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# SOME CONSTITUTIONAL LIMITATIONS ON ADMINISTRATIVE AGENCIES

## INTRODUCTION

As is indicated by the title, this article will attempt to deal with some ramifications of both the Wyoming and United States Constitutions as applied to administrative agencies.

Due to space limitations the scope of this article has necessarily been limited to treatment of the following subjects: (1) When is a hearing required and what are the requirements of a proper hearing; (2) Separation of function; (3) Retroactivity; (4) Extradordinary writs; (5) Constitutional agencies; (6) Article 3, Section 24 of the Wyoming Constitution. Other subjects with constitutional ramifications such as delegation and investigation are discussed elsewhere in this symposium.

## CONSTITUTIONAL RIGHT TO A HEARING

A hearing is an oral proceeding before a tribunal, and of two principal kinds—trials and arguments. The parties may present evidence (written or oral or both) argue, explain, cross-examine and rebutt in a trial type hearing. The tribunal then makes its determination on the record.<sup>1</sup> An argument is that type of hearing where the parties attempt to establish the validity of their contentions solely by a course of reasoning rather than by the presentation of evidence with cross-examination and rebuttal.<sup>2</sup> Many statutes expressly provide for a hearing. However, the following discussion has reference only to situations in which the statute does not require a hearing.

The three instances where it would appear clear that no hearing would be required are: (1) When the agency is conducting ex parte investigations presumably as possible basis for further proceedings; (2) When the agency is using testing or examinations in lieu of a hearing, and (3) When summary proceedings are made necessary by an emergency.

Except when a trial type hearing is constitutionally required, and in the absence of a statute, due process probably does not require a hearing of any sort. The authority for this proposition is somewhat unsatisfactory.<sup>3</sup>

The basic requirement of due process is fair play.<sup>4</sup> If the parties involved may be treated fairly without a hearing, due process will not require one. Under certain circumstances, however, a trial type hearing is a constitutional necessity. What are these circumstances? Davis suggests that when adjudicative facts are involved a trial type hearing is required.<sup>5</sup> Davis defines adjudicative facts as "facts about the parties and their activities, businesses, and properties . . . usually answer the questions of who did what, where, how, why, with what motive or intent; . . . are roughly the

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1. Davis, *Administrative Law Text* § 7.01 at p. 113 (1958).

2. *Black Law Dictionary*, 4th ed. (1951).

3. Davis, *Administrative Law Text* § 7.01 (1958).

4. *Morgan v. United States*, 304 U.S. 1 (1937), rehearing denied, 304 U.S. 1 (1937).

5. Davis, *Administrative Law Text* § 7.20 at p. 142 (1958).

kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion."<sup>6</sup> Some reasons why no trial type hearing is necessary for legislative facts and why other methods including oral argument may be more desirable in the area of legislative facts will be discussed below. No hearing would be required in an investigatory proceeding, whether the activity is being conducted by an official or by the entire agency.<sup>7</sup> Inspection and testing are often superior to the trial type of hearing, and are frequently substituted for the hearing-type procedure in appropriate cases.<sup>8</sup> For example, a trial type hearing certainly would be inferior to inspection and testing in determining whether or not a bridge was safe and made of proper materials. Courts have also in emergency-type situations permitted summary procedures based only on investigation even when destruction of property and personal liberty were involved.<sup>9</sup>

If a party cannot get a hearing in advance of the seizure and destruction, the Supreme Court has held that he has the right to have it afterwards.<sup>10</sup> The Court also said that such a person, in exercising this right, may bring an action for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the facts as claimed by them to be true.<sup>11</sup> This would seem to be a deterrent to arbitrary action.

In *Londoner v. Denver*,<sup>12</sup> the United States Supreme Court, after holding that under the particular circumstances due process required a hearing, said, "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and if need be, by proof, however informal." The case involved an assessment for public improvements, but was a rather unique situation. There were only a few individual land owners, and they were exceptionally affected due to the fact that the law under which the assessing board was acting denied them the right to object in the courts, objections being only cognizable by the board. Thus, this case should be limited to its special situation, especially when considered with subsequent cases decided by the Supreme Court. One such case is *Bi-Metallic Investment Co. v. State Board of Equalization*.<sup>13</sup> This case was substantially the same as the

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6. *Ibid.*

7. 73 C.J.S. 98 (1955); *Hannah v. Larche*, 363 U.S. 421 (1959).

8. See generally, 1 Davis, *Administrative Law Treatise*, § 7.09, at pp. 445-448. Also see Report of Attorney General Commission, Ad. Proc. 36-38 (1941).

9. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908); *Lauton v. Steele*, 152 U.S. 133 (1894); *People ex rel. Copcutt v. Board of Health*, 14 N.Y. 1, 35 N.E. 320 (1893); *State v. Schriber*, 185, Ore. 615, 205 P.2d 149 (1949); *State ex rel. McBride v. Sup. Ct.*, 103 Wash. 409, 174 Pac. 973 (1918); *Coletti v. Cassidy*, 12 F. Supp. 21 (Wyo.); *Bowden v. Davis*, 205 Ore. 421, 289 P.2d 1100 (1955). Also see *Cox v. Cox*, 400 Ill. 291, 79 N.E.2d 497 (1948), and *Lacy v. Lemmons*, 22 N.M. 54, 159 Pac. 949 (1916).

10. *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).

11. *Ibid.*

12. *Londoner v. Denver*, 210 U.S. 373, 386 (1908).

13. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915).

*Londoner* case except that the Board's action involved a 40% increase in valuation of *all* taxable property in Denver, Colorado. Here the Court realized the impracticability of affording everyone involved a hearing, and said that the Constitution does not require all public acts to be done in town meeting or an assembly of the whole. Thus the *Londoner* case is consistent with the *Bi-Metallic* case in terms of the "Davis test," because the *Bi-Metallic* case involved legislative facts, and the Court was correct in holding that no hearing was constitutionally required.

The Wyoming Supreme Court has held that a horizontal increase in valuation of all property of a class or classes without notice to the taxpayers is not a denial of due process.<sup>14</sup> In so holding the Wyoming Supreme Court followed the *Mi-Metallic* case.

In *W.J.R., The Good Will Station v. F.C.C.*<sup>15</sup> the Court put it that the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. The Court also stated that arguments may be written or oral, but it gave no useful guides to determine in what circumstances, if any, due process may require an opportunity for oral argument. However, one case by the United States Emergency Court of Appeals<sup>16</sup> is rather helpful in this respect. The Court said that rent control is purely a legislative function, and thus, a hearing was not required, but that if facts about the particular property (adjudicative facts) were in dispute, a denial of a trial type of hearing would be a denial of due process. When both adjudicative and legislative facts are present in any given proceeding, it would seem that trial type hearing would be constitutionally required with respect to the former.

Professor Davis' summary of the situation seems sound:<sup>17</sup>

The true principle is that a party who has a sufficient interest at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstances when some other interest, such as national security, justifies an overriding of the interest in fair hearing.

Generally, when a privilege or a mere gratuity is involved, as distinguished from a "right," the Supreme Court has said that there is no constitutional right to a hearing or judicial review.<sup>18</sup> But, as Professor Davis has pointed out<sup>19</sup> it is difficult to classify the decisions neatly under the "privilege or right" dichotomy. He points out that "right" is not synonymous with "life," "liberty," and "property," and the "privilege" is not synonymous with absence of an interest involving life, liberty, or property.

14. *Baker v. Paxton*, 29 Wyo. 500, 540, 215 Pac. 257 (1923).

15. *W.J.R., The Good Will Station v. F.C.C.*, 337 U.S. 265 (1948).

16. *150 East 47th Street Corporation v. Creedon*, 162 F.2d 206 (1947).

17. 1 *Davis, Administrative Law Treatise*, § 7.02 at p. 412 (1958).

18. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

19. *Davis, Administrative Law Treatise*, § 7.11 at p. 454 (1958).

For example, the discharged cabinet officer may have a property interest in job and in his reputation, but nevertheless we want the President to have an unrestricted power to discharge him. One who seeks a pardon has his life or his liberty at stake, but what he seeks is still a "privilege" or an act of grace. Davis says that the plain fact is that courts often give the legal protection of a hearing to what they persist in calling privileges.<sup>20</sup> A passport, for example, while now considered a right, used to be treated as privilege.<sup>21</sup>

Public employment when the job is not considered sensitive, i.e., involves national security, is considered property within the meaning of life, liberty, and property in the Constitution of the United States.<sup>22</sup> Yet the Supreme Court equally divided in the *Bailey* case, cited above, affirmed the lower court's holding that there was no constitutional right to public employment, and thus no right to cross-examine or even know the exact charges although Miss Bailey occupied a non-sensitive position. However, this case has been partially overruled by the *Wieman* case, cited above, and inferentially overruled by the *Greene* case though not specifically. The latter case was not decided upon constitutional grounds, but it certainly had a constitutional overtone. An engineer's security clearance was revoked, and as a result his employer, who was a private manufacturer under a government contract, discharged him. In the several hearings given him no evidence was presented against him and the board relied upon confidential reports not made available to him. The Court held that the engineer should have been allowed the right to cross-examine.

The Court said:

Explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. . . . Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguard of due process.

The Court has also held that a person has a right to meet the evidence against him upon applying for a license to practice before the Board of Tax Appeals as an accountant so far as adjudicative facts are concerned.<sup>23</sup> Whether or not the practice of law is a right or a privilege, an application for admission to the bar is governed by the principles of procedural due process.<sup>24</sup> The Wyoming Supreme Court has held that an incumbent of a

20. See also *Clarke v. Board of Collegiate Authority*, 327 Mass. 279, 284, 98 N.E.2d 273, 276 (1951); *Walker v. City of Clinton*, 244 Iowa 1099, 1102-1103, 59 N.W.2d 785, 787 (1953); *Bailey v. Richardson*, 86 U.S. App. D.C. 248, 182 F.2d 46, affirmed by equally divided court, 341 U.S. 918 (1951). This case has been overruled although not specifically by *Greene v. McElroy*, 360 U.S. 474 (1959); *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).

21. *Boudin v. Dulles*, 136 F. Supp. 218 (D.C. 1955); *Kent v. Dulles*, 357 U.S. 116 (1958).

22. *Greene v. McElroy*, 360 U.S. 474 (1959); and *Wieman v. Updegraff*, 344 U.S. 183 (1952).

23. *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1925).

24. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1948). See also *Menkoff v. Payne*, 210 F.2d 689 (1953).

public office has a substantial right, and if appointed for a definite term may be removed only after being given notice of the charges against him and a hearing.<sup>25</sup> Whether the hearing is adequate or not depends upon the circumstances of the case and is not determined from a technical or formal standpoint, in the absence of legislation on the subject. The Wyoming Court in *Lake De Smet Reservoir Company v. Kaufman*<sup>26</sup> dealt directly with the problem of the requirements of a hearing. The case involved an action to enforce payment for sale of surplus water at rates found by a board of special commissioners. The Court held that the hearing in which the rate to be charged for the water was determined was not adequate because of its brevity and lack of notice. The Court indicated that an adequate hearing in such a matter is required by due process. The Court held that for such a hearing to be adequate persons directly affected must be given adequate notice and opportunity to appear and present evidence. Furthermore, the board or agency must consider all relevant evidence and arguments. Although it was within the discretion of the board whether or not to require discovery and production of certain information contained in the company's books and records, because this evidence directly affected the merits of the case, to afford an adequate hearing, the board must consider it before making its decision.

However, the Wyoming Court has held that whatever rights an applicant for a liquor license has are dependent upon the statute, and that the due process clause of the Federal Constitution is not involved in the denial of an application, even though it might be when such a license is sought to be revoked.<sup>27</sup> The statute involved provided that the license to sell intoxicating liquor is a mere personal privilege, and that any rejected applicant was not entitled to a trial de novo or an appeal. The Court by way of dictum indicated that a party renewing did have the right to a trial de novo and/or an appeal. The *Cowan* and *Whiteside* cases seem to align Wyoming definitely with courts which have adopted the privilege-right classification. Furthermore, they raise the implication that a mere privilege or gratuity may blossom into a constitutionally protected right.

While state courts go many ways in their decisions concerning "rights vs. privileges," the federal courts seem to adhere to the principle that a trial type hearing is required if issues of adjudicative fact are involved when important interests are at stake and in the absence of a sufficient reason for refusing or modifying the trial type aspect. Professor Davis suggests three basic propositions:<sup>28</sup> 1. "Constitutional principles of substantive and procedural fairness apply even when a privilege is at stake and even when the privilege itself is not directly entitled to legal protection."

25. *Cowan v. State ex rel. Scherck*, 57 Wyo. 240, 131 P.2d 300 (1942).

26. *Lake De Smet Reservoir Co. v. Kaufmann*, 75 Wyo. 87, 292 P.2d 482 (1955).

27. *Whitesides v. Council of City of Cheyenne*, 319 P.2d 520, 78 Wyo. 80 (1958). The Court cited *Crowley v. Christensen*, 137 U.S. 86, 91 (1890), which stated that in such only a privilege or gratuity was involved, and thus the due process clause did not apply.

28. Davis, *Administrative Law Text*, § 7.12, p. 127.

2. "Privileges as well as rights are entitled to legal protection." 3. "When a privilege is combined with another interest the combination may be a right and accordingly entitled to a legal protection."

It would seem that some of the characteristics of a trial type hearing may be relaxed in administrative adjudications. Administrative proceedings are not criminal proceedings or suits of common law, and thus, neither the Sixth and Seventh Amendments of the Federal Constitution nor Article 1, Sections 9 through 11 of the Wyoming Constitution apply. Sometimes, at least, affording confrontation and cross-examination of witnesses is discretionary with agency. For example, it has been held that one is afforded a fair hearing if he is given a fair resume of the evidence against him, even though he is not permitted to see the investigator's report which the tribunal used in reaching its decision.<sup>29</sup>

A denial of a jury in an administrative proceeding is not a violation of any constitutionally guaranteed rights.<sup>30</sup> Furthermore, the Wyoming Supreme Court has held that the constitutional provisions guaranteeing the right of trial by jury in criminal cases may not apply when the activity of the defendant affected that public interest and thus came within the police powers of the state to enjoin a crime.<sup>31</sup> Thus, the defendant might not only be penalized for violating the Act, but also for contempt.

There is no federal constitutional right to counsel in an administrative proceeding.<sup>32</sup> The Supreme Court of the United States held this to be so by a 5-4 decision in the *Groban* case even though the purpose of the hearing was to determine whether the person involved should be prosecuted for arson.

Although in certain situations (as we have noted supra) there is a constitutional requirement of notice, unless notice is constitutionally required or required by statute, it is unnecessary.<sup>33</sup> The time and place of the hearing are within the discretion of the agency.<sup>34</sup> The Supreme Court

29. *United States v. Nugent*, 346 U.S. 1 (1953). See also *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). *Contra*, *Greene v. McElory*, 360 U.S. 474 (1959); *Wiemann v. Updegraff*, 344 U.S. 183 (1952).

30. *Guthrie National Bank v. City of Guthrie*, 173 U.S. 528 (1899); *N.L.R.B. v. Reinecke*, 275 U.S. 101 (1927); *Yakus v. United States*, 321 U.S. 414 (1944).

31. *State v. Grimshaw*, 49 Wyo. 192, 53 P.2d 13 (1935). See also, *State v. Sorrentino*, 36 Wyo. 111, 253 Pac. 14 (1927), in which the Court holds that jury trial is not a necessary requisite to due process; and *State v. Bolin*, 10 Wyo. 439, 70 Pac. 1 (1901), in which the Court held that there was no constitutional right to any particular method of selecting a jury. Neither the A.P.A. nor the Revised Model Act give the right to a jury.

32. *In re Groban*, 352 U.S. 330 (1957); Art. 1, § 10 of the Wyoming Constitution is limited to criminal cases. Section 6(a) of the Administrative Procedure Act confers the right to counsel upon a party to an investigation only if he is forced to appear. The Revised Model State Administrative Procedure Act (4th draft) does not specifically provide for right to counsel. However, in the absence of emergency action or matters involving the public health, safety, and welfare, each party is afforded an opportunity to present evidence and arguments. Thus, the right to counsel may be implied.

33. *North Laramie Land Co. v. Hoffman*, 30 Wyo. 238, 219 Pac. 561 (1924); *Farm Investment Co. v. Carpenter et al.*, 9 Wyo. 110, 61 Pac. 258 (1900); 73 C.J.S. 131; also see W.R.C.P. Rules 4 and 5.

34. 73 C.J.S. 133, 134 (1955); 1 Davis, *Administrative Law Treatise*, § 8.08 (1958).

has held that the constitutional requirement of a hearing does not mean that the hearing must be held at the initial stage, or at any particular point, or at more than one point in an administrative proceeding so long as the requisite hearing is held before final order becomes effective.<sup>35</sup> Due process usually requires notice where it also requires a hearing, such as in adjudicatory proceedings.<sup>36</sup> The Supreme Court of Wyoming has held that brevity of hearing and lack of notice can deprive a person of a fair hearing.<sup>37</sup> However, when there is an adequate provision for judicial review, notice and hearing within the administrative proceeding are sometimes held not to be necessary.<sup>38</sup> Where there are statutory provisions for notice, these must be substantially complied with.<sup>39</sup>

The writer can find no cases determining whether or not an administrative hearing *must* be public. Professor Davis suggests that the usual problem is not the agency's denial of a public hearing, but rather the agency's insistence upon a public hearing where a private party is urging secrecy.<sup>40</sup> The Supreme Court of the United States has upheld the agency's position in these cases.<sup>41</sup> The Supreme Court of Wyoming has held that the very nature of the activities of a quasi judicial board requires that its meetings be open to interested persons, but that the fact that a hearing is private will not per se render the hearing unfair and partial of the parties concerned were permitted to present their theories of their respective cases. The Wyoming Court also said that the right to a public hearing should not prevent the agency from having private sessions for planning or deliberation.<sup>42</sup>

#### BIAS

Bias may render a hearing unfair. The term "bias" may have as many as four different meanings: 1. A preconceived point of view about issues of law or policy (e.g., American's bias for democratic methods). 2. A pre-judgment concerning the issues of fact about the parties in a particular case (the presence of too much of this type will disqualify, but a judge or an administrator who has decided the particular question in a previous case will not be disqualified solely because of this). 3. Personal bias or prejudice (when strong enough this will disqualify). 4. Direct pecuniary interest (this will always disqualify).

35. *Orcutt v. Crawford*, 85 F.2d 146 (1936), cert. denied, 299 U.S. 594 (1936); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-154 (1941).

36. *Knauff v. Watkins*, C.A.N.Y., 173 F.2d 599 (2d Cir. 1949), affirmed, 338 U.S. 537 (1950); *Nulter v. State Road Commission of West Virginia*, 119 W.Va. 312, 193 S.E. 549 (1937).

37. *Lake De Smet Reservoir Co. v. Kaufmann*, 75 Wyo. 87, 229 P.2d 482; *School Dist. No. 9, in the county of Fremont v. District Boundary Board in and for Fremont County*, Wyo. 351, P.2d 106 (1960).

38. *Ibid.* See also *Brinegar v. Clark*, 371 P.2d 62, 66 (Wyo. 1962).

39. *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327 (1945).

40. Davis, *Administrative Law Text*, § 8.09 at p. 142 (1958).

41. See, for example, *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U.S. 56 (1939).

42. Cases cited, *supra* note 37.



In the fourth *Morgan* case,<sup>43</sup> the Supreme Court held that the fact that the Secretary of Agriculture wrote a letter to the New York Times criticizing the Court's decision in the second *Morgan* case<sup>44</sup> did not make him unfit to exercise his duty in the subsequent proceedings. If prejudgment of issues result from a prior official investigation, then there ordinarily will be no disqualification.<sup>45</sup> Professor Davis puts it that,<sup>46</sup> "Belief must not be so unyielding as to smother the contributions that alert practical administration may make to the molding and remolding of policy. And yet a dominant point of view or bias may appropriately color all activities, including even the fact-finding function." Even an examiner who previously announced a position concerning an appraisal of particular facts which he later had to appraise in an adjudication was not disqualified. The Supreme Court said that judge is not disqualified from sitting in a retrial because he was reversed on earlier rulings, and that a stiffer rule should not be applied to administrative agencies.<sup>47</sup>

Federal district judges may be disqualified for personal bias or prejudice<sup>48</sup> but not for nonpersonal bias or prejudice. The judge's attitude is not personal unless it involves animosity toward a party, as distinguished from favoritism on the issues. A judge was disqualified when he made comments to the effect that he preferred a safeblower to the defendant who was being tried for espionage.<sup>49</sup> However, total rejection of an opposed view does not of itself show that the trier of fact holds a personal prejudice even though he found all the witnesses of one side were untrustworthy and those of the other reliable.<sup>50</sup> This *Pittsburgh* case seems to indicate that if the record shows personal bias, the order of judgment will be reversed. But it is submitted that the record seldom if ever will reflect that kind of bias which will disqualify. However, one may prove personal bias by affidavit in connection with a motion to disqualify.<sup>51</sup>

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance neat, clear, and true between the state and the accused, denies the latter due process of law."<sup>52</sup> This case involved a town's mayor who received fines as his only compensation for trying cases; if the defendant were not convicted the mayor would receive nothing. The Court held that the pecuniary interest of the mayor in the outcome of the case violated the due process clause.

The Wyoming Supreme Court held that a member of a judicial, quasi judicial, or administrative body who seems apparently to be interested

43. *United States v. Morgan*, 313 U.S. 409 (1941).

44. *Morgan v. United States*, 304 U.S. 1 (1938).

45. *F.R.C. v. Cement Institute*, 333 U.S. 683 (1948).

46. 1 Davis, *Administrative Law Treatise*, § 12.01 at 217 (1958).

47. *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 210 (1947).

48. 36 Stat. 1090 (1911), 28 U.S.C.A., § 25, *Judicial Code* § 21.

49. *Berger v. United States*, 225 U.S. 22.

50. *N.L.R.B. v. Pittsburgh S.S. Co.*, 337 U.S. 656 (1949).

51. Davis, 12.05 (7a of APA); 60 Stat. 237 (1946); 5 USCA 1001.

52. *Tumey v. Ohio*, 273 U.S. 510 (1927).

either directly or indirectly in the result of the hearing is under an obligation to disqualify himself, even if there is no actual interest of the official in conflict with the duties of his office. The Court pointed out that, "The best administration of our laws requires not only that the officers be fair, impartial, and disinterested, but that they do not give an appearance to the contrary."<sup>53</sup> However, tripartite tribunals (those with two members who are definitely partial, and one who is completely neutral) are frequently used.<sup>54</sup> Perhaps the reason for using this type of board is the feeling that in submitting highly technical problems to a board it is more advantageous to have the board comprised of highly skilled and informed members even though they may also be members of an interested economic group. Of course, the number of members who are known to be partisan generally must be equal on each side. Furthermore, such agencies as state medical and dental boards which are composed of members who have an *indirect* interest are both permissible and necessary in view of the specialized nature of their functions.

Much of the thinking and ideas expressed so far become less significant in the face of the "rule of necessity."<sup>55</sup> The Supreme Court of the United States in determining the validity of taxing the income of federal judges held that the plaintiff was entitled by law to invoke the Court's decision, and since there was no other appellate tribunal which could decide, it would consider the case even though the judges would be financially affected by the decision.<sup>56</sup> Automatic application of the rule may often result in injustice,<sup>57</sup> and one court has even held that application of the rule is a denial of due process.<sup>58</sup> Professor Davis suggests, "In invoking the rule of necessity the courts should always determine whether in the circumstances the system of allowing decisions to be made disqualified officers should be held to deny due process. And when the rule of necessity is applied, reviewing courts may well consider that the disqualification of the officers makes appropriate an intensification of judicial review."<sup>59</sup>

The Administrative Procedure Act, Section 7 (a), provides that an officer *may* disqualify himself or a party can file an affidavit of personal bias (impersonal prejudice is not enough), and this shall be determined by the agency and become part of the record and decision in the case. However, Section 144 of Title 28 U.S.C. provides that if an affidavit is timely and sufficient, a federal judge *must* automatically disqualify himself. Each party is entitled to only one such affidavit in any case. Section 455 of Title 28 U.S.C. provides that a judge must disqualify himself if he has a substantial interest, has been of counsel, is or has been a material witness,

53. *Lake De Smet Reservoir Co. v. Kaufman*, 75 Wyo. 87, 292 P.2d 482 (1955).

54. The Railroad Adjustment Board is such a tribunal.

55. Davis, *Administrative Law Text*, § 12.03 (1959).

56. *Evans v. Gore*, 253 U.S. 245 (1920).

57. *Mayor of City of Everett v. Superior Court*, 23 Mass. 144, 85 N.E.2d 214 (1949); *Scannel v. Wolff*, 86 Cal. App.2d 489, 195 P.2d 536 (1948).

58. *Abrams v. Jones*, 35 Idaho 532, 207 Pac. 723 (1922).

59. 1 Davis, *Administrative Law Treatise*, § 12.06 (1958).

or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein. The question of bias is subject to judicial review.<sup>60</sup>

The term "timely" has been defined to mean "at the first reasonable opportunity after discovery of the facts tending to show disqualification."<sup>61</sup> "Sufficient" means allegations of fact as distinguished from conclusions, and the facts must be such that, taken to be true as stated, they would be sufficient to convince an unbiased, unprejudiced and disinterested mind.<sup>62</sup> The court in the *Long Beach* case held that an agency should be given the first chance to hear and determine the question of bias. This is consistent with the general rule that the agency should be given the first chance to correct any defect in its activity. This court also said that when a charge of bias is made, the agency must rule on the question as a condition precedent to its hearing the principal matter, in default of which the court can stay the administrative proceedings<sup>63</sup>

Finally, it should be pointed out that when a judge is disqualified, his activity in the case is terminated, but an administrative presiding officer, after disqualification, may still be active in the case so far as investigation and prosecution of the case is concerned.

#### SEPARATION OF FUNCTIONS

The problem here is combining inconsistent functions such as investigation, prosecution including the initiation of proceedings, negotiating settlements, and testifying with the function of judging or adjudicating. The question is whether these inconsistent functions contaminate the adjudication of a particular case. These inconsistent functions may be performed by different sections or departments in the agency, by different people in the same section or department, or by the same person or persons. The mechanics and detailed ramifications of this problem are discussed in "Administrative Adjudication in Wyoming," in this symposium. Only the constitutional aspects will be dealt with here, and these are few. The short of it is that no matter how undesirable it may be to combine various inconsistent functions with adjudication, such combination to date has not been held unconstitutional,<sup>64</sup> although state courts often mildly disapprove such combinations of inconsistent functions. Some courts justify their holdings by invoking the rule of necessity. Others merely express the view that in such cases a closer scrutiny on judicial review is called for.<sup>65</sup>

60. Sen. Doc. No. 248, 79th Cong., 2d Sess., 207, 269 (1946).

61. *Long Beach Fed. Sav. & Loan Ass'n. v. Federal Home Loan Bank Board*, 189 F. Supp. 589 (S.D. Cal. 1960); see also *Chafin v. United States*, 5 F.2d 592 (4th Cir. 1925).

62. *Long Beach Fed. Sav. & Loan Ass'n. v. Federal Home Loan Bank Board*, supra note 61.

63. Also see § 10d of the Administrative Procedure Act.

64. *Marcello v. Bonds*, 349 U.S. 302 (1955); *Belizaro v. Zimmerman*, 200 F.2d 242 (3d Cir.). The Supreme Court of Wyoming approved the act permitting the Board of Control to both investigate and adjudicate priority of water rights. *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 261 Pac. 258 (1900); and *Simmons v. Ramsbottom*, 51 Wyo. 419, 68 P.2d 153 (1937).

65. 1 Davis, *Administrative Law Treatise*, § 13.02 (1958).

The Wyoming Supreme Court has recently implied that statutes permitting the fire marshal to promulgate necessary rules and regulations and determine when there has been a violation of these and other fire regulations, with no provisions for notice, hearing, judicial finds or judicial review, were constitutional. The Court justified its position by stating that the subject matter was within the police powers of the state, affecting the health safety, and welfare of the people. The Court also said that protection is afforded from actions which are arbitrary, fraudulent, collusive or otherwise illegal by the court's inherent power to review actions of officials and agencies in such cases.<sup>66</sup>

#### RETROACTIVITY

Retroactive legislation deemed unreasonable violates the due process clause.<sup>67</sup> An unreasonable application of a law or regulation may occur in an area where the law is pretty well settled.<sup>68</sup> The federal constitutional prohibition of ex post facto is limited by judicial construction to criminal cases and does not apply to civil legislation or regulations.<sup>69</sup> Article 1, Section 35 of the Wyoming Constitution provides, "No ex post facto law, nor any law impairing the obligation of contract shall ever be made." An ex post facto law has been defined as "A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed."

The Wyoming Supreme Court has held that a plain rule of the State Board of Equalization which had stood for more than a decade, and had never been repealed or changed, should not be disregarded and its interpretation changed so as to retroactively and unjustly affect taxpayers dealing with the board in such matters. The Court also said that these rules carry decided weight when the board attempts to impose a sales tax contrary to the rule. Furthermore, the Court said that generally the regulations of an administrative agency should, as concerns the effect of a retroactive change, be likened to judgments of a court of final appeal rather than to judgments of a trial court. Thus, the Court seemed to stress the importance of the plainness, and long standing of the previous rule and the unjust effect of the change. The Wyoming Court also refused to permit a rule to be applied retroactively which was issued by the Board of Education, defining first class teacher's certificates which were required by statute in order to qualify the holder for the position of county superintendent of schools.<sup>70</sup> Article 1, Section 35 has been held to be an "emphatic

66. *Brinegar v. Clark*, 371 P.2d 62 (Wyo. 1962). But see discussion of this case in Note, *Administrative Rule Making in Wyoming*, *infra* p. 255.

67. *Welch v. Henry*, 305 U.S. 134.

68. *S.E.C. v. Chenery Corporation*, 322 U.S. 194 (1947).

69. *Calder v. Bull*, 3 U.S. 286.

70. *Lynch v. Board of County Commissioners*, 75 Wyo. 435, 296 P.2d 986. Here, the Court did not base its decision on constitutional principles, but citing 82 C.J.S. 414 said: "We might incidently state that the Board of Education made its latest rule in October, 1954, after the relator had been nominated for the office she now holds. Retrospective legislation is not favored. That should apply to rules and regulations. Hence, even if the rule in question were such as to govern in the future we ought not apply it to the relator in this case."

command" to the state legislature in connection with retroactivity.<sup>71</sup> The general rule is that statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts or by necessary or unavoidable implication.<sup>72</sup>

The United States Supreme Court in the *Chenery* case held that even though an agency has general rule making power, it may also proceed by adjudication on a case by case basis. In one sense of the word, any legal principle arrived at by the latter method will have a retroactive effect, at least to the parties concerned. However, this is also inherent in our common law court procedures.

#### EXTRAORDINARY WRITS

A question may arise as to whether the extraordinary writs may be abolished by the legislature. This may be answered in the affirmative in the absence of any constitutional restrictions.<sup>73</sup> The general rule is that a person does not have a vested or constitutional right to any certain remedy.<sup>74</sup> The Iowa Constitution, like the Wyoming Constitution provides for these extraordinary writs under the judicial section.<sup>75</sup> The only difference is that in the Wyoming Constitution some of these writs are specifically named, while in the Iowa Constitution they are referred to as "all writs and processes." The Iowa court holds that their mention in the constitution does not establish them as constitutionally guaranteed remedies.<sup>76</sup> There is one exception. The Iowa Constitution provides for the writ of habeas corpus and specifies that it shall not be abolished or suspended unless, when in the case of rebellion or invasion the public safety may require it.

However, in some states where the constitution empowers the supreme court or other courts to issue such extraordinary writs, it has been held that the legislature is not competent to change or modify the scope of these remedies. Wyoming is probably one of these.<sup>77</sup> The Wyoming Supreme Court, in deciding *Loomis v. Dahlen*, held that where the remedy of certiorari is created or guaranteed by constitutional provisions (Wyo. Const. Art. 1, Secs. 3 and 10) it may not be taken away by the legislature. The Court also held that the writ may be used in proper cases in Wyoming, notwithstanding Wyo. Comp. Stat. 6392 (1920) which attempted to

71. *Jansen v. Afton*, 59 Wyo. 500, 143 P.2d 190.

72. 82 C.J.S. 981. For example, see, Wyo. Comp. Stat. § 34-67 (1957).

73. 74 C.J.S. 5 (1955).

74. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).

75. Iowa Cont., Art V, § 4; Wyo. Cont., Art. V, § 3.

76. *State v. Wineshiek Coop. Burial Assn.*, 234 Iowa 1196, 15 N.W.2d 367 (1944); and *Dosman v. Thompson*, 204 Iowa 1254, 215 N.W. 261 (1927).

77. *Loomis v. Dahlen*, 37 Wyo. 498, 263 Pac. 708 (1928). But see, *Call v. Afton*, 73 Wyo. 271, 278 P.2d 270 (1954), in which the Supreme Court of Wyoming said "Perhaps neither this section, giving power to issue the writ of certiorari, nor Section 3-5323, W.C.S. (1945), abolishing such writs in civil cases should be entirely disregarded. Effect perhaps may be given to each by keeping provisions of this section within its proper limits."

abolish certiorari in civil cases, because the Constitution was adopted after the enactment of the statute, and the framers of the Constitution must have thought it wise that the right to issue the writ should exist.

It is generally held that unless such power is conferred on the legislature by its constitution, it has no power to confer or withdraw jurisdiction or judicial power. The judicial power of the courts is controlled by the constitution and statutes enacted pursuant thereto.<sup>78</sup> No such power is given the legislature in the Wyoming Constitution with reference to remedies. However, the legislature may limit jurisdiction by providing that only certain courts may hear certain types of cases. The legislature may also impose venue restrictions. Furthermore, the Congress cannot create or regulate state courts. Even though it can *authorize* these courts to enforce a cause of action created by a federal act, it cannot *require* them to do so.<sup>79</sup> The above mentioned denial of power to regulate jurisdiction of courts applies to appellate jurisdiction as well as original jurisdiction, absent constitutional authorization. Again, there is no such power to regulate appellate jurisdiction in the Wyoming Constitution. Even so, it would seem that unless the scope of a remedy were defined in the constitution, the legislature might supplement the remedies, even though it could not abolish them.

#### CONSTITUTIONAL AGENCIES

Several administrative agencies or boards have been specifically provided for in the Wyoming Constitution. They are: The Board of Land Commissioners, the Board of Water Control, the Board of Equalization, the Board of Arbitrators, the Board of Charities and Reforms, the Board of County Commissioners, and the Board of Canvassers.

The Board of Land Commissioners<sup>80</sup> is the only authority vested with the power to lease lands owned by the state.<sup>81</sup> In the absence of fraud or abuse the Land Commissioners have wide discretion. Furthermore, an omission of a restrictive clause in a statute relating to leasing shows that the legislature meant to increase the discretion of this board.<sup>82</sup> Accordingly, the legislature may limit and direct the functions of the Board, but the statute must be clear and definite.<sup>83</sup> However, in *Frolander v. Ilsley*, and *Sullivan v. Veer*, cited above, the Court held that the Board could not refuse a preference right of renewal of a lease on light, trivial or technical grounds that the greatest benefit to the state would not be subserved by

78. 21 C.J.S. 120-122 (1955).

79. 21 C.J.S. 125 (1955).

80. Wyo. Const., Art. 18, § 3. This section supersedes Wyo. Const., Art. 7, § 13, by adding the following language: "And said board, subject to the limitations of this constitution and under such regulations as may be provided by law shall have the direction, control, disposition and care of all lands that have been heretofore or may hereafter be granted to the state." Statutory provisions for this board are Wyo. Stat. §§ 36-14 to 36-41 (1957).

81. *Banzhaf v. Swan Co.*, 60 Wyo. 201, 148 P.2d 225 (1944).

82. *Frolander v. Ilsley*, 72 Wyo. 342, 264 P.2d 790 (1954); *Banzhaf v. Swan Co.*, supra note 81, and *Sullivan v. Veer*, 58 Wyo. 90, 125 P.2d 168 (1952).

83. Wyo. Const., Art. 18, § 4; *Mahoney v. L. I. Sheep Co.*, 79 Wyo. 293, 333 P.2d 714 (1958).

granting it. Thus it would seem that the courts may control the Board's activity to the extent of deciding whether its grounds are substantial enough to support its decision.

In the absence of review by a district court the decisions of the Board of Water Control are *res judicata*.<sup>84</sup> That is to say, the decisions can only be attacked directly by seeking judicial review. In the *Horse Creek* case the Wyoming Supreme Court held that the act conferring the power to adjudicate the priorities of the various claimants to the use of public waters of the state is not unconstitutional as investing the Board with judicial powers. Possibly this is because there is not only concurrent jurisdiction but also the proceedings are subject to judicial review. However, in the absence of fraud or collusion, the proceedings may not be attacked in an independent action.<sup>85</sup> Even though the Board's statutory jurisdiction is concurrent with the courts<sup>86</sup> the Supreme Court held that the Board may have complete discretion in certain areas such as defining the meaning of a stream.<sup>87</sup> Furthermore, the jurisdiction of the courts, in matters of water adjudication is except for appeals, confined to determining the rights in individual cases to the extent that the Board of Water Control has not acted.<sup>88</sup> Other constitutional ramifications of water law are beyond the scope of this article.

It is submitted that providing for specific administrative agencies or boards with specific functions in the state constitutions might not have been wise. Some of these specific provisions may become outdated and obsolete. Different and more efficient entities and methods for accomplishing the same functions might be devised. In short, times and circumstances may change and thus bring about need for a comparable change in the administrative procedure. However, with specific agencies with specific functions enumerated in the constitution the change will become more difficult to effect, because the amending of a constitution is a rather burdensome and time-consuming procedure.

One provision in the Wyoming Constitution, Article 3, Section 24, may cause trouble with respect to the enabling legislation for an administrative agency and the functions and activities of these. The section provides that no bill except general appropriation bills and bills for the codification and general revision of the laws shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject is embraced in any act which is not expressed in the title, such act shall be void only as to so much thereof as shall not be so ex-

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84. *Horse Creek Conservation District v. Lincoln Land Co.*, 50 Wyo. 229, 59 P.2d 763 (1936). The constitutional provisions for the Board of Control are found in Wyo. Const., Art. 8, § 2; the statutory provisions for the Board are Wyo. Stat. §§ 41-154 to 41-164 (1957).

85. *Farm Investment Co. v. Carpenter et al.*, 9 Wyo. 110, 61 Pac. 258 (1900).

86. *Simmons v. Ramesbottom*, 57 Wyo. 419, 68 P.2d 153 (1937).

87. *Laramie Irr. & Power Co. v. Grant*, 44 Wyo. 392, 13 P.2d 235 (1932).

88. *Campbell v. Wyo. Development Co.*, 55 Wyo. 347, 100 P.2d 124 (1940). Rehearing denied, 55 Wyo. 347, 102 P.2d 745 (1940).

pressed. However, the section should be liberally and reasonably construed.<sup>89</sup> The objections should be grave and the conflict between the act and the constitution should be palpable before the judiciary should disregard or annul a legislative enactment solely because of this section of the constitution.<sup>90</sup> The problem may be avoided by making the title to the legislation as broad and general as possible because it is necessary only that the agencies function or activity may be fitted into a section or provision of the respective act which is germane to the subject expressed in its title.<sup>91</sup> It has been held that the title of an act of the legislature may be sufficiently general and comprehensive to embrace every means and end necessary or convenient for the accomplishment of the general purpose expressed therein.<sup>92</sup> Furthermore, any territorial legislation still in existence is not affected by the section because it is not to be applied retroactively.<sup>93</sup>

#### CONCLUSION

As the reader has no doubt already discovered this article is a combination of various loose ends not otherwise treated in the symposium. Thus a summary is impossible without a complete rehash of the entire article. All the conclusions which the writer could make have already been made in the text. However, mention of the various topics and sub-topics may serve in lieu of a summary and for conclusion.

When and under what circumstances a hearing is required was discussed. In connection with this the subtopics of adjudicative as distinguished from legislative facts, and privileges as distinguished from rights were discussed. The requirements of a proper hearing were discussed, along with the subtopics, notice, opportunity to be heard, public hearing vel non, jury trial, bias, and right to counsel. The problem of separation of functions and the problem of retroactive application of rules and regulations as well as new interpretations thereof were also discussed. Mention was made of the Wyoming Constitution's effect on extraordinary writs. Mention was also made of various agencies specifically provided for in the Wyoming Constitution. Finally, the problem which all Wyoming legislation faces was discussed, to wit: Article 3, Section 24 limiting statutory enactments to a single subject matter.

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89. *Wyckoff v. Ross*, 31 Wyo. 500, 228, Pac. 636 (1924).

90. *English v. Smith*, 71 Wyo. 1, 253 P.2d 857 (1953); reh den 71 Wyo. 28, 257 P.2d 365 (1953).

91. *Bd. of Commrs. of Laramie County v. Stone*, 7 Wyo. 281, 51 Pac. 605 (1898); also *Brinegar v. Clark*, 371 P.2d 62 (1962).

92. *Public Service Comm. v. Gunshew*, 49 Wyo. 158, 53 P.2d 1 (1935).

93. *State v. Smart*, 22 Wyo. 154, 136 Pac. 452 (1913).