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PROCEDURE IN ADMINISTRATIVE RULE-MAKING *

ADMINISTRATIVE rule-making is one type of function performed by administrative agencies. The procedural problems attending the exercise of this function are to some extent distinct from those which surround the performance of other administrative acts, such as decisions and orders addressed to particular individuals in licensing, workmen's compensation administration, and public health regulation. Rule-making, sometimes referred to as "administrative legislation," and a companion function, often called "administrative adjudication," have become primary categories in the study of administrative law.¹

In the United States, on the whole, administrative adjudication has received by far the larger share of attention, but recently "administrative legislation" has assumed greater prominence than before. The New Deal legislation of 1933 was marked by an unprecedented delegation of power to the President² and other executive officers³ to prescribe regulations. Political and legal discussion centered in large part upon the wisdom and constitutionality of delegating these powers.⁴ Some of the delegations

* The writer makes grateful acknowledgment to the Columbia University School of Law for the opportunities afforded him as a Special Fellow in 1937-38 to engage in the study of which this article is a product.

¹ In "vertical" studies of particular administrative agencies the emphasis, however, is upon the manner in which these agencies perform the tasks entrusted to them, rather than upon theoretical distinctions.

² See 48 STAT. 52 (1933), 31 U. S. C. § 821(b)(2) (1934) (regulation of the gold content of the dollar); 48 STAT. 13, § 3 (1933) (variation of the compensation of federal employees according to the cost of living); 48 STAT. 195, 1183 (1933, 1934), 15 U. S. C. §§ 702, 702a (1934) (establishment of administrative agencies and fixation of the duration of the NIRA); 48 STAT. 196, 197 (1933), 15 U. S. C. §§ 703, 704 (1934) (promulgation of codes of fair competition and of import restrictions; provision of licensing of business enterprises); 48 STAT. 202 (1933), 40 U. S. C. § 403 (1934) (expenditures for public works).

³ 48 STAT. 2 (1933), 12 U. S. C. § 248(n) (1934) (authority of the Secretary of the Treasury to require the surrender of gold and gold certificates); 48 STAT. 35 (1933), 7 U. S. C. § 609 (1934) (power of the Secretary of the Treasury to levy processing taxes). For a further enumeration of rule-making powers under the New Deal statutes, see (1933) 58 A. B. A. REP. 418-23; BLACHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934) 10-30.

⁴ See, e.g., Hanna, *Currency Control and Private Property* (1933) 33 COL. L.

were upheld,⁵ but the National Industrial Recovery Act and the later Bituminous Coal Conservation Act fell under the condemnation of the Supreme Court, partly because of the scope of the delegated rule-making power contained in them.⁶ In the course of its first NRA opinion, moreover, the Court pronounced unconstitutional the procedure which the Act permitted and the President followed in promulgating certain regulations.⁷ Hence the problem of the permissible extent of administrative power to prescribe regulations and that of the procedure to be employed in formulating them have been brought to the fore.⁸

I. RULE-MAKING AS A DISTINCTIVE FUNCTION

The question arises whether it is useful to attempt to distinguish rule-making from other administrative functions for procedural purposes. That question involves, first, the possibility of defining rule-making and, second, the utility of the definition if it can be established.

It has been said that rule-making operates as to the future whereas other mandatory governmental acts affect present or past situations. However, almost all governmental orders have the characteristic of prescribing or forbidding future conduct. A judgment for money damages, an order for the abatement of a nuisance, and a decree compelling an employer to bargain collectively with a union must be executed in the future, no less than

REV. 617; Ellingwood, *The New Deal and the Constitution* (1934) 28 ILL. L. REV. 729, 745 *et seq.*; Maggs, *The Constitution and the Recovery Legislation* (1934) 1 U. CHI. L. REV. 665, 691; Carpenter, *Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act* (1934) 7 SO. CALIF. L. REV. 125, 126-28; Fuchs, *The Constitutionality of the Recovery Program* (1933) 19 ST. LOUIS L. REV. 1; Note (1933) 47 HARV. L. REV. 85, 93-95.

⁵ *Norman v. Baltimore & O. R. R.*, 294 U. S. 240 (1934); *Nortz v. United States*, 294 U. S. 317 (1935); *Perry v. United States*, 294 U. S. 330 (1935); *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324 (1937). See also *Smyth, Ex'r v. United States*, 302 U. S. 329 (1937).

⁶ *Panama Ref. Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 529 (1936); *Carter v. Carter Coal Co.*, 298 U. S. 238, 310-12 (1936).

⁷ *Panama Ref. Co. v. Ryan*, 293 U. S. 388, 432 (1935).

⁸ Hart, *The Exercise of Rule-Making Power* in REPORT OF PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937) pt. II, 313-15; *Report of the Special Committee on Administrative Law* (1937) 62 A. B. A. REP. 789; Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938) 47 YALE L. J. 647.

a statute requiring the payment of taxes or an administrative regulation which orders the submission of specified data by public utilities to the government. Permissive regulations and licenses likewise have effect in the future and their revocation frequently substitutes a prohibition for the previous permission.

Declaratory statements, findings, or decrees fall into a different category. Commanding nothing, they purport simply to state interpretations of law or to assert the existence of facts upon which the later issuance of mandatory orders or the operation of existing regulations may be expected to depend. An official statement may seek to interpret a phrase in a taxing statute for the purpose of applying it; an assessment may fix the basis upon which future tax collections will be made; and a declaratory judgment or administrative order may define with more or less conclusiveness the particular rights and duties on the basis of which judgments may later issue.⁹ Sometimes the finding of a fact, pursuant to statute, constitutes the contingency upon which a prescribed general regulation operates in the future.¹⁰

It is clear that mere futurity of operation, which is common to most official acts, cannot serve to distinguish rule-making from other governmental functions. It sometimes is said with respect to legislation, however, that the considerations which enter into it relate to the future and that adjudication is distinguishable because its basis lies in past facts and existing rules of law.¹¹ This suggested distinction conceivably may serve to define the function of rule-making.

According to the foregoing theory, the legislature translates policy into law by prescribing legal rights and duties, with regard primarily to the future welfare of the community and of those immediately affected. Courts, on the other hand, decide in particular cases what specific rights and duties flow from those pre-

⁹ *E.g.*, *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515, 562 (1937) (certification of union as bargaining representative of workers). Since a declaratory judgment in the sense in which recent statutes employ the term concludes the issues, it is mandatory in actual effect, though not in legal form, and it may easily be translated into a mandatory judgment.

¹⁰ *E.g.*, the flexible tariff acts. 46 STAT. 701 (1930), 19 U. S. C. §§ 1336-1338 (1934).

¹¹ See *Prentis v. Atlantic Coast Line R. R.*, 211 U. S. 210, 226 (1908); *Green, Separation of Governmental Powers* (1920) 29 YALE L. J. 369, 373.

scribed in existing rules of law in the light of the facts presented.¹² The courts, according to this view, are concerned with the legal consequences of past occurrences and not at all with the effects of their decisions.

Legislation and adjudication cannot, however, be kept true to these ideas. Courts must ascertain the content and scope of the rules upon which they base their judgments; but these rules are to a considerable extent conflicting and vague even when embodied in constitutions and statutes, and hence do not afford adequate guides. In choosing among them and imparting greater precision to them, courts may invoke considerations of fairness and equity growing out of the facts, which have not previously been embodied in rules, or read into the rules the logical prerequisites of decisions that are felt to be desirable or necessary for future welfare. In so far as these opportunities for choice exist, the judicial process becomes "legislative" in character, for new law is created on the basis of desired results. Conversely, legislators may to some extent seek to offset past wrongs in conferring future benefits.¹³ Evidently it cannot be said truthfully that adjudication is wholly determined by past facts and existing rules or that legislation is enacted with an eye single to future welfare.

When the attempt is made to carry this distinction between "legislation" and "adjudication" into the functions of the executive branch of the government, and to identify rule-making by means of it, additional difficulties are encountered. Many acts of the executive are supposed to be determined by considerations of future advantage, indicated more or less definitely in the controlling statute. In other words, they are discretionary acts.¹⁴ Regulations governing some of the practices of banks and insurance companies, safety regulations, and regulations prescribing the conduct of public services fall within this category. So do certificates of convenience and necessity, licenses to persons of good moral character, rate orders, and the abatement of nuisances

¹² See Radin, *A Restatement of Hohfeld* (1938) 51 HARV. L. REV. 1141.

¹³ E.g., subsidies are granted to farmers because of the advantages which protective tariffs previously have bestowed upon manufacturers.

¹⁴ See Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538, 544-45; Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577; HART, *The Ordinance Making Powers of the President of the United States* (1925) 34.

upon the general ground that they are threats to comfort or decency. If rule-making were defined as official action based upon considerations of future benefit, all of the foregoing types of administrative acts would be included within it, for it would embrace all discretionary action. So sweeping and varied a category would hardly possess utility and certainly would depart far from accepted concepts.¹⁵

The most obvious definition of rule-making and the one most often employed in the literature of administrative law asserts simply that it is the function of laying down general regulations as distinguished from orders that apply to named persons or to specific situations.¹⁶ Most acts of legislatures, although by no means all,¹⁷ establish rights and duties with respect either to people generally or to classes of people or situations that are defined but not enumerated. Conversely, the judgments of courts usually are addressed to particular individuals or to situations that are definitely specified. Similarly, administrative action can be classified into general regulations, including determinations whose effect is to bring general regulations into operation, and orders or acts of specific application.

Difficulties present themselves in relation to this distinction also. Classes of people or situations may be so narrowly defined that the identity of the component units virtually is specified. Thus a law or regulation forbidding the discharge of industrial waste into the waters of a stream would not differ in effect, at least immediately, from an order directed to the only millowner

¹⁵ It is true, however, that the facts pertinent to a discretionary decision often call for an investigational rather than a litigious procedure, regardless of the type of official action contemplated, as is coming to be appreciated with reference to judicial decisions in which "legislative" considerations are prominent. See authorities cited in Fuchs and Freedman, *The Wagner Act Decisions and Factual Technique in Public Law Cases* (1937) 22 WASH. U. L. Q. 510, 515, n.18. For this purpose a classification of functions based upon the presence of discretion has utility.

¹⁶ 1 COMMITTEE ON MINISTERS' POWERS (Report) (1932) 20; CARR, *DELEGATED LEGISLATION* (1921) 46; WILLIS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS* (1933) 49. Legislation "consists of an abstract formulation of a general rule." ALLEN, *LAW IN THE MAKING* (1927) 238. By contrast, "adjudication operates concretely upon individuals in their individual capacity." DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927) 21.

¹⁷ "Private" acts are a recognized exception which the constitutions of only some of the states have eliminated. *Wilkinson v. Leland*, 2 Pet. 627 (U. S. 1829).

engaged in the practice.¹⁸ Conversely, an order establishing specified freight rates on a named railroad affects a host of shippers as well as the respondent and applies to a multitude of transactions.¹⁹ When an order, such as a labor injunction, applies to a vague group of people of whom only a few are named, it takes on the character of a general regulation.²⁰ Even where only a single respondent is subject to an order, the order seems general in character if it embraces a considerable area of conduct.²¹

Notwithstanding these difficulties, it is feasible to distinguish a general regulation from an order of specific application on the basis of the manner in which the parties subject to it are designated. If they are named, or if they are in effect identified by their relation to a piece of property or transaction or institution which is specified,²² the order is one of specific application. If they are not named, but the order applies to a designated class of persons or situations, the order is a general regulation or a rule. Thus a railroad rate order is an order of specific application if one or more railroads are named in it as the parties addressed, regardless of how many shippers may be affected by it. Conversely, an order that all carriers reduce their rates by a specified percentage would be a general regulation. Similarly, the increase or reduction of a single taxpayer's assessment is different for the purpose in hand from the order of a state board raising or lowering the assessments upon a given class of property throughout a county.

Of itself, of course, the foregoing distinction signifies nothing. Its practical value turns upon whether there are other important differences accompanying the distinction in form. There seem to be such differences. Ordinarily an order addressed to named persons or dealing with the legal interests of easily ascertainable individuals bears directly upon a relatively small number of peo-

¹⁸ *Commonwealth v. Sisson*, 189 Mass. 247, 75 N. E. 619 (1905). See also *Ryder v. Board of Health of Lexington*, 273 Mass. 177, 173 N. E. 580 (1930).

¹⁹ See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW* (1927) 18; FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928) 15.

²⁰ See FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 86-89, 123-26.

²¹ Cf. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924) 72-77.

²² The parties are identified, though not named, for example, where a judgment "in rem" decrees the forfeiture of an article of property.

ple, whereas a general regulation is likely to affect many more. Moreover, the identity of the parties who will be most immediately affected by an order of specific application is generally known, whereas that of the persons upon whom a general regulation will bear usually is known only in part. These two facts have important consequences in regard to the procedure that is appropriate to the two classes of orders.²³

Accordingly it is useful to define rule-making as the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations; to distinguish this function from the issuance of orders or findings or the taking of action applying to named or specified persons or situations; and to consider separately the procedural problems which surround rule-making when it is carried on by administrative agencies. For legal purposes these problems are of importance where regulations bear upon private interests. They will be considered in this article in relation to rule-making which operates with regulatory effect upon such interests.

II. THE BASES OF RULE-MAKING PROCEDURE

Administrative rule-making procedure necessarily requires adaptation to the varying circumstances under which general regulations are prescribed by administrative action. Thus a regulation applying to the railroads of the United States permits, if it does not require, an antecedent procedure involving a full hearing to the affected parties,²⁴ whereas a rule of the Bureau of Marine Inspection and Navigation applying to thousands of unknown owners of small boats²⁵ can scarcely be preceded by an investigation of the same character. It is one thing, moreover, to lay down a simple regulation governing a particular aspect of the use

²³ See p. 275, *infra*; testimony of Sir Arthur Robinson, Secretary, and E. J. Maude, Solicitor, of the Ministry of Health, 2 COMMITTEE ON MINISTERS' POWERS (Minutes of Evidence) (1932) 144 *et seq.*; *cf.* WILLIS, THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS (1933) 183-84.

²⁴ *E.g.*, 36 STAT. 298 (1910), 45 U. S. C. § 12 (1934) (safety appliance regulations to be changed only "after full hearing and for good cause shown").

²⁵ 35 STAT. 69 (1908), 46 U. S. C. § 454 (1934) (authorizing the Secretary of Commerce to issue regulations "to promote the safety of life on navigable waters during regattas and marine parades").

of streets by motorists,²⁶ and quite another to prescribe the detailed accounting practices of a large group of utilities in matters of great technical difficulty affecting claims to large sums of money.²⁷ There is an equally important distinction between regulations put forth with an eye single to the maintenance of a smooth-working routine in the conduct of a public service,²⁸ and the highly discretionary code of financial controls by which it is sought to direct, in part, the workings of a credit economy.²⁹ A single official, moreover, who perhaps is only intermittently in touch with the problem to be governed,³⁰ may proceed quite differently in arriving at a regulation from the way in which a board of experts or of representative character is likely to attack a rule-making problem.³¹ Finally, a regulation whose breach entails simply the loss of a minor privilege³² is quite different from one whose violation may result in a penitentiary sentence.³³

Between the extremes which these examples represent many shades of difference may be found. The aspects of rule-making which determine the significant categories for procedural purposes may, however, be grouped under the following headings: (1) the character of the parties affected; (2) the nature of the problems to be dealt with; (3) the character of the administrative determination; (4) the types of administrative agencies exercising the rule-making function; and (5) the character of enforcement which attaches to the resulting regulations.

The character of the parties affected by administrative regulations varies widely, even when only those regulations that bear upon private interests are considered. It varies not only with the number and identifiability of the parties, which have obvious

²⁶ *Cavanaugh v. Gerk*, 313 Mo. 375, 280 S. W. 51 (1926).

²⁷ *American Tel. & Tel. Co. v. United States*, 299 U. S. 232 (1936).

²⁸ 1 FED. REG. 2284 (1936) (procedure for the filing of executive orders and proclamations); Cheadle, *The Delegation of Legislative Functions* (1918) 27 YALE L. J. 892, 909.

²⁹ Board of Governors of the Federal Reserve System, Regulations A—U.

³⁰ 50 STAT. 124, 22 U. S. C. § 245b(a) (Supp. 1937) (Secretary of State authorized to promulgate regulations for the enforcement of the National Munitions Control Act).

³¹ 34 STAT. 881 (1907), 46 U. S. C. § 375 (1934) (providing for the Board of Supervising Inspectors of the Bureau of Marine Inspection and Navigation).

³² *E.g.*, regulations governing the use of public recreation facilities.

³³ *Panama Ref. Co. v. Ryan*, 293 U. S. 388 (1935).

bearing upon the practicability of adequate notice and a full hearing to all, but, in addition, with the vast differences in the extent to which groups in the community are organized to safeguard their interests in relation to governmental action. Groups that are so organized can be heard or consulted more readily than those that are not; and of the latter, many consist of large numbers of ordinary citizens who will be unrepresented unless the governmental agency itself undertakes to protect their interests. Consumers,³⁴ farmers,³⁵ small tradesmen, and those in receipt of public assistance,³⁶ are notoriously in need of being protected in this manner. Group organization is especially important to the development of a consultative type of procedure whereby interests are enabled to participate in official action instead of merely being heard in regard to it.³⁷

The nature of the problems to be dealt with in administrative regulations affects procedure in evident ways. Thus in matters of governmental routine, even where private interests are affected,³⁸ as they are, for example, by the hours during which public offices are open for business and by the forms prescribed for tax returns, it is evident that there is less occasion for permitting interested private parties to be heard with regard to proposed regulations than there is where rule-making operates in a regulatory manner. In the conduct of public services most of the matters that arise are also of a routine nature, but others, such as the regulations for

³⁴ 2 COMMITTEE ON MINISTERS' POWERS (Minutes of Evidence) (1932) 5 (testimony of Sir Maurice L. Gwyer, Treasury Solicitor). See CONSUMERS' COUNSEL DIVISION OF AAA, CONSUMER SERVICES OF GOVERNMENT AGENCIES (rev. ed. 1937) 1, 9 (for accounts of existing federal agencies which represent the consumer before regulatory bodies).

³⁵ Pub. L. No. 440, 75th Cong., 3d Sess. (Feb. 16, 1938) § 201(a), authorizes the Secretary of Agriculture to initiate cases and appear in proceedings before the Interstate Commerce Commission involving rates and practices in the transportation of farm products.

³⁶ The English Ministry of Health has found it possible to maintain effective contact with groups that are affected by its administrative activities, except under the Widows', Orphans', and Old Age Contributory Pension Act. 2 COMMITTEE ON MINISTERS' POWERS (Minutes of Evidence) (1932) 120 (supplementary memorandum from the Minister of Health).

³⁷ Gaus, *A Theory of Organization in Public Administration*, in GAUS, WHITE AND DIMOCK, *THE FRONTIERS OF PUBLIC ADMINISTRATION* (1936) c. V.

³⁸ See, e.g., the matter of prescribing the design of motor vehicle license plates, mentioned in the testimony of Sir Maurice L. Gwyer, Treasury Solicitor, in 2 COMMITTEE ON MINISTERS' POWERS (Minutes of Evidence) (1932) 3.

grazing in the national forests, assume such commercial significance that some formality of rule-making procedure is called for.³⁹ In governmental regulatory activities affecting health and safety, the occasional urgency of action and the technical nature of the questions arising, falling outside the competence of witnesses, tend to minimize the need of formality in rule-making procedure. Where, however, important economic groups are affected by proposed regulations of the same general character, there are strong grounds for according procedural recognition to their stake in the issues. These considerations have been recognized in the procedural provisions of the 1938 Pure Food, Drug, and Cosmetic Act.⁴⁰ Recently, without statutory requirement, the Bureau of Marine Inspection and Navigation, which proceeded for nearly a century to prescribe safety regulations through a purely deliberative board,⁴¹ held hearings upon proposed rules for the construction of tank vessels.⁴² A subsequent statute covering the same matters contains a requirement for such hearings.⁴³ For similar reasons, occupational safety codes frequently are arrived at after consultation with affected groups.⁴⁴

Where economic control of private business enterprise is the purpose of regulation, the practice of according procedural formalities to affected interests in rule-making as well as in framing orders of specific application is especially applicable. Within this broad field of governmental control, however, differentiations need to be made. Procedural formality may be expected to increase roughly in proportion to the directness with which economic regulation affects the financial condition of the affected business enterprises. Hence, control of methods and practices whose bearing upon income and outgo is indirect⁴⁵ can proceed more freely than regulation of rates and prices or of factors entering visibly into the cost of doing business.⁴⁶ Thus, the prescription of insurance

³⁹ COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927) 208-10.

⁴⁰ Pub. L. No. 717, 75th Cong., 3d Sess. (June 25, 1938), 21 U. S. C. A. § 301 *et seq.* (Supp. 1938).

⁴¹ 10 STAT. 70, § 18 (1852).

⁴² 1 FED. REG. 467 (1936). The regulations were to be promulgated under the Act of Aug. 26, 1935, c. 697, 49 STAT. 868 (1935), 46 U. S. C. § 178 (Supp. 1937).

⁴³ 49 STAT. 1890 (1936), 46 U. S. C. § 319a(3) (Supp. 1937).

⁴⁴ ANDREWS, ADMINISTRATIVE LABOR LEGISLATION (1936) 42, 71-78, 97.

⁴⁵ *Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935).

⁴⁶ *United States v. Baltimore & O. R. R.*, 293 U. S. 454 (1935).

policy forms need have, and to some extent does have, fewer of the aspects of a judicial proceeding than a rate-fixing order issued by the same authority.⁴⁷ More recently the establishment of minimum wages by administrative action has called for ample notice-and-hearing procedure.⁴⁸

The character of the administrative determination which an authority is called upon to make, having regard to the mental processes involved, has an important effect upon the suitable procedure. Some degree of discretion, involving a choice either of the ends to be served or of the means to be employed in attaining defined ends, usually is involved in rule-making. Regulations for the routine operations of a public office, for example, involve at least an appraisal of the factors that bear upon efficiency; and the administrator who is responsible for the regulations must frame them to serve the prescribed end of effective conduct of his office. There is little occasion for obtaining facts or opinions from outside interests in the making of such determinations, even where there are groups that will be affected by the regulations. The same may be said of regulations in matters of health, such as the imposition of restrictions to prevent the spread of an epidemic. Although these may bear heavily upon private interests, the determinations involved are of so expert a character, embracing primarily a choice of means for the attainment of a definite, legally prescribed purpose, that there is little or no occasion for hearing or consulting affected groups. The need is rather for hewing resolutely to the line of duty, regardless of the possible clamor of interests.⁴⁹

Where official discretion in the exercise of regulatory functions⁵⁰ involves a choice of ends to be served, however, the need for hearing or consulting affected individuals and groups is marked. Rule-making functions that require such choices occur in a wide variety of circumstances. Thus in the regulation of marketing practices a balance must be struck between the inter-

⁴⁷ PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927) 389, 390, 406. Statutory procedural requirements are still in a rudimentary stage in respect to insurance regulation. *Ibid.*

⁴⁸ Mass. Acts 1937, c. 401, §§ 4-10; Pub. L. No. 718, 75th Cong., 3d Sess. (June 25, 1938) §§ 8-10; 11 U. S. C. A. §§ 208-10 (Supp. 1938).

⁴⁹ See COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* (1927) 230.

⁵⁰ The discretion involved in the performance of nonregulatory functions also may involve a choice of ends, but its exercise when private interests are not directly

ests of buyers and those of sellers, sometimes without statutory guides as to which are to be preferred.⁵¹ In imposing safety regulations with respect to locomotives the Interstate Commerce Commission must decide the point at which the furtherance of safety ceases to justify additional drains upon the carriers' incomes, without legislative direction other than that locomotives shall be "in proper condition and safe to operate."⁵² Again, in deciding whether to authorize substandard wages within a subdivision of an industry under the 1938 Wage-Hour law the Administrator must make up his mind whether to prefer the interest of competitors in maintaining the plane of competition or that of a group of producers in continuing to exist; for he is directed to give attention to both.⁵³ Such weighty determinations are not to be made without procedural safeguards, and in each of the foregoing instances they have been provided by administrative action or by statute.

Procedure should be adjusted also to the *types of administrative agencies exercising the rule-making functions*. If a nonexpert Assistant Secretary of Commerce is to recommend regulations for safety in air flight,⁵⁴ the means by which he will inform himself of the matters he is to control are likely to differ rather widely from those employed in an analogous field by a board of inspectors who have devoted their lives to the preservation of safety in navigation.⁵⁵ If a board or commission is to make determinations

affected does not require procedural formalities. Thus no one would suppose that hearings should precede a revision of the Army Regulations. Such rule-making functions fall outside the scope of this study.

⁵¹ The successive labeling requirements for substandard canned foods under the McNary-Mapes Amendment to the Federal Pure Food and Drug Act [46 STAT. 1019 (1930), 21 U. S. C. § 10 (1934)] have represented a shifting balance between the interest of the main body of canners in protection against the competition of low-quality products and the interest of low-income groups of consumers in a supply of wholesome, inexpensive food that has not been rendered forbidding by a "crepe" label. The products in question are in no sense adulterated or harmful, but simply fall below certain standards of quality, or desirability, which the Secretary of Agriculture is authorized to establish. The statute requires only that the label "indicate that such canned food falls below" the prescribed standard.

⁵² 43 STAT. 659 (1924), 45 U. S. C. § 23 (1934).

⁵³ Pub. L. No. 718, 75th Cong., 3d Sess. (June 25, 1938) § 8(b),(e), 29 U. S. C. A. § 208(b),(e) (Supp. 1938).

⁵⁴ See 48 STAT. 1113, 49 U. S. C. § 173 (1934) (now superseded).

⁵⁵ See note 31, *supra*.

of economic consequence, a formal hearing or consultation may be an efficient means of bringing relevant factors before all of the members at the same time, whereas a single official might inform himself more easily upon the same question by means of a simple investigation. If an agency is representative of the interests affected by its acts, the need for hearings and consultations in advance of its determinations obviously is reduced or eliminated.⁵⁶

The character of the enforcement which attaches to a regulation also has a bearing upon the procedure which is best adapted to its formulation. If the regulation is subject to challenge in all of its aspects after its promulgation,⁵⁷ the need of advance formalities is reduced or eliminated. If it binds the affected parties only by requiring them to comply with certain procedures in matters subsequently arising — as, for example, in future applications for licenses — it is not likely to be sufficiently weighty in its effects to warrant advance hearings or consultations in regard to its content.⁵⁸ When, however, a regulation presents affected parties

⁵⁶ Canadian provincial legislation regarding the extension of collective labor agreements to nonsignatories reflects this fact interestingly. In Quebec, the Minister of Labor must give notice and may hold a hearing before a decree is entered by the Lieutenant Governor in Council. Quebec Statutes 1937, c. 49, § 5, *as amended by* Statutes 1938, c. 52, § 2. In Ontario and Alberta, on the other hand, where only such agreements as are negotiated in open conferences summoned by the Minister may be extended, no further procedure is required in advance of a decree. Ontario Statutes 1936, c. 29, §§ 4-6, *as amended by* Statutes 1937, c. 32, § 6; Alberta Statutes 1935, c. 47, §§ 7-11, *as amended by* Statutes 1938, c. 56, § 2. See Note, *Collective Agreements in Foreign Countries* (1936) 43 Mo. LAB. REV. 398.

⁵⁷ *E.g.*, many Treasury, Federal Reserve, and other regulations are interpretative of statutory provisions which do not purport to confer discretion upon the rule-making agency. Hence they are subject to complete judicial review if they are challenged in court. The fact that the challenge may be expensive, that weight attaches to the administrative interpretation in the eyes of the courts [*Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479 (1919); *Modern System Dentists, Inc. v. State Board of Dental Examiners*, 216 Wis. 190, 256 N. W. 922 (1934)], and that re-enactment of a statute impliedly incorporates outstanding administrative interpretations into its terms [*McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488 (1931), with which compare, however, *Lynch, Ex'x v. Tilden Produce Co.*, 265 U. S. 315 (1924)] perhaps warrants more thorough procedural provisions than now exist in connection with their formulation; but clearly the need is less great than it would be if no challenge were possible. See COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* (1927) c. V.

⁵⁸ The existence of a body of practitioners who are called upon for regular observance of procedural regulations may make it desirable that its members be heard or consulted in connection with their formulation. Rules of court are increasingly being devised with the collaboration of members of the bar.

with the alternative of compliance or loss of property or liberty, with only limited opportunity or none at all to challenge its correctness, the need is evident for an antecedent opportunity to influence its content or be heard in regard to it.

Obviously an enormous number of permutations and combinations of the foregoing factors is possible. No simple rules exist or can be hoped for to serve as guides in the formulation of desirable procedures. All that can be hoped for are suggestive considerations which may serve to present the essential procedural issues more clearly and to introduce elements of rationality and consistency into their determination.

A much less self-conscious method has determined the procedures that actually prevail. Many regulatory administrative agencies, undirected and unhampered by statutory prescriptions, and unenlightened as well as undeterred by advice of counsel, have developed methods which are quite informal and which never have become involved in litigation. In many instances these have remained uncodified practice, often varying from case to case as practical officials, untrained in law, have gone about their business of getting things done as expeditiously and smoothly as possible. Attempts to crystallize the procedure of such agencies into prescribed methods might well result in lessened efficiency occasioned by unaccustomed and unnecessary attention to matters of form. In other instances, rule-making procedure has assumed a formal character with apparently an almost equal lack of design, by reason largely of association with methods employed by the same agency in the decision of cases by formal methods.⁵⁹

Rule-making procedure is devised, however, not only in the course of administration itself but also in the drafting of legislation and in court review of administrative proceedings. Legislation and judicial review yield, on the whole, no greater evidence of calculated adaptation of procedure to actual needs than is afforded by administrative practice. If a statute perchance requires that a regulation be promulgated only "after hearing," it is almost certain not to specify what shall be the nature of the hearing afforded; and if a judicial decision attaches a specific strict requirement to

⁵⁹ There is little doubt that the methods of the Interstate Commerce Commission in preparing safety regulations have, without conscious design, become increasingly similar to those employed in rate cases. See *United States v. Baltimore & O. R. R.*, 293 U. S. 454 (1935).

rule-making procedure in a particular instance,⁶⁰ the opinion probably will not trouble to set forth the reason for imposing it in that instance as distinguished from others or to state in what other situations it may be required. In a few recent statutes, however, which call for executive rule-making in highly controversial matters, a procedure that is designed to secure due attention to the interests of all affected parties has been prescribed with some particularity.⁶¹ In general, moreover, a heightened consciousness of the importance of administrative procedure has resulted from recent pronouncements of the Supreme Court.⁶²

III. TYPES OF RULE-MAKING PROCEDURE

The administrative rule-making procedures that have grown up as a result of the interplay of the foregoing factors may be separated for convenience into four general types. These are (1) investigational procedure, (2) consultative procedure, (3) auditive procedure, and (4) adversary procedure. The names here assigned to these types are somewhat arbitrary, but they lay stress in each instance upon the most significant aspects of the procedure designated. Roughly speaking, the four types of procedure have come into use in the order named. All of them prevail in various fields of administration at the present time.

The *investigational procedure* is analogous to that of legislatures. A legislature is theoretically competent to dispose of matters coming before it without according procedural formalities to affected interests. It is vested with full discretion and final authority, subject to constitutional limitations. Its representative character brings the community's knowledge and wisdom into the exercise of its discretion.⁶³ The parliamentary law which controls legislative proceedings is designed to secure fair discussion, adequate deliberation, and efficiency in the disposition of matters coming before legislative assemblies and not at all to accord procedural rights to outside individuals and groups.

Nevertheless, legislatures, like other bodies, find it necessary to

⁶⁰ See *Panama Ref. Co. v. Ryan*, 293 U. S. 388 (1935); *United States v. Baltimore & O. R. R.*, 293 U. S. 454 (1935).

⁶¹ See statutes cited notes 40, 53, *supra*.

⁶² *Panama Ref. Co. v. Ryan*, 293 U. S. 388 (1935); *United States v. Baltimore & O. R. R.*, 293 U. S. 454 (1935); *Morgan v. United States*, 304 U. S. 1 (1938).

⁶³ JOHN ADAMS, *Thoughts on Government* (1776) in 4 WORKS (1851) 195.

inform themselves specially concerning particular matters with which they must deal. An elaborate process of committee investigations, hearings, and reports has been developed for this purpose. The extent to which this procedure shall be used in particular instances, however, and the degree of participation which shall be permitted to those concerned remain wholly within legislative control. The channels through which the legislators may obtain information and acquaint themselves with points of view in the community are unlimited. There are no procedural forms whose observance can be demanded.⁶⁴ The investigational method may range as widely and proceed as informally as the legislature wishes.

Similar freedom prevails in the investigational activity of many administrative rule-making agencies. Performing functions which resemble the making of many statutes, they naturally employ similar investigational methods. In place of the competence which the legislature derives from its representative character, their discretion is founded upon their expertness, or at least their specialization, within designated fields of administration; and that discretion extends to their investigational methods as well as to the content of their official pronouncements. Few administrative agencies have been subjected to statutory or judicial control of any kind in regard to their rule-making procedure.

Consultative rule-making procedure has grown out of the practice, to which legislatures and administrative rule-making agencies have resorted increasingly, of receiving opinions, advice, and suggestions from groups whom their work affects. It is inevitable, on the one hand, that such groups should seek to make their wishes known and, on the other hand, that officials should turn to them for information upon the problems to be solved. The complexity of these problems under modern conditions makes consultation with those who are "on the inside" virtually a necessity.⁶⁵

⁶⁴ Where, however, the legislature seeks to compel testimony in the course of an investigation, it must do so subject to constitutional limitations. These, however, permit a wide latitude in regard to the range of matters to be investigated and the procedure to be employed. Potts, *Power of Legislative Bodies to Punish for Contempt* (1926) 74 U. OF PA. L. REV. 691, 780; Landis, *Constitutional Limitations on the Congressional Power of Investigation* (1926) 40 HARV. L. REV. 153.

⁶⁵ See CHAMBERLAIN, *LEGISLATIVE PROCESSES* (1936) 64 *et seq.*; Walker, *Where Does Legislation Originate?* (1929) 18 NAT. MUNIC. REV. 565; Beutel, *Pressure of*

Few administrative rule-making agencies whose work affects organized groups, especially economic groups, fail to maintain fairly regular contacts with them.⁶⁶ The Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Bureau of Marine Inspection and Navigation, the Board of Governors of the Federal Reserve System, the Food and Drug Administration, and many others follow this practice. Occasionally proposed regulations are submitted to a governmental agency by an expert, interested private organization. When an administrative agency itself frames proposed regulations the practice almost uniformly is to submit them to a long list of interested individuals and groups for suggestion and comment. Thereafter, discussion and correspondence often go forward at great length. At times advisory committees, established by administrative action or by legislation,⁶⁷ engage regularly in the review of proposed regulations.

To a considerable extent in England and to a less extent in this country, the consultative method of proceeding has been standardized by the creation of statutory advisory committees. These are entitled to be consulted in the rule-making process. They serve one or more of the following purposes: (1) to furnish information and suggestions to the administrative agency; (2) to insure the presentation of the contentions of interested groups to the responsible authorities; and (3) to "educate" the affected parties, through the members of the advisory committee, in regard to the regulations that are adopted.

The consultative type of procedure obviously is inapplicable where the groups affected by regulations are very numerous or the

Organized Interests as a Factor in Legislation (1929) 3 So. CALIF. L. REV. 10; HERRING, *GROUP REPRESENTATION BEFORE CONGRESS* (1929); 9 ENCYC. SOC. SCIENCES (1933) 565.

⁶⁶ For English practices see CARR, *DELEGATED LEGISLATION* (1921) 31-32; 2 COMMITTEE ON MINISTERS' POWERS (Minutes of Evidence) (1932) 5 (testimony of Sir Maurice L. Gwyer, Treasury Solicitor), 120 *et seq.* (supplemental memorandum from the Ministry of Health); for American practices see WHITE, *INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION* (1926) 407-10; HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* (1936) 28-43.

⁶⁷ HERRING, *op. cit. supra* note 65, c. XXI; FAIRLIE, *ADMINISTRATIVE PROCEDURE IN CONNECTION WITH STATUTORY RULES AND ORDERS IN GREAT BRITAIN* (1925) 66-75; Hart, *The Exercise of Rule-Making Power* in REPORT OF PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937) 339.

parties are unorganized. *Auditive procedure*, either by itself or as a supplement to the types previously described, affords an opportunity to such interests to express their views, as well as a means whereby rule-making agencies may receive fruitful suggestions. This procedure consists of the holding of duly-announced hearings at which interested parties are permitted to appear. There are no specific issues or rules of evidence or formalities of any kind except such as are necessary to assure order. Such hearings are analogous to legislative hearings⁶⁸ and bear no relation to court proceedings. They are valuable to the extent that notice of them can be brought home to affected parties, that they are accessible to these parties, and that the questions involved are susceptible to intelligent discussion by those who do appear. This auditive type of procedure is increasingly being resorted to voluntarily by administrative agencies⁶⁹ and is required frequently in statutes.

To a considerable extent, however, government is not the moving force in the framing of regulatory measures or, if it is, finds itself opposed by other interests. The function of legislation in recent times has been stated to be essentially that of effecting compromises which enable society to go forward with reasonable satisfaction to contending interests,⁷⁰ and legislative procedure has been characterized as analogous to judicial procedure, with "plaintiffs" and "defendants" presenting cases before "courts."⁷¹ All the more in administrative rule-making, which frequently serves as a focus of conflict among fairly stable groups with reference to well-defined issues, do the proceedings take on an adversary character.

The *adversary procedure* in rule-making, like so many other aspects of administrative law, seems to have crystallized first in the regulation of railroads. It is in the state utility commissions and the Interstate Commerce Commission that administrative procedure has assumed its most formal aspect. Although these bodies are freed by statute from the requirements of judicial pro-

⁶⁸ *Louisville & N. R. R. v. Garrett, et al.*, 231 U. S. 298, 307 (1913); *Bi-Metallic Investment Co. v. Colorado*, 239 U. S. 441, 445 (1915); *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 305, 319 (1933); *Highland Farms Dairy, Inc. v. Agnew*, 16 F. Supp. 575, 586 (E. D. Va. 1936).

⁶⁹ See note 42, *supra*; Hart, *supra* note 67, at 340.

⁷⁰ T. V. SMITH, *THE PROMISE OF AMERICAN POLITICS* (1936) 196.

⁷¹ CHAMBERLAIN, *LEGISLATIVE PROCESSES* (1936) 4-5.

cedure,⁷² they and their trial examiners sit as tribunals before whom affected interests and government representatives present evidence and arguments; ⁷³ they are required to base their factual conclusions upon "evidence" and to embody them in careful "findings"; ⁷⁴ and they maintain formal records embodying all the evidence presented at their hearings.⁷⁵ Whether a commission may go outside the record for information, not regularly the subject of "judicial notice," upon which to base a decision, is a subject of controversy.⁷⁶ In any event, adherence to these and other aspects of a careful, essentially adversary procedure is usual and is to a large extent judicially enforced.

Neither in the case of the Interstate Commerce Commission nor in that of the other federal agencies whose procedure is fashioned more or less upon the same model ⁷⁷ is an express distinction made between proceedings involving named parties and proceedings leading to the formulation of general regulations. In the case of the Interstate Commerce Commission certain differences have been recognized between proceedings involving many parties and those concerning only a few. In the former, where the same issue relates to all the parties, the evidence upon which the result is based need not deal specifically with the affairs of each affected carrier.⁷⁸ In proceedings affecting a host of motor carriers or involving complex matters such as accounting regulations, it is manifestly impossible to extend full rights of cross-examination to each party or to enter detailed findings upon each point covered in the regulations. Especially in the early stages of a commission's work, when blanket regulations are to be prescribed, is an auditive

⁷² Smith, *Practice and Procedure before the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 404.

⁷³ See the summarized account in the Introduction to BLACHLY, *WORKING PAPERS ON ADMINISTRATIVE ADJUDICATION*, prepared for the Senate Committee on the Judiciary, 75th Cong., 3d Sess. (1938); *Morgan v. United States*, 304 U. S. 1, 20 (1938).

⁷⁴ *Florida v. United States*, 282 U. S. 194 (1931); *United States v. Chicago, M., St. P. & P. R. R.*, 294 U. S. 499 (1935).

⁷⁵ *United States v. Abilene & S. Ry.*, 265 U. S. 274 (1924).

⁷⁶ Hanft, *Utilities Commissions as Expert Courts* (1936) 15 N. C. L. REV. 12.

⁷⁷ The Federal Power Commission, the Federal Communications Commission, the Securities and Exchange Commission, the National Bituminous Coal Commission, and the Civil Aeronautics Authority.

⁷⁸ *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74 (1930).

or consultative method likely to be followed.⁷⁹ In the main, however, the adversary type of procedure is employed, leading to a decision for or against a proposed regulation — a method which is furthered by the frequent practice of entertaining petitions from interested parties for desired regulations, which are opposed by those who would be adversely affected.⁸⁰

It is doubtful whether the adversary procedure is well adapted to the formulation of general regulations. Even when a regulation covers only a single subject, such as the installation of power reverse gears on locomotives, the facts to which the evidence and the findings must relate are not limited in time or space or number of parties affected. They embrace such questions, for example, as the degree of hazard involved in prevailing practices and the improvement to be expected from requiring a change. Multitudinous occurrences bear upon such a question and the element of judgment that enters into its determination is necessarily large. The issues to be determined are not legally defined, as are the elements considered in a public utility rate case, for example. In resolving the issues that relate to rule-making a more wide-ranging inquiry and a freer marshalling of the evidence seem necessary.

Notwithstanding these considerations, recent federal legislation has displayed a tendency to require the adversary type of procedure in rule-making⁸¹ and, moreover, to subject the resulting regulations to rather thorough judicial review. The Bituminous Coal Act of 1937 provides that "No order which is subject to judicial review . . . and no rule or regulation which has the force and effect of law shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence, shall be conclusive upon review thereof by any court of the United States."⁸² Thus the procedure in rule-making

⁷⁹ SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* (1935) pt. III-A, 70-74.

⁸⁰ *Johnson v. Atlantic C. L. R. R.*, 190 I. C. C. 351 (1933); *United States v. Baltimore & O. R. R.*, 5 F. Supp. 929 (N. D. Ohio 1933), *aff'd*, 293 U. S. 454 (1935), *further proceedings*, 222 I. C. C. 542 (1937).

⁸¹ In *Western Union Telegraph Co. v. Industrial Comm.*, 24 F. Supp. 370 (D. Minn. 1938), the view is advanced that probably due process requires the observance of the procedure that is usual in rate cases for the formulation of a minimum wage order applicable to many industries in a state.

⁸² 50 STAT. 73, 15 U. S. C. § 829 (Supp. 1937).

is equated to that in the formulation of orders, with judicial review of regulations made equally as comprehensive, if not equally as available,⁸³ as that which is given to orders. Regulations that have "the force and effect of law" are intended, no doubt, to include all those which are not merely procedural and which are backed by penal sanctions or by expulsion from membership in the Bituminous Coal Code, entailing the obligation to pay a 19.5 per cent additional sales tax.⁸⁴

The Food, Drug, and Cosmetic Act of 1938 specifically requires not only that the issuance of regulations under it shall be preceded by notice and hearing but also that the regulations shall be accompanied by "detailed findings of fact" and shall be based "only on substantial evidence of record at the hearing."⁸⁵ Judicial review of questions of law involved in the issuance of regulations under the Act and of whether the findings of fact are supported by "substantial evidence" is provided.⁸⁶ Thus, such technical, widely-ramifying matters as standards of identity and quality for foods, the information to be conveyed by the labels on dietary products, the quantities of poisonous residues to be permitted in food products, and the habit-forming qualities of narcotic derivatives must be determined in the manner in which the conformity of a shipment of goods to specifications is tried in a lawsuit. The considerations entering into such determination must be segregated so that the substantiality of the supporting evidence may be tested in court. The court may then either affirm the order or "set it aside in whole or in part, temporarily or permanently" and, if the Secretary of Agriculture should refuse to obey the court's decree, may order him "to take action . . . in accordance with law."

Under the Fair Labor Standards Act also, wage orders applying to entire industries must be based upon evidence contained in a record and may be subjected to judicial review of questions of law and of the substantiality of the supporting evidence.⁸⁷ The judi-

⁸³ The review provided by the Act itself extends only to "orders," but other means of reviewing regulations exist, such as injunction suits to prevent their enforcement. *Id.* § 6(b), (c), 15 U. S. C. § 836(b), (c) (Supp. 1937).

⁸⁴ *Id.* §§ 3(b), 5(b), 15 U. S. C. §§ 830(b), 835(b) (Supp. 1937).

⁸⁵ Pub. L. No. 717, 75th Cong., 3d Sess. (June 25, 1938) § 701(e), 21 U. S. C. A. § 371(e) (Supp. 1938).

⁸⁶ *Id.* § 701(f), 21 U. S. C. A. § 371(f) (Supp. 1938).

⁸⁷ Pub. L. No. 718, 75th Cong., 3d Sess. (June 25, 1938) §§ 8, 10(a), 29 U. S. C. A. § 208, 210(a) (Supp. 1938). Also illustrative of recent tendencies in federal

cial review, however, will extend to the validity of each order only so far "as it is applicable to the petitioner" in the case. The issues, therefore, will be somewhat narrowed.⁸⁸

IV. CONCLUSION

Recent developments open a new chapter in rule-making procedure. Whether the result will be a partial paralysis of administration by reason of excessive formality and litigation or an improvement in the precision with which administrative determinations are made cannot be discussed here. Probably it is too early in any event to forecast the outcome. Much will depend upon the realism with which administrators and courts differentiate the rule-making problems that confront them from the problems that arise in proceedings affecting definite parties, and upon the care with which they discriminate in the field of rule-making according to the presence of factors which have genuine procedural significance.

Certainly there will never be a time when it will be possible to assert that the details of rule-making procedure, or even the "basic requirements of fair play"⁸⁹ in such procedure, should be the same in all the varied circumstances that arise. Many regulations, even where private interests are affected, should continue to be issued on the basis of administrative knowledge or after merely informal investigation; others will call for systematic consultation with affected parties or regularized opportunities for such parties to be heard; still others, perhaps, will involve adversary proceedings in which parties are accorded virtually the status of litigants. But a particularism that regards each procedural problem as unrelated to others goes beyond the requirements of the present situation. Common factors exist amidst the prevailing diversity and may be made the basis of procedural norms, running through much administrative practice.

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legislation is the Agricultural Marketing Agreements Act of 1937, 50 STAT. 246, 7 U. S. C. § 601 *et seq.* (Supp. 1937). For procedural provisions, see § 8(c) (3), (4), (9) and (15). See also *Colteryahn Sanitary Dairy v. Milk Control Comm. of Pa.*, 1 A.(2d) 775 (Pa. 1938).

⁸⁸ *Id.* § 10(a).

⁸⁹ *Morgan v. United States*, 304 U. S. 1, 22 (1938).