement of the new rate schedule on condition that the commission men deposit in court pending the final outcome of the litigation all funds collected by them in excess of those permissible under the Secretary's rate schedule, and, striking the procedural allegations, denied the permanent injunction on the merits.²

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¹ 42 Stat. 159, 166 (1921). So far as is here pertinent the Statute provides: "Sec. 310. Whenever . . . after full hearing . . . the Secretary is of the opinion that any rate, charge, regulation or practice of a stockyard owner or market agency . . . is or will be unjust, unreasonable or discriminatory, the Secretary—(a) May determine and prescribe what will be the just and reasonable rate or charge . . . to be thereafter observed in such case . . ."

² Morgan v. U. S., 8 Fed. Supp. 766 (1934).

In an appeal to the Supreme Court the judgment of the District Court was reversed and the case remanded solely on the procedural grounds raised in the stricken allegations. The crux of the Supreme Court's opinion appears in the following quotation:

"The (statutory) requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and heard by the trier of the facts.³ 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 guided by that alone, and to reach his conclusions uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."⁴

Since the District Court had stricken the procedural allegations, the case was remanded to it for further hearing with the instructions that "The defendants should be required to answer these allegations, and the question whether plaintiffs had a proper hearing should be determined."⁵ On retrial Secretary Wallace and members of his staff testified at some length as to the part which the former had played in the rate order proceedings. The testimony indicated that (although the hearing had been held before an Assistant Secretary) Secretary Wallace had read the plaintiff's brief and some portions of the record and had made his own decision, though relying in part at least on *ex parte* consultation with, and memoranda from, his departmental subordinates. A permanent injunction was again denied. On appeal the Supreme Court was apparently satisfied that the requirement indicated in its former opinion had been met (though this is not entirely clear), but reversed the lower court's order this time on the procedural ground that:

"The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the

³ This fiat constitutes the basic decision in the entire Morgan litigation. Since the court itself recognizes that rate-making is legislative in nature, it is hardly *obvious* (though it might upon examination prove to be true) that Congress intended to require a judicial and not a legislative hearing analagous to a Congressional committee hearing. Wouldn't the court have done well to have explored this question more thoroughly? See the Assigned Car Cases, 274 U. S. 64 (1926), and Norwegian Nitrogen Products Co. v. U. S. 288 U. S. 294 (1933) (both involving administrative proceedings) in which the essentially different natures and purposes of legislative and judicial hearings is recognized.

⁴ 298 U. S. 468, 480.

⁵ *Ibid.*, at page 482.

opposing party and to meet them. * * * 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 proposes and to be heard upon its proposals before it issues its final command.*

This second requisite of a "full hearing", it was held had not been met because the rate inquiry, initiated under a generally worded complaint, did not fully apprise the commission men of the Government's position and because this defect had not been cured at any subsequent stage of the proceedings.

Thus the actual holdings of the first two Morgan cases in the abstract seem clear, reasonable and not at all inconsistent with the effective administrative regulation. They may be epitomized by the following catch phrases from the court's opinions: "The one who decides must hear"⁷ and he whose action is the subject of proposed administrative regulation is entitled "to be fairly advised of what the government proposes and to be heard"⁸ thereon.

But the application of these abstract propositions to the concrete facts of the administration of the statute in question is not easy. How can the Secretary of Agriculture in view of his many other duties be expected to hear in person all of the evidence and argument where, as in the principal case, the record of the evidence alone, exclusive of exhibits, exceeded 10,000 pages? How is it possible to specify changes where the proceeding begins simply as an inquiry into existing conditions? The court was not oblivious to these difficulties. In regard to the methods by which they might be solved some interesting observations were made suggesting the use of a trial examiner and a trial examiner's report. Thus in the first Morgan opinion, it was said that:

"* * * while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented * * * we can not say that that particular type of procedure was essential to the validity of the hearing."⁹

In the second opinion the court referred to the "absence of any report by the examiner" in deprecatory terms and then

* 304 U. S. 1, 18.

⁷ 298 U. S. 468, 481.

* 304 U. S. 1.

⁸ 298 U. S. 468, 478

reconciled this attitude with its former remarks on the following grounds:

"But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them."¹⁰

The inferences to be drawn from these observations, it would seem, are that a trial examiner's report, subject to the right of the parties to except to, and argue on, points therein presented, may be relied upon to satisfy the Morgan case requirements, as set out above, that is: 1. to specify charges, where, as in the principal case, that would be impossible at the outset because the proceeding began as a general inquiry into existing conditions, and 2. to form the basis for the responsible official's (here the Secretary of Agriculture) final order, where that official does not himself hear (or read) all of the evidence and argument.

Equally as important in their administrative aspects, however, as the actual holdings of the first two Morgan cases are the implications which they contain. Outstanding in this connection is the cavalier way in which the District Court authorized the interrogation of the Secretary of Agriculture in response to the Supreme Court's instructions that the defendants "be required to answer" the allegations that the Secretary in making his final order had not considered the evidence or arguments of the commission men and that his information in the case had been derived solely from consultation with his subordinates.¹¹

¹⁰ 304 U. S. 1, 22.

¹¹ Immediately after the second Morgan case the N. L. R. B. was faced in the courts in a considerable number of cases with allegations "on information and belief that the Board members themselves did not consider or appraise the evidence or did not make the findings of fact which were issued as the Board's decision. Such pleading has usually been supplemented by a motion to require the Board members and others to answer interrogatories, or a motion to make depositions of the Board members and others, or both." J. Warren Madden, *Handbook of the Assoc. of American Law Schools*, December, 1938.

The extent of the threat to efficient administration of the indiscriminate use of interrogatories is evidenced by a request of council in an N. L. R. B. case for a court order requiring each member of the N. L. R. B. to answer a list of fifty-seven questions in most minute detail concerning his conduct in relation to, and method of deciding a certain case. See *New York Times*, May 3, 1938. For an excellent

Modern government, it is submitted, can not possibly operate, if administrative officials may be called from their duties and required to explain to a court the manner in which they reach their decisions upon the mere allegation of irregularity.¹²

Another important aspect of the first Morgan case relates to the problem of the subdelegability of administrative functions. The Secretary of Agriculture in addition to many other administrative and political duties has been entrusted by Congress with the administration of forty-two regulatory statutes.¹³ It is certainly not psychologically possible for a single man to do such a job with the personal attention required by the first two Morgan decisions. Some sort of subdelegation is necessary. But the Supreme Court said that the question of subdelegation was not involved and brushed aside the whole matter on the ground that:

"The Assistant Secretary, who had heard (the evidence and argument) assumed no responsibility for the findings and order, and the Secretary, who had not heard, did assume that responsibility."¹⁴

One does not want to quibble over words, but it seems clear that the problem of subdelegation was involved in the sense that the Secretary had attempted to place at least part of his hearing-deciding power in the hands of the Assistant Secretary. What seems to have bothered the court was the apparent splitting up of the power by delegating the hearing aspect and retaining and deciding aspect without the guarantee of a coordinate exercise of the two. Such an approach, it is submitted, is excessively narrow and "legalistic" and ignores, in fact precludes the possibility of, any sense of departmental solidarity or ministerial responsibility.¹⁵ Since the Secretary assumed re-

summary of the difficulties which the first two Morgan decisions raised in the lower courts see *Aftermath of the Morgan Decisions*, an unsigned note in 25 Iowa Law Review 622 (1940). See also W. Mendelson, *The Public Service Commission of Wisconsin: A Study in Administrative Procedure*, 1940 Wisconsin Law Review 503, 534 (1940).

¹² This problem is dealt with in the fourth Morgan case. See page 416, below.

¹³ A. H. Feller, *Prospects For the Further Study of Administrative Law*, 47 Yale Law Journal 647, 622 (1938).

¹⁴ 298 U. S. 468, 479.

¹⁵ The English case of *Local Gov. Bd. vs. Arlidge*, House of Lords, 1915. A. C. 120, involves substantially the same problem as that raised in the first Morgan case. A different result was reached however. Note the remarks of Lord Haldane in his opinion in the English case: "The Minister at the head of the Board is directly

sponsibility for the order in question by issuing the same in his own name, it appears difficult to justify the court in concerning itself with the methods by which he made his determination. Under the circumstances this would seem to be a political not a legal question.^{15a} Finally, the court's language would seem to justify the inference that if the Secretary had subdelegated the entire power to hear and decide the case and issue an appropriate order, the whole proceeding would have been sustained. This in fact seems to be the only possible formal solution to the dilemma in which the Secretary is placed by the extent of his duties on the one hand and the requisites of the first two Morgan decisions on the other. Such a solution would entail the "atomization" of the Department of Agriculture.^{15b}

After the invalidation of the Secretary's rate order in the second Supreme Court decision the District Court ordered the

responsible to Parliament like any other minister. He is responsible not only for what he himself does, but for all that is done in his department. The volume of work entrusted to him is very great and he can not do the great bulk of it himself." It was held that Arlidge was not entitled: (1) to know who specifically within the department was to decide his case, (2) to argue orally before such person or persons, nor (3) to see the inspector's report as submitted to such person or persons. The Report of the Committee on Minister's Powers (Great Britain, 1932) seems to assume the first proposition, expressly accepts the second (Sect. III, par. 22, IV) and rejects the third (Sect. III, par. 22, VI).

^{15a} This position apparently is taken by the Supreme Court in the fourth Morgan decision. See page 416, below. But contrast the view taken in the Report of the Attorney General's Committee on Administrative Procedure (1941) in which it is said at page 52, "The heads of the agency should do personally what the heads purport to do."

^{15b} The Attorney General's Committee is apparently willing to accept this result. "We here recommend similar relief (i.e., sub-delegation to department subordinates) so far as the hearing and initial decision of cases is concerned and have outlined the restricted nature of the review which should be given those decisions. But that review should be given by the officials charged with the responsibility for it, and the review so given should include a personal mastery of at least those portions of the records embraced within the exceptions." Report, page 52.

See L. L. Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, University of Chicago Law Review 401, 430 (1941). "Here again the committee's recommendation is based upon a choice between competing conceptions, rather than on a demonstration that any other system would work positive injustice. It no doubt feels that the supposed symbolic importance of merely formal connection with the adjudication has been exaggerated or at least is overborn by the values assumed to arise from personal decision." The "competing conceptions" may be seen respectively in the Arlidge case and the first Morgan case (or in the fourth and first Morgan cases).

funds which had been accumulating in court as a result of the original temporary restraining order (\$586,000. as of November, 1937) to be returned to the commission men.¹⁶ From this order a third appeal was taken to the Supreme Court.¹⁷ In the meanwhile the Secretary of Agriculture had reopened the original rate-making proceedings for the purpose of correcting the procedural defects indicated in the first two Morgan decisions and to issue accordingly a valid order retroactively effective as of June 14, 1933—the date of his original order.

In the third Morgan case the Supreme Court reversed the lower court's distribution order and remanded the case to await the Secretary's determination so as to have an "appropriate basis for its action" in distributing the impounded funds. The crux of the decision for present purposes may be paraphrased thus in the words of the court:

"in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice . . . Neither body should repeat in this day the mistake made by courts of law when equity was struggling for recognition as an ameliorating system of justice . . ."¹⁸ The District Court in staying the Secretary's original order and requiring the collections in excess thereof to be paid into court "assumed the duty of making proper distribution of the fund upon termination of the litigation. The duty was the more important here because the court's . . . (temporary restraining) order not only deprived the public of the benefit of lower rates but obstructed any effective reparation order by the Secretary. . . . Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its own discretion in such manner as to effectuate the policy of the (Packers and Stockyards) Act and facilitate the system of administration which it has set up, require retention of the (impounded) fund by the district court until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceeding pending before him."¹⁹

¹⁶ Morgan v. U. S., 24 Fed. Supp. 214 (1938).

¹⁷ U. S. v. Morgan, 307 U. S. 183 (1939).

¹⁸ Compare Dean Pound's remark made some thirty-two years earlier that "The two rival agencies in government are law and administration." 14 Proc. Amer. Pol. Sci. Assn., (1907) 232, 233.

¹⁹ 307 U. S. 183, 191, 193, 198.

"The court avoided any general holding that an administrative body may correct a procedural defect in a rate order and give it effect as of its original date. But its decision nonetheless takes an important step to counteract the possibility that its recent willingness to invalidate orders for improper procedure might delay the effective date of regulation until the completion of a procedurally perfect proceeding. By holding out to similar litigants the prize of interim freedom from regulation the likelihood of further delay of final determination would have been increased because of more frequent and more vigorous procedural objections."

An unsigned note in 53 Harvard Law Review 105, 106 (1939).

Thereafter (having in the reopened proceedings served the commission men with the rate order of June 14, 1933, and the findings in support thereof as a starting point of the new inquiry, having appointed an examiner to take new evidence, and having submitted the examiner's report to the commission men and heard their exceptions and arguments) the Secretary of Agriculture issued an order prescribing the same rates as those set in the original order of June, 1933, though supported by somewhat different calculations. Thereupon the Government moved the District Court to distribute the impounded funds in accordance with the Secretary's order, but the court (having again authorized the commission men to interrogate the Secretary for the purpose of determining the propriety of the reopened rate proceedings) held the new order invalid on procedural (and other here irrelevant) grounds.²⁰

On appeal the Supreme Court, speaking through Mr. Justice Frankfurter, sustained the Secretary's order on all counts.²¹ With respect to the alleged impropriety of the Secretary's conduct of the proceeding which the commission men strenuously urged on the basis of the Secretary's own testimony, the court had this to say:

"* * * * the short of the business is that the Secretary should never have been subjected to this examination (by the lower court). The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding'. * * * Such an examination of a judge would be destructive of judicial responsibility. * * * Just as a judge can not be subjected to such a scrutiny, * * * so the integrity of the administrative process must be equally respected."²²

Thus succinctly was terminated the threat which has hung over the administrative process since the first Morgan decision.²³ But methodologically that threat was abolished in exactly the same manner in which it originated; namely, by analogy to the judicial process. This in itself should be a sufficient condemnation of such reasoning as a method of determining the propriety or impropriety of administrative procedures.

Curiously the court only a few months earlier in a unanimous opinion written by Mr. Justice Frankfurter had expressly recognized the weakness of this methodology in the following terms:

²⁰ 32 Fed. Supp. 546, April, 1940.

²¹ U. S. v. Morgan, 313 U.S. 409 (1941).

²² *Ibid.*, at page 422.

²³ See footnote 6.

"Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law. Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigations in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation (to administrative proceedings) of the rules of procedure, trial and review which have been evolved from the history and experience of courts."²⁴

With respect to matters other than those concerning administrative procedure the final (fourth) Morgan decision is important in the attitude which it exemplifies on the classical problem of the relationship between administrative agencies and courts in rate making proceedings. On the past the courts have in effect made themselves the ultimate arbiters of rate questions by their insistence in reviewing not only the conclusions of law, but also the findings of fact, of administrative rate regulating agencies.²⁵ To the conventional objection urged by the commission men in the final Morgan case that the Secretary of Agriculture's findings of fact were not supported by adequate evidence the court answered briefly:

"To reexamine here with particularity the extensive findings made by the Secretary and to test them by a record of 1340 printed pages and thousands of additional exhibits would in itself go a long way to convert a contest before the Secretary into one before the courts. * * * We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive

²⁴ Federal Communications Commission v. Pottsville Broadcast-
ing Co., 309 U. S. 134 (1940).

²⁵ St. Joseph Stockyards Co. v. United States, 298 U. S. 38 (1936);
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920).

certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment."²⁸

²⁸ 313 U.S. 409, 417: Compare Mr. Justice Frankfurter's remarks in his concurring opinion in *Driscoll v. Edison Power & Light Co.*, 307 U.S. 104, 122 (1939). "The determination of utility rates—what may fairly be exacted from the public and what is adequate to enlist enterprise—does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment. Those are matters for the application of whatever knowledge economics and finance may bring to the practicalities of business enterprise. The only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process."