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## Discussion of Administrative Procedure

John B. Gage

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agreements and the issuance of orders, limiting or allotting the amounts of certain agricultural commodities other than milk that may be purchased, handled, or shipped by each handler in interstate or foreign commerce, and by fixing the minimum prices to be paid by handlers to producers of milk, to establish and maintain such orderly marketing conditions for such commodities in interstate commerce as will give such commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of such commodities in the base period described in the Act. AAA.

37. Act of September 1, 1937, 50 Stat. 903, (1939) 7 U. S. C. A. sec. 1100 (Sugar Act of 1937): To regulate sugar marketings in interstate and foreign commerce by the imposition of quotas on the continental United States, the off-shore possessions, the Commonwealth of the Philippine Islands, and foreign countries. SD.

38. Title III of the Act of July 22, 1937, 50 Stat. 525, (1939) 7 U. S. C. A. sec. 1010 (Bankhead-Jones Farm Tenant Act): to authorize the Secretary to regulate the use and occupancy of submarginal lands and lands not primarily suitable for cultivation acquired by, or transferred to, the Secretary for the effectuation of the land conservation and land utilization programs prescribed by the Act. SCS.

39. Act of February 16, 1938, 52 Stat. 31, 45 (1939) 7 U. S. C. A. sec. 1311 (Agricultural Adjustment Act of 1938): in subtitle B, Title III, to establish marketing quotas for commercial producers of tobacco, corn, wheat, cotton, and rice whenever the Secretary finds that the total supply of any such commodity exceeds a certain level specified in the Act; and provided that more than one-third of the farmers subject to such quotas and voting in a referendum do not oppose the quotas. AAA.

40. Act of August 9, 1939, 53 Stat. 1275, (1939 Supp.) 7 U. S. C. A. sec. 1551 (Federal Seed Act): to regulate interstate and foreign commerce in seeds; to require labeling and to prohibit misrepresentation of seeds in interstate commerce; and to require certain standards with respect to certain imported seeds. AMS.

## DISCUSSION

by JOHN B. GAGE†

Remarks of previous speakers have had to do with the *Morgan* case. That case now runs so far back in history that even I would be unable to tell you how many times it had been argued. It looks as though it may, when finally disposed of, have been productive of more opinions of the Supreme Court than any other case that has come before that Court—four already, and yet it goes on. The fact that it still stands, and that I am still of counsel in the case, and still living after all the time that has elapsed, leads me to say that I am a little reluctant to discuss,

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otherwise than in the forum provided for its decision, the details of that case.

However, I do want to mention one thing. Mr. Sellers has performed a signal service here, I think, in outlining to you the vast range of the regulatory activities of the Department of Agriculture. They extend from control of the humble hivers of bees, growers of bull frogs, and ordinary farmers, clear up to the greatest corporations in the land, such as the packers with larger annual cash turnover than any other industry. They include authority in the Secretary of Agriculture to determine what is in the public interest in this vast field, to ascertain what is public convenience and necessity in the granting of licenses, to declare what are unfair practices in the agricultural marketing industry, handling the products of our tremendous farming operations, and to prevent those practices which he deems unfair.

Now, that is a vast range of authority. When legislatures or parliaments have met in the past, what have they been doing? They have been trying to define what was unfair practice on the part of the individuals that compose the body politic. A day has apparently come about when our economic and social order has become so complex that these practices can no longer be definitely defined by direct legislative action. The legislatures must pass that function on to experts in the particular fields. The day has apparently also come when the adjudications that must result after those legislative determinations are made must be made not by juries drawn from the body of the people, as in the past, but by experts in the particular matters coming up for adjudication. Let us grant that that is the situation.

We have yet to consider, and that is the subject Mr. Sellers has been discussing, what shall be the procedure involved in the making of these determinations of such vast scope and tremendous consequences, whether they be legislative, *i. e.*, looking to the future, or adjudicative, *i. e.*, determining past or existing facts and declaring the law in its application to the individual case.

It is one thing to say, well you should have a body of chosen experts to pass upon matters. It is another thing to say how those experts should proceed in making the determinations, either legislative or adjudicative, which this situation calls upon and demands. Shall we have in their deliberations any of the old

safeguards leading to judicial objectivism that have characterized judicial determinations in the past, and if we must have some of them, how many of them shall we have?

Now, it was Mr. Justice Frankfurter who said, in a meeting somewhat of this kind several years ago:

Remember, there are very precious values of civilization which ultimately, to a large extent, are procedural in their nature. \* \* \* All tribunals, administrative or judicial, have to enquire and examine before they decide. Historic experience lies behind the right to a day in court, and a full day.

Mr. Sellers has performed another service. He has sought to clarify the issues, as he said, by delimitation, by elimination, by a classification between regulatory and non-regulatory activities. I would suggest another thought. The very term "administrative law" leads to a confusion of thought. "Ad minister" in Latin is related to the performance of the old ministerial duties of government, to the exercise of governmental power, proprietary in character, including the control of public services such as the post office or this seed distribution that Mr. Sellers mentioned. In these fields government controls its own property or the performance of its own purely governmental functions.

Now, I do not see, particularly, why the government in the exercise of these proprietary functions, as for example, when it leases public land or sells it, is any more required to give notice and hearing to the parties to be affected thereby than any other owner, public or private. That is, the private owner of property when he sells or leases lands is not compelled to conduct a hearing and the government in the expenditure of public funds is not required to do so. We are spending public money in various and diversified ways in recent years. The farmer voluntarily agrees to limit his acreage of certain crops to comply with certain soil conservation practices in order to get public money. It is his voluntary act. There may be reasons of policy rather than of law why a hearing should be accorded, but the rules could well be different from what they would be in other instances where hearing is required as a matter of law.

There is a different situation presented when we read in the packers and stockyards case of rate regulation, where the Department of Agriculture fixes upon a hypothetical basis a maximum return to the livestock salesman, provided he reaches a

certain standard of selling performance. Such powers are compulsory, regulatory, dealing with somebody else's livelihood and business.

And so, let us cast out from our thoughts for the time being in our consideration of this subject the ministerial, proprietary activities of government. It may be that in matters arising in the Post Office Department, or many of them, notice and hearing should be had before they are disposed of. But that is not because of any elementary rule of law. It has nothing to do with the supremacy of the law, so to speak.

Having said that, we approach the regulatory activities arising, as Mr. Sellers says, under forty varying acts. Now let's stop to think. The Supreme Court says that they who decide must hear. It also in its first opinion in the *Morgan* case said that where under the law it was given only unto the Secretary himself to decide a matter, that might result in the imposition of an onerous duty upon him. When you think of these forty acts and all the other manifold duties of the Secretary, you see what a situation has arisen. In the *Morgan* case it was shown that in a prior proceeding under the Act a delegation of power had been arrived at by agreement with the respondents and the rates in question in the *Morgan* case were fixed by delegates of the Secretary, he finally approving the order. The rates so determined were changed by an order made by subordinates without agreement as in the first instance. Therefore, the situation in the *Morgan* case was that the Secretary both by the law and by the recognized practice was called upon to decide and hence he was called upon to hear. Now, hear in what manner? Not necessarily to listen to the witnesses' testimony, not necessarily to read all the evidence, but by reading fair analyses and summaries of evidence or reading the parts of the record related to the controverted issues. The opinion required him who was to decide to become familiar with the case.

Now, is that necessary? Or is it unnecessary? That was one of the questions.

Let us go further into this regulatory side, this non-proprietary side of governmental control. One of the functions being carried on is that of rule-making, a function legislative in character. I think we can understand these things better, perhaps, by taking concrete cases. Here is an actual case. We will take

one under the Packers and Stockyards Act. A shipper of livestock in a country town in Missouri a year ago draws a draft on a market agency at Kansas City. The market agency accepted that draft on that occasion, the cattle coming in being worth the amount for which it was drawn. A year later the same man draws another draft, negotiable in form, on the same market agency. He uses that draft in payment for cattle which he buys in a Missouri town from a farmer. The agency refuses to accept the draft, refuses to sell the cattle. Their value is less than the amount of the draft. The draft is dishonored. The original vendor, the farmer, recovers the cattle and refuses to take the offered market price for them. He then files a complaint with the Secretary of Agriculture charging an unfair practice on the part of the market agency in refusing to accept the draft. Reparation is allowed.

We have a Negotiable Instruments Act that requires a written acceptance on every instrument. But reparation is based on an unfair practice involved, a matter purely legislative. It covers a question that would otherwise be determined by law and procedure already existing. The law merchant, as I recall it, first was written into the laws of England by judicial decision, later covered by parliamentary act, but it was the custom of merchants that had already been well established before it was recognized either judicially or legislatively. Here we have a new process set up for changing the law so established.

Here is another case. This time under the Perishable Commodities Act. Lettuce moves from California to Kansas City. A contract is entered into between a producer of lettuce in California and a dealer in Kansas City which provides for the shipment of lettuce f. o. b. Kansas City, subject to the inspection upon arrival by the buyer, the Kansas City dealer. The dealer declines on inspection to accept the lettuce. A complaint charging an unfair practice is filed against the dealer. An order issues that he make reparation and pay the damage representing the difference in the price he contracted to pay and the price that the farmer in California received for the lettuce from someone else. The theory is that the contract for inspection on arrival is an unfair practice and against the policy of the Act.

The important question is, should that character of unfair practice, if it be an unfair practice, if it be within the authority

of the Secretary so to declare, be first determined by rule or should it be declared through a method of law-making employed adjudicatively in the individual case after the event has occurred? What should be the character of notice to affected parties? What should be the character of hearing provided before such a law or implementation of existing law is to govern transactions in lettuce?

Here we are dealing with matters that are of judicial cognizance and which would be determinable in ordinary courts. I could give you case after case of that sort which would emphasize the importance of the questions and illustrate the problems involved. If very precious values of civilization rest on procedure, we can see how important it is to provide correct procedure, fair hearing, notice and not to permit anonymous decisions.

Mr. Sellers was discussing present practice in the Department. We talk about experts. Here are two examples. One man in the Department of Agriculture may today be prosecuting a case in which an associate is sitting as an examiner. The reverse of the situation may be true on the next day. These examiners are not themselves the experts. The experts are in the Bureau of Animal Industry, or some other Bureau, who study matters of the sort involved continuously. Should not those experts, if placed upon a fact-finding board, be given some permanency in the positions they occupy? Vital determinations they are going to make that spell livelihood or lack of livelihood to men who have long been engaged in business. I think it was Alexander Hamilton in the Constitutional Convention, when he discussed giving federal judges a tenure "during good behavior," who said that this was the Ark of the Covenant that protected the impartiality and independence of the judiciary.

Does anything like that, or should it, enter into this administrative procedure? Or should the personnel change from day to day, from the prosecuting side of the picture to the adjudicative side? I think that you can readily see the significance and, perhaps, recognize a certain inadequacy in the Act to reform administrative procedure that is pending, that has passed the Senate, which Mr. Sellers has referred to. Even if men could be appointed and designated by the Secretary to exercise his authority, whether they be one or two, they could not supplant these examiners or take the place of the experts in digging into the

facts in individual cases. The vast range of authority which is now delegated to the Secretary could not be handled by any one or two men. The priceless condition of judicial objectivity such as has been built up by the historic experience of the past in the administration of courts would not necessarily exist under the plan proposed. That must go without saying.

One of my colleagues has said, "About all we can do here in this discussion is to vote, to express a vote, not to discuss it." I would like to go on in detail and cover the field more thoroughly. What do I think about it from such experience as I have had with three or four of these acts—milk proceedings under the Marketing Act, perishable commodity proceedings, packers and stockyards regulations? In each there is rule-making, legislative action, as well as adjudicative action. If you are making a general rule to be applicable to all like circumstances in a given industry in implementation of an act, I am not so sure that any definite formal hearing should precede it. A regulation of this sort really is a product of the knowledge and experience of the Bureau that makes it. It is a purely legislative act, operating *in futuro*. It should be formulated by experts using their own methods. Of course, they are advantaged if they consult the people to be affected. Sometimes inaction is as dangerous as action.

Take this illustration. A group of us, representing ninety-eight per cent of the cooperative and non-cooperative livestock market agencies of the country engaged in selling livestock on public markets, went to the Secretary of Agriculture and proposed certain rules relating to unfair practices on these public markets. On these markets are exchanges, which, commonly, by general practice and their own rule, obliterate the statute of frauds as applied to transactions of sale. They have to do it to sell at the crack of the whip; the spoken voice may consummate the sale of personal property involving thousands of dollars. They asked the Secretary to declare it would be an unfair practice for any market agency to refuse to respect such an agreement. Other long established rules were suggested. He refused to make the rules, although on the other side of the picture as to the packers, rules were made forbidding the giving of secret discounts to dealers in connection with the sale of meat products. I believe our agencies were damaged by the refusal to make these rules, under all the circumstances. But there is a question,



at least, whether these rules should be, or should not be, made after public hearing. Maybe they should. They are of enormous consequence.

Legislatures have adopted the practice, as you know, of having hearings before committees, formal and informal, and then acting. In England administrative rules go back to Parliament for approval or disapproval before they become effective, just as the rules of federal courts went back to our Congress or were reviewed by Congress for a certain given period before they were allowed to become effective. Maybe that is the best course to pursue. Perhaps that is the solution, supplemented by some degree of court review to determine whether the regulations are within or without the authority of the act under which they issue, or are unconstitutional.

But you pass to a different field when you come to adjudicative procedure. Where a function is purely adjudicative it may be carried out by experts. But we should place those experts in the situation that you would place a jury, using their expert knowledge upon testimony in the record before them, and that alone, and make the record available to all parties. Remember that in many adjudications important interests are at stake. Take the Federal Communications Commission. Here is an application for a license to a broadcasting station. The applicant is a little fellow in a big town; and here is a great big newspaper in the city whose interests will be stepped on if that license be granted. Vast forces play back and forth to influence those who are charged with the exercise of the discretion. The same thing is true under the Packers and Stockyards Act. Here are the packers over here, buying the livestock, well organized, heavily financed. Nothing can serve their purpose better than to have inefficient selling by the market agencies. The experts who decide such questions, it seems to me, should be placed in such a position that by tenure of position, by character of personnel, by the procedure in the execution of the great adjudicative authority given to them, they are kept aloof, kept independent, and are in a position to be impartial.

We can draw, as is indicated here, not in the way we draw juries by lot from the body of the people to decide these things, but upon our experience in the past in building up those safeguards that will result in impartiality of determination and im-

partiality of decision. I think that is the process in which we are now engaged, and we don't care, as lawyers, whether it be laymen or lawyers who sit on these Boards, if they be impartial—we, indeed, prefer that they be experts. But we are greatly concerned as to whether they are given an opportunity fairly to utilize the expert judgment which they should possess in the light of the evidence in the record which we know about. To let somebody who knows nothing about it overrule their opinions creates another condition that is dangerous in the extreme to the cause of justice. This is true because policy, as Mr. Justice Hughes pointed out, may overcome fact and experience.

I don't think, when you properly classify the subjects you are dealing with and distinguish between the legislative act and the adjudicative act, that there is going to be such great difficulty in charting a sound course. People want to be fair and to set up necessary standards and safeguards. As we go forward we will find that the administrative process, if we want to call it that, when bottomed on sound procedure, will run truer and smoother and with less impediments to its proper exercise than would be possible under any other system that lacks these procedural requirements that I know anything about.

by RALPH R. NEUHOFF†

I want to second the compliment to Mr. Sellers for his most clear presentation of an unclear subject. From a logical standpoint, if I may talk that plainly, I think that the procedural situation which he outlined is a mess, and perhaps off the platform our previous speaker would agree with that. Now, I don't believe the Department of Agriculture will countenance that as a permanent condition. And I want to see if I can give a little contribution toward solving that mess.

It seems to me that comparing, as the chairman said I would do, my experience in dealing with the Treasury Department with that in dealing with the Department of Agriculture, where a ruling is made in the Treasury Department it affects so many people that if you tell an affected person that there need be no hearing and that his remedy is political, that is quite satisfactory to him, because he would have plenty of help in getting a political

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remedy. On the other hand, if you take a ruling of the Secretary of Agriculture, which may be general in scope, but as a matter of fact affects so few people that when all of the people affected by the ruling get together, you would not have as good an attendance as we have in here, not nearly, then I say the political remedy did not appeal to Congress as being adequate, and that is why they floundered around and tried to do something to provide procedural safeguards and every time they tried it they had a different party attempt to fill the bill and a different product resulted. So you have all those laws and procedures.

Now, if we make the classification that where an administrative act concerns people in their proprietary capacity, that is to say, takes their property or their right to work away from them, or where it affects so few people in their so-called public capacity that as a matter of realism it affects only a private interest, then I think that fairness demands that we must have some kind of an impartial hearing to take the place of political remedies. But on the other hand, wherever the political remedy is adequate, I think it should be relied upon. The Executive Department should take the praise or the blame. They should shoulder the responsibility frankly and in each instance grant no more hearings or conferences than they see fit and deem necessary in order to aid them to carry on their responsibility.

Now, I would make two exceptions to the requirement of hearings. If you have an emergency where the public good outweighs the infringement of the liberty, or the property right, of individuals, then I vote for the public good, or for protection of the public. And the second exception is where the matter to be determined is so inconsequential that it would simply clutter up things to have an elaborate procedure. Under those circumstances I see no need of a hearing.

Now, if we decide to have something like a court—and you see I am helping out by eliminating a vast class of cases in which we won't even try to have that sort of thing—I say if we have a court, let's not have a spurious court. A procedure in which one employee of the Department of Agriculture sits as a judge and another employee of the same department acts as a prosecutor does not impress me with its sincerity. We had better go all the way at once. Say rather that the department is charged with a certain function and let them do it by means of an efficient pro-

cedure. Then, if need be, have a separate reviewing body like the Board of Tax Appeals. Where you have a board or tribunal of that sort, you have substantial safeguards, although I guess you people will agree it is not a court. It is more of a court than some courts, but still it's not a court.

Now, coming to our own situation on the St. Louis Merchants' Exchange, wherever there is any complaint that seems to be sincere, whether well grounded or not, by any shipper to our market, that any one of our members has done something he should not have done, it is my advice to the committees and officers of our exchange that the matter should be run to the ground. We do that for two reasons. In the first place, it is sound business. We shall pass that, because this symposium is not on business methods. The second reason is that if we don't furnish such a remedy, the Government must. It is a sort of insurance, a small thing compared to court costs, and a small thing compared to attorneys' fees. I am not at all impressed that such a complainant should be told to go to court because he has all the rights that began in the Magna Charta and have come on down. He has the "right" to spend money to hire a lawyer to get justice. That does not impress me. We either have to give the fellow a square deal or have a tribunal in back of the market, the Department of Agriculture, to see that it is done.

Well, now, everybody here this morning seems to have some relative in the country, so I had a relative that was a farmer. He used to ship to this market. After making a shipment he would get on the train—this was before the day of automobiles. He got here ahead of the cattle or grain as the case might be, and if they said there was garlic in his wheat, he would say, "Let me see it." If it was three and one half per cent, he wanted to see that. If they said the wheat was moist, he wanted to see that. I happen to have contact with a farm now, I am sorry to say. It isn't necessary to get on the train, and you don't have to meet your wheat in the market. Why don't you? Because you have confidence in the inspection. And I say the credit for that is due to the Department of Agriculture.

Now, one final thought and then I am through. I think Mr. Gage made a wonderful presentation, starting with certain premises and leading up to a conclusion that probably is historically grounded upon the Constitution and everything we revere, that

we have to have a certain type of hearings. Well, I want to ask, if there is a dangerous drug abroad in the land, or if there is a cosmetic a woman uses which will mar or blind her, which is the greater good—that these things shall be captured now, despite alleged constitutional rights, or that we worship the Constitution so much that three or four people die? These things have happened, and you people know it, on account of drugs. Other people have been made blind, despite the fact that the Department of Agriculture was trying to prevent it. They had a right to try to capture those products, and I think that by all that is holy they ought to retain that right, and if the Constitution doesn't mean that, then let's change the Constitution.

by CLARENCE T. CASE†

When Professor Tyrrell Williams called me on the telephone and asked me to take part in a symposium on administrative law, I was somewhat puzzled. What kind of a symposium could it be? By reference to my dictionary, I found that primarily a symposium means a drinking party, a merrymaking, and as a practicing lawyer representing rugged individualists, I couldn't for the life of me understand how any group of lawyers would want to make merry over administrative law and its procedures. However, the encouragement I had gotten from the dictionary seemed to hold out some promise until the next day when I received a copy of the printed program. Then I felt a chill as if someone had poured cold water down my spine, for there I found that the master of ceremonies would be Missouri's most outstanding dry leader—Charles M. Hay. My spirits rose again this morning when I saw Roscoe Anderson as our presiding officer, but so far nothing extraordinary has happened to enliven this sober occasion.

As administrative law increases, the usefulness of the legal profession in the great open field of business materially diminishes. With the delegation of judicial powers to administrative boards, the prestige of our courts and our distinguished Bar necessarily declines. The legal profession is on the way down instead of on the way up. These new police courts in the Executive Department composed in many instances of a lay judiciary follow police procedure generally. Rules of evidence are ignored,

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and practice before them is not confined exclusively to licensed members of the Bar. Nearly all of them recognize various types of lay practitioners and thereby reduce to a great extent the appearances of licensed lawyers. There is ample precedent for this in our federal statutes.

For many years the Patent Office has had its own exclusive Bar composed of both lawyers and laymen legally designated as "patent attorneys." Under the federal statutes, it provides its own rules for admission to practice. A legal education is by no means a necessary qualification. The same thing is true of the Interstate Commerce Commission and the Department of Internal Revenue. There may be some others before whom I have not yet obtained my licenses. At any rate, throughout all the administrative agencies performing judicial functions lay practitioners are just as welcome, if not more so, than licensed lawyers.

I attended a dinner of manufacturers one evening at which one of our leading tax accountants was the chief speaker. In the course of his remarks he made the statement, "When you go before the Internal Revenue Department on a tax matter, always take your Certified Public Accountant, never take your lawyer. If you take your lawyer, you will be immediately looked upon with suspicion as having something to cover up, but with your Certified Public Accountant, the Department official will feel that you are ready to lay all your cards on the table and that your purpose is an honest one, so that the employment of counsel is not only a useless, but a hazardous expense." This statement brought forth vociferous and hearty applause from everyone in the audience. I say all—but one, because I was present.

It would seem therefore good advice to the young lawyers who are about to leave this law school that, if they are at any time lucky enough to represent some client before an administrative agency, they ought to hide their diplomas and appear in some other capacity.

It is not only from this standpoint alone that the usefulness of the practicing lawyer is diminished, but many of these regulatory agencies volunteer to give the citizen all necessary direction and advice free of charge. These free legal aid bureaus promote acquiescence and minimize court review. As a rule, administrative agencies dislike court review.

The advent of these regulatory processes has so changed the practise of the law in the business world that the most available

opportunities for the young men leaving law school now lie in the field of government service. Dean McClain, it might be well in this law school to have a chair in practical politics.

The greatest difficulty confronting the lawyers with reference to administrative law and its procedure is how can it be made to fit due process of law. This splendid paper of Ashley Sellers shows in what fine, lawyer-like manner he has analyzed the various functions of the Department of Agriculture, and how he is attempting to make certain of them conform to an orderly judicial procedure. I am sincere when I say to you, sir, that you are to be commended by all the Bar for your efforts.

The Constitution provides that no one shall be deprived of life, liberty or property without due process of law. Many of us still like to go back to the work of Justice Story and Judge Cooley as authority on this subject. These distinguished authorities have said due process of law means that no man shall be condemned until he has had a fair and impartial hearing; that no property shall be taken until the owner has had an opportunity to be heard. There is only one exception to the rule, and that is where the preservation of society or its protection requires immediate and instantaneous destruction of individual rights and freedom or private property. An example of the exception would be a case where the immediate and instantaneous dynamiting of buildings is necessary to prevent the spreading of a conflagration. Administrative law and procedure undertakes to govern itself largely by the exception rather than the rule. Many of our legislative enactments go to the extremes in their preambles and elsewhere to set forth the existence of the conflagration which necessitates violent and instantaneous action on the part of the administrators. The purposes are frequently so expressed that they must be effectuated regardless of individual rights and property. Mr. Sellers has given us a broad picture of the many responsibilities resting upon the Secretary of Agriculture. I heartily sympathize with the Secretary's predicament, but the courts have quite uniformly held that where Congress has delegated rule-making power to or conferred judicial authority on one man he alone must account for his stewardship. He cannot shift the burden. This is perhaps the principal ruling in the *Morgan* case. But that case goes further than that into the realm of due process of law. The Court says: "If in an equity case a special master or trial judge permitted the plaintiff's

attorney to formulate the findings upon the evidence conferred *ex parte* regarding them without affording an opportunity to his opponent to know their contents and present objections there would be no hesitation in setting aside the report or decree."

It is largely in this situation that lawyers representing private citizens find themselves before administrative boards. After a hearing has been held and evidence taken it may become convenient for the Department examiner to confer privately with the Department investigators and obtain their private versions on matters not fully disclosed in the testimony. This is most likely where the Department is seeking a finding of bad faith.

Of course, Trial Examiners always protest that they want to be fair, but I never appear before any of them that I am not reminded of Earl Pirkey's dream about Sam McChesney.

To fully understand Earl's dream, you must know that Earl has for many years been a "plaintiff's lawyer," trying a great many cases against the Public Service Company, represented by Sam. In these cases, Sam understands thoroughly what advantage may be gained for the defendant by discrediting the plaintiff's witnesses. He has a trick of suddenly asking a witness some question like this: "Were you ever in jail?" Of course, immediately plaintiff's counsel is on his feet with objections that the question is immaterial. Then Sam, in his very quiet way, apologizes to the Court by withdrawing the question and saying, "I just want to be fair, Your Honor, I just want to be fair."

It happened one morning that I met Earl shambling along and I said to him, "How do you feel this morning, Earl?" and his answer was, "Oh, I passed a miserable night! I had a nightmare. I dreamed that I was about to be murdered. A man was standing over my bed with a dagger in his hand. I could feel the sharp point of the dagger at my left breast. In my agony, I screamed and awoke and there I saw standing over me my would-be murderer. It was Sam McChesney, saying, "I just want to be fair, Your Honor, I just want to be fair." My allotted time is about up, and I must cease my merrymaking.

When the decision in the *Schechter* case was handed down declaring the National Recovery Act unconstitutional, Senator Borah, who has now passed on to his reward, was reported by the Press to have uttered these words—"God bless the Courts"—I say, "God bless the law students." May they all ultimately find surcease from sorrow in administrative law and procedure.