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# THE MORGAN CASE AND ADMINISTRATIVE PROCEDURE

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There will be no effort to discuss various aspects of administrative procedure. Attention will be confined to two propositions which were discussed in the Morgan opinions.

The first task is to state as accurately as possible the facts that appeared in the Morgan opinions. Then it seems desirable to add such facts as have appeared in discussions of the opinions. Particular reference will be made to the communications by Secretary of Agriculture, Henry A. Wallace, and Frederick Wood, who was one of the lawyers appearing in the *Morgan* case. After the facts have been presented, an effort will be made to state the rulings of the Supreme Court of the United States. After acquiring this background, other decisions, dealing with the same or similar questions will be discussed.

The first Morgan opinion,<sup>1</sup> delivered in 1936, was almost certain to be unsatisfactory if the real facts were ever to be disclosed to the public. The case arose as a suit to restrain an order of the Secretary of Agriculture from fixing maximum rates. Paragraph 4 of the bill of complaint charged that the Secretary had denied a "full" hearing as required by statute, in that he had (a) denied a request for a separate hearing for the petitioner who was one of fifty affected by the order; (b) had denied the request for a tentative report by the examiner; (c) had improperly delegated to Dunlap and Tugwell the authority solely vested in the Secretary; and (d) had signed the order although he had not (1) personally heard or read any of the evidence, (2) had not heard or considered the

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<sup>1</sup> *Morgan v. U. S.*, 298 U. S. 468, 56 Sup. Ct. 906, 80 L. ed. 1288 (1936).

oral arguments and (3) had not read or considered the briefs submitted by the petitioner. On the contrary it was asserted that the Secretary's sole information of the proceedings was derived from consultation *ex parte* with the employees of the Department of Agriculture.

This paragraph 4 of the bill of complaint was "struck out" by the District Court. Thus the controversy came before the Supreme Court on the pleadings and my observation has been that this is a very poor way of realistically considering the facts. It will suffice at the present time to say no more than that the Supreme Court ruled that the District Court erred in its order striking out paragraph 4. It ordered the defendants to answer the allegations and also ordered that the lower court determine whether the plaintiffs had had a proper hearing.

The case was returned to the District Court of three judges and they proceeded to determine whether the plaintiffs had had a "full" hearing. District Judge Otis, speaking for himself and District Judge Reeves stated, as follows:<sup>2</sup>

. . . Evidence has been heard. Not only has it not been proved that the Secretary did not read any of the evidence, nor hear the oral arguments, nor read and consider the briefs which plaintiffs submitted, but exactly the opposite has been proved. The Secretary did read parts of the transcript of the testimony; he did hear (not with his ears but by reading) the oral arguments, he did read and consider the briefs submitted by plaintiffs. These things have been proved unless indeed we shall reject the testimony of the Secretary of Agriculture as incredible. That alternative, absent a much stronger showing than is here, is not to be thought of in connection with the testimony of an honorable and distinguished head of a great executive department of the Federal government.

The Supreme Court has not said that it was the duty of the Secretary of Agriculture to hear or read all the evidence and, in addition thereto, to hear the oral arguments and to read and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Act, 7 U.S.C.A. § 181 *et seq.* cannot be administered. It is entirely impracticable to administer it if it imposes such a duty on the Secretary person-

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<sup>2</sup> *Morgan v. U. S.*, 23 F. Supp. 380 (1937). For the first opinion in the District Court, see 8 F. Supp. 766 (1934).

ally. Consider that in this very case the transcript of the oral testimony fills 13,000 pages. The exhibits, several hundred, fill more than 1,000 pages. A narrative statement of just a part of the oral testimony fills 500 printed pages. Learned counsel for plaintiffs assert indeed that they do not mean to contend that the Secretary personally must have read all of this mass of testimony. Such a contention could not be maintained. Let it be frankly stated now that the judges of this court, whose duty it was to consider the case *de novo* (since it involved constitutional issues), did not read all this testimony. We think, moreover, that it may be predicted with some assurance that all this testimony will not be read by the Justices of the Supreme Court when, as they must, they consider the cases on the merits.

Circuit Judge Van Valkenburgh, dissenting, stated that the Secretary of Agriculture did not give the matter "the personal consideration which it is his duty" to give. In other words, the Secretary's "examinations . . . were casual and perfunctory in the extreme."

After the case was returned to the Supreme Court, Mr. Chief Justice Hughes wrote the second opinion and he stated the facts, as follows:<sup>3</sup>

In the record now before us the controlling facts stand out clearly. The original administrative proceeding was begun on April 7, 1930, when the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the reasonableness of the charges of appellants for stockyards services at Kansas City. The taking of evidence before an examiner of the Department was begun on December 3, 1930, and continued until February 10, 1931. The Government and appellants were represented by counsel and voluminous testimony and exhibits were introduced. In March, 1931, oral argument was had before the Acting Secretary of Agriculture and appellants submitted a brief. On May 18, 1932, the Secretary issued his findings and an order prescribing maximum rates. In view of changed economic conditions, the Secretary vacated that order and granted a rehearing. That was begun on October 6, 1932, and the taking of evidence was concluded on November 16, 1932. The evidence received at the first hearing was re-submitted and this was supplemented by additional testimony and exhibits. On March 24, 1933, oral argument was had before Rexford G. Tugwell as Acting Secretary.

It appears that there were about 10,000 pages of transcript of oral evidence and over 1,000 pages of statistical exhibits. The oral argument was general and sketchy. Appellants submitted the brief which they had presented after the first administrative

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<sup>3</sup> *Morgan v. U. S.*, 304 U. S. 1, 58 Sup. Ct. 773, 82 L. ed. 1129 (1938).

hearing and a supplemental brief dealing with the evidence introduced upon the rehearing. No brief was at any time supplied by the Government. Apart from what was said on its behalf in the oral argument, the Government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused.

Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the government, and were submitted to the Secretary who signed them, with a few changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. They dealt with the practices and facilities at the Kansas City livestock market, the character of appellants' business and services, their rates and the volume of their transactions, their gross revenues, their methods in getting and maintaining business, their joint activities, the economic changes since the year 1929, the principles which governed the determination of reasonable commission rates, the classification of cost items, the reasonable unit costs plus a reasonable amount of profits to be covered into reasonable commission rates, the reasonable amounts to be included for salesmanship, yarding salaries and expenses, office salaries and expenses, business getting and maintaining expenses, administrative and general expenses, insurance, interest on capital, and profits, together with summary and the establishment of the rate structure. Upon the basis of the reasonable costs as thus determined, the Secretary found that appellants' schedules of rates were unreasonable and unjustly discriminatory and fixed the maximum schedules of the just and reasonable rates thereafter to be charged.

No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order. Appellants sought a rehearing by the Secretary but their application was denied on July 6, 1933, and these suits followed.

The part taken by the Secretary himself in the departmental proceedings is shown by his full and candid testimony. The evidence had been received before he took office. He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was contained in appellants' briefs. These, together with the transcript of the oral argument, he took home with him and read. He had several conferences with the Solicitor of the Department and with the officials in the Bureau of Animal Industry and discussed the proposed findings. He testified that he considered the evidence before signing the order. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows:

“My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry.”

There is no great difference in the facts as stated by the District Court and by the Chief Justice. Nevertheless, it is interesting to observe that Judge Otis for the District Court stated that Secretary Wallace “read parts of the transcript of the testimony” whereas the Chief Justice stated that the Secretary “dipped into it from time to time to get its drift.” This is an example of the difficulty one has in securing an accurate picture of the true factual situation even when he is relying upon carefully phrased court opinions. And this is my excuse for setting forth both statements of the facts, which, after all, are of fundamental importance.

After the second opinion in the *Morgan* case was delivered, Secretary Wallace decided to appeal to the “bar of public opinion.” Accordingly, he wrote a long letter to the New York Times which was printed Sunday, May 8, 1938. This letter was answered by Frederick H. Wood in an equally long letter which appeared in the New York Times Sunday, May 15, 1938. No attention will be devoted to the effort of the Secretary to acquit his administration and to blame the lack of proper procedure upon the preceding administration, nor to the effort of Mr. Wood to refute this allegation and to blame Secretary Wallace for the asserted procedural irregularity. For the present, at least, we are interested only in additional facts disclosed by the two writers. From this point of view the following statements by Secretary Wallace are of interest. In 1928 the administration of the Packers and Stockyards Act had been divided. The legal phase of the work “composed of the active prosecutors, went to the Solicitor’s office; the administrative and investigational section went to the Bureau of Animal Industry.”

This was by way of partial answer to the statement in the second Morgan opinion implying that the Secretary had accepted and made as his own, findings of fact which had been prepared "by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them."

The Secretary stated further that the Solicitor's office prosecuted the case; but that the Bureau of Animal Industry digested the evidence. Then "I conferred separately and collectively with both groups. Their opinions did not agree. I arrived at an independent opinion of my own." As a result of his own opinion he raised certain rates. The Secretary made the point that the men in the Bureau "were not the active prosecutors" but, as stated, they were the ones who digested the evidence.

The argument in the proceedings, after it had been reopened by Secretary Hyde, occurred on March 24 just twenty days after President Franklin Roosevelt had been inaugurated the first time. Previous to this argument before Assistant Secretary Tugwell the commission men had not been given the right to look at the proposed order, if there was one at that time.

Mr. Wood in his letter stated that, at the conclusion of the argument before Secretary Tugwell, the commission men requested that a tentative report be served on them in order that they might be apprised of the proposed findings and have an opportunity to take exception thereto. This request was denied. Then to quote from Mr. Wood's letter: "Thereafter, however, a tentative report was prepared by the attorney for the department who had prosecuted the case against the commission men in the proceedings within the department, by a subordinate attorney who assisted the former in such prosecution, and by an economist in the department who was one of the chief witnesses for the department in the case. The tentative

report was then submitted to the Secretary, who accepted the findings of fact prepared by the gentlemen named, without change." This statement by Mr. Wood appears to justify substantially the statement by the court concerning the active prosecutors for the Government.<sup>4</sup>

On May 21, 1938, J. H. Mohler, Chief of the Bureau of Animal Industry, wrote to the New York Times defending Secretary Wallace against the charges made by Mr. Wood. He denied that the Secretary had accepted the findings of the active prosecutors for the government. He stated, "That the findings were the Secretary's own, arrived at after looking over the statistical exhibits and transcript of oral argument and after conferring with the experts in the Bureau of Animal Industry who had summarized the evidence." As will be observed, this statement does not include what the Secretary had admitted about conferring with the men in the Solicitor's office.

Such are the facts as I have been able to glean them from the several sources. To repeat, the first opinion in the *Morgan* case was based upon the pleadings and, therefore, is an opinion that is not based upon a realistic view of facts. It also seems necessary to say that the second opinion is not entirely satisfactory in this respect. By this there is meant no criticism of the Supreme Court. But it is one case to show that in our legal procedure we sometimes deal with unreal situations.

It also seems fair to state that it is rather unfortunate that the Supreme Court apparently decided to use the *Morgan* case as an opportunity for setting forth some general standards to which administrative tribunals, acting in a quasi-judicial capacity, must adhere. To begin

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<sup>4</sup> From conversations I have had with John B. Gage of Kansas City, one of the attorneys for Morgan, I have concluded that the main procedural complaint of his clients is that the Department of Agriculture operated in this particular case, at least, in a manner that compelled the conclusion that in reality the prosecutor and judge functions were not separated. Therefore, there was, in their opinion, no adequate consideration of the question of confiscatory rates by the Department, acting through its Secretary, free from preconceived notions and desires. In other words there was a lack of judicial objectivity.

with, it is doubtful whether such tribunals are sufficiently alike to make general utterances as to procedural regularity of much value. In any event looking at the facts as a whole, it is impossible for me to believe that the Kansas City commission men were mistreated if they are to be judged by procedural standards frequently applied. On the contrary it seems that the Secretary of Agriculture proceeded fairly and honestly. This means that I know of no general rule that in administrative proceedings, there must be a formal and careful separation of the judge and prosecutor. The Secretary may have been wrong in the rates he set. It is a pity that there has been no decision of this question. Instead of that, we have what has too much the appearance of shadow boxing without really getting to the controversy over the merits. One must keep in mind that here was a controversy that started in 1930. An order setting rates was issued in 1932. Due to the economic situation, the rates then set were apparently thought to be too high and the proceeding was re-opened. More evidence was taken. A supplemental brief was filed. Another argument was had. In view of all of this, how can any one have any reasonable doubt that the commission men well knew the points in controversy? How can one be sympathetic with the Supreme Court when it said, after all of this had occurred, that the commission men were not sufficiently advised of the government's complaint? One is reminded of persons standing before the bar accused of crime in the form of the old-time verbose indictments, but complaining, nevertheless, and often successfully, that they had not been informed of the crimes of which they had been accused.

I have been impressed with a comment made by Secretary Wallace in his letter in the New York Times that the purpose of the court apparently was to flash a warning to quasi-judicial agencies that their procedure would have to be reformed and applied more carefully. Last Monday, the Supreme Court set the *Morgan* case for re-

argument. This time, after nearly nine years the court may be concerned lest the Secretary of Agriculture breaks forth with a statement similar to the "greatest legalized steal in history." Over \$500,000 is in the "bag."

Regardless of the complete story of the facts one must bow to the authority of the Supreme Court in the first two Morgan opinions. I shall attempt to state the decisions, although I am conscious that in all probability others would state them differently. The first Morgan opinion seems to hold *merely* that the District Court committed error in striking out paragraph 4 of the bill of complaint. As a justification for this holding the Court set forth the following conclusions: (a) the Secretary of Agriculture had a personal responsibility in making the rate order and this responsibility was not discharged when he decided the controversy, without hearing the argument, or reading the evidence or brief, and merely upon consultation with departmental employees; (b) the submission of an examiner's report to the parties prior to the argument before the Secretary was good practice, but nevertheless not essential to the validity of the hearing. I am omitting discussion of the point of the Secretary's lack of authority to delegate his duty to the Acting Secretary.

The decision on the second appeal of the *Morgan* case was that the hearing was fatally defective because the government's claims were not presented in a way that the plaintiffs could know and meet them. In support of this the Court stated that there was "no specific complaint." There was no examiner's report and there was no government brief.

In the third Morgan opinion,<sup>5</sup> a per curiam opinion that was prompted by a motion for rehearing by the Solicitor General, we have in the main a refutation by the Supreme Court of a complaint that the second Mor-

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<sup>5</sup> *Morgan v. U. S.*, 304 U. S. 1, 58 Sup. Ct. 999, 82 L. ed. 1129 (1938). For subsequent history, see *Morgan v. U. S.*, 24 F. Supp. 214 (1938).

gan opinion was inconsistent with a part of the first Morgan opinion. This was denied by the Court with some heat. And it was stated that, "Our decision was not rested upon the absence of an examiner's report." This seems to be *literally* true because the second opinion did not limit itself to the absence of an examiner's report. The procedural objection was stated more broadly, to wit: that the plaintiffs had not had a reasonable opportunity to know the claims of the government and to meet them. Since, however, an examiner's report is a desirable, if not the most desirable, method of disclosing the government's claims based on the facts, it seems to me that the Supreme Court made a serious error in stating in its first opinion that an examiner's report was not essential to the validity of the hearing, if it contemplated that later it would deliver such an opinion as the second opinion proved to be. If in the meantime, the Court had changed its mind, it would have been much more satisfactory to have so stated.

The rule of law becomes still more confused if one attempts to reconcile these three opinions with the opinion in *N.L.R.B. v. Mackay Radio and Telegraph Co.*<sup>6</sup> which was rendered on May 16, 1938, a very short time before the per curiam or third Morgan opinion. In the *Mackay* case complaint was made that there was no examiner's report. But the Court denied the validity of the argument in view of the fact that the record disclosed that the complainant understood the issue and had had a full hearing and thus an opportunity to justify its action. I have been unable to draw any satisfactory distinction between the *Mackay* and *Morgan* cases. It seems that the issue in the *Morgan* case was clear, *viz.*, whether the rate order would afford the commission men a fair return for the services rendered and the property used. I do not understand how there could have been any confusion. Presumably, an examiner's report would have been helpful in getting the issue down to the finer details of the

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<sup>6</sup> 304 U. S. 333, 58 Sup. Ct. 904, 82 L. ed. 1381 (1938).

broad problem, but probably this general remark could be made of any case.

Of more importance, probably, is the question, what has been the reception of the Morgan opinions and what appears to be the prospect for a change of procedure with respect to administrative agencies performing quasi-judicial functions.

The law reviews<sup>7</sup> generally have been critical. A look at the citator shows one opinion professing to follow but several opinions which "distinguished" the Morgan opinions. This may be of considerable significance.

As far as the Secretary of Agriculture in the administration of the Packers and Stockyard Act is concerned, Secretary Wallace derived considerable satisfaction in writing that, long before the second Morgan opinion was rendered, procedure in his department had been changed so that an examiner's report, before the argument was heard, was regarded as a matter of right and its issuance apparently has become a routine matter.

Also it appears that the N.L.R.B., the most harshly criticized of the administrative agencies, quickly resolved to make it a general rather than a variable custom to have the trial examiner issue a report which would afford a basis for argument before the Board. One may guess that there will be other administrative agencies which will follow this pattern. Thus, even though the Morgan opinions have been the subject of considerable criticism, they seem to be having some effect in changing administrative procedure. This seems to me to be all to the good. Regardless of whether examiners' reports are necessary, they seem to be at least desirable from the point of view of reconciling business interests to administrative procedure. After all it is almost as important to give the *appearance*

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<sup>7</sup> (1939) 52 HARV. L. REV. 509; (1938) 14 IND. L. J. 164; (1936) 5 GEO. WASH. L. REV. 119; (1938) 7 GEO. WASH. L. REV. 110; (1936) 36 COL. L. REV. 1156.

See also, (1938) 33 ILL. L. REV. 227.

The following comment is favorable to the decisions in the Morgan Case. (1939) 27 GEO. L. J. 351.

of rendering justice as it is actually to render justice. The deep suspicion on the part of many, if not most, practicing lawyers and business men as to the fairness of many administrative tribunals is a matter of great regret and should be corrected wherever possible. The only apparent limitation upon this theory involves consideration for a prompt disposition of controversies. It will be unfortunate if courts compel elaboration of administrative procedure to the extent that administrative agencies are as slow as the courts themselves in rendering justice.

In *U. S. v. Standard Oil Co. of California*,<sup>8</sup> there is some discussion of the first Morgan opinion, but the court was not aware of the real facts. The opinion was distinguished and held not applicable to procedure before the Secretary of Interior where he acts as an appellate tribunal. He is justified, holds the District Court, in having assistants digest the facts and prepare the opinion for him to sign. Apparently all the Secretary has to do is listen to the argument and take the responsibility for the opinion and decision. The District Court, by way of distinction, stated that the first *Morgan* case concerned a proceeding before the Secretary of Agriculture involving original jurisdiction rather than appellate jurisdiction.

Two interesting cases involving the N.L.R.B., both of which discuss the Morgan opinions, are *N.L.R.B. v. Biles Coleman Lumber Co.*<sup>9</sup> and *N.L.R.B. v. Cherry Cotton Mills*.<sup>10</sup> In the first case it was held that it was no defense for a petition to the Board to assert that the Board arrived at its order without reading *all* of the testimony. This, said the court, was not required in order to render due process. Nor was it an answer to say that the Board had not read a "sufficient" portion of the testimony. This, said the court, was an allegation of a conclusion of law. More important, the court held that it was no answer to

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<sup>8</sup> 20 F. Supp. 427, 448 (1937).

<sup>9</sup> 98 F. (2d) 16 (1938).

<sup>10</sup> 98 F. (2d) 444 (1938); (1938) 38 Col. L. Rev. 1279; (1939) 8 FORDHAM L. REV. 115.

a petition to enforce the Board's order that its findings of fact, conclusions of law, and order were never in advance of approval by the Board submitted to the defendant so that it could object to them. The court arrived at this conclusion because it was admitted: (a) that the charges against the defendant had definitely advised the defendant of the matters complained of; (b) that an argument was had by the defendant before the trial examiner upon the evidence and at the same time the Board attorney presented the Board's contention; (c) that the defendant prepared a brief for the Board; and (d) that defendant was allowed full opportunity to argue its case. The admission that all of this occurred, in the opinion of a Circuit Court of Appeals, justified a holding that the lumber company had received a fair hearing and had thus been accorded procedural due process.

In the cotton mills case it was asserted as a defense to the petition for the enforcement of the Board's order that (a) no copy of the examiner's report, if any, was furnished to the defendant; (b) that counsel for the Board made no argument before the Board and, if a brief was filed by the Board's counsel, defendant had received no copy; (c) that no proposed findings of fact were submitted to the defendant before the final order was issued, and (d) that the Board had at no time read or considered the evidence, but that the evidence had been considered only by "hirelings" of the Board. In view of these allegations the court decided that under the Morgan opinions interrogations to the Board should be issued in order to obtain the facts. The court postponed the question as to whether a commission should issue to take the depositions of the members of the Board, but the court asserted that it was the duty of the Board to find the facts on the disputed issues. It also stated that if only one party to the controversy makes an argument or if neither makes an argument, the responsibility of the Board is broader.

The lumber company and the cotton mills cases do not

appear to contradict each other, but they may be very narrowly on opposite sides of the line that may be "pricked out" by the process that is now unfolding. Both are cases on the pleadings, unfortunately, but the really significant point in the cotton mills case seems to be the allegation that the Board decided the case without knowledge of the facts. This seems to be a repudiation in a broad way of the English *Arlidge* case. But it has been pointed out elsewhere<sup>11</sup> that the Supreme Court in the first Morgan opinion apparently repudiated that opinion even though ostensibly it stated that it was a horse of another color.

Finally, it should be stated that in the *Consolidated Edison* case,<sup>12</sup> a Circuit Court of Appeals held that where there was a transfer of the proceeding from the trial examiner to the N.L.R.B. before an intermediate report was prepared, there was no lack of due process even though there was no oral argument before the Board. Said the court, after disapproving of the procedure: "Nor do we think the Board is bound to hear oral argument if it prefers to take a brief." It is doubtful whether this decision will carry far in view of the way the Supreme Court disposed of the same issue.<sup>13</sup>

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<sup>11</sup> (1938) 47 YALE L. J. 647, 663.

<sup>12</sup> 95 F. (2d) 390, 394 (1938).

<sup>13</sup> *Consolidated Edison Co. v. N.L.R.B.*, 59 Sup. Ct. 206 (U. S. 1938). The rules of the Board did not dispense with the necessity, after a transfer of the case to the Board, "of a suitable request by the petitioners for such additional hearing as they desired. It does not appear that such request was made."