

September 1954

## Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process

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### Recommended Citation

John Mann, *Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process*, 7 Fla. L. Rev. 328 (1954).

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Bluebook 21st ed.

John Mann, Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process, 7 U. FLA. L. REV. 328 (1954).

ALWD 7th ed.

John Mann, Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process, 7 U. Fla. L. Rev. 328 (1954).

APA 7th ed.

Mann, J. (1954). Administrative law: ad hoc deviation from federal procedural regulations as violation of due process. University of Florida Law Review, 7(3), 328-331.

Chicago 17th ed.

John Mann, "Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process," University of Florida Law Review 7, no. 3 (Fall 1954): 328-331

McGill Guide 9th ed.

John Mann, "Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process" (1954) 7:3 U Fla L Rev 328.

AGLC 4th ed.

John Mann, 'Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process' (1954) 7(3) University of Florida Law Review 328

MLA 9th ed.

Mann, John. "Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process." University of Florida Law Review, vol. 7, no. 3, Fall 1954, pp. 328-331. HeinOnline.

OSCOLA 4th ed.

John Mann, 'Administrative Law: Ad Hoc Deviation from Federal Procedural Regulations as a Violation of Due Process' (1954) 7 U Fla L Rev 328

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## CASE COMMENTS

### ADMINISTRATIVE LAW: AD HOC DEVIATION FROM FEDERAL PROCEDURAL REGULATIONS AS A VIOLATION OF DUE PROCESS

*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)

Petitioner, a deportable alien, applied for suspension of his deportation order. A hearing officer recommended denial of the application, and this recommendation was adopted by the Acting Commissioner of Immigration. After a further denial by the Board of Immigration Appeals, petitioner sued out a writ of habeas corpus; the writ was subsequently dismissed. On the day before his scheduled deportation, petitioner's wife sought a writ of habeas corpus in a district court, alleging that a list of "unsavory characters" issued by the Attorney General had caused the Board to prejudice her husband's petition. In this confidential list were named a number of persons, including petitioner, whom the Attorney General planned to deport. Petitioner alleged that the Board's knowledge of the contents of this document made it impossible for him to secure a fair hearing. The district judge refused the offer of proof and summarily denied the writ. The court of appeals affirmed.<sup>1</sup> On certiorari, HELD, a petitioner, upon proof of his allegations, is entitled to a hearing before the Board without the burden of previous proscription; since the discretionary power of the Attorney General<sup>2</sup> is conferred upon the Board,<sup>3</sup> the failure of the Board to exercise its own independent judgment denied to petitioner that due process required by the regulations. Reversed, Justices Jackson, Reed, Burton, and Minton dissenting.<sup>4</sup>

It is clearly established that valid administrative regulations have the force and effect of law<sup>5</sup> and, until repealed or modified by the

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<sup>1</sup>206 F.2d 897 (2d Cir. 1953).

<sup>2</sup>54 STAT. 671 (1940), as amended, 8 U.S.C. §1254 (Supp. 1953).

<sup>3</sup>8 CODE FED. REGS. §§243, 244 (1952).

<sup>4</sup>The dissenters, at p. 269, thought that habeas corpus was improperly invoked and that the petitioner had no legal right to a suspension of a lawful deportation order.

<sup>5</sup>E.g., *Boske v. Comingore*, 177 U.S. 459 (1900); *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950); *Alexiou v. McGrath*, 101 F. Supp. 421 (App. D.C. 1951); *In re Briley's Estate*, 155 Fla. 798, 21 So.2d 595 (1945); *Atkins v. Manning*, 206 Ga. 219, 56 S.E.2d 260 (1949).

administrative agency,<sup>6</sup> are binding on the administrative tribunal as well as those affected thereby.<sup>7</sup> But a procedural regulation cannot be specifically repealed, changed, waived, or suspended to affect a case under consideration,<sup>8</sup> nor can a long-established rule of procedure be disregarded to the derogation of rights acquired under the rule.<sup>9</sup> It logically follows that valid procedural regulations bestow rights upon persons within their scope.<sup>10</sup> When regulations are ignored the rights of parties are subverted and the hearing is without due process of law.<sup>11</sup> An administrative agency may relax or modify its procedural rules in the cause of justice, and this action is reviewable only upon a showing of substantial prejudice to the complaining party.<sup>12</sup> By stressing the reviewability aspect the courts avoid the abstract question whether the ad hoc deviation is per se a violation of due process.

The protection of the Fifth Amendment is not limited to citizens of the United States alone but extends to aliens as well.<sup>13</sup> Courts have stated, however, that an alien seeking entry is entitled only to observance of the procedures authorized by Congress and that these procedures are "due process" as concerns the alien.<sup>14</sup> It appears that these courts have used the term "due process" as meaning something less than constitutional due process. Nevertheless, an alien is entitled

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<sup>6</sup>*Sheridan-Wyoming Coal Co. v. Krug*, 172 F.2d 282 (D.C. Cir. 1949), *rev'd on other grounds sub nom. Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950).

<sup>7</sup>*E.g.*, *United States ex rel. Ohm v. Perkins*, 79 F.2d 533 (2d Cir. 1935); *Sibray v. United States ex rel. Plichta*, 282 Fed. 795 (3d Cir. 1922); *People ex rel. Bergquist v. Gregory*, 337 Ill. App. 661, 86 N.E.2d 434 (1949); *Mallen v. Morton*, 199 Misc. 805, 99 N.Y.S.2d 521 (Sup. Ct. 1950); *In re Consumers Power Co.*, 6 S.E.C. 444 (1939). *But cf.* *NLRB v. Grace*, 184 F.2d 126 (8th Cir. 1950); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780 (9th Cir. 1941).

<sup>8</sup>*Colyer v. Skeffington*, 265 Fed. 17 (D. Mass. 1920), *rev'd on other grounds sub nom. Skeffington v. Katzeff*, 277 Fed. 129 (1st Cir. 1922); *State v. Tri-State Tel. & Tel. Co.*, 204 Minn. 516, 284 N.W. 294 (1939); *Stanton v. Municipal Civil Serv. Comm'n*, 189 Misc. 782, 75 N.Y.S.2d 732 (Sup. Ct. 1947). *But cf.* *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763 (8th Cir. 1953).

<sup>9</sup>*Germania Iron Co. v. James*, 89 Fed. 811 (8th Cir. 1898).

<sup>10</sup>*Sibray v. United States ex rel. Plichta*, 282 Fed. 795 (3d Cir. 1922); *Mah Shee v. White*, 242 Fed. 868 (9th Cir. 1917); *Germania Iron Co. v. James*, *supra* note 9.

<sup>11</sup>*United States ex rel. Chin Fook Wah v. Dunton*, 288 Fed. 959 (S.D.N.Y. 1923).

<sup>12</sup>*NLRB v. Monsanto Chemical Co.*, 205 F.2d 763 (8th Cir. 1953).

<sup>13</sup>*The Japanese Immigrant Case*, 189 U.S. 86 (1903); *Colyer v. Skeffington*, *supra* note 8.

<sup>14</sup>*E.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Ekiu v. United States*, 142 U.S. 651 (1892).

to constitutional due process in deportation proceedings<sup>15</sup> and may insist upon the observance of rules validly promulgated;<sup>16</sup> rules of procedure constitute, for aliens, that due process of law guaranteed by the Constitution to all men.<sup>17</sup> The alien is equally protected in a hearing in which he invokes discretionary relief.<sup>18</sup> A statutory recital that discretionary action is final will not bar the alien from resorting to habeas corpus proceedings when there has been an abuse of discretion<sup>19</sup> or a failure to exercise discretion.<sup>20</sup> Statutes making Attorney General decisions final are intended to preclude judicial review except by habeas corpus,<sup>21</sup> which may be used to determine if an alien's constitutional rights have been violated.<sup>22</sup>

It might be argued that an admittedly deportable alien seeking suspension of deportation is in the same position as one seeking entry, and is therefore not entitled to constitutional due process. Even if the validity of this proposition were assumed, however, observance of the procedure is necessary to insure the fair treatment intended by Congress. The argument seems specious, since an alien within the United States is still within the definition of "any person" as contemplated by the Fifth Amendment. Furthermore, the suspension proceedings are merely a logical extension of the deportation process, in the course of which the alien is entitled to constitutional due process.

One reason why courts strike down ad hoc administrative deviations from procedural rules may be that constitutional principles require that statutes be administered according to law and not according

<sup>15</sup>United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); *Ex parte Radivoeff*, 278 Fed. 227 (D. Mont. 1922).

<sup>16</sup>Bridges v. Wixon, 326 U.S. 135 (1945); see United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923).

<sup>17</sup>*Ex parte Radivoeff*, 278 Fed. 227 (D. Mont. 1922).

<sup>18</sup>*E.g.*, Chavez v. McGranery, 108 F. Supp. 255 (S.D. Cal. 1952) (suspension of deportation); United States *ex rel.* Giacalone v. Miller, 86 F. Supp. 655 (S.D.N.Y. 1949) (voluntary departure); see United States *ex rel.* Weddeke v. Watkins, 166 F.2d 369, 371 (2d Cir.), *cert. denied*, 333 U.S. 876 (1948) (suspension of deportation); Kavadias v. Cross, 82 F. Supp. 716, 718 (N.D. Ind. 1948), *rev'd on other grounds*, 177 F.2d 497 (7th Cir. 1949) (suspension of deportation).

<sup>19</sup>*Cf.* United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950); see United States *ex rel.* Adel v. Shaughnessy, 183 F.2d 371, 372 (2d Cir. 1950).

<sup>20</sup>Chavez v. McGranery, 108 F. Supp. 255 (S.D. Cal. 1952).

<sup>21</sup>Heikkila v. Barber, 345 U.S. 299 (1953).

<sup>22</sup>United States *ex rel.* Weddeke v. Watkins, 166 F.2d 369 (2d Cir. 1948), *cert. denied*, 333 U.S. 876 (1948); see Reynolds v. United States *ex rel.* Koleff, 70 F.2d 39 (7th Cir.), *cert denied*, 293 U.S. 590 (1934).

to the caprice of men.<sup>23</sup> Another rationale is the courts' belief that administrative procedural regulations are the minimum requirements of fair procedure and that any deviation therefrom raises a conclusive presumption of unfairness.<sup>24</sup> Courts have not always articulated the elements of due process involved in a particular case, relying instead upon a finding of "unfair hearing"<sup>25</sup> or "abuse of discretion."<sup>26</sup> Nevertheless, procedural due process seems inextricably involved in many of the cases. It is difficult to perceive the theory under which a court may strike down an administrative nonobservance of regulations by issuing a writ of habeas corpus unless the court recognizes that the petitioner has a right to a close observance of the regulations.

This decision is consistent with the American concept of fair play inherent in procedural due process. Although the power of the Attorney General is discretionary, once he has indicated by regulations that he will exercise his discretion in a certain manner — through the Board by quasi-judicial proceedings in the instant case — he should be bound to exercise his discretion accordingly until a change is effected through promulgation of superseding regulations.

The fact that the Attorney General may review and overturn any decision of the Board<sup>27</sup> does not render an ad hoc deviation any less arbitrary. The due process principle requires that all of a class, including deportable aliens, be afforded equal treatment under the regulations. Whether the Attorney General's action in issuing the proscribed list is considered as an abuse of his discretion or the alleged action of the Board in prejudging the alien's application is considered as a failure to exercise its discretion, the effect is the same: the alien has been denied his right to a fair hearing before the Board as guaranteed by regulations.

This decision looks beyond the petitioner who presents no overwhelming equities and has scant hope of ultimate success. It warns over-zealous administrators that arbitrary action in the face of self-imposed procedures, even though taken under the guise of "discretion," will not stand the acid test of procedural due process.

JOHN MANN

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<sup>23</sup>See *Sibray v. United States ex rel. Plichta*, 282 Fed. 795, 798 (3d Cir. 1922).

<sup>24</sup>GELLHORN, *ADMINISTRATIVE LAW CASES AND COMMENTS* 449 (2d ed. 1947).

<sup>25</sup>E.g., *Mah Shee v. White*, 242 Fed. 868 (9th Cir. 1917).

<sup>26</sup>E.g., See *Alexiou v. McGrath*, 101 F. Supp. 421 (App. D.C. 1951).

<sup>27</sup>See 8 CODE FED. REGS. §6.01 (h) (1952).