

# Administrative Procedure and Civil Liberties

Foster H. Sherwood

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Foster H. Sherwood, *Administrative Procedure and Civil Liberties*, 33 Cornell L. Rev. 235 (1947)  
Available at: <http://scholarship.law.cornell.edu/clr/vol33/iss2/3>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# ADMINISTRATIVE PROCEDURE AND CIVIL LIBERTIES

FOSTER H. SHERWOOD

Most students of government are coming to recognize the importance of administrative action as the very essence of government. This awareness is of comparatively recent origin, dating back not much more than a generation. As it has grown there has developed a resistance based logically on a solicitude for individual rights. It is now recognized that the most difficult problem of American government is that of establishing and maintaining the delicate balance between the general welfare and individual rights of person and property. This problem is revealed in sharp relief in the field of procedural administrative law as it is affected by the guarantees in the first eight Amendments to the Constitution. It is emphasized by the demonstrated and growing unwillingness of the federal courts to inquire too closely into the substance of administrative decisions.

The Bill of Rights most frequently imposes limitations on administrative procedure (as distinguished from administrative action) with respect to the following guarantees: freedom from unreasonable searches and seizures; from compulsory self-incrimination; of jury trial; and of procedural due process of law. Other guarantees, such as habeas corpus, are not a part of the administrative process, or, like freedom of speech and press, are substantive rather than procedural in form as they affect administrative action, so that they present no special problems to the student of civil liberties.

## *Searches and Seizures*

Most federal administrative bodies have in their fundamental laws provisions which impose on them two duties: the task of enforcing the law against individual violators; and the duty of recommending amendments to the Congress designed to improve the basic statute. Both require investigations, and investigations are seldom successful unless armed with the power of subpoena.

With respect to investigations incident to the enforcement of existing law, the federal courts have retreated markedly from their original position which was one of extreme concern for the privacy of litigants. At one time the subpoena power was so narrowly interpreted as to require a showing that the evidence being sought was required in a current proceeding and not merely a possible one; that it was needed in a proceeding over which the adminis-

trative body had jurisdiction; and that even without the evidence, a showing of probable violation could be made. Retreat from this position has been along several lines:

1. *The Type of Business Being Regulated.* As early as *Hale v. Henkel* it was implied that corporations had less guarantees than natural persons.<sup>1</sup> But the decision in *Silverthorn Lumber Co. v. U. S.* held that this distinction was not sound and for a time all respondents were protected equally from fishing expeditions.<sup>2</sup> The courts next distinguished those businesses affected with a public interest from ordinary private business, giving to the latter a greater immunity from searches and seizures. The former, for example, may be required to submit regular reports which can be used in subsequent complaint cases.<sup>3</sup> And Congress can now authorize an inspection in such businesses even when no reason to suspect a violation exists,<sup>4</sup> or to determine whether the business falls within the jurisdiction of the agency before filing a complaint.<sup>5</sup> Further, it has become evident that the courts will permit recovery of damages for obtaining evidence illegally only in an exceptionally clear case of flagrant and deliberate violation of this civil right.<sup>6</sup>

2. *The Point at Which the Immunity Will Be Enforced.* The Supreme Court recently concluded on the basis of decisions on searches and seizures and self-incrimination that "without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to

---

<sup>1</sup>201 U. S. 43, 26 Sup. Ct. 370 (1908). This implication was reinforced by language used in some subsequent cases. *Nelson v. U. S.*, 221 U. S. 361, 31 Sup. Ct. 538 (1910); *Wheeler v. U. S.*, 226 U. S. 478, 33 Sup. Ct. 158 (1912); *Linn v. U. S.*, 251 Fed. 476 (C. C. A. 2d 1918). See Comment, 40 MICH. L. REV. 78 (1941).

<sup>2</sup>251 U. S. 385, 40 Sup. Ct. 182 (1920). *F. T. C. v. American Tobacco Co.*, 264 U. S. 298, 44 Sup. Ct. 336 (1923).

<sup>3</sup>*Bartlett Frazier Co. v. Hyde*, 65 F. 2d 350 (C. C. A. 7th 1933) cert. denied 290 U. S. 654, 54 Sup. Ct. 70 (1933). Cf. *U. S. v. Jones*, 72 F. Supp. 48 (S. D. Miss. 1947).

<sup>4</sup>*Fleming v. Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7th 1940) cert. denied 311 U. S. 690, 61 Sup. Ct. 69 (1940).

<sup>5</sup>*N. L. R. B. v. Barrett Co.*, 120 F. 2d 583 (C. C. A. 7th 1941). It may be noted that the courts have now come to treat administrative bodies as possessed of powers as broad at least as those of a grand jury. Cf. *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. Ct. 538 (1910); *Boehm v. U. S.*, 123 F. 2d 791 (C. C. A. 8th 1941).

<sup>6</sup>*Jones v. Kennedy*, 121 F. 2d 40 (App. D. C. 1941).

be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant."<sup>7</sup> This raises the problem of the point at which the inquiry into the agency's jurisdiction and the relevancy of the materials sought may be made. In the same case the rules applicable to grand jury and Congressional investigation are held applicable to administrative proceedings: that a complaint or indictment need not be issued prior to the investigation; that the purpose need only be one that the Congress could authorize; and that the documents sought be relevant. The Court in this and the *Endicott Johnson* case<sup>8</sup> held that these are questions to be finally determined normally only after hearing and on review or application for enforcement of the administrative order. That, so long as in an application for enforcement of the administrative subpoena the administrator or board shows "probable cause," it is the intent of the Congress that these questions be determined in the first instance by the administrative body rather than through judicial "forecasts of the probable results of the investigation."<sup>9</sup> These matters are to be determined by the court at the interlocutory stage on the basis of the pleadings only, plus such reasonable inferences as the court wishes to draw; which at least in the *Oklahoma Press* case were general in the extreme—so much so that only by assuming a prima facie case for the government was the application sustained.

With respect to administrative investigations of value in making recommendations to the Congress, the broadened power of subpoena has had another basis. Here the courts similarly were very solicitous of the personal rights of privacy at an early date. But the limit here was one arrived at by strict interpretation of the statutes authorizing administrative issuance of subpoenas. Thus when the Interstate Commerce Commission attempted to conduct a general investigation at the beginning of the century the Supreme Court put the constitutional issue to one side and merely held that Congress had not delegated the power to be used except in complaint cases.<sup>10</sup> But

---

<sup>7</sup>*Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 208, 66 Sup. Ct. 494, 505 (1946), followed in *Penfield Co. v. S. E. C.*, 330 U. S. 585, 67 Sup. Ct. 918 (1947).

<sup>8</sup>*Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 63 Sup. Ct. 339 (1944). See F. H. Sherwood, *The Enforcement of Administrative Subpoenas*, 44 Col. L. Rev. 531 (1944).

<sup>9</sup>*Blair v. U. S.*, 250 U. S. 273, 282, 39 Sup. Ct. 468, 471 (1918).

<sup>10</sup>*Harriman v. I. C. C.*, 211 U. S. 407, 29 Sup. Ct. 115 (1908). To the same effect *F. T. C. v. American Tobacco Co.*, 264 U. S. 298, 44 Sup. Ct. 336 (1924), and *Cudahy Packing Co. v. U. S.*, 15 F. 2d 133 (C. C. A. 7th 1926). A much more liberal interpretation is found in the case of state commissions at least with respect to corporations created by or admitted to the state. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. 178 (1907); *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 29 Sup. Ct. 370 (1908).

when the Interstate Commerce Commission statute was broadened in 1910 the Court held that no constitutional guarantee had been breached.<sup>11</sup> Constitutional limitations with respect to searches and seizures remaining, however, seem reducible to two: (1) The court will usually interpret the statute narrowly and assume the lack of any power not expressly given;<sup>12</sup> and (2) the subject under investigation must be one upon which Congress is able to legislate. That is, the subpoena power given an administrative body by the Congress can be no greater than the power which Congress could itself exercise. The same limits seemingly apply in the use of questionnaires and regular reports.<sup>13</sup>

### *Self-Incrimination*

The immunity from compulsory self-incrimination in administrative proceedings is said to be as extensive as that in ordinary adversary adjudication.<sup>14</sup> As a matter of practice most federal agencies inform witnesses of this privilege although presumably this is not necessary. The statutes of the more important federal agencies permit the agency to compel disclosure if immunity to prosecution for the crime is given. Such a guarantee has been held to be a constitutional minimum.<sup>15</sup> At one time mere issuance of the subpoena alone gave the immunity. More recently, an express overruling of the claim by the agency has been required and has become a feature of the statutes as well.<sup>16</sup> But such silence may be purchased at a high price. Thus it has been held that refusal to testify itself may furnish the basis of an inference in administrative proceedings if the witness is not seeking to

<sup>11</sup>*Smith v. I. C. C.*, 245 U. S. 33, 38 Sup. Ct. 30 (1917). See also *Champlain Ref. Co. v. U. S.*, 329 U. S. 29, 67 Sup. Ct. 1 (1946). A similar right to carry on investigations with the aid of subpoenas has been given the S. E. C. 54 STAT. 853, 15 U. S. C. § 80-b-9 (b) (1940). However this clause has never been challenged as to its constitutionality.

<sup>12</sup>*Cf. Cudahy Packing Co. v. Holland*, 315 U. S. 357, 62 Sup. Ct. 651 (1942); *La Porta v. Bitker*, 145 F. 2d 445 (C. C. A. 7th 1944). There is some evidence, however, of a relaxation of this requirement; compare *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 67 Sup. Ct. 1129 (1947).

<sup>13</sup>*Baltimore & Ohio R. R. v. I. C. C.*, 221 U. S. 612, 31 Sup. Ct. 621 (1910); *Bartlett Frazier Co. v. Hyde*, 56 F. 2d 245 (N. D. Ill. 1932); *Bartlett Frazier Co. v. Hyde*, 65 F. 2d 350 (C. C. A. 7th 1933).

<sup>14</sup>*U. S. v. Murdock*, 284 U. S. 141, 52 Sup. St. 63 (1931). See Note, 54 HARV. L. REV. 1214 (1941). The Federal Constitution is less stringent with respect to state action. *Adamson v. California*, 332 U. S. 46, 67 Sup. Ct. 1672 (1947).

<sup>15</sup>*Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644 (1895); in spite of several earlier lower court decisions which held that the evidence thus obtained could not be used, although the crime revealed could be prosecuted on other evidence. *In re Strouse*, 23 Fed. Cas. 261, No. 13,548 (D. Nev. 1871) and cases cited.

<sup>16</sup>Compare *Sherwin v. U. S.*, 268 U. S. 369, 45 Sup. Ct. 517 (1924); and *Benetti v. U. S.*, 97 F. 2d 263 (C. C. A. 9th, 1938).

enforce a right.<sup>17</sup> Presumably also such silence may be used against the respondent by those tribunals whose findings of fact are final, if other supporting evidence exists.

This is not a right possessed by a corporation, whether the subpoena is issued to the corporation,<sup>18</sup> or to the officer.<sup>19</sup> While in other than administrative law cases it is clear that the claim will be investigated by the court and a simple assertion of the privilege will not ordinarily discharge the respondent from producing the records demanded for the court's inspection,<sup>20</sup> the rule in the administrative law field has been subject to considerable recent change. Originally, the court would hear such pleadings in interlocutory proceedings for the enforcement of the administrative subpoena,<sup>21</sup> but since the *Endicott Johnson* decision as we have seen, the court's function at this stage approaches a routine one. Presumably such questions will now be determined in the first instance by the administrative tribunal, and finally in separate criminal court proceedings based upon any evidence thus uncovered.

#### *Jury Trial*<sup>22</sup>

The federal constitutional guarantee of a trial before a judge and jury is, at the very least, incompatible with the objectives and forms of administrative action. Half-hearted efforts to reconcile these contradictory methods have taken two forms:

1. Judicial trials *de novo* with a jury of a cause previously determined without a jury.<sup>23</sup> Such was the early practice in the District of Columbia courts. And in New England for a time there was a statutory right to jury trial and then to an appellate court retrial with a jury. As far as is known, this practice has never been used with respect to review of decisions of national administrative authorities, although ad-

---

<sup>17</sup>U. S. *ex rel. Vajtauer v. Comm'r. of Immigration*, 273 U. S. 103, 47 Sup. Ct. 302 (1926).

<sup>18</sup>*Wilson v. U. S.*, 221 U. S. 361, 31 Sup. Ct. 538 (1910).

<sup>19</sup>*Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370 (1908). Nor may the officer invoke it in his own behalf. *Drier v. U. S.*, 221 U. S. 394, 31 Sup. Ct. 550 (1910); *Wheeler v. U. S.*, 226 U. S. 478, 33 Sup. Ct. 158 (1912) (with respect to papers and records in his custody).

<sup>20</sup>*Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (1907); *aff'd*, 207 U. S. 541, 28 Sup. Ct. 178 (1908).

<sup>21</sup>*Commonwealth v. Southern Express Co.*, 160 Ky. 1, 169 S. W. 517 (1914).

<sup>22</sup>See generally Note, 56 HARV. L. REV. 282 (1942).

<sup>23</sup>*Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301 (1887); *Capital Traction Co. v. Hop*, 174 U. S. 1, 19 Sup. Ct. 580 (1898).

ministrative action may give rise to criminal prosecution where the administrative decision is collaterally attacked.<sup>24</sup>

2. Administrative findings are made prima facie correct with judicial review of them provided in a court using a jury.<sup>25</sup>

Since these have proved unsatisfactory expedients, the most common line of reasoning adopted by the federal courts to reconcile administrative procedure with the guarantee of jury trial maintains that the guarantee applies only to those proceedings in which a jury was used at the common law. Thus, the prosecution of petty offenses does not require a jury since such offenses were triable before manorial, and other non-common law courts. Much is made of the language of the Seventh Amendment. Since it guarantees the "right" of trial by jury rather than "jury trial," the reference is to the extent of the right and in the circumstances provided for in the common law of England as of 1791.<sup>26</sup> Seemingly in such cases where the administrative action must be quickly made, the delay of a jury trial is recognized as unnecessary since it would destroy the effectiveness of government. For when, in the opinion of the court, time is not so important, the jury trial has been required. Thus the collection of "taxes" which are found to be not taxes but criminal penalties may not be entrusted to administrative agents without jury trial.<sup>27</sup> Yet other administrative penalties may be imposed without jury trials; for example, punishment of those responsible for admitting aliens into the United States who are afflicted with communicable diseases,<sup>28</sup> or the destruction or confiscation of property which is a menace to health or safety.<sup>29</sup> The proceedings of courts-martial which are openly penal in nature

<sup>24</sup>Cf. *U. S. v. Garvin*, 71 F. Supp. 545 (W. D. Pa. 1947).

<sup>25</sup>*Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412, 35 Sup. Ct. 328 (1914); *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458 (1920).

<sup>26</sup>*Bank of Columbia v. Okely*, 4 Wheat. 235 (U. S. 1819). And see JOSEPH STOREY, COMMENTARIES ON THE CONSTITUTION OF THE U. S. 1778-1789 (1833); *Dimick v. Schiedt*, 293 U. S. 474, 55 Sup. Ct. 296 (1934); *Wickwire v. Reinecke*, 275 U. S. 101, 105-106, 48 Sup. Ct. 43, 44 (1927), "It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them, when illegal, without a jury trial—if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied."

<sup>27</sup>*Dukich v. Blair*, 3 F. 2d 302 (E. D. Wash. 1925); *Regal Drug Co. v. Wordell*, 260 U. S. 386, 43 Sup. Ct. 152 (1922).

<sup>28</sup>*Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 29 Sup. Ct. 671 (1908); or deportation of aliens, *Bridges v. Wixon*, 144 F. 2d 927 (C. C. A. 9th 1944). Presumably administrative agents may even be empowered to find individual aliens guilty of illegal entry and to expel them. But no imprisonment or property confiscation can take place in such cases without a jury. *Wong Wing v. U. S.*, 163 U. S. 228, 16 Sup. Ct. 977 (1895).

<sup>29</sup>See CHAMBERLAIN, DOWLING, HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES c. III (1942).

are not violative of the jury trial guarantee simply because "The power of Congress to provide for the trial and punishment of military and naval offenses in the manner practiced by civilized nations is conferred quite independent of the Third Article of the Constitution defining the Judicial power."<sup>30</sup> With respect to some other activities, the reasoning seems to be that the function will be better performed without rather than with a jury. This is so where the function involves expertness in fact finding, such as assessment of damage or property values in condemnation proceedings,<sup>31</sup> workmen's compensation,<sup>32</sup> or reparation orders.<sup>33</sup>

Although the courts are remarkably uniform in not requiring a jury trial, the above by no means exhausts the reasons given. Thus with respect to removal from office, jury trial is not required, sometimes because this would destroy the public's remedy in that the term of office would expire long before the completion of the trial in many cases; and sometimes because the lack of this right was one of the conditions of the position accepted by the incumbent.<sup>34</sup>

#### *Procedural Due Process of Law*

Closely associated with the foregoing guarantees is the Fifth Amendment assurance of procedural due process of law. Historically, as Professor Gellhorn has pointed out,<sup>35</sup> the specific content of this phrase has been determined by two factors: what the judge believes is fair, and what has been done customarily and by long usage. These requirements which concern the forms of notice, hearing, findings, and the deciding function, have become in the last generation in particular so technical that their substantive content cannot be analyzed at any one place and time. Consequently, I am limiting this analysis to only one aspect of the whole field, the judicial criteria of fairness. For actually, Professor Gellhorn's two factors come to this, since the traditional forms of the common law or extended usage are regarded by the judicial mind as Coke's "absolute perfection of reason" by virtue of their antiquity.

---

<sup>30</sup>Reilly v. Pescor, 156 F. 2d 632, 635 (C. C. A. 8th 1946). Compare *Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 1 (1942).

<sup>31</sup>U. S. v. Jones, 109 U. S. 513, 519, 3 Sup. Ct. 346, 350 (1883); *Bauman v. Ross*, 167 U. S. 548, 593, 17 Sup. Ct. 966, 970 (1896).

<sup>32</sup>*Crowell v. Benson*, 285 U. S. 22, 45, 52 Sup. Ct. 285, 297 (1931); *Abrecht-Lynch Corp. v. Clark*, 30 F. 2d 144 (D. Md. 1929).

<sup>33</sup>*N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, 57 Sup. Ct. 615, 629 (1936).

<sup>34</sup>*Cf.* Note, 3 A. L. R. 232 (1919).

<sup>35</sup>GELLHORN, ADMINISTRATIVE LAW CASES AND COMMENTS 335 *et seq.* (1940).

1. *When Are Notice and Hearing Required.* In the first place it is quite clear that the requirements of notice, etc., are not invariable. Exceptions are of two kinds: those traditional and familiar to the common lawyer; and those where the inequity of such a requirement in a new field of regulation is obvious and irrefutable.

With respect to the first, the Supreme Court of the United States as early as 1856<sup>36</sup> pointed out that "due process" was not always "judicial process" and that the common law was not unacquainted with executive and summary procedure without the safeguards of the judicial system. The Supreme Court of Michigan in 1874 enumerated some of the situations in which common law guarantees of fair play were not required, and concluded by saying:

"A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection. To require that the action of the government, in every instance where it touches the right of the individual citizen, shall be preceded by a judicial order or sentence after a hearing, would be to give the judiciary a supremacy in the state, and seriously to impair and impede the efficiency of executive action."<sup>37</sup>

Such fields of action where notice and hearing were not required at the common law as a prerequisite to action include among other subjects military law,<sup>38</sup> taxation,<sup>39</sup> eminent domain,<sup>40</sup> and public health and safety measures.<sup>41</sup>

The second type of exception—those situations unknown to the common law, but where substantial justice would not seem to require notice and hearing as preliminary to action—have recently been summarized by the Supreme Court as comprised of those decisions which "leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity."<sup>42</sup> Specifically, such instances include:

- a. Legislative administrative action such as a rate order, where the courts are open to review before penalties run against respondents.<sup>43</sup>

<sup>36</sup>*Murray's Lessee v. Hoboken Land. & Imp. Co.*, 18 How. 272 (U. S. 1855).

<sup>37</sup>*Weimer v. Bunbury*, 30 Mich. 201, 215 (1874), cited in GELLHORN, ADMINISTRATIVE LAW CASES AND COMMENTS, 335 *et seq.* (1940).

<sup>38</sup>*Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 1 (1942).

<sup>39</sup>*Bi-Metallic Co. v. Colorado*, 239 U. S. 441, 36 Sup. Ct. 141 (1915).

<sup>40</sup>*Bragg v. Weaver*, 251 U. S. 57, 40 Sup. Ct. 62 (1919).

<sup>41</sup>*People ex rel. Lodes v. Dep't of Health*, 189 N. Y. 187, 82 N. E. 187 (1907).

<sup>42</sup>*Yakus v. U. S.*, 321 U. S. 414, 442, 64 Sup. Ct. 660, 676 (1944).

<sup>43</sup>*Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50 (1908). But

- b. Closely associated with this exception is the general agreement by the courts that most other administrative rule-making need not be preceded by notice and hearing.<sup>44</sup>
- c. Suspension or even revocation of licenses to engage in business activities which are termed by the courts privileges rather than rights.<sup>45</sup> The power of suspension pending hearing is given to many federal agencies by statute without any fine distinction between privileges and rights being made by the courts or the Congress.<sup>46</sup>
- d. Where the publicity attendant on notice and hearing would be injurious to a private individual, e.g., requiring a respondent to reveal trade secrets.<sup>47</sup>
- e. Where notice and hearing would result in public injury due to the need for speed, e.g., suspension of mailing privileges on a charge and pending a hearing for misuse of the mails, or daily and bi-weekly market quotas fixed by the Agricultural Marketing Administration, or investigation of reserve requirements of national banks by the Comptroller of the Currency.
- f. Where no compelling reason seems to require them and where no interest would be served, as administrative decisions based solely on inspections, tests or elections.

2. *Must Findings Be Prepared by the Hearing Officer?* Due process seemingly requires that findings accompany any decision or order whether recommendatory or final. Where the evidence is collected by one subordinate, conclusions and recommendations may not be made by another who was not present,<sup>48</sup> unless the new subordinate conducts a second hearing.<sup>49</sup> The question of whether the death of a trial examiner during a hearing necessitates a complete rehearing is still an open one. Early last year such a rehearing was ordered by a circuit court, but this decision was vacated by

---

where such administrative orders are final, they must be preceded by these safeguards. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462 (1889); *Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 Sup. Ct. 148 (1933).

<sup>44</sup>*Guiseppe v. Walling*, 144 F. 2d 608 (C. C. A. 2d 1944); *Brown v. Winter*, 50 F. Supp. 804 (W. D. Wis. 1943).

<sup>45</sup>*Tuttrup, Necessity of Notice and Hearing in the Revocation of Occupational Licenses*, 4 WIS. L. REV. 180 (1927).

<sup>46</sup>C. A. A., 52 STAT. 973 (1938), 49 U. S. C. § 401 (1946); *Packers and Stockyards Act*, 42 STAT. 164 (1921), 7 U. S. C. § 207-e (1940). Compare *Ashbacker v. F. C. C.*, 326 U. S. 327, 66 Sup. Ct. 148 (1945), and *Malonee v. Fahey*, 68 F. Supp. 418 (S. D. Cal. 1946), *rev'd*, 332 U. S. 245, 67 Sup. Ct. 1552 (1947).

<sup>47</sup>*Norwegian Nitrogen Products Co. v. U. S.*, 288 U. S. 294, 53 Sup. Ct. 350 (1933).

<sup>48</sup>U. S. *ex rel. Ohm v. Perkins*, 79 F. 2d 533 (C. C. A. 2d 1935).

<sup>49</sup>U. S. *ex rel. Minute v. Reimer*, 83 F. 2d 166 (C. C. A. 2d 1936).

the Supreme Court at the request of the respondent so the question remains unanswered.<sup>50</sup> In such event the courts are much impressed with the wastefulness of requiring a complete rehearing and seem to believe that fairness to all parties will be better served by speed than by requiring recommendations to be furnished the deciding officers by the one who had opportunity to see and judge the witness. When the hearing is held before a deciding body itself, a change in personnel is not fatal.<sup>51</sup> Apparently this is in part because the courts recognize the need of such officers to depend upon time saving devices such as sitting in divisions; and in part because it is recognized that there is no constitutional right to appear and present oral argument before such a body if a hearing has already been offered at some prior stage of the proceedings,<sup>52</sup> or if no substantial injustice in the particular case will be produced by a denial of an opportunity to argue orally.<sup>53</sup>

Where recommendations and findings are made by subordinates, however, there must be an opportunity for the person adversely affected to challenge them before a final decision,<sup>54</sup> although the deciding body need not forewarn a respondent of its intent to reverse findings and recommendations of a trial examiner which are favorable to respondent.<sup>55</sup>

3. *Content of Findings.* Here the decisions seemingly require the administrative body to make findings of fact of three types: jurisdictional,<sup>56</sup> evidentiary; and ultimate.<sup>57</sup> Beyond this point it is impossible to generalize since, as has been repeatedly pointed out by the federal courts, the specific facts included within each class will vary with the circumstances of the case.

4. *Reviewability of the Decision or Order.* It is clear that Congress may not, consistent with due process, forbid judicial review of administrative action which directly affects or threatens immediately to impair vested legal rights of person or property.<sup>58</sup> It is equally clear that Congress may not authorize judicial review, consistent with the case or controversy concept, of forms of administrative action which fail to meet this standard. Administrative action may be unreviewable because it does not directly affect individual

<sup>50</sup>F. T. C. v. Buchabaum & Co., 328 U. S. 818, 66 Sup. Ct. 1016 (1946).

<sup>51</sup>Eastland Co. v. F. C. C., 92 F. 2d 467 (App. D. C. 1937), *cert. denied*, 302 U. S. 735, 58 Sup. Ct. 120 (1937).

<sup>52</sup>Morgan v. U. S., 298 U. S. 468, 56 Sup. Ct. 906 (1936).

<sup>53</sup>Yakus v. U. S., 321 U. S. 414, 64 Sup. Ct. 660 (1944).

<sup>54</sup>Morgan v. U. S., 304 U. S. 1, 58 Sup. Ct. 773 (1937).

<sup>55</sup>N. L. R. B. v. Elkland Leather Co., 114 F. 2d 221 (C. C. A. 3d 1940); F. R. C. v. Nelson Bros. Co., 289 U. S. 266, 285-6, 53 Sup. Ct. 627, 636 (1933).

<sup>56</sup>U. S. v. Baltimore & Ohio R. R. Co., 293 U. S. 454, 55 Sup. Ct. 268 (1935).

<sup>57</sup>Saginaw-Broad. Co. v. F. C. C., 96 F. 2d 554 (App. D. C. 1938); U. S. v. Pyne, 313 U. S. 127, 61 Sup. Ct. 893 (1941).

<sup>58</sup>Yakus v. U. S., 321 U. S. 414, 64 Sup. Ct. 660 (1944).

legal rights, as is true of most administrative rules;<sup>59</sup> or because the threat is not immediate, for example, advisory administrative orders;<sup>60</sup> or it is preliminary, such as a certification order of the National Labor Relations Board.<sup>61</sup> Since this subject falls at least in part within the scope of substantive due process, no more will be said here.

It is important to note, however, that the courts are coming to emphasize these procedural questions almost to the exclusion of substantive issues. In such judicial control, the courts frequently advise the agency whose action is being reviewed of better methods or practices than the minimum requirements of due process. Thus recently a federal court advised the Civil Aeronautics Board that it should not have permitted a trial examiner to argue the case for his proposed order before the Board, although the practice was admittedly not reversible error.<sup>62</sup>

#### *The New Administrative Procedure Bill*<sup>63</sup>

No discussion of procedural due process is complete these days without some reference to aspects of the new administrative procedural code approved by the 79th Congress. The principal restrictions imposed on what has hitherto been permissible under procedural due process are:

1. Notice must precede all administrative acts, here called rules, where the statutes do not at present require it.<sup>64</sup>
2. An opportunity to participate in such rule-making is offered to "interested parties" in all the above cases of the issuance of administrative rules.

---

<sup>59</sup>*Varney v. Warhime*, 147 F. 2d 238 (C. C. A. 6th 1945), *cert. denied*, 325 U. S. 882, 65 Sup. Ct. 1575 (1945).

<sup>60</sup>*Employers Group v. N. W. L. B.*, 143 F. 2d 145 (App. D. C. 1944), *cert. denied*, 323 U. S. 735, 65 Sup. Ct. 72 (1944).

<sup>61</sup>*N. L. R. B. v. Int. Brotherhood of Elect. Workers*, 308 U. S. 413, 60 Sup. Ct. 306 (1940). Compare *Parker v. Fleming*, 329 U. S. 531, 67 Sup. Ct. 463 (1947).

<sup>62</sup>*O'Carroll v. C. A. B.*, 144 F. 2d 993 (App. D. C. 1944). See also *S. H. Camp & Co. v. N. L. R. B.*, 160 F. 2d 519 (C. C. A. 6th 1947).

<sup>63</sup>Pub. L. No. 404, 79th Cong., 2d Sess., c. 324 (June 11, 1946), 60 STAT. 237-44, 5 U. S. C. A. § 1001-1011 (Supp. 1946).

<sup>64</sup>Except where (1) judicial review is by trial *de novo*; (2) a government employee's tenure is involved; (3) decisions rest solely on inspections, tests, or elections; (4) military, naval, or foreign affairs are involved; (5) or in the case of rules where such notice is shown to be impractical, to concern matters of internal management of an agency or matters of public property, loans, grants, benefits or contracts. This presumably includes everything from the prescription of railroad accounting methods to an income tax rule. *But see Churchill Tab. v. F. C. C.*, 160 F. 2d 244 (App. D. C. 1947), holding that this agency is not bound by its own prior decision even with respect to the same respondent. *Ames Power & Light Co. v. S. E. C.*, 329 U. S. 90, 67 Sup. Ct. 133 (1946), holding that rules need not precede decisions.

And until the opportunity has been offered and presumably exhausted, the rule cannot be issued regardless of the exigencies.

3. In all cases of rule-making where statutes now require a hearing and in all cases of adjudication, decisions must be preceded by a tentative finding and proposed decision to which the respondent has a right to present objections and alternatives either orally or in writing.<sup>65</sup> And even before such a tentative decision and finding, the agency must permit the submission of proposed findings and conclusions by the parties. The well recognized and judicially established distinctions between administrative acts affecting rights, those which concern benefits, and those which concern police matters, etc., are thus eliminated at one blow. Further, decisions must be supported by evidence even though in many cases of rule-making the considerations involved cannot be reduced to evidentiary terms.

4. Investigations are limited to those authorized by law and the courts are instructed to sustain any subpoena "upon contest" to the "extent that it is found to be in accordance with law. . . ." Thus the re-establishment of interlocutory judicial review is to be encouraged after having been tried and found unsatisfactory.

5. The burden of proof is placed on the proponent of a rule or decision—which, when applied to the government, would make administrative action impossible in many cases. This is so not only because it implies that rules referred to above must be supported by evidence, but also because this statute does not even specify what is to be proved.

6. Licenses can be granted, suspended, or revoked only after a formal adjudicatory procedure, regardless of whether the license involved is one granted to a grain inspector of the Department of Agriculture, or a broadcast license for a radio station. It is to be noted also that no recognition is given by the statute to the well recognized legal distinction between granting and revoking a license, or to the distinction made between suspension and revocation of licenses referred to above.

Let me emphasize that these are only a few of the changes to be imposed on existing administrative procedures—those within our frame of reference here.<sup>66</sup> That they narrow administrative discretion previously permitted under judicial interpretations of the Fifth Amendment cannot be denied as a legal proposition. Nor has it been argued to my satisfaction that this

---

<sup>65</sup>This provision includes license suspension or revocation except in cases of willfulness, or where the public health, interest or safety requires otherwise.

<sup>66</sup>See, for a more exhaustive analysis, Blachly and Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213 (1946).

statute does other than irreparably damage the balance spoken of at the beginning, between individual rights and the general welfare, a balance which can be maintained only through refinements in procedure based upon study of individual agencies and practices. Certainly problems of the sort discussed here can never be finally solved by any static formula in a dynamic society.