

REVIEWS

ADMINISTRATIVE LAW TREATISE. By Kenneth Culp Davis. St. Paul: West Publishing Company. 1958. 4 vols. Pp. xxx, 640; xxx, 628; xxx, 616; xxx, 671. \$70.00.

PROFESSOR Davis' treatise has been so widely and justly acclaimed that it would be superfluous, at this late date, to attempt to add anything substantial to that evaluation. It may not, however, be entirely out of place to consider a few major themes of the treatise in the light of what is sometimes called the current phase or crisis in American administrative law.¹ It is somewhat ironic that so soon after the publication of these beautifully written and impressive volumes, the administrative process should again be on the defensive. Of course this is not to suggest that Professor Davis, as one of the foremost defenders of the administrative process, is somehow to blame for the troubles reflected, for example, in Dean Landis' Report on Regulatory Agencies to the President-Elect,² and more recently in the President's message to Congress of April 13, 1961.³ Quite the contrary, a good deal of Professor Davis' energy has been devoted to warning against just such over "judicialization" of the administrative process as Dean Landis suggests may be partly responsible for present inadequacies of the regulatory agencies.⁴ It is therefore these aspects of the treatise to which this discussion will be devoted.

Fundamental to any consideration of the "judicialization" of administrative procedures—using the term simply as shorthand for a host of subordinate problems, without suggesting either approbation or disapproval—is the question of when "a quasi-judicial," or "trial-type" hearing is required. Professor Davis prefers the last term; the Administrative Procedure Act uses "on the

1. See Landis, *The Administrative Process: The Third Decade*, 47 A.B.A.J. 135 (1961); Kintner, *Federal Administrative Law in the Decade of the Sixties* (pts. 1-2), 47 A.B.A.J. 269, 366 (1961). Berger, *Removal of Judicial Functions from a Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 MICH. L. REV. 199 (1960).

2. SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) [hereinafter cited as LANDIS REPORT].

3. N.Y. Times, April 14, 1961, p. 12, col. 1.

4. Very recently suggestions have been advanced that due to modern techniques for the assemblage of facts, the older "judicialized" forms may well be supplanted. The exact technology applicable to such a process has not as yet been clearly articulated. But if judgments of regulatory agencies in many fields such as rates are, in truth, business judgments rather than judgments conforming to a legal theory, techniques which do not rest upon the tedious process of examination and cross-examination and which underlie honest business judgments made by the industries may have a value in the handling of substantially the same problem by the agencies.

record" with similar connotations. The Treatise devotes one of its fullest chapters to this problem,⁵ and understandably it emphasizes an analysis of the cases concerned with the constitutional requirement of such a hearing—in effect the requirement of due process. On this point Professor Davis' principal thesis is that the courts have frequently gone astray by answering right to hearing questions in terms of the function being performed—the grant or denial of a license, the establishment of a rate, or the issuance of a cease and desist order—instead of in terms of the kind of factual issues, if any, being resolved. For example, when there is no factual issue in dispute, he quite incontrovertibly points out that a trial-type hearing is unnecessary. This does not rule out the possibility, as Davis apparently recognizes, that there may nevertheless be a right, constitutional or statutory, to have the decision made on the record of admitted facts, and also to have opportunity for argument with respect to their significance. The distinction which he next advances is more difficult to apply. Davis contrasts adjudicative facts—issues which require a trial-type hearing—with legislative facts—those which may be determined on the basis of the agency's general knowledge or through whatever investigative techniques may be prescribed by the legislature or considered appropriate by the agency.

Adjudicative facts are facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.⁶

Apart from the rather circular nature of this distinction—since it takes us back to the ultimate question of law or policy to be decided—in actual application it is as elusive as all the other magic keys which have been offered for the solution of the right to hearing problem. Suppose, for example, that the issue is whether a general rate increase should be allowed for the major railroads in the United States, a recurring problem before the Interstate Commerce Commission. The factual issues concern the expenses, earnings, actual and probable tonnages, financial structures, and capital needs of all the railroads. In one sense these are facts pertaining to the immediate parties, since all the railroads are parties to the proceedings and will be directly affected by the order. In another sense they are general facts pertaining at least to an entire industry, and in some aspects to competing industries, to consumers and to the entire economy. In part they help the Commission determine questions of policy and discretion regarding the wisdom of a rate increase, but they also help determine the financial needs of the particular roads. As a matter of practice, these determinations are of course made by the Commission in trial-type hearings, although the Commission may take official notice of general economic data and

5. Vol. 1, ch. 7.

6. Vol. 1, § 7.02 at 413.

the voluminous information reported to it by the carriers. Conceivably, these determinations could be made in a general rule making proceeding, with notice of the proposed action and opportunity to submit views and data, as provided for in section 4 of the Administrative Procedure Act. This view has been adopted, at least partially, by the Court of Appeals for the District of Columbia with respect to the regulation of insurance rates,⁷ and by some state courts with respect to prescription of prices for several industries such as dairy production.⁸ Representatives of the Bureau of the Budget in hearings before the Carroll Subcommittee on Administrative Practice and Procedure also accepted this view when they suggested that the procedure for rate-making should "be more a hearing of the character of a legislative hearing, rate-making being a legislative process rather than a trial in the sense in which the formal proceeding is now carried out."⁹ Professor Davis does not undertake to predict, on the basis of the distinction between legislative and adjudicative facts, whether such a rule making proceeding would be acceptable to the United States Supreme Court; he apparently believes, however, that some factual issues in rate-making proceedings may require trial-type hearings while others do not.¹⁰

Whatever may be the difficulties in applying the distinctions between adjudicative and legislative facts, or between quasi-judicial and quasi-legislative functions, for the purpose of determining constitutional requirements, a policy question would remain as to the desirability of substituting more informal procedures for the present trial-type or on-the-record proceedings generally used for rate determinations, issuance of certificates of convenience and necessity, and the like. In this connection it is perhaps worth recalling that the early struggles of the administrative process in the United States were directed against a crippling judicial review which insisted, also in the name of due process, that some degree of independent judicial judgment should be accorded to key facts upon which substantive constitutional rights were supposed to depend. Partly to provide an administrative record which would make unnecessary a judicial trial *de novo*, and partly to assure fairness in the administrative determination so as to obviate the need for an independent judicial judgment on factual issues, the elaborate quasi-judicial administrative hearing was developed. Since the restriction upon judicial review and the emphasis upon the quasi-judicial administrative hearing largely grew up together, without explicit legislative prescription of either, it is practically impossible to say which was cause and which effect. The Interstate Commerce Act, for example, in providing for rate determinations by the ICC and judicial review by the federal district courts, failed to prescribe either the nature of the administrative

7. *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948).

8. See, e.g., *State ex rel. State Bd. of Milk Control v. Newark Milk Co.*, 118 N.J. Eq. 504, 179 Atl. 116 (1935).

9. *Hearings pursuant to S. Res. 234 on Procedural Problems in the Administrative Agencies Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. 31 (1960).

10. Vol. 1, § 7.06 at 430-31 & nn.6, 8.

hearing or the type of review. It was the United States Supreme Court which introduced the conception that judicial review would be generally limited to the record made before the Commission, and that the Commission's determination should be based upon facts introduced in an open hearing similar to a judicial proceeding, even though formal rules of evidence or procedure need not prevail.¹¹

This dual conception of limited judicial review based on a record developed in the administrative hearing must be recognized as part of the theoretical foundation of the trial-type hearing so prevalent in American administrative law, particularly at the federal level, even in the absence of explicit statutory requirements. Perhaps this explains why the Supreme Court had no hesitancy in holding in *Riss & Co. v. United States* that a proceeding before the ICC for issuance of a motor carrier certificate was "an adjudication required by statute to be determined on the record after opportunity for an agency hearing" within the meaning of the Administrative Procedure Act, even though there is no such requirement in the Interstate Commerce Act.¹² Whether or not such a hearing was constitutionally required, as the Court may have meant to imply, it is clear that the trial-type hearing characteristic of the rate-making and certifying functions of the major regulatory agencies, cannot substantially be abandoned without reexamining the respective roles of administrative and judicial determinations in the federal system. This does not necessarily mean that the procedures for formulating the issues or establishing the facts might not be significantly altered to suit best the functions being performed, within the framework of a determination "on the record after opportunity for an agency hearing."

This brings us to another major theme of the Davis treatise—his argument for "official notice" as a principal tool by which an administrative agency may make appropriate use of its own accumulated knowledge and the technical knowledge of its staff, without either evidentiary procedures or sacrifice of a fair hearing. Here again Professor Davis relies heavily upon the distinction between adjudicative and legislative facts; with respect to the latter, he argues that liberal use of official notice is particularly desirable. Courts, he contends, do not hesitate to examine any relevant published sources of information, to rely upon their own experience or even to consult with acquaintances in order to acquire the factual background needed for the intelligent resolution of constitutional and other questions of law.¹³ Similarly he urges that administrative

11. See, e.g., *ICC v. Louisville & N.R.R.*, 227 U.S. 88 (1913).

12. *Riss & Co. v. United States*, 341 U.S. 907 (1951), reversing 96 F. Supp. 452 (1950). The Court's per curiam opinion cited only *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), which explicitly rested on the constitutional right to hearing in deportation cases, implied of necessity in the Immigration and Nationality Act. *Id.* at 50-51. The question under the Interstate Commerce Act, when issuance of a certificate of public convenience and necessity is involved, is by no means so clear, as demonstrated by the lower court's opinion. 96 F. Supp. 452.

13. The latter sources may be somewhat unusual—at least in explicit mention—although Professor Davis, Vol. 2, § 15.03 n.26, cites the support of a delightful, but dissent-

agencies should be free to use all available sources of information in exercising their delegated law-making powers. But administrative agencies, unlike courts, are frequently required by statute to exercise their law making powers upon a factual record developed in an adversary proceeding. Thus it would be nonsense for the ICC suddenly to announce that in prescribing rates for the future it would resolve all relevant factual questions on the basis of official notice, without any opportunity for rebuttal in a trial-type hearing. This Professor Davis himself would be the first to recognize, since he urges that all fairly disputable facts officially noticed should somehow be made a part of the record and the parties given a fair opportunity to challenge them.

As a possible alternative to the more conventional evidentiary procedures Professor Davis refers to the official notice practices of the Office of Price Administration, which he suggests rested somewhat upon the legislative character of price and rent ceilings. They also had the sanction of the statutory provision requiring the protestant to be informed "of any economic data and other facts of which the Administrator has taken official notice." Yet fundamentally there was little difference between the prescription of price ceilings for an entire industry and the prescription of rates for large segments of the railroad industry. True, the Price Control Act allowed the Administrator to issue regulations without prior formal hearing. But upon the filing of a protest he was required to accord either a written or oral hearing,¹⁴ and denial of a protest was reviewable in the Emergency Court of Appeals on the record made in the administrative proceedings. In practice, in complex cases with difficult factual issues, the Administrator, during the protest proceedings, announced exactly what data had been officially noticed so that the protestant might offer rebuttal evidence or even demand an oral hearing and cross-examination. It was in short a determination "on the record after opportunity for agency hearing." Probably most members of the ICC bar would be horrified at any suggestion that the Commission procedures should even remotely resemble those of the Office of Price Administration. And yet, with the increasing substitution of written for oral hearings, Commission practices have in effect been moving in that direction.¹⁵ How far these tendencies may properly and profitably be carried is the real question. Nevertheless, Professor Davis is undoubtedly on sound ground in urging that the Commission itself could be more hospitable to the idea of official notice and more daring in its use.

As Professor Davis recognizes, there is a close connection between the problem of official notice and the problems of internal separation of functions, and

ing, opinion by Judge Frank, describing his investigation of feminine shopping practices. *Triangle Publications, Inc. v. Rohrlisch*, 167 F.2d 969, 976 (2d Cir. 1948). Another more recent example is provided by the Supreme Court's own reference to factual information supplied in the briefs of *amici curiae* in disposing of a question of agency discretion in taking cognizance of facts outside the record. *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 n.23, 81 Sup. Ct. 435, 450 n.23 (1961).

14. The procedures were generally described and sustained in *Yakus v. United States*, 321 U.S. 414 (1944) and *Bowles v. Willingham*, 321 U.S. 503 (1944).

15. Vol. 2, § 14.16 at 331.

the so-called institutional decision. When either the hearing examiner or the agency head is making an intermediate or final decision, he may find some issue of fact which is not adequately covered in the record. If the missing facts can be supplied from the examiner's or commissioner's own personal information, or from available agency records, only the problem of official notice is presented. But if the deciding officer requires the help of staff specialists, then we must take account of the various statutory provisions, procedural regulations or conceptions of fair hearing which forbid secret consultation between deciding officers and staff members in adversary or trial-type hearings. The outstanding provision of general application is section 5(c) of the Administration Procedure Act¹⁶—the so-called separation of functions provision, which represents a carefully articulated compromise between strongly opposing points of view, and like most such compromises, is not without ambiguities. Professor Davis' attitude toward this provision, and various proposals for its amendment, is complex and not easily summarized. Basically, section 5(c) prohibits the presiding officer in adjudicatory proceedings from consulting "with any person or party on any fact in issue unless upon notice and opportunity for all parties to participate." It also provides that no staff member engaged in investigatory or prosecutory functions in any case shall participate in the decision or recommended decision in that case or a factually related case except as witness or counsel in public proceedings. This subsection is also made inapplicable to initial licensing proceedings, to proceedings involving public utilities, and to the heads of the agency. Professor Davis generally approves of this provision, but doubts the wisdom of some of its qualifications. Thus, speaking of an instance involving initial licensing before the FCC, where the Commission's General Counsel after acting as advocate in public proceedings before the Commission also argued before it in execution session, in the absence of opposing counsel, he says: "What was done was clearly a violation of sound principle but just as clearly was not a violation of the APA, because the case involved an application for an initial license."¹⁷ His thought is that one who was an advocate in formal proceedings should not continue as advocate in private sessions, whether the proceedings involve licensing, rate making, or the issuance of a cease and desist order. On the other hand, he argues that deciding officers should be encouraged to consult with agency specialists on technical questions which trouble them in trying to arrive at their decision. Under the APA agency heads may clearly so consult with specialists who have not participated in investigating or prosecuting. They should also be allowed, Davis argues, to consult with experts who have testified, so long as any new analyses or advice presented is clearly reflected in the final opinion and adequate opportunity is afforded for argument or rehearing. He would also extend this freedom of consultation to hearing officers in preparing proposed decisions, on the theory that the use of all the technical resources of the agency would make the report more

16. 60 Stat. 240 (1946), 5 U.S.C. § 1004(c) (1958).

17. Vol. 2, § 13.06 at 214.

likely to reflect the ultimate thinking of the agency and give the private parties a better opportunity to expose any weaknesses in such thinking.

Whether the separation principle—as represented by section 5(c)—should be expanded or curtailed is a key question in the debate over “judicialization” of the administrative process. The separation principle has been carried much further in the creation of the independent office of General Counsel to the National Labor Relations Board. It would be carried still further in the congressional proposals, supported by the American Bar Association, for the creation of a Labor Court in place of the Labor Board, and an Administrator and a Trade Court in place of the FTC. But these enforcement agencies present relatively simple separation problems as compared with those posed by proposals for further separation of functions within such agencies as the ICC, FCC, the FPC and the CAB. This is illustrated by the 1952 amendments to the Communication Acts, which, besides extending the separation principle to initial licensing by prohibiting staff members who participated in the presentation or preparation of any case from advising as to that case, also prohibited any member of the Offices of the General Counsel, the Chief Engineer, the Chief Accountant, and anyone else performing investigative or prosecutive functions for the Commission, from participating, except as witness or counsel, in any adjudication designated for hearing.¹⁸ These amendments in effect isolate both Commissioners and examiners from any extra-record consultation with staff specialists, except that the Commissioners are allowed the help of a review staff which might include such specialists. Professor Davis, as a staunch defender of the institutional decision, criticizes these provisions on the grounds (1) that they cut off even Commissioners from the assistance of responsible staff members who have not had investigatory or prosecutory responsibilities in the particular case; and (2) that they isolate examiners who might be expected to have even less experience than Commissioners, from the staff specialists.¹⁹ Although we might be somewhat skeptical of the latter assumption, and although cause and effect in these matters is difficult to establish, the recent history of the FCC clearly casts doubt on the wisdom of the amendments.

However this may be, the pressing issue now is whether internal isolation of the decision maker should be carried still further, whether we should struggle along with the present uneasy compromise, or whether some new approach should be attempted. The American Bar Association has generally tended toward the first alternative in its support of bills which would amend the APA. This position has now gained the support of the House Special Subcommittee on Legislative Oversight. In its controversial Final Report of January, 1961,²⁰ the Subcommittee highlighted the probably routine approaches to the Federal Power Commission of Thomas Corcoran, Washington lawyer, in connection with a certification and rate proceeding then awaiting Commission decision

18. 66 Stat. 713, 721 (1952), 47 U.S.C. §§ 154(f), 155(c), 409(c) (1958).

19. Vol. 2, § 11.14 at 98-99.

20. H.R. REP. No. 2238, 86th Cong., 2d Sess. 19-30 (1961). See the minority report at pp. 85-86.

after completion of the formal record. Mr. Corcoran had argued that his conduct was clearly permitted by the APA, and violated no general ethical principles because it was above-board and did not affect adversary parties. The majority of the Subcommittee wholeheartedly accepted almost all of Corcoran's arguments. They agreed that since section 5(c) permitted staff members free access to the Commissioners, it was only fair that a similar privilege should be accorded to private parties. They also agreed that this was a nonadversary proceeding outside of the principle of the *Sangamon Valley* case,²¹ in which the Court of Appeals vacated an FCC allocation of television channels between communities because of ex parte communications by an interested station owner. For good measure the majority of the Subcommittee added that such ex parte conduct was not unusual, and was in fact encouraged by the Commission. "[T]he Commission in meeting emergencies and deadlines is acting in the public interest by having ex parte contacts with industry representatives."²²

Despite these conclusions—labeled by the minority as an "incredible white-wash"²³—the Subcommittee Report went on to recommend that section 5(c) be amended to forbid staff members from communicating with Commissioners concerning a case awaiting decision after oral argument, except that the Commission could have a staff panel of experts to assist them in arriving at decisions and writing opinions. Members of this staff could also be assigned to a case in process of hearing, and could periodically report to a Commissioner assigned to that case with regard to its progress, but would not participate in it except as observers. These subcommittee conclusions and recommendations illustrate a questionable assumption that internal separation of functions and ex parte communications from private parties are necessarily opposite sides of the same coin. But they also indicate an attempt to escape from results of this assumption by the creation of another hierarchy of staff experts who may observe and report but who will not be contaminated by active participation. This suggestion may reflect a suspicion that one difficulty of the formal decision making process in complex regulatory proceedings is that the Commissioners enter only at the final stage, after months or years of formulating issues and developing facts at the staff level. Yet the proposal would only acquaint one of the Commissioners with the general progress of the proceedings, and this at the expense of assigning precious staff time to passive observation. The practicability of this suggestion, to say nothing of the probable reactions it would elicit from the Bureau of the Budget and Congressional Appropriations Committees, is hardly promising. A serious attempt to implement the proposal is more likely to result in the same kind of internal organization required of the Communications Commission by the 1952 amendments.

A more radical solution than those discussed thus far has been Louis Hector's plan for complete separation of the agencies' quasi-judicial functions from

21. *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959).

22. H.R. REP. No. 2238, *supra* note 20, at 23.

23. *Id.* at 86.

planning and policy making.²⁴ Although he has made the suggestion explicit only with regard to the CAB, he apparently means that any case to be determined on the record after opportunity for formal agency hearing, would necessarily be transferred into the jurisdiction of an Administrative Court. In a CAB case, the planning of route patterns would be the job of an Administrator responsible to the President, perhaps as part of a Department of Transportation. An Administrative Court would award routes to particular airlines, subject to such general policy regulations as the Administrator might declare. Mr. Hector did not wrestle explicitly with how rate regulation would be handled under his set-up. Whatever the mechanics, he apparently envisages a system which would allow the Administrator to act wholeheartedly as an executive with all the attendant informalities, and the Administrative Court to act in a wholeheartedly judicial manner with no *ex parte* consultations except those appropriate for judicial proceedings. Under the present setup, he says, it is virtually impossible for the Administrator, in a quasi-judicial role to divorce himself from the background and attitudes acquired through informal contact with the industry.²⁵

Perhaps Professor Davis would ask why the Administrator should even attempt such a divorce. The original justification for the administrative commission was partly this very "expertise" developed from experience with the industry. Indeed, Mr. Hector's own description of the insights and outlook acquired through a Commissioner's general regulatory experience suggests that much would be lost if the Administrative Court came to the decision of contested cases without any comparable background. In answer to this criticism, Mr. Hector points to the separation between the Internal Revenue Service and the Tax Court. Perhaps this minimizes the fact that both the Internal Revenue Service and the Tax Court are concerned primarily with interpreting the tax laws, rather than formulating tax policies. Thus the job of the Tax Court is not to implement policies formulated by Internal Revenue, but to apply the tax laws themselves to specific cases, giving such weight to the administrative interpretations as would be given by a court.²⁶

The most perplexing question suggested by Mr. Hector's memorandum is why the regulatory agencies cannot exercise their policy making functions properly without turning over their quasi-judicial functions to an Administrative Court. For example, if the CAB, or a single Administrator acting in its place, could develop policies sufficiently precise for the guidance of an Administrative Court in concrete cases, why could not the CAB do the same thing for

24. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960).

25. This view is also elaborated in Mr. Hector's testimony. *Hearings, supra* note 9, at 207.

26. This too is an over-simplification since some Treasury Regulations may doubtless more properly be classified as legislative rather than interpretative, but in general the distinction mentioned is still a valid one. See BITTKER, *FEDERAL INCOME ESTATES & GIFT TAXATION* 27 (2d ed. 1958).

the guidance of its examiners? The only difference, aside from the multi-headed nature of the CAB, would be that the Board would retain some check on the application of those policies through review of examiners' decisions. To some extent the FCC, with no greater statutory authority, has done just this by issuing regulations which are in effect the prior announcement of principles to govern the disposition of applications for broadcasting licenses.²⁷ The FCC also adopted the policy of allocating television channels among different communities in rule-making hearings before allocating particular channels among competing applicants.²⁸ This device has not solved all the problems of the FCC. Indeed the *ex parte* communications problem of the *Sangamon Valley* case, arose in just such a rule-making proceeding which was treated as an adversary proceeding. But such problems would be presented irrespective of whether an Administrator or a Board was doing the allocating. Also, complete separation of route patterns for air service from the choice of the particular airlines may itself be impracticable because the relative strengths of the airlines are relevant in determining such patterns.²⁹ But whatever the difficulties inherent in the problem, the development of such plans should be just as feasible for a Board as for an Administrator, allowing for the likelihood of greater delay and deliberateness on account of the multiheaded character of the Board. If a substantial part of the problem is the simple pressure of the work load, then perhaps the decision making process should be delegated in relatively unimportant cases to examiners or intermediate boards, as exemplified in the recent reorganization of the ICC.³⁰

It is interesting to compare Mr. Hector's proposal with the reactions of Dean Landis to CAB procedures shortly after his service as its Chairman. Landis felt that both the routes to be flown and the carriers to fly them should be determined by informal study and investigation, out of which the Board would evolve a comprehensive plan allocating routes among various carriers.³¹ Such a procedure could probably not be adopted without substantial amendment of the Civil Aeronautics Act, which now requires that certificates should be issued only upon application after public hearing. Even if the Act were amended to provide explicitly for issuance of certificates in accordance with comprehensive plans drawn by the Board after general investigations, the constitutional question of whether applications by particular carriers for particular

27. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

28. This procedure was sustained in *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954).

29. See Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 WIS. L. REV. 183, 186.

30. 26 Fed. Reg. 241, 861, 1378 (1961). This possibility is further emphasized in the President's message of April 14, 1961. *N.Y. Times*, April 14, 1961, p. 12, cols. 5-6.

31. Landis, *Air Routes Under the Civil Aeronautics Act*, 15 J. AIR L. & COM. 295, 299, 301 (1948). In his report to Mr. Kennedy, Dean Landis seems ready to settle for a less radical change in CAB procedures. See LANDIS REPORT 42.

routes could be denied without trial-type hearings would remain. This reintroduces the question discussed at the outset—when a trial-type hearing is constitutionally required—and also the implications of the Supreme Court's *per curiam* decision in the *Riss* case. If this decision means that a certificate may not be constitutionally denied without a trial-type hearing on the record it would also seem to mean that all issues relevant to the decision cannot be conclusively determined beforehand by informal investigation. On the other hand, the *Riss* case may mean that the trial-type hearing was implicit in the scheme of the Interstate Commerce Act, with judicial review limited to the administrative record. If so, it is conceivable that route allocations could be made in informal rule-making proceedings, leaving the administrative determinations challengeable in *de novo* judicial proceedings. In view of the mutual interests of both the agencies and the federal courts in avoiding such proceedings whenever possible, this seems an unlikely alternative either in the case of the CAB or the other major regulatory agencies.

More fruitful possibilities may lie in the development of composite procedures permitting the agencies to conduct general studies and investigations leading to the formulation of proposed plans, orders or regulations which would then serve as the basis for formal, trial-type hearings. For such a system to work effectively agency heads would have to be fully responsible for, and thoroughly familiar with, the preliminary investigation and planning stage, and would of course have to be free to consult extensively with their most responsible staff members. It would be indeed unfortunate if hasty reactions to the *ex parte* communications problem and uncritical extensions of the principle of internal separation of functions were to prevent the evolution of such composite procedures. One of the great virtues of the administrative process has supposedly been its flexibility. Now that it has so clearly come of age, it should not be forced to suffer prematurely from hardening of the arteries.³²

NATHANIEL L. NATHANSON†

32. At this writing the latest developments in the re-examination of federal administrative procedures are the Executive Order of April 13, 1961, establishing an Administrative Conference of the United States (26 Fed. Reg. 3233), and the Report of April 14, 1961 of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, S.R. No. 168, 87 Cong., 1st Sess. The Subcommittee does not recommend a general revision of the Administrative Procedure Act, but does make a number of particular recommendations, including the establishment of a White House Office of Administration and Reorganization, and also a continuing Conference on Administrative Procedure.

†Professor of Law, Northwestern University.