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The Hoover Report--Procedural Due Process in Required Administrative Hearings

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This may be accomplished by a direct overruling of the *Wolf* case through a holding that the exclusion of evidence is an essential ingredient of the right of privacy guaranteed by the fourth amendment.[105] Without directly overruling *Wolf*, the Court could reexamine the scope of the due process clause and include within it a bar to the use of illegally obtained evidence. Since "basic rights do not become petrified as of any one time," [106] and since "it is of the very nature of a free society to advance in its standards of what is deemed reasonable and right," [107] this solution is not without justification.

But the "national" protection of the right of privacy by the exclusion of evidence may require a departure from the sources tapped in previous investigations of the problem. In this connection, the privileges and immunities clause of the fourteenth amendment may provide a fertile field for future consideration. Assuming that the exclusion of illegally obtained evidence in federal courts is a privilege afforded every citizen of the United States, an argument could be made that the admission of such evidence in state courts is an unconstitutional abridgement of that privilege. Since other remedies do not appear to provide adequate protection, the imposition of the exclusionary rule on the state level would seem to be necessary.

THE HOOVER REPORT — PROCEDURAL DUE PROCESS IN REQUIRED ADMINISTRATIVE HEARINGS

One of the most pressing problems in administrative law is that of procedural due process in administrative hearings.[1] The remedial Administrative Procedure Act [2] has provided only a limited solution.[3]

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[105] See Olmstead v. United States, 277 U.S. 438, 462-63 (1928) (dictum); Wolf v. Colorado, 338 U.S. 25, 48 (1948) (dissenting opinion). See also MACHEN, *The Law Of Search And Seizure,* in LAW AND ADMINISTRATION 144 (1950).

[106] See Wolf v. Colorado, *supra* note 105 at 27.

[107] *Ibid.*

[1] See GELLHORN AND BYSE, ADMINISTRATIVE LAW 715-22 (1954); ATTORNEY GENERAL, MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 6 (1947); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT TO THE CONGRESS ON LEGAL SERVICES AND PROCEDURE 45-46 (1955) (hereinafter referred to as COMMISSION REPORT).

[2] 60 STAT. 237 (1946), 5 U.S.C. §§ 1001-1011 (1952).

[3] See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 137-43 (1955) (hereinafter referred to as TASK FORCE REPORT). Schwartz, *The Administrative Procedure Act In Operation,* 29 N.Y.U.L. REV. 1173 (1954).

This fact was emphasized by the appointment of the Hoover Commission to study legal services and procedure in the executive branch of the federal government.[4] Mr. Hoover stated, in addressing the Task Force, that "there is no field in the whole government that so sorely needs remedies as the field you will study." [5] Because of the wide scope of "due process" it will be dealt with solely in relation to required adjudicatory hearings within administrative agencies. The Hoover Report will also be considered and evaluated in the light of present law.

Due Process

Procedural due process by its very nature is difficult to define. Justice Brandeis, in explaining it, has said:

> The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings . . . are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.[6]

The right to a fair hearing [7] of which Mr. Justice Brandeis spoke, presents a major difficulty in determining whether procedural due process has been accorded in an administrative hearing.[8]

Separation of Functions

Many of the objections that a hearing is not conducted in accordance with procedural due process arise because of the lack of "separation of functions." The problem arises when one agency is at once the investigating, prosecuting and judging instrumentality. This combination of functions appears not only in a particular agency as a whole, but often, an individual is at once both prosecutor and judge.[9]

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[4] There are two reports, the Task Force Report and the Commission Report. The first was written by a committee of the Hoover Commission, and is merely a recommendation to the Commission. The second is the report of the Commission itself to Congress. The Commission adopted, in substance, all of the Task Force's recommendations not dealing directly with amendments to the Administrative Procedure Act. See Schwartz, *Summary of the Reports* in *Symposium: Hoover Commission and Task Force Reports on Legal Services and Procedure*, 30 N.Y.U.L. REV. 1270, 1272 (1955).

[5] TASK FORCE REPORT 1.

[6] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73 (1936) (concurring opinion).

[7] Iowa Cent. Ry. v. Iowa, 160 U.S. 389, 393 (1896) (dictum); see GELLHORN AND BYSE, ADMINISTRATIVE LAW 722 (1954); SCHWARTZ, AMERICAN ADMINISTRATIVE LAW 70 (1950).

[8] See GELLHORN AND BYSE, ADMINISTRATIVE LAW 715-22 (1954).

[9] See DAVIS, ADMINISTRATIVE LAW § 118, at 390 (1951).

It has been said that an agency, in its infancy, may necessarily combine all three tasks in order to explore the field of its activity. As it matures, however, the functions should be separated in order to do away with the danger of omnipotence.[10] The separation of these functions may be accomplished by internal limitations or the separation may be complete. In the first instance, judging is separated from "inconsistent functions" within the agency itself.[11] In the second case, the agency is divided into two completely divorced parts.[12] One is composed of the investigating and prosecuting division, while the other is the judging division.[13]

That this combination of functions within one agency is a serious threat to the procedural due process demanded by the Constitution cannot be denied. It is also a violation of the maxim that "no man shall be a judge in his own cause."[14] Section 5(c) of the Administrative Procedure Act provides for internal separation of functions,[15] and is applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[16] Procedure in the Immigration Service is an excellent illustration of the evils intended to be corrected by this section. In *Wong Yang Sung v. McGrath,*[17] a Chinese alien contended in a habeas corpus proceeding that the deportation hearing afforded him did not comply with the provisions of Section 5(c). The hearing was conducted before an inspector, and although this "inspector" did not conduct the investigation, it was his function to investigate similar cases.[18] The Government argued that Section 5 did not apply since the hearing was not an "adjudication required by statute."[19] The Court held that the immigration hearing, although not *specifically* required in the enabling act,[20] was necessary because:

> The constitutional requirement of procedural due process . . . permeates every valid enactment.

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[10] See VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 92 (1953).

[11] DAVIS, ADMINISTRATIVE LAW § 125 (1951).

[12] *Ibid.*

[13] *Ibid.*

[14] ". . . *[A]liquis non debet esse Judex in propria causa. . . .*" Dr. Bonham's Case, 8 Co. 113b, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610).

[15] 60 STAT. 240 (1946), 5 U.S.C. § 1004(c) (1952).

[16] *Id.* at 239, 5 U.S.C. § 1004 (1952).

[17] 339 U.S. 33, *modified on motion,* 339 U.S. 908 (1950).

[18] The immigrant inspector, for purposes of the hearing, is called the "presiding inspector." An examining inspector may be designated to hold the hearing, but none was appointed in this case. The presiding inspector may have investigated a very similar case immediately before being appointed to hear a case. See Wong Yang Sung v. McGrath, 339 U.S. 33, 47, *modified on motion,* 339 U.S. 908 (1950).

[19] 60 STAT. 239 (1946), 5 U.S.C. § 1004 (1952).

[20] 39 STAT. 889 (1917).

. . . . We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity.[21]

In addition, the inspector was required to cross-examine the alien's witnesses, and to present the evidence necessary to support the charges against the alien. Mr. Justice Jackson said for the majority that, ". . . the inspector's duties include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today." [22] It is to be noted that Congress, six months later, overruled this decision by the passage of the Supplemental Appropriations Act,[23] which specifically exempted deportation proceedings from the operation of the Administrative Procedure Act. This of course permits a recurrence of the *Wong Yang Sung* situation.[24] Thus the provisions of Section 5(c), which are applicable only when the enabling act requires a hearing on the record, or where this requirement is read into the particular statute by the courts,[25] is too narrow in scope to provide the answer to the problem of combined functions.[26]

Consideration of the applicability of the Administrative Procedure Act aside, where functions are combined as they were in the *Wong Yang Sung* case due process is not afforded the individual. In *Marcello v. Bonds*,[27] another deportation proceeding, the special inquiry officer who heard the case was under the supervision of the investigative and prosecuting officials of the Immigration Service. Petitioner contended that he had been deprived of due process because of this control. The Court ruled, in effect, that the contention was without merit considering that this type of hearing was standard procedure in the Immigration Service and had judicial approval. This argument is employed to rebut the constitutional argument whenever it is raised. The prevailing thought seems to be that "the concentration of functions has become too firmly established in the administrative process to be" attacked constitutionally.[28] However, it is an

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[21] Wong Yang Sung v. McGrath, *supra* note 18 at 49-50.

[22] *Id.* at 45.

[23] 64 STAT. 1048 (1950). In 1952 the provisions of this act were repealed, but re-effectuated, by the McCarran Act. 66 STAT. 210, 280 (1952), 8 U.S.C. § 1252 (1952). See Marcello v. Bonds, 349 U.S. 302 (1955).

[24] *Cf.* United States v. Kenton, 224 F.2d 803 (2d Cir. 1955). *But see* Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), *aff'd per curiam*, 346 U.S. 929 (1954).

[25] See Wong Yang Sung v. McGrath, 339 U.S. 33, *modified on motion*, 339 U.S. 908 (1950); DAVIS, ADMINISTRATIVE LAW § 133, at 429-30 (1951).

[26] See TASK FORCE REPORT 182; DAVIS, ADMINISTRATIVE LAW § 133, at 425. It is to be noted that Section 5(c) does not apply where the head of an agency makes the decision. See Schwartz, *The Administrative Procedure Act In Operation*, 29 N.Y.U.L. REV. 1173, 1212 (1954).

[27] 349 U.S. 302 (1955).

[28] See, *e.g.*, *In re* Larsen, 17 N.J. Super. 564, 86 A.2d 430, 436 (App. Div.

established fact that the concentration of all governmental powers in one instrumentality is violative of the concept of separation of powers which is evidenced by the Constitution.[29] Merely because the judiciary has become conditioned over a long period of time to the concentration of functions in administrative agencies is no reason why it should be tolerated.

The Hoover Commission's answer to this problem is embodied in three Recommendations.[30] Recommendation No. 41 proposes that:

> Internal separation of functions should be extended to all adjudicatory proceedings, including the process of final decision by agency heads, aided by special review staff or personnel.[31]

Adoption of the Recommendation would solve the problem presented in both the *Wong Yang Sung* and *Bonds* cases. Basically what would be accomplished is the insulation of the top-decision-making division from any contact with the other departments of a particular agency. The argument is advanced that when a case is decided, it is desirable that the head of an agency have the expert advice of staff members who have worked on the case below.[32] The Recommendation provides for the establishment of a special review staff within an agency to render expert advice to aid the agency head in coming to a final decision. In this way, any necessity for contact with lower echelon agency personnel, who worked on the case initially, is obviated. By enacting this Recommendation into law, every agency, in cases of formal adjudication, would be required to conform to the principle of separation of functions.

Closely allied with this is Recommendation No. 66,[33] which deals primarily with the independence of hearing examiners. Although the

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1952) (concurring opinion); Schwartz, *Administrative Law, 1955 Annual Survey of American Law,* 31 N.Y.U.L. Rev. 93, 104 (1956).

[29] See Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance 4-5 (1953).

[30] Task Force Report 176 (Recommendation No. 41); *Id.* at 246 (Recommendation No. 63); *Id.* at 257 (Recommendation No. 66). Recommendation No. 63 deals with the establishment of an administrative court and will not be dealt with here. It should be noted that many more of the Recommendations deal to a certain extent with procedural due process, but also will not be treated in this Note.

[31] Task Force Report 176.

[32] See Davis, Administrative Law § 130, at 416 (1951). As to the advisability of too much dependence on expert advice, here is the opinion of one critic: ". . . special knowledge and the highly trained mind produce their own limitations. . . . *Expertise,* it may be argued, sacrifices the insight of common sense to intensity of experience. . . . Too often, also, it lacks humility; and this breeds in its possessors a failure in proportion which makes them fail to see the obvious which is before their very noses. It has, also, a certain caste-spirit about it, so that experts tend to neglect all evidence which does not come from those who belong to their own ranks." Laski, *The Limitations of the Expert,* 162 Harper's Magazine 102 (1930).

[33] Task Force Report 257.

Administrative Procedure Act provides, to some extent, for their independence,[34] that remedy has not been adequate.[35] It is suggested by the Task Force that:

> Hearing examiners should be replaced by hearing commissioners appointed by an authority other than the agency for which they conduct hearings; their tenure, status, compensation, and removal should be fixed by law; *and they should be completely independent of the agencies whose cases they hear.*[36]

A recent Supreme Court case [37] strikingly illustrates the need for a remedy. Petitioner, appealing from an adverse decision of the Board of Immigration Appeals in a deportation hearing, alleged denial of a fair hearing. It was claimed that the Board, directly under the supervision of the Attorney General, was influenced by the publication of a list of individuals whom the Attorney General wished deported. The Court rejected this contention, stating that it did not feel that "speculation on the effect of subconscious psychological pressures provides sufficient justification for" [38] upholding petitioner's contention. The lower court had been of the opinion that the Board of Immigration Appeals had been influenced by what was, in practical effect, an order from a superior.[39] The instant Recommendation would remedy this evil. The Task Force suggests the designation of a chief hearing commissioner with sole responsibility for the selection and control of hearing examiners of all agencies.[40] Thus, the hearing examiners would be almost completely out of the agency's control, thereby precluding any possibility of agency influence.[41] It is felt that agency control of examiners would "completely defeat the principle of independence of judgment indispensable to administrative due process." [42] It is further suggested that the examiners' status be raised, by a substantial pay increase, in order to attract high calibre personnel who

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[34] 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952). "Subject to the civil-service and other laws . . . there shall be appointed by and for each agency . . . examiners . . . who . . . shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission. . . ." *Ibid.* See Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953).

[35] See, *e.g.*, Marcello v. Bonds, 349 U.S. 302 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, *modified on motion*, 339 U.S. 908 (1950); United States v. Kenton, 224 F.2d 803 (2d Cir. 1955).

[36] TASK FORCE REPORT 257 (emphasis added).

[37] Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955).

[38] *Id.* at 283.

[39] See United States *ex rel.* Accardi v. Shaughnessy, 219 F.2d 77, 80-81 (2d Cir.), *rev'd*, 349 U.S. 280 (1955).

[40] See TASK FORCE REPORT 259.

[41] The hearing examiners, or commissioners, as the Task Force calls them, would still actually be employed by the various agencies. The chief hearing commissioner would merely have primary responsibility for the selection and supervision of the commissioners. He would select commissioners and appoint them to various agencies. See TASK FORCE REPORT 264.

[42] *Id.* at 258.

will inspire public confidence. This Recommendation, although not calling for complete separation of functions, would seem to go far toward insuring procedural due process. It is doubtful that an individual's rights could adequately be protected when the prosecuting and adjudicatory functions are both under the control of a particular agency.

Bias

Bias has been defined as the propensity, or leaning, toward a certain object or view.[43] It results indirectly from the combination of functions in that there is agency control over the decision making body of the organization. The result of this exercise of control, to a certain extent, forces the policy of the agency or agency head on the decision making body.[44] Then too, the fact that a given hearing examiner's job depends at times upon the carrying out of agency policy,[45] must influence his decision, even if only subconsciously.[46] Generally, though, this type of bias has not been held to be fatal to a hearing.[47] In *NLRB v. Pittsburgh S.S. Co.*[48] the contention was advanced that a fair hearing was not accorded in that the examiner was a zealous advocate of the union, and that he uniformly found against the petitioner on every factual issue. The Court stated that the total rejection of one view cannot in and of itself impugn the integrity of the trier of the facts.

Strong views on a particular controversial subject, as illustrated in the fourth *Morgan* case,[49] is another form of bias. That litigation concerned rate-fixing orders promulgated by the Department of Agriculture.[50] It seems that the Secretary of Agriculture held very definite views on the subject. The Supreme Court held that ". . . strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty. . . ." [51]

It has been said, in defense of this attitude, that single-mindedness in carrying out the objectives of particular agencies is desirable, and

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[43] WEBSTERS' NEW INTERNATIONAL DICTIONARY 262 (2d ed. 1946).

[44] See, *e.g.*, Marcello v. Bonds, 349 U.S. 302 (1955); Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955); NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949); Fry Roofing Co. v. NLRB, 222 F.2d 938 (1st Cir. 1955); United States v. Peebles, 220 F.2d 114 (7th Cir. 1955); NLRB v. Phelps, 136 F.2d 562 (5th Cir. 1943).

[45] See United States *ex rel.* Accardi v. Shaughnessy, 219 F.2d 77, 82 (2d Cir.), *rev'd*, 349 U.S. 280 (1955); Schwartz, *Administrative Law, 1955 Annual Survey of American Law*, 31 N.Y.U.L. REV. 93, 101 (1956).

[46] See United States *ex rel.* Accardi v. Shaughnessy, *supra* note 45 at 80-81.

[47] See, *e.g.*, NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949); United States v. Morgan, 313 U.S. 409 (1941).

[48] 337 U.S. 656 (1949).

[49] See United States v. Morgan, *supra* note 47 at 420-21 (1941); DAVIS, ADMINISTRATIVE LAW § 111 (1951).

[50] See United States v. Morgan, *supra* note 47 at 413.

[51] United States v. Morgan, *supra* note 47 at 421.

that a judge under similar circumstances might possibly be influenced in favor of the rights of owners of private property.[52] But the basic property rights of individuals are often subverted to the agencies' ends in carrying out their objectives.[53] The protection of these rights is basic in our system of law.[54] It is submitted that common-law judges are not prejudiced in favor of private property rights, but are merely aware of their great importance. Furthermore, the requirements of due process are not adhered to when the main purpose of a particular agency is to carry out its objectives without regard for property rights. What is needed is a balance between the two conflicting demands.

Proof of *personal* bias on the other hand is fatal to any hearing.[55] Personal bias means animosity toward a particular individual. Where it is clearly shown that there was such bias in an administrative hearing, the courts will not allow the results of the hearing to stand.[56] In *United States v. Peebles*,[57] for example, the defendant was convicted by the district court for failure to submit to induction into the armed forces. He contended that the classification by his local draft board was void, since there was bias shown on the part of the board. Bias was evidenced by statements to the effect that he was using political influence to stay out of the service. The court upheld this contention and stated that the defendant had a right to a fair hearing, and that it was deprived him by the biased board.

The Hoover Commission has not dealt specifically with the problem of bias, but the two Recommendations previously discussed[58] would seem to go a long way toward solving it. If the decision making bodies of the agencies are insulated from the rest of the agency, as suggested, prejudgment and coloring of views would be considerably lessened. As stated in the Task Force Report, internal separation of powers is ". . . an arrangement within an agency designed to *prevent the contamination of judging by other inconsistent*

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[52] See DAVIS, ADMINISTRATIVE LAW § 112 (1951). "One of the prime purposes behind the creation of many administrative agencies has been to escape the bias of judges. By and large, with many exceptions, judges who have been influenced by legal training toward conservative thought and who have been accustomed as advocates at the bar to favoring interests of property tend to be biased in favor of protection of private rights against governmental interference." *Id.* §112, at 371.

[53] See, *e.g.*, NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); Montana Power Co. v. Public Serv. Comm'n, 12 F. Supp. 946 (D. Mont. 1935).

[54] U.S. CONST. amend. V. See, *e.g.*, NLRB v. Phelps, 136 F.2d 562 (5th Cir. 1943); Montgomery Ward & Co. v. NLRB, 103 F.2d 147 (8th Cir. 1939).

[55] See United States v. Peebles, 220 F.2d 114 (7th Cir. 1955); Berkshire Knitting Mills v. NLRB, 121 F.2d 235 (3d Cir. 1941); Montana Power Co. v. Public Serv. Comm'n, 12 F. Supp. 946 (D. Mont. 1935).

[56] See United States v. Peebles, *supra* note 55; Berkshire Knitting Mills v. NLRB, *supra* note 55.

[57] 220 F.2d 114 (7th Cir. 1955).

[58] See TASK FORCE REPORT 176 (Recommendation No. 41); *Id.* at 246 (Recommendation No. 66).

functions." [59] One objective of the Commission would seem to be the de-emphasis of identifying hearing personnel with the agency itself.

Other Considerations

There are certain other aspects of procedural due process which should be mentioned. A recent Supreme Court case, *United States v. Nugent,*[60] dealt with the problem of the admission of *ex parte* evidence. Petitioner, a conscientious objector, claimed that an F.B.I. report, containing evidence adverse to him and used against him, should have been open to his inspection. He further claimed that because it was not, he was denied a fair hearing. The Court held that the petitioner was entitled merely to a "fair resume" of the report and that this procedure did not violate the fifth amendment. Mr. Justice Frankfurter, in a dissenting opinion, stated that: "The very purpose of a hearing is to give registrants an opportunity to meet adverse evidence. It makes a mockery of that purpose to suggest that such adverse evidence can be effectively met if its provenance is unknown. Nor is it possible to be confident that a 'resume is fair' when one cannot know what it is a resume of." [61] Usually, in adjudicatory hearings, the principle of the "exclusiveness of the record" is applicable. That is, the decision will be based solely on what is contained in the hearing record.[62] It is obvious that this principle was not utilized.[63] Even overlooking this violation of the "exclusiveness of the record" rule, the contention of Justice Frankfurter poses an insurmountable block to an acceptance of the decision. It is difficult to see how a hearing can be fair when adverse evidence is kept from the party. The Hoover Commission Task Force recommends that when a hearing is required "under the Constitution or by statute, the parties should be entitled to a formal adjudicatory proceeding." [64] Section 5 of the Administrative Procedure Act defines formal adjudicatory proceedings [65] and sets forth certain requirements with which agencies must comply in holding these hearings. It provides for a hearing "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." [66] In the *Nugent* case, the hearing was required by statute to be determined on

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[59] *Id.* at 176 (emphasis added).
[60] 346 U.S. 1 (1953).
[61] United States v. Nugent, *supra* note 60 at 13. See ICC v. Louisville & N. R.R., 227 U.S. 88 (1913). ". . . For manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." *Id.* at 93.
[62] See Schwartz, *Administrative Law,* 1953 ANN. SURVEY AM. L. 101, 106-07, 29 N.Y.U.L. REV. 101, 106-07 (1954).
[63] *Id.* at 107.
[64] TASK FORCE REPORT 167 (Recommendation No. 37).
[65] 60 STAT. 239, § 5 (1946), 5 U.S.C. § 1004 (1952).
[66] *Ibid.*

the record after an agency hearing.[67] But such hearings are specifically exempted from the operation of the Administrative Procedure Act by Section 13(b) of the Selective Service Act of 1948.[68] The Task Force Recommendation would do away with these exemptions and require formal adjudicatory procedure in all hearings. Thus, Section 5 would apply. Section 7(d), applicable by reference,[69] states:

> Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.[70]

Thus, the report relied upon in the *Nugent* case would have been shown to the defendant, thereby eliminating any denial of due process in this respect.

The Task Force sets forth another Recommendation pertinent to procedural due process:

> In adjudication . . . required under the Constitution or by statute to be made after hearing, in which the agency has not presided at the reception of the evidence, the presiding officer should prepare and file an initial decision.[71]

This would apply to all cases where hearing examiners preside at the initial hearing; it is based upon the premise that the one who hears the evidence is most fit to decide the case.[72] Today, in nine statutory agency proceedings examiners merely prepare recommended decisions, while in eleven initial decisions are submitted.[73] The difference lies in the fact that recommended decisions are merely a record to guide

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[67] "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. . . . If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board." 62 STAT. 613 (1948), as amended, 50 U.S.C. App. § 456(j) (1952).

[68] 62 STAT. 623, 50 U.S.C. § 463 (1948).

[69] Section 7 of the Administrative Procedure Act states: "In hearings which section 4 or 5 require to be conducted pursuant to this section. . . ." 60 STAT. 241 (1946), 5 U.S.C. § 1006 (1952). Section 5(b) states: "The agency shall afford all interested parties opportunity for . . . hearing, and decision upon notice and in conformity with section 7 and 8." 60 STAT. 239-40 (1946), 5 U.S.C. § 1004 (1952). Since Section 5 applies and requires these hearings to be conducted pursuant to Section 7, Section 7 also applies. This, of course, is in the absence of specific legislative exemption.

[70] 60 STAT. 242 (1946), 5 U.S.C. § 1006 (1952).

[71] TASK FORCE REPORT 201 (Recommendation No. 48). This Recommendation was not adopted by the Commission.

[72] See Morgan v. United States, 298 U.S. 468 (1936).

[73] See TASK FORCE REPORT 202.

the agency and are not final.[74] An initial decision on the other hand, is final, unless set aside by the agency on review.[75] The Task Force desires to make all decisions initial decisions in cases of ". . . adjudication . . . required under the Constitution or by statute to be made after hearing. . . ." [76] It is felt that due process demands that a fair hearing be given, and a fair hearing is not given when the person *deciding* the case initially has neither seen nor heard the witnesses.[77]

Conclusion

There can be little doubt that despite the Administrative Procedure Act, there are areas in administrative law where the individual's rights are not fully protected. The Hoover Commission has proposed what appears to be a concrete solution for many of these problems. Although criticized,[78] the Commission Report should not be dismissed lightly, since it was prepared after months of study by eminently qualified men. One criticism has been that it is an attempt to "judicialize" administrative procedure.[79] It is submitted that although the discussed Recommendations do tend to judicialize procedure to a certain extent, they are necessary to ensure protection of individual rights. It has also been said that to put these Recommendations into effect would entail heavy expenditures by the government.[80] *Assuming arguendo* that this is so, the economic purpose for which the administrative process was established [81] would be thwarted by efforts to provide procedural due process. Since it cannot be denied that the administrative process is here to stay, there is a choice between insuring procedural due process or keeping expenses down. It is hoped that the first alternative will be adopted. There are many, of course, who feel that procedural due process is assured under the present system.[82]

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[74] *Id.* at 201.
[75] *Ibid.*
[76] *Ibid.* (Recommendation No. 48).
[77] See Morgan v. United States, 298 U.S. 468 (1936); TASK FORCE REPORT 203.
[78] See, *e.g.*, Brownell, *Views on Hoover Commission and Task Force Reports*, 23 ICC PRAC. J. 195 (1955); *Symposium: Hoover Commission and Task Force Reports on Legal Services and Procedure*, 30 N.Y.U.L. REV. 1267 (1955).
[79] See Jaffe, *Basic Issues: An Analysis*, in *Symposium: Hoover Commission and Task Force Reports on Legal Services and Procedure*, 30 N.Y.U.L. REV. 1273, 1296 (1955).
[80] See Brownell, *supra* note 78, at 200.
[81] See Schwartz, *Administrative Justice*, in *Symposium: Hoover Commission and Task Force Reports on Legal Services and Procedure*, 30 N.Y.U.L. REV. 1390, 1399 (1955). Mr. Schwartz also feels that the initial reasons for the establishment of the administrative system are no longer valid. *Id.* at 1410-11. Further, he feels that it would be almost impossible to transfer their functions back to the courts, both politically and practically. *Id.* at 1411.
[82] See, *e.g.*, Brownell, *Views on Hoover Commission and Task Force Reports*, 23 ICC PRAC. J. 195, 198 (1955); LANDIS, THE ADMINISTRATIVE PROCESS 47 (1938).

From the preceding discussion, it can be seen that this is not always so. Nevertheless, in a field so charged with political and economic implications, there is little hope that these Recommendations will soon become law. It is submitted, however, that they should.

ARBITRATION AND UNANIMITY AGREEMENTS IN THE CLOSE CORPORATION

The statutorily expressed public policy of New York favors majority rule in corporations and the unhindered discretion of directors.[1] Varied and repeated attempts have been made to circumvent this policy through the use of stockholder agreements. In *Manson v. Curtis*,[2] for example, the plaintiff permitted the defendant to become the majority shareholder on condition that the plaintiff continue to manage the corporation, with the directors as mere figureheads. This agreement was held invalid as violative of public policy inasmuch as it created a sterile board of directors. However, the unanimity agreement,[3] a more moderate deviation from the statutory norm, ultimately received legislative sanction.[4] Some of the difficulties

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[1] "The business of a corporation shall be managed by its board of directors. . . . [A] majority of the board . . . shall be necessary to constitute a quorum . . . and the act of a majority . . . shall be the act of the board." N.Y. GEN. CORP. LAW § 27. See Benintendi v. Kenton Hotel, Inc., 294 N.Y. 112, 117, 60 N.E.2d 829, 830 (1945).

[2] 223 N.Y. 313, 119 N.E. 559 (1918). Later cases relaxed the rigid attitude of the court in the *Manson* decision. In McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934), the plaintiff, a dismissed director, sought specific performance of an agreement whereby the defendants were obligated to use their best efforts to continue him as director and officer of the corporation. The court held the agreement to be invalid because it destroyed the discretion of the directors. Indicative of a liberal trend, however, was the concurring opinion of Judge Lehman, maintaining that agreements to vote for one another were valid even then. Two years later, in Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936), an agreement to vote for the plaintiff as director and general manager was upheld since there was no rigid public policy involved. In Matter of Buckley, 183 Misc. 189, 50 N.Y.S.2d 54 (Sup. Ct. 1944), a by-law that prohibited removal of the chairman of the board or president without cause was upheld for the same reason. The court so held despite the fact that the corporation was large and all the stockholders had never assented. See 45 COLUM. L. REV. 960, 963 n.15 (1945). Prior to this case it was thought that unanimity was essential for any deviation from the statutory norm.

[3] By a requirement of unanimous concurrence for all actions of the corporation, minority stockholders retain a veto power over the acts of the majority. See Benintendi v. Kenton Hotel, Inc., *supra* note 1; 1948 LEG. DOC. No. 65(K), REPORT, N.Y. LAW REVISION COMMISSION 5 (1948).

[4] N.Y. STOCK CORP. LAW § 9. See also 1948 LEG. DOC. No. 65(K), *op. cit. supra* note 3, at 5-9.