Saturday Morning, February 17

ADMINISTRATIVE PROCEDURE—A SUGGESTED CLASSIFICATION OF PROCEDURES OF REGULATORY AGENCIES IN THE UNITED STATES DEPARTMENT OF AGRICULTURE

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The title requires both definition and delimitation. The terms "procedure," "regulatory," and "agencies" do not go unchallenged, especially in these days of symposia and institutes on administrative law.

For present purposes, the term "procedure" will be given a restricted meaning and will be used, in a manner especially familiar to lawyers, to describe the methods and practices relating to administrative hearings. Someone has called this the "full-dress" level of administrative procedure. This description, if applicable to the procedure of any administrative agency, is hardly descriptive of that of a bureau of the Department of Agriculture. Tuxedo and black tie, perhaps, but definitely not tails and topper.

As to the meaning to be given herein to the term "regulatory": the distinction between the regulatory and non-regulatory work of the Department is, for the most part, easily apparent. Issuance of crop and weather reports, seed distribution, and soil research are clearly not regulatory functions. Conversely, prescription of stockyard rates and fixing limitations upon speculative transactions on commodity exchanges are examples of pure regulation. Some of the activities of the Department, however, may not be so easily classified. For example, where the Department, as under the Sugar Act of 1937,[1] makes payments to producers on condition that no child labor has been used or that fair wages have been paid in the process of production, there

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1. 50 Stat. 903, (1939) 7 U. S. C. A. sec. 1100.

may not be regulatory activity in a strictly legal sense. Yet, except in degree, such activity frequently is indistinguishable in effect from a flat prohibition of child labor or regulation of wages.[2] For the purposes of this paper, however, we shall ignore the contested area and pretend that there is a well established boundary line between regulatory and non-regulatory activity.

As thus delimited, the regulatory activities of the Department are conducted under at least forty separate statutes.[3] According to a classification prepared by the Solicitor of the Department, these statutes are addressed to four principal purposes: (1) to protect the interests of producers; (2) to protect the interests of consumers; (3) to protect the public interest by the conservation of natural resources; and (4) to prevent cruelty to animals. Within the first of these types of statutes is a group of ten statutes (including the Animal Quarantine Act, the Plant Quarantine Act, and the Federal Seed Act) devoted primarily to increasing the quantity and improving the quality of crops and livestock; a group of eight statutes (including the Grain Standards Act, the Cotton Standards Act, the United States Warehouse Act, and the Tobacco Inspection Act) to enable the farmer, after production, to market his commodities with knowledge of their probable value by making available to him information concerning their comparative quality; a group of five statutes (including the Packers and Stockyards Act, the Perishable Agricultural Commodities Act, and the Commodity Exchange Act) to secure honest returns for farm products by regulating certain middlemen who handle or deal in such products; and a

2. Cf. United States v. Butler (1936) 297 U. S. 1, 70-71.

3. See the list set forth in the appendix, p. 379, infra. Wherever, because of common usage or statutory designation, one of these statutes may be referred to by a short or popular title, the popular title is given in the list. Hereafter in this article, statutory references will employ the popular titles, wherever possible, and no further citation will be given.

In addition to the official annual reports of the Department, see the following with respect to the history of the regulatory work of the Department. Chas. H. Greathouse, *Historical Sketch of the United States Department of Agriculture—Its Objects and Present Organization,* Div. of Publications, Bulletin 3, 2nd Revision, U. S. D. A., G. P. O., 1907; Francis G. Caffey, *A Brief Statutory History of the United States Department of Agriculture,* Sol. [Misc.], G. P. O., 1916; Marshall, *The Office of Solicitor for U. S. Department of Agriculture* (1932) 3 Mo. B. J. 55; Eisenhower and Chew, *The United States Department of Agriculture—Its Structure and Functions,* Misc. Pub. No. 88, G. P. O., 1934; Sherman, *The Legal Basis of the Marketing Work of the United States Department of Agriculture* (1937) 11 Agric. Hist. 289.

group of four statutes (including the Agricultural Marketing Agreement Act of 1937, the Sugar Act of 1937, and the Agricultural Adjustment Act of 1938) to establish and maintain fair prices by providing for the orderly marketing of agricultural commodities.

The second type of legislation mentioned above consists of ten statutes (including the Tea Act, the Meat Inspection Act, and the recently enacted Federal Food, Drug, and Cosmetic Act). The third type contains the Forest Service laws and those provisions of the Bankhead-Jones Farm Tenant Act relating to regulation of the use and occupancy of sub-marginal land acquired by or transferred to the Secretary of Agriculture for land conservation and utilization purposes. The fourth type includes the 28-Hour Law and the Act of March 3, 1891, authorizing the Secretary to examine all vessels which carry livestock from the ports of the United States and to prescribe rules and regulations regarding accommodations to be provided for such animals.

Principal charge of the administration of the regulatory work of the Department has been given to ten different "agencies" or bureaus: the Agricultural Marketing Service, the Bureau of Animal Industry, the Bureau of Dairy Industry, the Commodity Exchange Administration, the Bureau of Entomology and Plant Quarantine, the Food and Drug Administration, the Forest Service, the Division of Marketing and Marketing Agreements, the Soil Conservation Service, and the Sugar Division. Each of these bureaus, however, must and does depend upon other units in the organization of the Department. The research and planning services of such agencies as the Bureau of Agricultural Economics, the Bureau of Agricultural Chemistry and Engineering, and the Bureau of Home Economics must be relied upon by the regulatory agencies, especially in connection with the fixing of standards and the formulation of regulations of general economic content requiring coordination with broad agricultural programs. The Office of the Solicitor is charged by statute with the supervision and direction of the "legal work" of the Department and is particularly active with respect to the legal aspects of regulatory matters. Finally, all of the work of the Department, except that which may be redelegated to departmental subordinates, must pass over the desk of the Secretary or of his two sub-cabinet assistants, the Undersecretary and the Assistant Secretary. Be-

cause of the highly discretionary nature of much of the regulatory duties devolved upon the Secretary, relatively little of this type of responsibility has been shifted to the shoulders of others.[4]

Preliminary account should also be taken of the fact that there is no single or uniform procedure prevailing in the Department of Agriculture. It is difficult to discover even one typical procedure. Rules of administrative practice necessarily differ in content according to the variations in the true nature of the proceedings they are devised to govern. This is true of the procedures in the Department of Agriculture as in administrative agencies generally. But it is also true that in some instances the different procedures which have been established in the Department have not been very carefully attuned to the character of the proceedings for which they were designed. To some extent, therefore, there is a greater variety of procedures than is necessary. This condition, once it has developed, may not be easily corrected. Its alleviation may be accomplished only through the

4. The constant expansion of the regulatory responsibilities of the Department over the years has increased the general burden upon the persons of the Secretary, the Undersecretary and the Assistant Secretary, particularly by reason of the increasing number of hearings which the Department is required to conduct. Since, on the one hand, the delegated duty or power to make determinations or decisions giving rise to the issuance of administrative regulatory orders presumably may not be redelegated without specific statutory authorization, and because, on the other hand, the Supreme Court, in the Morgan case (1936) 298 U. S. 468, 481, has declared that the "one who decides must hear," the attention and time of the Secretary and of his two sub-cabinet assistants have been given to regulatory matters frequently at an undue sacrifice of other phases of the Department's activities. To alleviate this situation, the Secretary, early in 1939, requested the Congress to enact legislation which would enable the Secretary upon occasion to redelegate to other officials and employees of the Department the authority to issue regulatory orders having the force and effect of law but issuable only after notice and opportunity for hearing have been allowed to the parties affected. Neither of the respective Congressional Committees on Agriculture to which the matter was referred would countenance such a broad redelegation of authority, although each committee has approved in principle the proposal of the Department. A bill introduced by Senator Schwellenbach (Senate 1955) proposes to create the position of Second Assistant Secretary of Agriculture and to permit the Secretary to redelegate such authority to the occupant of the new position. This bill passed the Senate in the first session of the present Congress and, as amended in the House committee, is now pending the action of the House. The House amendment would permit the redelegation to one or two officials to be selected by the Secretary, rather than to a new sub-cabinet officer. Should the proposed legislation, in either form, become law, the current burden upon the persons of the Secretary and his present sub-cabinet assistants would be greatly alleviated, although undoubtedly it would be desirable, from an administrative standpoint, to obtain legislative sanction for a considerably broader power of redelegation.

tedious process of reexamining the statutes, including their legislative histories, and, after isolating each provision calling for or requiring an administrative hearing, analyzing the hearing contemplated thereby in the light of some rational formula or classification calculated to result in such measure of standardization and uniformity as is consistent with the demands of realistic administration. As will presently appear, such a project has been undertaken at the instance of the Solicitor of the Department and substantial progress has been made.[5] Until this project has been fully completed and the procedure revised to conform to the conclusions flowing from the research, it would be premature to undertake, on a comprehensive scale, any decisive steps toward standardization of the Department's procedures.

However, of the various proceedings which thus far have been examined in pursuit of the Solicitor's project, certain tentative classifications and differentiations have been made, to which consideration will now be given.[6] The proceedings to be discussed arise under the following statutes, which perhaps may be termed the five statutes of the Department of greatest interest to students of administrative law: the Agricultural Marketing Agreement Act of 1937, the Commodity Exchange Act, the Federal

5. For an official account of the Solicitor's project and its progress to July 1, 1939, see United States Department of Agriculture, *Report of the Solicitor* (1939) 3-7. A considerable portion of the results of the research made in pursuit of the Solicitor's project has been set forth in a series of mimeographed monographs which have been given a limited circulation among some of the more outstanding students and practitioners of Federal administrative law for the purpose of eliciting criticism which would be helpful in the formulation of the ultimate conclusions and recommendations growing out of the project. Thus far the following monographs have been completed and so circulated. Sellers, Administrative Procedure and Practice in the Department of Agriculture under the Agricultural Marketing Agreement Act of 1937; Sellers, Administrative Procedure and Practice in the Department of Agriculture under the Packers and Stockyards Act, 1921; Sellers, Administrative Procedure and Practice in the Department of Agriculture under the Commodity Exchange Act; and Sellers and Goodrich, Administrative Procedure and Practice in the Department of Agriculture under the Perishable Agricultural Commodities Act, 1930. It should be stated that these studies are as yet of a preliminary nature, and the Department has taken no final or official action regarding them.

6. In large measure, the substance of this article is a summary of the findings made and conclusions drawn from the studies described in note 5, supra. Because of this fact, the present discussion necessarily will be quite general in nature. Some of the observations made and conclusions drawn herein, because of limitations of space, will doubtless appear to have been too sketchily set forth. They should be criticized, however, only after examination of the source material upon which they are based, and which is contained largely in the monographs described in note 5, supra.

Food, Drug, and Cosmetic Act, the Packers and Stockyards Act, and the Perishable Agricultural Commodities Act.[7] The first three of these statutes are administered primarily by the Division of Marketing and Marketing Agreements, the Commodity Exchange Administration, and the Food and Drug Administration, respectively, and the last two by the Agricultural Marketing Service.

With the exception of one or two proceedings which do not lend themselves to classification, all of the proceedings contemplated by or conducted under these five statutes may be regarded for procedural purposes as falling within four separate groups, (A), (B), (C), and (D). Groups (A) and (B) each embraces rule-making or quasi-legislative proceedings, but are distinguishable the one from the other according to whether the rules or regulations must be based upon evidence taken in the course of a public hearing. Thus, the proceeding under section 5a(4) of the Commodity Exchange Act, empowering the Secretary, "after due notice and opportunity for hearing," to fix a period for delivery in settlement of futures contracts, but not requiring a record to be taken of the hearing, is placed in group (A); and the proceeding under section 701(e) of the Federal Food, Drug, and Cosmetic Act, requiring the Secretary, before he may issue, amend, or repeal any regulation establishing, *inter alia,* definitions and standards of identity and standards of quality and fill of container for food, to hold a public hearing and enter an order, "based solely on substantial evidence of record at the hearing," falls within group (B). Groups (C) and (D) each includes adjudicative proceedings, but are distinguishable the one from the other according to whether the Department participates therein as an advocate. This distinction may be made both between different kinds of adjudicative proceedings and between adjudicative proceedings of the same kind, depending upon whether the Department assumes an active responsibility for

7. These statutes were selected for study not only because of the interest in their subject-matter, but also because they were determined to be most nearly typical, insofar as administrative procedure is concerned, of the numerous regulatory statutes assigned to the Department for enforcement. It was thought that comprehensive studies of the administrative process as it occurred in the Department under the selected statutes would be adequate, when supplemented by less detailed studies of the other acts, to afford a basis for suggesting a greater measure of uniformity in the Department's procedures.

the development of the evidence for the Government. For example, under the Perishable Agricultural Commodities Act there are two types of adjudicative proceedings: (1) upon a complaint filed with the Secretary by a private person seeking damages by way of reparation for loss sustained by a violation of the statute by a commission merchant, dealer, or broker; and (2) upon an order issued by the Secretary to an alleged violator of the statute commanding the latter to show cause why he should not be refused a license or why his license should not be suspended or revoked. Again, the proceeding to determine whether to suspend or revoke a license, although normally instituted by the Department, may sometimes be instituted by and proceed upon the complaint of a private person; and the Department may or may not take an active part in the development of the evidence. Proceedings in which the Department actively participates as advocate as well as adjudicator may be placed in group (C); those in which it participates in an adjudicatory capacity only, in group (D). Without pausing just here to argue for or against the propriety of the above classification of the proceedings, and using the classification primarily as a convenient mode of approach to a discussion of the different procedures to be examined here, we may now endeavor to describe some features of the procedures of regulatory agencies in the Department of Agriculture.

Group (A): Rule-making proceedings in which the rules or regulations need not be based solely upon evidence taken at a hearing

Under each of the five statutes named above, the Secretary of Agriculture is expressly empowered to make such rules and regulations as may be necessary to effectuate the provisions of the statute. In addition, he is specifically directed to exercise rule-making authority in a number of special instances. These statutes do not specify what procedure shall attend the formulation of general rules and regulations.[8] Nor has Congress prescribed the procedure to govern the making of special rules and

8. In this connection, compare the recently enacted Federal Seed Act (1939) 53 Stat. 1285, c. 615, sec. 402, (1939 Supp.) 7 U. S. C. A. sec. 1592, requiring that, prior to the promulgation of *any* rule or regulation under the Act, a public hearing shall be held. This seems to be the only instance in which the Department is required by statute to hold a hearing in connection with general as well as special rules and regulations.

regulations except in a few instances where the statutes specifically provide for notice and hearing. Except in two instances, to be discussed under the next section of this article, the statutes do not require that the rules or regulations be based only upon evidence taken and placed of record at an administrative hearing.

The varieties of procedure controlling administrative rule-making long have been suggested, but, until recently, they have remained largely unclassified. For the most part, past study has been directed to an evaluation of adjudicatory procedures, and rule-making procedures have gone relatively unnoticed. Recent legal research[9] and analysis, however, have demonstrated that, of the several modes of procedure commonly in operation in connection with administrative rule-making, the device of the more or less formal "hearing" is the least employed and is, perhaps, the least appropriate. Normally, the information prerequisite to the formulation of rules and regulations is more expeditiously and adequately obtained through scientifically conducted investigations by trained departmental administrators and experts, and through the media of informal conferences and consultations by such experts with informed members of the interested trade or public and with others experienced and acquainted with the subject matter to which the proposed rule or regulation is to be addressed. Where "hearings" are held, they generally serve a useful purpose only where the trade or industry is so organized and its activities so standardized that its practical problems and the operation of the contemplated rules and regulations may, comprehensively and severally, be developed by and ascertained from the testimony of only a small number of its members. Otherwise the record made at the hearing will not be comprehensive enough to cover the entire range of the proposed rules and regulations; will tend to be comprised largely of unnecessary duplications and repetitions; will tend unduly to reflect the individual or personal viewpoint of the witnesses; will, in many cases, be cluttered up with procedural and legalistic objections and arguments; and will tend, in general, to consume substantially more time, labor, and expense than would adherence to less formal procedures.

In the promulgation of rules and regulations pertaining to the

9. See Fuchs, Procedure in Administrative Rule-Making (1938) 52 Harv. L. Rev. 259, and the authorities therein cited.

five statutes under discussion, the Department, in instances where public hearings were not required by expressions in the statute to be held as part of the rule-making process, has been guided largely by the above considerations. The procedure followed in the formulation of rules and regulations under the Perishable Agricultural Commodities Act is fairly typical. The original regulations issued under that statute were prepared in tentative draft by the two or three officials of the Department to whom had been given the initial responsibility for the administration of the statute. The draft was submitted to and discussed with the chief of the bureau[10] and with representatives of the Office of the Solicitor. Subsequently, extended conferences were held with representatives chosen by the three principal trade associations in the fresh fruit and fresh vegetable industries. No public hearings were held, although, before the issuance of the regulations, opportunity was given to individual members of the trade to express their views through the medium of meetings or informal conferences scheduled for various cities throughout the country. The then assistant chief of the bureau undertook to conduct the conferences and appeared at the places and times announced for the purpose. Presumably for the reason that the regulations, as proposed, had been so carefully and sensibly drafted as to be reasonably adapted to the practical problems of the trade, no persons appeared to be heard; and the regulations were promulgated without further change.

Where, however, the statute, as does the Commodity Exchange Act, specifically provides that interested persons shall be given an opportunity to be heard upon certain proposed regulations, the statutory requirements must be met; and, as a consequence, a different rule-making procedure obtains. While this statute requires public hearings to be held prior to the promulgation of regulations in only one or two special instances, the Commodity Exchange Administration held public hearings prior to the promulgation of general rules and regulations as well. Furthermore, the rule-making hearings held under the statute, while by no means attended by such formalism as prevailed in the hearings

10. From the time of its enactment in 1930 until July 7, 1939, the Perishable Agricultural Commodities Act was administered by the Bureau of Agricultural Economics. Since the latter date, the Act has been administered by the newly created Agricultural Marketing Service.

held preliminary to the exercise of administrative adjudicative authority, are accompanied by considerably more formality than were the round table conferences or meetings held under the Perishable Agricultural Commodities Act as noted above. The witnesses in rule-making hearings required under the Commodity Exchange Act are not under oath; cross-examination is not permitted; there are no "parties" to the proceeding; there is no rule as to burden of proof nor any necessary order of presentation of evidence; and argument, either oral or on brief, is not allowed. But the testimony is stenographically reported, and opportunity is afforded for the filing of written statements supplemental to or in lieu of oral testimony. The transcript of the testimony, together with the written statements filed, is digested and analyzed by officials of the Commodity Exchange Administration and by the attorney from the Office of the Solicitor who has appeared in the hearing.[11] Findings usually are prepared, and are set forth in the form of proposed regulations, which eventually are submitted to the Secretary for approval and sig-

11. While the statute does not expressly restrict the Secretary to action based solely upon the evidence appearing in the administrative record, he has, in the past, sometimes considered himself so restricted. This interpretation was based upon the two-fold view (1) that the statutory requirement that hearings be held prior to the issuance of regulations indicates, in and of itself, a Congressional intent that the regulations are to be based solely upon evidence taken at the hearings, and (2) that the requirement in one or two Supreme Court decisions (Panama Refining Co. v. Ryan (1935) 293 U. S. 388; Schechter Poultry Corp. v. United States (1935) 295 U. S. 495) to the effect that executive or administrative regulations, in order to avoid attack on the ground of unwarranted delegation of legislative authority, must recite or be accompanied by findings of fact, likewise compels the regulations to be based upon evidence in the record. Each of these views is open to question. To attribute to the statutory requirement of a "hearing" or "opportunity for a hearing"—no further specification of procedure appearing—a legislative intention that a formal record must be taken and an effect given to it equivalent to that given in an adjudicative proceeding is to beg the whole unsettled question of the procedural requisites of rule-making hearings. As to the second view, to ascribe to the requirement that "findings" accompany administrative regulations, the construction that there must be evidence taken and a transcript made is to apply a categorical conclusion upon a point of procedure upon which no definite judicial pronouncement has yet been made. See Landis, Administrative Policies and the Courts (1938) 47 Yale L. J. 519, 533-544; Fuchs, Concepts and Policies in Anglo-American Administrative Law Theory (1938) 47 Yale L. J. 538, 550, n. 46. It is also interesting to note that the sponsors of the Logan-Walter Bill now pending in Congress expressly disavow that any such effect is intended to attach to the rule-making procedure under that proposed legislation. See Sellers, Administrative Law—The Extent to Which S. 915 or H. R. 4236 Would Affect the Work of the Department of Agriculture (1939) 7 Geo. Wash. L. Rev. 819, 828.

nature. In at least one instance the proposed findings and regulations were made available to all the persons who attended the hearing and an opportunity was given them to file exceptions.[12] Comparing the one procedure just described with the other, one cannot fail to be impressed with the procedural differences occasioned by the simple statutory requirement that the Department shall make rules and regulations only "after notice and an opportunity to be heard."

Group (B): Rule-making proceedings in which the rules or regulations must be based upon evidence taken at a hearing

The two proceedings of this character conducted by the Department under the five statutes under discussion are (1) those arising under section 701(e) of the recently enacted Federal Food, Drug, and Cosmetic Act and (2) those under the Agricultural Marketing Agreement Act of 1937 incident to the issuance of marketing orders.[13]

In addition to the Secretary's authority to make general rules and regulations under the Federal Food, Drug, and Cosmetic Act, he is empowered to issue regulations covering a wide variety of special subjects.[14] For some obscure reason, the statute singles

12. On June 13, 1938, the Commodity Exchange Commission (an agency composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, which shares with the Secretary of Agriculture the task of administering the Commodity Exchange Act), after a hearing to formulate regulations under section 4a of the statute, issued and published in the Federal Register [(1938) 3 Fed. Reg. 1408] a notice of the proposed order containing the regulations, announcing that any interested party would be permitted to file exceptions to the proposed order and that the Commission, before issuing a final order, would give due consideration to any exceptions filed. This procedural step was undoubtedly influenced by possible implications of the second opinion in the Morgan case (1938) 304 U. S. 1, which had been announced less than two months previously on April 25. Now that sufficient time has elapsed to obtain a more thorough understanding of the opinions of the Court in the Morgan case, it is obvious that that decision has no application to rule-making proceedings of the type under present consideration. The fact that, in the proceeding under section 4a, a period of nearly six months elapsed between the time of publication of notice of the proposed order and the issuance of the final order is indicative of the delay which such procedure may entail.

13. Section 8c of the Agricultural Adjustment Act (1933) 48 Stat. 31, as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, (1939) 7 U. S. C. A. sec. 601 et seq.

14. Regulations under this statute may be placed into four classes: (1) regulations subject to the procedural provisions of subsections 701 (e) and (f); (2) regulations providing exemptions from statutory requirements; (3) procedural regulations; and (4) regulations to govern inspection service under the "sea food amendment." Public hearings are required in connection with the formulation of only the first of these classes of regulations.

out a number of the provisions contemplating special regulations and, as to such regulations only, requires the Department to hold hearings prior to their promulgation. Typical regulations subject to such procedure are those establishing definitions, standards of identity, and standards of quality and fill of container for foods.[15] The statute does not stop with the simple requirement of notice and hearing, however, but, in addition to making several other procedural requirements not usually found in connection with a grant of administrative rule-making authority, provides that the Secretary "shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based." Special provision is made for an appeal to an appropriate circuit court of appeals, where the order may be reviewed upon the administrative record, but where the findings of the Secretary are conclusive if supported by substantial evidence.[16]

15. At several places in the succeeding portion of this paper, reference is made to food standards hearings. It should be remembered that the observations as to administrative procedure made in connection with such references are equally applicable to all of the proceedings contemplated by section 701 (e) of the Federal Food, Drug, and Cosmetic Act.

As of January, 1940, all of the hearings held under section 701 (e) of the Act have related to regulations proposed: (1) under section 401, providing for establishment of standards of identity and standards of quality and fill of container for food; and (2) under sections 406 (b), 504, 604, and 706, providing for the listing of harmless coal-tar colors suitable for use in food, drugs, and cosmetics, the certification of batches of such colors, and the payment of fees for such service. The hearings held on proposals under section 401 include the following foods: tomato puree, tomato paste, tomato catsup, tomato juice, canned tomatoes, eggs, liquid whole eggs, liquid mixed eggs, frozen whole eggs, dried whole eggs, egg yolk, frozen egg yolk, dried egg yolk, canned peaches, canned apricots, canned pears, canned cherries, canned peas, canned vegetables, cream, whipping cream, evaporated milk, sweetened condensed milk, dried skim milk, fruit preserves, jelly and butter foods, cheddar cheese, washed curd cheese, Colby cheese, and cream cheese.

16. The special statutory appeal, however, is not the sole method by which a court review of administrative regulations may be obtained. The statute expressly states that "the remedies provided for in this subsection [701(f)] shall be in addition to and not in substitution for any other remedies provided by law." Thus, it appears that a regulation may be challenged in any court which may be called upon to adjudicate an alleged violation of the regulation, whether in an enforcement proceeding or in a proceeding to enjoin enforcement. It is not altogether clear whether, in such an instance, the court would restrict its review to an examination of the administrative record, or whether the court proceeding would be at least partially *de novo*. In this connection, it should be noted that subsection 701 (g) provides that a certified copy of the administrative record "shall be admissible" in any judicial proceeding arising under the Act, irrespective of whether a special statutory appeal under subsection 701 (f)

Included with the rule-making powers of the Secretary under the Agricultural Marketing Agreement Act of 1937 is his authority to issue so-called "orders" regulating the interstate or foreign commerce handling of certain agricultural commodities or products. In one form or another, orders authorized by the statute control the volume of interstate business which may be transacted by handlers; prescribe a mode of distribution of commodity surplus; prohibit unfair methods of competition and unfair trade practices among handlers; and, with reference solely to the han-

has "previously been instituted or become final * * *." The argument has been made that, by providing that the record be "admissible," Congress intended that other evidence as well might be entertained by the court. Such an interpretation of the Act does not seem tenable, however, in view of (1) the provisions in sections 701 (f) and 505 that, in cases where the court deems additional evidence appropriate, it is to order such evidence taken at a hearing before the Secretary; and (2) the rules requiring exclusive preliminary resort to administrative agencies and making the exhaustion of the administrative remedies prerequisite to judicial proceedings with reference to any claim for relief. As to (1), both the new drugs provisions and the special statutory review of regulations section of the Act require that any additional evidence deemed appropriate by a court that is called upon to review the administrative action of the Secretary shall be taken, if at all, at a hearing before the Secretary. These express provisions would seem to exclude the idea of implying that a court has the power to take new or additional evidence in any proceeding challenging the Secretary's administrative action under the statute. As to the primary jurisdiction and exhaustion of administrative remedies rules, both of which are so intimately connected as to be called sometimes by one name and sometimes by the other, it seems clear that no person would be allowed to offer evidence bearing upon the reasonableness of an administrative regulation in any judicial proceeding without having first offered to present the evidence before the Secretary of Agriculture. See, on the primary jurisdiction rule, Great Northern Ry. v. Merchants Elevator Co. (1922) 259 U. S. 285, 291; Texas and Pacific Ry. v. Abilene Cotton Oil Co. (1907) 204 U. S. 426; Baltimore & Ohio R. R. v. United States ex rel. Pitcairn Coal Co. (1910) 215 U. S. 481; Woodrich v. Northern Pacific Ry. (C. C. A. 8, 1934) 71 F. (2d) 732, 97 A. L. R. 401; and Red "C" Oil Manufacturing Co. v. Board of Agriculture of North Carolina (1912) 222 U. S. 380. On the exhaustion of administrative remedy rule, see P. F. Petersen Baking Co. v. Bryan (1934) 290 U. S. 570; Hegeman Farms Corp. v. Baldwin (1934) 293 U. S. 163; Natural Gas Pipeline Co. v. Slattery (1937) 302 U. S. 300; Goldsmith v. United States Board of Tax Appeals (1926) 270 U. S. 117. In general, see 2 Sharfman, *The Interstate Commerce Commission* (1931) 393, et seq., especially 403-404; Comment, Primary Jurisdiction —Effect of Administrative Remedies on the Jurisdiction of Courts (1938) 51 Harv. L. Rev. 1251; and Berger, Exhaustion of Administrative Remedies (1939) 48 Yale L. J. 981. It may not be disputed that the administrative rule-making contemplated by section 701 (e) requires expertness and specialized skill to such an extent as to render the primary jurisdiction doctrine applicable. Further, it seems that, in view of the Secretary's power to amend or repeal any such regulation either upon his own initiative or upon the proper application of any interested industry or substantial portion thereof, there is an available administrative remedy which must be exhausted before judicial proceedings are attempted.

dling of milk, price-fixing is provided. The Secretary may issue a marketing order only after notice and opportunity for hearing have been provided, and shall issue the order "if he finds, and sets forth in such order, upon the evidence introduced at such hearing," among other findings, that the issuance of the order will tend to effectuate the declared policy of the statute with respect to the commodity involved. Except for provisions permitting the United States to collect forfeitures in civil suits against persons who wilfully exceed any quota or allotment fixed under the Act, and provisions conferring jurisdiction upon the federal district courts specifically to enforce and to prevent and restrain any person from violating any order, regulation or agreement issued or made under the statute, there is no special provision for obtaining judicial review of a marketing order. However, it appears likely that judicial review could be obtained, but that the courts, regardless of the method by which the order is challenged, would restrict the scope of their review to a scrutiny of the administrative record and would sustain the order if based upon substantial evidence in such record.[17] It is quite probable, therefore, that the requirements of law, whether in the form of statutory provisions or of judicial pronouncements, pertaining to the procedure to govern the two proceedings under the Federal Food, Drug, and Cosmetic Act and the Agricultural Marketing Agreement Act of 1937, are virtually identical.

17. Presumably, the courts will apply the same formula of review with respect to challenged marketing orders as they apply to challenged rate orders of the Interstate Commerce Commission, as to which also the statute is silent respecting the conclusiveness of the administrative findings. In reviewing rate orders, the courts have consistently sustained the findings of the Commission if supported by substantial evidence. Tollefson, Judicial Review of the Decisions of the Interstate Commerce Commission (1936) 5 Geo. Wash. L. Rev. 503. The same formula has been applied in reviewing orders of other agencies, despite variations as to the scope of the review in the language of the various statutes. See, for example, the following cases where the judicial approach seems to be the same, regardless of statutory formulae. Consolidated Edison Co. v. National Labor Relations Board (1938) 305 U. S. 197 and Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board (1937) 301 U. S. 142, arising under the National Labor Relations Act; Saginaw Broadcasting Company v. Federal Communications Comm. (App. D. C. 1938) 96 F. (2d) 554, 563, cert. den. (1938) 305 U. S. 613, arising under the Communications Act of 1934; and Federal Trade Comm. v. Algoma Lumber Co. (1934) 291 U. S. 67; with which compare Federal Trade Comm. v. Curtis Publishing Co. (1923) 260 U. S. 568; Electro Thermal Co. v. Federal Trade Comm. (C. C. A. 9, 1937) 91 F. (2d) 477, cert. den. (1937) 302 U. S. 748; and the dictum in Chamber of Commerce of Minneapolis v. Federal Trade Comm. (C. C. A. 8, 1922) 280 Fed. 45, 48, all arising under the Federal Trade Commission Act.

A comparison of the actual procedures governing these two proceedings reveals that, up through the stage of the taking of the testimony before the presiding officer, the procedures are quite similar. In each case the proposal upon the basis of which the hearing was held has been formulated by a long process of intra-departmental research and of informal consultation with representative members of the affected trade or industry, and the proposal has been reduced to a quite specific form. The notice of the hearing has been published in the Federal Register and copies sent to a large number of persons known to be interested in the proceeding. The notice in each instance contained either the full text of the proposal or a summary thereof.[18]

The atmosphere of each of the hearings is alike, although they differ somewhat by virtue of the fact that the food standards hearings thus far have always been held in Washington, while most of the marketing order hearings have been held in the area to be affected by the order. Each has a large number of participants representing different trade groups and interests. The Department itself is represented not only by the bureau which has usually made the proposal but sometimes by other agencies as well, notably the Consumers' Counsel; and there are frequently differing points of view advanced by the different departmental representatives.

The two hearings are alike also as to the order of introduction or reception of testimony, although the rules of practice obtaining in hearings upon proposed marketing orders seem to give less discretion to the presiding officer in this respect.[19] The rules of evidence in each case are equally liberal, although, because in the food standards hearings the privilege of cross-examination is more freely allowed and employed, the evidence in the records of such hearings is more closely developed. In neither instance is oral argument permitted at any stage of the proceeding, but in both cases written arguments or briefs are freely received.

18. In food standards proceedings, the full text of the proposal is set forth in the notice—for an example, see (1939) 4 Fed. Reg. 3585; in marketing order proceedings, the notice contains merely a summary of the terms of the proposal, but advises that true copies will be furnished to any interested person upon request—see (1939) 4 Fed. Reg. 4465. The statute specifically requires, as to food standards proceedings, that "the notice shall set forth the proposal in general terms * * * ."

19. United States Department of Agriculture, General Regulations—A. A. A. Series A, No. 1, sec. 207.

Upon the conclusion of the taking of testimony, however, real differences in the two procedures commence. In a proceeding upon a proposed marketing order, the persons to be affected by the order are allowed no further participation in its formulation. The representatives of the Department who participated both in the formulation of the initial proposal and in the public hearing proceed immediately to the preparation of the final order, making such modifications of or additions to the initial proposal as the evidence adduced at the hearing requires. The final draft of the order, together with a memorandum prepared by the draftsmen of the order explaining its provisions and a transcript of the administrative record, is then submitted to the Secretary for his consideration and signature. At no time throughout the entire proceeding upon a proposed marketing order, either during the hearing or afterwards, is there an attempt made to isolate the presiding officer from the departmental employees who participate in the hearing, or to preclude the latter from participating freely in the post-hearing procedures involved in the preparation and promulgation of the final order.

With the close of the testimony in a food standards proceeding, on the other hand, the persons to be affected by the order continue their active participation in the rule-making process.[20] At the close of the hearing they, as well as the departmental representatives, are invited by the presiding officer to submit proposed findings of fact and supporting briefs. The presiding officer then proceeds, without assistance from or consultation with other employees of the Department, to prepare a report or so-called "suggested findings of fact, conclusions, and order" which is published in the Federal Register and a copy of which is sent to each of the persons who appeared at the hearing. Opportunity is given to interested persons to file exceptions to any matter set out in the report and to file written statements concerning each of the objections taken to the action of the presiding officer at the hearing. The rules of practice then provide that the presiding officer shall transmit the record of the proceeding to the Secretary, and that the Secretary, "upon the basis of such record, and after careful consideration of the same by him,"

20. For the procedure governing food standards proceedings, see the rules of practice published in Federal Register on Jan. 13, 1939, 4 Fed. Reg. 223, and the amendment published on July 22, 1939, 4 Fed. Reg. 3401.

will make his findings and issue the order. Altogether, the rules of practice governing the post-hearing procedure in food standards proceedings differ only slightly from the rules governing such procedure in departmental proceedings of an admittedly adversary, adjudicative character.[21] Even though the actual practice in food standards proceedings is somewhat less formal than the rules of practice seem to contemplate, the procedure followed in such proceedings is considerably more formal and elaborate than the procedure in marketing order proceedings. Despite the fact that the procedural requirements of the Federal Food, Drug, and Cosmetic Act are somewhat more explicit than those of the Agricultural Marketing Agreement Act of 1937—especially if account be taken of certain portions of the legislative history of the former statute,[22] it is difficult to discern a basis for any real differences in the two procedures.

Group (C): Adjudicative proceedings in which the Department is an active participant both as advocate and adjudicator

Under this heading falls the largest number of proceedings conducted under the five statutes selected for the Solicitor's special study. The proceedings in this group—see the list set forth in the footnote[23]—arise under twelve different statutory provi-

21. See p. 368, et seq., infra.
22. See Fuchs, The Formulation and Review of Regulations Under the Food, Drug, and Cosmetic Act (1939) 6 Law and Contemp. Prob. 43.
23. Proceedings in this group are the following:
(a) Under the Agricultural Marketing Agreement Act of 1937.
(1) Proceedings to determine the claim of an individual handler subject to a marketing order that the order is invalid as to him or should be modified or that he should be exempted therefrom. (1939) 7 U. S. C. A. sec. 608c(15).
(b) Under the Commodity Exchange Act.
(1) Proceedings to determine whether to suspend or to revoke the registration of a futures commission merchant or a floor broker or to order all contract markets to refuse trading privileges to any person (other than a contract market) alleged to be guilty of violating the act or the regulations thereunder, or of manipulation. (1939) 7 U. S. C. A. sec. 9.
(c) Under the Federal Food, Drug, and Cosmetic Act.
(1) Proceedings to determine whether to refuse an application to introduce into interstate commerce a new drug. (1927) 21 U. S. C. A. sec. 355.
(d) Under the Packers and Stockyards Act.
(1) Proceedings to determine whether to issue a cease and desist order against any packer alleged to have violated or to be violating any provision of Title II of the statute. (1939) 7 U. S. C. A. sec. 193.
(2) Proceedings to determine the lawfulness of any new rates.

sions and fall within at least four separate categories: (1) proceedings to determine whether to refuse, suspend, or revoke a license or other authorization equivalent in its legal effect to a license; (2) proceedings to determine whether to issue an order to cease and desist alleged infractions of law; (3) proceedings to determine whether to exempt an individual handler from the terms of a marketing order issued under the Agricultural Marketing Agreement Act of 1937; and (4) rate proceedings under the Packers and Stockyards Act.

Few will quarrel with the inclusion of the license and cease and desist order proceedings within this group. Granting the danger in a quick application of such terms as "adjudication," "legislation," *et cetera,* in any endeavor to effectuate a sound classification of administrative procedures, and recognizing that, particularly with respect to proceedings relating to the licensing power, generalization is frequently foolhardy, the license and cease and desist order proceedings arising under the particular statutes under discussion may nevertheless be described as "adjudicative."[24] It is significant in this connection that notice and hearing are made necessary as a part of such proceedings not

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or charges filed by stockyard owners or market agencies. (1939) 7 U. S. C. A. sec. 207.

(3) Proceedings instituted by the Secretary, on his own motion, to determine whether an existing rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory. (1939) 7 U. S. C. A. sec. 211.

(4) Proceedings instituted by the Secretary to determine whether to issue a cease and desist order against a stockyard owner, market agency, or dealer alleged to be violating the provisions of sec. 213 (a). (1939) 7 U. S. C. A. sec. 213.

(5) Proceedings to determine whether to refuse applications for licenses to live poultry dealers or handlers. (1939) 7 U. S. C. A. sec. 218 (a).

(6) Proceedings to determine whether to suspend or to revoke the license of a live poultry dealer or handler. (1939) 7 U. S. C. A. sec. 218 (d).

(7) Proceedings to determine whether to suspend a registrant under the provisions of the annual Department of Agriculture Appropriation Act.

(e) Under the Perishable Agricultural Commodities Act.

(1) Proceedings to determine whether to refuse a license to comsion merchants, dealers, or brokers. (1939) 7 U. S. C. A. sec. 499 (d).

(2) Proceedings to determine whether to suspend or to revoke licenses of commission merchants, dealers, or brokers. (1939) 7 U. S. C. A. secs. 499h, 499i, 499m.

only by virtue of statutory but probably also as a matter of constitutional requirements.

The proceeding to exempt an individual handler from the terms of a marketing order issued under the Agricultural Marketing Agreement Act of 1937 authorizes a handler who deems himself aggrieved by a marketing order to file with the Secretary a petition stating that the order is not in accordance with law and praying either that the order be modified or that the petitioner be exempted therefrom.[25] The handler is entitled to an opportunity for a hearing upon the petition, following which the Secretary is required to make a ruling upon the prayer of such petition. Special statutory provision is made for review of the Secretary's ruling by an appropriate district court, but it is expressly provided that the Secretary's ruling shall be final, "if in accordance with law." This administrative proceeding was devised by Congress to afford an administrative, in lieu of an immediate judicial, remedy to a handler believing himself aggrieved by the terms of a marketing order, with the expected legal consequence being that the administrative remedy must be exhausted before the judicial process may be invoked. The adjudicative aspect of the proceeding is clear, being directed, among other matters, to a determination of the legality of the marketing order and to ascertaining the applicability of the order to the particular handler seeking to challenge the order.

Extension of the proceedings in this group to embrace rate proceedings under the Packers and Stockyards Act has only doubtful basis in logic, but is attributable to two sources: (1) the practice of the Interstate Commerce Commission in the conduct of similar proceedings;[26] and (2) the language of the Su-

24. The term used, in what perhaps may now be called the "orthodox" manner, to characterize the making of decisions or determinations in a proceeding involving designated or named persons or situations. See Fuchs, supra note 22, at 263-265, where some of the principal authorities are cited and the term is defined with unusual frankness. Of course, any definition of the term is to be confined to the connection in which it is offered, which, in the present instance, is the classification of types of administrative proceedings for procedural purposes.

25. For a fuller discussion of the nature of the proceeding, see Sellers, Administrative Procedure and Practice in the Department of Agriculture under the Agricultural Marketing Agreement Act of 1937 (1939) 35-38, 42-46, 71-72, cited supra note 5.

26. Title III of the Packers and Stockyards Act, upon which the power to fix rates of stockyards and stockyard agencies is based, is closely patterned after the rate-fixing provisions of the Interstate Commerce Act. The

preme Court in its first opinion in the *Morgan* case.[27] Except for these two precedents—the one highly persuasive in practice and the other presumably conclusive as a matter of law, rate proceedings under the Packers and Stockyards Act, at least those involving general rate inquiries and those to fix the rates to be charged by market agencies and dealers (generally a numerous group of individuals),[28] would seem to be more appropriately classified with the proceedings in group (B) previously described. A proceeding to fix stockyard rates under the Packers and Stockyards Act is quite similar to a proceeding to formulate a marketing order under the Agricultural Marketing Agreement Act of 1937, particularly where a proceeding of the latter kind involves the fixing of prices to be paid by handlers of milk to producers serving a given area.[29] Rate proceedings, nevertheless,

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courts have frequently recognized the similarity between the two statutes. See Sullivan v. Union Stockyards Co. (C. C. A. 8, 1928) 26 F. (2d) 60, 61; Stafford v. Wallace (1922) 258 U. S. 495.

27. (1936) 298 U. S. 468. Note the following excerpts from the Court's opinion, wrestling with the problem of "typing" a rate-proceeding under the Packers and Stockyards Act:

1. "The proceedings is not one of ordinary administration, conformable to the standards governing duties of a purely executive character." 298 U. S. at 479.
2. "It is a proceeding looking to legislative action in the fixing of rates * * * ." 298 U. S. at 479.
3. "And, while the order is legislative and gives to the proceeding its distinctive character * * * it is a proceeding which by virtue of the authority conferred has special attributes." 298 U. S. at 479.
4. "That duty [to fix rates] is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements." 298 U. S. at 480.
5. A rate proceeding "has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character." 298 U. S. at 480.

28. The number of market agencies and dealers which has been involved in rate proceedings under the Act to date has averaged around 50 individuals and concerns, ranging from approximately 15 to approximately 100, depending upon the size of the market involved.

29. One difference between rate proceedings under the Packers and Stockyards Act and marketing order proceedings is that, in the former, each of the "parties" is named in the order, whereas, in the latter, they are not so named, the order being made applicable to any and all "handlers" of the particular commodity crop covered by the order. But, except for this difference as to the manner of designating the persons to be affected by the two proceedings, each of them operates alike upon a fairly numerous group of individuals, so that, as a rule, both a rate order and a marketing order have "general applicability."

One wholly superficial difference between rate orders and orders issued in group (B) proceedings is that the former are not customarily published in the Federal Register. Technically, if they are to be classed as regulatory orders of "general applicability," they should be so published. But, on the

because of notions concerning them which prevail outside the Department, have been grouped by the Department for procedural purposes with proceedings of a judicial nature.

In the main, the procedures followed by the Department in the conduct of proceedings in this group are quite similar. The differences, while numerous and annoying to one seeking to acquire a ready knowledge of the Department's procedures, are mostly differences in detail. Sometimes the procedural variations result logically from the differences in the nature of the proceedings. A notice of inquiry in a general rate proceeding, for example, cannot be very specifically drawn, whereas an order to show cause in a license revocation cause can and uniformly does contain concise and detailed allegations. Frequently, the differences have an entirely statutory origin. Thus, whether a given proceeding should be commenced upon an order to show cause or upon a complaint or upon a petition is often the result of statutory rather than administrative provision.[30] Occasionally, also, the procedural differences are based upon nothing more substantial than the fact that the rules of practice in general have been

other hand, cease and desist orders issued by the Federal Trade Commission may hardly be regarded as having "general applicability"; nevertheless, they are usually published in the Federal Register.

30. The several federal administrative statutes presently in force contain a wide variety of differences as to procedural detail. There is no agency connected with the Congress charged with effectuating the use of standard terminology in the procedural provisions of the administrative statutes. Both the House of Representatives and the Senate have legislative counsel, but, at present, the personnel of those offices is too small to handle the numerous tasks assigned to them, and, for the more reason, it is not of such size as to undertake the additional task of reviewing every bill pertaining to administrative procedure which may be introduced in order to see that the use of terminology therein fits into a scheme for standardization. As a result of variations which exist in statutory terminology, the administrative agencies sometimes have been dissuaded from devising more uniform procedures, regardless of the urge to achieve that objective. Note, for example, the obstacles of statutory language which had to be overcome by the Department of Agriculture in framing its rules of practice under the Packers and Stockyards Act:

> Any *complaint* issued under section 203(a), and any *notice of inquiry* issued under section 306(e), 309(b), 309(c), 311, or 401, and any *petition* filed pursuant to section 309(a), and any *order to show cause* why an application for license should not be denied * * * shall state, briefly and clearly, the facts complained of, in the case of a complaint or petition, or the matters concerning which the notice of inquiry or order to show cause is issued * * * . (Italics supplied.)

How much simpler would have been the task of phrasing this rule of practice had the statute authorized all the different proceedings to be instituted upon a complaint or some other singly described pleading.

devised at various times by different personnel and under diverse circumstances. Fashion and style enter into the manufacture of procedure as well as clothes. Basically, however, a common procedure governs the proceedings in this group.

The hearing is conducted by an attorney attached to the Office of the Solicitor, but specifically designated by the Secretary to conduct the hearing. In such capacity, he is called, variously, an examiner, referee, or presiding officer; and, when so serving, he acts as the direct representative of the Secretary and not as Government counsel.[31] He is usually empowered to administer oaths, to sign and issue subpoenas, to examine witnesses, to receive such evidence as appears to be relevant to the issues, to require by subpoena the attendance and testimony of witnesses and the production of such accounts, records, and memoranda as may be material to the determination, and to adjourn the hearing from time to time and from place to place.

Representing the Department in the presentation of its case is another attorney from the Office of the Solicitor, who, with the cooperation and assistance of members of the staff of the administrative bureau interested in the proceeding, actively participates in the development of the evidence for the Government.

31. In the Department of Agriculture, there is no special unit similar to the Trial Examiners Division of the Federal Trade Commission, or any organization of similar description such as exists in the Interstate Commerce Commission, the Securities and Exchange Commission, and a number of other agencies. Examiners, referees, and presiding officers who preside over hearings in proceedings in this group are attorneys employed in the Office of the Solicitor who, from time to time, are selected to serve as trial examiners in particular proceedings. When not so serving, they resume their more usual duties under the supervision of the Solicitor. In May, 1939, as an experiment in the direction of the creation of a separate trial examiners' unit, there was established, as a separate division within the Office of the Solicitor, a Hearing Division, composed of four attorneys who had customarily been engaged in presiding over certain departmental hearings, and headed by an attorney with extensive hearing experience and with wide knowledge of the subject matter of the statutes under which such hearings have arisen. Because of budgetary considerations, it was found after this division had existed for six months that the arrangement was not feasible. Perhaps, in any case, it could not have achieved its full purpose because, despite its separation from other divisions in the Office of the Solicitor, it was still a part of that office, and, as such, the independence of its status would have been difficult to demonstrate outside the Department. The Hearing Division was formally abolished on December 21, 1939; but there is now under serious consideration a proposal to revive the organization and to attach it to the Office of the Secretary. Should the proposed legislation referred to in note 4, supra, be enacted, the proposed reëstablishment of a hearing unit would become quite probable.

The other party or parties appear either in person or by counsel, as they may prefer.

Almost invariably the examiner is called upon to rule on motions of one sort or another. Except with respect to motions for continuances or to permit amendments of pleadings, which the examiner rules on *in limine*, motions are generally entertained, but are reserved for the eventual decision of the Secretary in his ultimate consideration of the entire record.

The hearing then proceeds in a manner similar to a trial in a court of law, except that the strict rules of evidence are not controlling. The testimony is reported *verbatim* and copies of the transcript are made available to the private parties at a stated cost. Cross-examination is freely permitted. The examiner, within his discretion, permits oral argument during the hearing; and provision is usually made for the filing of briefs within a stated time after the hearing has been concluded.

Upon the conclusion of the hearing, the examiner requests the parties (including the Department) to file within a time stated suggested findings of fact and a suggested order. This, of course, is merely affording the parties an opportunity to file such papers and is in no sense compulsory. Where a suggested-findings-and-order practice is followed, it enables the examiner to have the views of all parties in interest with respect to the facts and the law at a time before he begins the preparation of his report. This practice, although begun less than two years ago, is now uniformly followed in proceedings in this group, and is dispensed with only in disciplinary cases in which the respondent consents to the maximum disciplinary action allowed by law. In cases of the latter description, the examiner prepares no report.

As soon as practicable after the termination of the period allowed for the filing of suggested findings and suggested orders, the examiner prepares, upon the basis of the evidence received in the hearing, a report containing his proposed findings, conclusion, and order, a copy of which is served upon each of the parties, including the bureau or agency within the Department charged with immediate responsibility for the enforcement of the statute involved. Within a stated time after completion of service, usually twenty days, any party who desires to except to any matter set out in the report must file written exceptions which, if made to a proposed finding of fact, must suggest a

corrected finding of fact. Within the same period of time, each party must file a brief statement in writing concerning each of the objections taken to the action of the examiner upon which he wishes to rely.

Immediately following the expiration of the time allowed for the filing of exceptions, the examiner transmits to the Secretary (or to the other officer of the Department who is to determine the cause in the Secretary's stead)[32] the record of the proceedings. Such record includes: the pleadings; the transcript of the evidence taken at the hearing; such suggested findings of fact and suggested orders, and briefs in support thereof, as may have been filed; the examiner's report and the exceptions to such report; statements concerning an aggrieved party's objections to the action of the examiner; and briefs filed in connection therewith, if any.[33]

If oral argument before the Secretary is permitted, it takes place at this stage of the proceeding. Oral argument is not always allowed, however, and in no event is it permitted except where a written request has been made before the expiration of the time allowed for the filing of exceptions. Where an officer of the Department other than the Secretary is to issue the final order, oral argument is heard by such officer.

The cause is then ready for the preparation of the final order. The Secretary (or such other officer who is to act in the Secretary's stead) considers the record, consulting freely with the examiner who presided over the hearing, and makes his determination of the issues in the cause. He advises the examiner of his determination and instructs the examiner to prepare the final order in accordance with his (the Secretary's) decision. The examiner prepares the order for the approval and signature of the Secretary. The order then is routed directly from the

32. Under the present construction of the laws now applicable to the Department, only the Undersecretary and the Assistant Secretary may be substituted for the Secretary in the performance of this function.

33. The record of the proceedings, as here described, indicates only the intra-departmental record. Whether all of the items enumerated would become a part of the record to be filed in a court, when an order is to be judicially reviewed, is a matter reserved by the Department for determination in a particular instance, insofar as the Department may exercise its discretion in the matter. See Arrow-Hart & Hegeman Electric Co. v. Federal Trade Comm. (C. C. A. 2, 1933) 63 F. (2d) 108, 109, holding that the trial examiner's report was not a part of the record to be certified to the reviewing court.

examiner to the Secrtary, and, if approved and signed by him, is served upon the parties in due course.

Group (D): Adjudicative proceedings in which the Department participates only as adjudicator

The distinction between proceedings in this group and those in Group (C) is frequently more apparent than real, and the assignment of a proceeding to one group rather than to another should be made with caution. For example, a reparation proceeding, although itself involving a dispute entirely between private parties, is sometimes consolidated for hearing purposes with a proceeding in which the Department is an active advocate. Such a consolidated cause may not be classified with certainty in either group to the exclusion of the other. Reparation proceedings are authorized under both the Packers and Stockyards Act and the Perishable Agricultural Commodities Act. In either event, they are commenced by private complaints filed with the Department, but, before the respondent in any case is called upon to answer a complaint, the Department conducts its own investigation into the facts upon which the complaint was based. If it is found that the complainant has probable cause for his complaint, and if the respondent, after being called upon to answer, fails to make a satisfactory response, the Department may not only set the private complaint for hearing, but may, if the results of the investigation indicate that a serious violation of the law has occurred, issue its own disciplinary complaint against the respondent. In that event, the two complaints are sometimes consolidated for a hearing; and the procedure followed is that which governs the proceedings in Group (C) above described. This is so not because the proceeding may be classified in that group to the exclusion of a Group (D) classification, but because the procedure obtaining in Group (C) proceedings is such as to satisfy all of the Group (D) requirements and, in addition, to afford the respondent a fair hearing on so much of the controversy as is being prosecuted and adjudicated by the Department.

It may happen, also, that some proceedings contemplating the same sort of adjudication as those falling within Group (C), i. e., an adjudication invoking disciplinary sanctions against the respondent, *et cetera,* will be instituted upon the complaint of a private party and not upon that of the Secretary. In such an

instance, the Department may take over the complaint and assume an active responsibility for the development of the evidence, but this does not necessarily follow. Where it does occur, the proceeding loses its private character and is governed by the Group (C) procedure heretofore described; otherwise it is controlled by Group (D) procedure. Only rarely, however, does the Department remain disinterested and stand, so to speak, on the side-lines.

Nevertheless, the instances in which adjudicative proceedings are conducted by the Department solely upon private complaints and without a Department advocate appearing therein are sufficiently numerous as to warrant separate procedural treatment. In such instances, the procedure, while identical in many respects with the procedure attending proceedings in which the Department prosecutes and adjudicates, differs in a few important respects. The Department is not represented by counsel, it makes no attempt to introduce evidence on its own account, and it does not participate in the cross-examination. While a large part of the evidence consists of the testimony of the Department's investigators and employees and of material from departmental files and records, such evidence is adduced entirely at the instance of the private disputants and is made equally available to both parties. The hearing concluded, the examiner, freely assisted by other employees of the Department, prepares his report in the form of a final order. No provision is made for the parties to submit suggested findings; for service of copies of examiner's report upon the parties; or for the filing of exceptions to the report. The record, containing only the transcript of the evidence, briefs filed by the parties, and the examiner's report, is routed from the examiner to the Secretary over the desks of the Solicitor and of officials of the bureau having immediate responsibility for the administration of the statute, who initial the report and attach such comment in the form of memoranda concerning the substance of the tentative findings and order as they deem pertinent. In his consideration of the examiner's tentative order, the Secretary freely consults with bureau officials, none of whom is regarded as disqualified because of previous participation in the proceeding to make suggestions as to the form or content of the final order. In short, the hearings in such instances, while they are governed by a procedure which reflects

their character as adjudicative proceedings, do not adhere to the far reaching implications of the Supreme Court in the *Morgan* case.[34] The proceeding is different in kind from the proceeding involved in that momentous decision.

Conclusion

In the field of administrative procedure, perhaps more than in any other, the urge to standardize is strong—so strong, indeed, as to have prompted a large element of the legal profession and the general public to sponsor legislation which, as to certain of the agencies, would not merely standardize but would virtually rigidify administrative procedure. On the other hand, there are some who, passionate in their sympathy for the administrative process, look with suspicion upon any movement toward procedural uniformity, and regard all steps taken in that direction as tokens of surrender to those who oppose the administrative process on principle. The extremists in each of these groups are subject to the common charge that their chief interest is not in the procedure but in the ends or the subject-matter of administration. The activities of such persons give an unfortunate political emphasis to much of the thinking in the field of administrative procedure. Once this political emphasis can be removed, or perhaps as a medium to effectuate its removal, dispassionate and empirical research directed toward classification and differentiation of procedures should be commenced. Ultimately, of course, the goal is not procedural classification itself, but the establishment of a system of procedures which will satisfy alike the legitimately competing demands of public and private interests.

Before that goal may be reached, there must be collected an adequate body of descriptive data concerning the existing activities and procedures of the various administrative agencies and a common terminology devised. This collection of data, to be truly embracive, must concern itself not only with hearing practices—to which this article is devoted—but also with numerous other administrative practices which have yet to receive the attention they deserve in the process of evaluating administrative conduct and performance.[35] When this is done, it will make

34. (1936) 298 U. S. 468; (1938) 304 U. S. 1; (1938) 304 U. S. 23.

35. The broader the range of data which will be collected, the more elaborate will inevitably become the classifications to be adopted. To the extent that data are considered beyond what are currently regarded as sig-

available a broader description of administrative activity and make possible the introduction of hitherto largely neglected criteria which bear upon the adequacy of hearing procedures themselves.

The discussion in the foregoing pages has concerned itself with a body of doctrine which has been developed mainly in the language of the courts reviewing contested administrative action. The studies upon which this article is based have adopted this embryonic ideology and have elaborated upon, modified, and altered it in the light of the numerous varieties of procedural data which have been discovered. The classification suggested herein and the doctrines upon which it rests are actually recognized in the practice of the Department of Agriculture. Whether or not it may suffice as a working classification by means of which uniformity and simplicity in *all* of the regulatory procedures of the Department may be attained without undue sacrifice of the objectives of administration cannot yet be safely predicted. The answer rests in the results of the research of the future.

APPENDIX

Regulatory Statutes Administered by the Department of Agriculture*

1. Act of May 29, 1884, 23 Stat. 32, secs. 5 and 6, (1927) 21 U. S. C. A. 113, 115: to prevent exportation and interstate transportation of livestock

nificant in the field of administrative procedure, prevailing concepts as to procedural classification will undergo revision. Thus, in time, the separation of powers formula used herein, i. e., legislative-judicial-administrative, or even the use of similar but less doctrinaire terms such as "rule-making," "licensing," and "adjudication," currently employed in the preliminary studies of the Attorney General's Committee on Administrative Procedure, ultimately may give way to an entirely different terminology. There may even be a revival of interest in the work of the late Professor Freund and his classification of administrative activities into "licensing powers," "relaxing or dispensing powers," "directing powers," etc. In any event, we seem to be on the threshold of an era of classification based upon empirical research. The high tide of what may be called political-constitutional conceptualism has been reached in the Logan-Walter bill, now pending in Congress. In the future, classification will and should spring from the material of empirical research itself. This article is designed to bridge the gap between the two modes of thinking.

* The letters inserted at the end of the description of the subject-matter of each statute refer to the bureau or division of the Department which administers the statute. Thus, "AAA" means Agricultural Adjustment Administration; "AMS" means Agricultural Marketing Service; "BAI," Bureau of Animal Industry; "BDI," Bureau of Dairy Industry; "CEA," Commodity Exchange Administration; "E&PQ," Bureau of Entomology and Plant Quarantine; "F&DA," Food and Drug Administration; "FS," Forest Service; "SCS," Soil Conservation Service; and "SD," Sugar Division.

and poultry known to be diseased or from an area found by the Secretary to be "infected." BAI.

2. Act of March 3, 1891, 26 Stat. 833; May 28, 1928, 45 Stat. 789, (1929) 45 U. S. C. A. 75: to provide for safe and proper transportation and humane treatment of cattle, horses, mules, asses, sheep, goats, or swine which are exported from the ports of the United States; to authorize the Secretary to examine all vessels which are to carry such animals and to prescribe rules and regulations regarding accommodations which said vessels shall provide for such animals. BAI.

3. Act of March 2, 1897, 29 Stat. 604; May 31, 1920, 41 Stat. 712, (1927) 21 U. S. C. A. sec. 41 (Tea Act): to forbid the importation of tea which does not conform to standards fixed and established by the Secretary after initial determination by the United States Board of Tea Experts established therein. F&DA.

4. Act of May 9, 1902, 32 Stat. 196, (1935) 26 U. S. C. A. sec. 995 (Renovated Butter Act): to provide for the supervision of the labeling of processed or renovated butter and the sanitary inspection of establishments where renovated butter is made. BDI.

5. Act of February 2, 1903, 32 Stat. 791, secs. 1 and 2, (1927) 21 U. S. C. A. sec. 111 et seq.: to regulate the exportation, importation and interstate shipment of livestock and poultry from any locality where the Secretary has reason to believe that infectious animal diseases exist. BAI.

6. Act of February 1, 1905, 33 Stat. 628, (1927) 16 U. S. C. A. sec. 551 (Transfer Act and Related Statutes): to regulate the occupancy and use of national forests and to preserve them from destruction. FS.

7. Act of March 3, 1905, 33 Stat. 1264 and 1269, (1927) 21 U. S. C. A. sec. 123 (Animal Quarantine Act): to prevent the interstate transportation of livestock and poultry from areas which the Secretary has quarantined after he has determined that there are livestock or poultry therein "affected with contagious, infectious, or communicable" diseases. BAI.

8. Act of June 30, 1906, 34 Stat. 768, (1927) 21 U. S. C. A. secs. 1, 2, 3. (Food and Drugs Act); June 25, 1938, 52 Stat. 1040, c. 675, sec. 1, (1939 Supp.) 21 U. S. C. A. sec. 301 (Federal Food, Drug, and Cosmetic Act): to prohibit the movement in interstate commerce of adulterated and misbranded "foods, drugs, devices and cosmetics." F&DA.

9. Act of June 29, 1906, 34 Stat. 607, (1927) 16 U. S. C. A. sec. 684 (Twenty-eight Hour Law): to prohibit the confinement by common carriers of animals in the course of interstate transportation for a longer period than 28 consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water and feeding for a period of at least five consecutive hours. BAI.

10. Act of March 4, 1907, 34 Stat. 1260, (1927) 21 U. S. C. A. sec. 71 (Meat Inspection Act): to prevent the interstate or foreign shipment of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food by requiring such shipments to bear marks of federal inspection and approval. BAI.

11. Act of May 23, 1908, 35 Stat. 254, (1927) 21 U. S. C. A. sec. 132

(Dairy Products for Export Act): to prevent the exportation of dairy products unless the same shall have been inspected and certified as to quality, purity and grade. BDI.

12. Act of April 26, 1910, 36 Stat. 331, (1939) 7 U. S. C. A. secs. 125, 126 (Insecticide Act): to prevent the manufacture, sale, or transportation of adulterated or misbranded insecticides and fungicides. F&DA.

13. Act of August 20, 1912, 37 Stat. 315, (1939) 7 U. S. C. A. sec. 154 (Plant Quarantine Act): to regulate or prevent the importation and interstate shipment of plants and plant products capable of bearing plant diseases and pests. E&PQ.

14. Act of March 4, 1913, 37 Stat. 833, (1927) 21 U. S. C. A. sec. 155 (Virus-Serum-Toxin Control Act): to license and supervise the production and to regulate the importation of, and interstate commerce in, viruses, serums, toxins, and analogous products for use in the treatment of domestic animals. BAI.

15. Act of August 11, 1916, 39 Stat. 482, (1939) 7 U. S. C. A. sec. 71 (United States Grain Standards Act): to establish standards of quality and condition for wheat, corn and other grains and, after standards have been established, to prohibit the interstate or foreign transportation of grains not officially inspected and graded by licensed inspectors. AMS.

16. Act of August 11, 1916, 39 Stat. 486; July 24, 1919, 41 Stat. 266; February 23, 1923, 42 Stat. 1283; March 2, 1931, 46 Stat. 1463; (1939) 7 U. S. C. A. secs. 242 et seq. (United States Warehouse Act): to provide for the licensing by the Secretary of warehouses in which agricultural commodities are stored for shipment in interstate commerce. AMS.

17. Act of August 31, 1916, 39 Stat. 673, (1939) 15 U. S. C. A. secs. 251, 252 (Standard Container Act): to establish standards for Climax baskets, berry boxes, and similar containers for small fruits and vegetables moving in interstate commerce; to authorize the Secretary to prescribe tolerances and variations and make examinations and tests for the purpose of determining whether such containers meet the requirements of the Act; and to prohibit the manufacture, shipment, or sale of containers not conforming to such standards. AMS.

18. Act of August 11, 1916, 39 Stat. 476, (1939) 26 U. S. C. A. sec. 1090 et seq. (Cotton Futures Act): to regulate trading in cotton futures by levying a tax on each pound of cotton involved in any contract of sale of cotton for future delivery upon any exchange, board of trade, or similar institution or place of business, unless prescribed types of contract are used. AMS.

19. Act of July 24, 1919, 41 Stat. 241, (1927) 21 U. S. C. A. sec. 96 (Horse-meat Act): to prohibit transportation in interstate or foreign commerce of horse-meat and horse-meat products unless such meats be plainly and conspicuously labeled, marked, branded, or tagged "horse-meat" or "horse-meat product," as the case may be. BAI.

20. Act of August 15, 1921, 42 Stat. 159, (1939) 7 U. S. C. A. sec. 181 et seq. (Packers and Stockyards Act); August 14, 1935, 49 Stat. 648, (1939) 7 U. S. C. A. sec. 218 et seq. (Live Poultry Amendment): to regu-

late the business conduct of packers and stockyards insofar as their transactions are in the current of interstate commerce, and to prescribe the rates to be charged by the owners of stockyards and by the commission men who operate at such yards. AMS.

21. Act of August 31, 1922, 42 Stat. 833, (1939) 7 U. S. C. A. sec. 281: to prohibit the importation of adult honey bees, except from countries in which the Secretary shall determine that no diseases dangerous to honey bees exist and then under rules and regulations to be prescribed by the Secretary of the Treasury and the Secretary of Agriculture. E&PQ.

22. Act of February 18, 1922, 42 Stat. 388, (1939) 7 U. S. C. A. sec. 291 (Capper-Volstead Act): to promote associations of producers of agricultural products for collective processing and marketing in interstate commerce of such products and to direct the Secretary, in event any such association monopolizes trade so as unduly to increase the price thereof, to order such association to cease and desist from such monopolization. AMS.

23. Act of March 3, 1923, 42 Stat. 1435, (1939) 7 U. S. C. A. sec. 91 (Naval Stores Act): to establish standards for rosin and turpentine and to prohibit the sale of such products inferior to the official standards. F&DA.

24. Act of March 4, 1923, 42 Stat. 1517, (1939) 7 U. S. C. A. sec. 51 (United States Cotton Standards Act): to establish standards of quality for cotton and, once standards have been established, to prohibit the interstate and foreign transportation of cotton not inspected and sampled by licensed samplers. AMS.

25. Act of March 4, 1923, 42 Stat. 1486, (1927) 21 U. S. C. A. sec. 61 (Filled Milk Act): to prohibit the manufacture and interstate transportation of any milk, cream, or skim milk containing fat, other than milk fat, which has been added by any of the methods described in the statute. F&DA.

26. Act of March 4, 1927, 44 Stat. 1406, (1939) 15 U. S. C. A. sec. 401 (Federal Caustic Poison Act): to require the labeling of certain specified or corrosive substances and their preparations, and to prohibit the distribution and sale of such substances not properly labeled. F&DA.

27. Act of March 3, 1927, 44 Stat. 1355, (1939) 7 U. S. C. A. sec. 491 (Produce Agency Act): to prevent the destruction or dumping, without good and sufficient cause therefor, of farm produce received in interstate commerce by commission merchants and others, and to require them truly and correctly to account for all farm produce received by them. AMS.

28. Act of May 21, 1928, 45 Stat. 685, (1939) 15 U. S. C. A. sec. 257 (Standard Container Act): to establish standards for hampers, round stave baskets, and split baskets for fruits and vegetables moving in interstate or foreign commerce; to authorize the Secretary to prescribe tolerances and variations and make examinations and tests for the purpose of determining whether such containers meet the requirements of the Act; and to prohibit the manufacture, shipment, or sale of containers not conforming to such standards. AMS.

29. Act of June 17, 1930, 46 Stat. 689, sec. 306, (1937) 19 U. S. C. A. sec. 1306 (Imported Meat Act): to prevent the importation of cattle or meats from any foreign country in which the Secretary shall determine that rinderpest or foot-and-mouth disease exists; and to prohibit the importation of fresh beef, veal, mutton, lamb, pork, bacon, and ham and prepared or preserved meats of all kinds unless they are "healthful, wholesome and fit for human food," and contain "no dye, chemical, preservative or ingredient which renders the same unhealthy, unwholesome or unfit for human food." BAI.

30. Act of June 10, 1930, 46 Stat. 531 (Perishable Agricultural Commodities Act of 1930); April 13, 1934, 48 Stat. 584; June 19, 1936, 49 Stat. 1533; August 20, 1937, 50 Stat. 725; (1939) 7 U. S. C. A. sec. 499a: to require the licensing of commission merchants, dealers, and brokers handling fresh fruits and vegetables in the current of interstate commerce. AMS.

31. Act of June 10, 1933, 48 Stat. 123, (1939) 7 U. S. C. A. sec. 581 (Export Apple and Pear Act): to establish standards for apples and pears in packages which are to be shipped to foreign countries, and to prohibit the sale or transportation of uncertified products. AMS.

32. Act of August 23, 1935, 49 Stat. 731, (1939) 7 U. S. C. A. sec. 511 (Tobacco Inspection Act): to establish standards of quality and condition for tobacco and, after standards have been established, to prohibit the sale at designated auction markets of tobacco not officially inspected and certified. AMS.

33. Act of August 24, 1935, 49 Stat. 781, secs. 56-60, (1939) 7 U. S. C. A. secs. 851-855 (Anti-Hog-Cholera Serum and Hog-Cholera Virus Act): to insure the maintenance of an adequate supply of serum and virus, and to prevent undue and excessive fluctuation and unfair methods of competition and unfair trade practices in the marketing thereof; to authorize the Secretary to enter into marketing agreements, and to issue orders for the regulation of the marketing of serum and virus in interstate commerce. BAI.

34. Act of April 25, 1936, 49 Stat. 1239, (1939) 7 U. S. C. A. sec. 515 (Tobacco Compact Act): to permit tobacco producing states to negotiate compacts for the purpose of regulating the production of or commerce in tobacco, and, under certain circumstances, to enable the Secretary to establish tobacco marketing quotas for Puerto Rico and for individual farms therein, in accordance with the formula given in the Act. AAA.

35. Act of June 15, 1936, 49 Stat. 1491, (1939) 7 U. S. C. A. sec. 1 (Commodity Exchange Act) which amended the Act of September 21, 1922, 42 Stat. 998, (1929) 7 U. S. C. A. sec. 1 (Grain Futures Act): to regulate transactions on commodity futures exchanges; and to limit or abolish short selling, manipulation of the market, and other designated practices. CEA.

36. Act of June 3, 1937, 50 Stat. 246, (1939) 7 U. S. C. A. sec. 601 (Agricultural Marketing Agreement Act of 1937) affirming, validating, and re-enacting certain provisions of the Act of May 12, 1933, 48 Stat. 31, as amended (Agricultural Adjustment Act): by the execution of marketing

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

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

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

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

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

DISCUSSION

by JOHN B. GAGE†

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

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