
Robert O'Callahan

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Within 13 days of being named Commissioner of the Food and Drug Administration (FDA), Commissioner Schmidt issued “14 final regulations, 13 proposed regulations and six notices stretching over many pages of the Federal Register.”1 Schmidt was authorized to make the requisite final review of the National Nutritional Foods Association’s objections prior to issuing final FDA regulations.2 The final regulations, which govern the public sale of dietary supplements, were preceded by a recital3 that the Commissioner had considered the evidence from public hearings, the hearing examiner’s report and all the later exceptions and written arguments filed against the regulations.

Petitioners argued that the severely limited time available for personal consideration, even of staff-prepared synopses,4 suggested that

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1. National Nutritional Foods Ass’n v. FDA, 491 F.2d 1141, 1143 (2d Cir. 1974).
2. The Secretary of Health, Education and Welfare is directed by statute to consider objections to regulations under the Federal Food, Drug & Cosmetic Act, 21 U.S.C. §§ 301 et seq. (1970), before the regulations become final:

   [A]ny person who will be adversely affected by such order if placed in effect may file objections thereto with the Secretary, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections . . . .

   (3) As soon as practicable after such request for a public hearing, the Secretary, after due notice, shall hold a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections . . . . As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public.

   Id. § 371(e). This Section requires a personal decision by the Secretary. Willapoint Oysters v. Ewing, 174 F.2d 676, 696 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1950).

   Regulations grant the Commissioner of Food and Drugs authority to perform:

   (1) Functions vested in the Secretary under the Federal Food, Drug & Cosmetic Act (21 U.S.C. 301 et seq.) . . . .

   . . . .

   (15) Functions vested in the Secretary regarding the issuance of all regulations pursuant to authorities cited in paragraphs (1) through (14) of this section.

   21 C.F.R. § 2.120(a) (1973). The Commissioner has authorized the Deputy Commissioner of Food and Drugs and the Associate Commissioner for Compliance to perform these functions. 21 C.F.R. §§ 2.120(a), .121 (1973).


4. Examination of staff-prepared synopses would provide an adequate basis for his decision since some division of labor among decisionmaker and subordinates is regarded as necessary to the performance of an agency’s task. See, e.g., Morgan v. United States, 298 U.S. 468, 481–82 (1936) (Morgan I) (designated official must “hear”
Commissioner Schmidt in fact had not considered objections to the regulations and thus had not complied with the authorizing statute in issuing the challenged regulations. In view of the allegedly "more than ordinary basis of doubt as to the extent of his personal reading and consideration," petitioners moved for discovery of the Commissioner's actual consideration. The motion was denied. Held: Agency head may not be examined on statutorily required personal consideration of objections to promulgated regulations despite circumstances raising doubts concerning the existence of appropriate consideration. National Nutritional Foods Association v. Food & Drug Administration, 491 F.2d 1141 (2d Cir. 1974). 6

Petitioners in National Nutritional Foods contended that Morgan v. United States7 (Morgan I) and United States ex rel. Accardi v. Shaughnessy8 (Accardi I), cases in which the discovery of an agency head was permitted, were controlling. In Morgan I, the Supreme Court had remanded to the district court with instructions to determine whether

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5. 491 F.2d at 1144 (court's characterization of petitioners' position).
6. In both the court of appeals and the district court, petitioners requested permission to depose Commissioner Schmidt. The Federal Food, Drug & Cosmetic Act, 21 U.S.C. §§ 301 et seq. (1970), provides for court of appeals review of regulations promulgated under id. § 371(e), the section pertinent here. Id. § 371(f)(1). Petitioners believed such review would be inadequate because the agency record would not reflect the adequacy of Schmidt's consideration. The district court dismissed petitioners' motion for discovery for lack of subject matter jurisdiction believing that the court of appeals could provide an adequate remedy because its review was not limited to the agency record. The district court suggested that it agreed with the agency's contention that the regulations had been properly promulgated. National Nutritional Foods Ass'n v. Schmidt, 367 F. Supp. 889 (S.D.N.Y. 1973). On appeal from the district court's dismissal, petitioners renewed their motion to depose Commissioner Schmidt. The Court of Appeals for the Second Circuit denied the motion, stating: "The facts of this case do not constitute nearly the showing of bad faith necessary to justify further inquiry [into the adequacy of Commissioner Schmidt's consideration]." National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1145 (2d Cir. 1974). Wishing to immediately petition the Supreme Court for a writ of certiorari, petitioners requested and were granted an order affirming the district court's opinion. National Nutritional Foods Ass'n v. Schmidt, Civil No. 74-1225 (2d Cir., ordered Mar. 26, 1974), cert. denied, 95 S. Ct. 135 (1974). Petitioners' substantive objections to the regulations were the subject of another opinion of the Second Circuit Court of Appeals. National Nutritional Foods Ass'n v. Schmidt, 504 F.2d 761 (2d Cir. 1974).

the Secretary of Agriculture had, in fact, afforded the complainants the statutorily prescribed hearing. Similarly, in Accardi I, the Court had remanded to the district court for a determination of whether the Board of Immigration Appeals had, in fact, exercised its own discretion in denying relief to the petitioner.

It is generally thought, however, that Morgan v. United States (Morgan IV) reconsidered and reversed Morgan I. In Morgan IV, the Court objected to questioning of the administrator at length regarding the process by which he reached the conclusions of his

9. In Morgan I, the district court originally dismissed the complaint which alleged, in part, that the Secretary of Agriculture had not met his statutory duty of becoming acquainted with the evidence prior to fixing maximum commission rates for sales of livestock at the Kansas City Stock Yards. Morgan v. United States, 8 F. Supp. 766 (W.D. Mo. 1934). The Assistant Secretary had provided the “full hearing” required but did not make the decision, although entitled to do so as Acting Secretary. The Morgan I Court reversed, stating that “[t]he defendants should be required to answer these allegations and the question whether plaintiffs had a proper hearing should be determined.” 298 U.S. at 482.

10. In Accardi I the Board of Immigration Appeals had ruled that Joseph Accardi should be deported. The Attorney General had delegated authority in such matters to the Board. Petitioner sought a writ of habeas corpus, alleging that the Attorney General had compiled a list of “unsavory characters” targeted for deportation and had circulated this list among Board members. The district court refused to issue the writ or allow a hearing on the allegations. On appeal, the court of appeals affirmed. United States ex rel. Accardi v. Shaughnessy, 206 F.2d 897 (2d Cir. 1953). The Supreme Court reversed, however, holding that “the Board’s alleged failure to exercise its own discretion [would be] contrary to existing valid regulations.” 347 U.S. at 268 (emphasis in original).

11. 313 U.S. 409 (1941). The Morgan cases are commonly referred to by number because the Morgan v. United States matter was before the Supreme Court four times: Morgan v. United States, 298 U.S. 468 (1936) (Morgan I); Morgan v. United States, 304 U.S. 1, reh. denied, 304 U.S. 23 (1938) (Morgan II); Morgan v. United States, 307 U.S. 183 (1939) (Morgan III); and Morgan v. United States, 313 U.S. 409 (1941) (Morgan IV).

The district court proceeding directly following Morgan I established that plaintiffs had received a full and fair hearing and that the contested rate order was therefore valid. Morgan v. United States, 23 F. Supp. 380 (W.D. Mo. 1937). The appeal from that judgment resulted in reversal by the Supreme Court in Morgan II. The opinion suggests at least two grounds for that reversal: (1) the absence of an intermediate decisional report providing the plaintiffs some idea of the issues presented to the ultimate decisionmaker, see W. Gellhorn & C. Byse, Administrative Law, Cases and Comments 916 (5th ed. 1970), or (2) the Secretary’s ex parte consultation with staff members charged with the prosecution of the matter. See Schwartz, Institutional Administrative Decisions and the Morgan Cases: A Re-Examination, 4 J. Pub. L. 49, 79–80 (1955).

Morgan III considered the disposition of funds impounded pending the outcome of the rate controversy. The Secretary of Agriculture decided to promulgate an all-new rate order. The district court’s examination of the Secretary on his consideration of this new order was at issue in Morgan IV.


13. The terms “administrator” and “agency head” are used interchangeably in this Note.
order, including the manner and extent of his study of the record and his consultation with subordinates."\(^{14}\) The M\(\text{o}\)\(n\)\(g\) \(\text{I}V\) Court was blunt: "The short of the business is that the Secretary should never have been subjected to this examination."\(^{15}\) The Accardi \(\text{I}\) decision did not mention M\(\text{o}\)\(n\)\(g\) \(\text{I}V\) and their relationship is unclear.\(^{16}\)

In reviewing these decisions, the National Nutritional Foods court noted that M\(\text{o}\)\(n\)\(g\) \(\text{I}V\) has been qualified in that discovery of an administrator's mental process is permitted upon a strong showing of bad faith or improper behavior on the part of the decisionmaker.\(^{17}\) Since the only suggestion of irregularity in National Nutritional Foods was the short time between Schmidt's installation as Commissioner and his issuance of the regulations, the court believed that M\(\text{o}\)\(n\)\(g\) \(\text{I}V\)

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14. 313 U.S. at 422.
15. Id.
16. In the district court proceeding following Accardi \(\text{I}\), testimony was taken from members of the Board of Immigration Appeals indicating the existence of a Justice Department list of undesirables targeted for deportation, with which the Board members were acquainted. The Board members further testified that their decisions were unaffected by these actions of their superior. The district court accepted this testimony as settling the issue and did not grant a new hearing for Mr. Accardi. The court of appeals disagreed with the lower court, however, and reversed and remanded. United States \textit{ex rel.} Accardi v. Shaughnessy, 219 F.2d 77 (2d Cir. 1955). Judge Frank, writing for the court, regarded the testimony as sincere but highly improbable. He believed that in such circumstances the Board members must have been "unconsciously influenced" by the Attorney General's list. 219 F.2d at 81. Chief Judge Clark, concurring, believed evidence of a publicized list was sufficient to create a "presumption of bias" and that the Board's further testimony should be ignored. Circuit Judge Harlan, in dissent, would have accepted the Board's testimony and the trial court's appraisal of it, and dismissed the writ.

On review, the Supreme Court reversed the court of appeals and reinstated the district court decision. Shaughnessy v. United States \textit{ex rel.} Accardi, 349 U.S. 280 (1955) (Accardi \(\text{II}\)). The majority agreed with Circuit Judge Harlan and gave weight to the Board's testimony. Justice Black, joined by Justice Frankfurter, in dissent, took Chief Judge Clark's position, arguing that M\(\text{o}\)\(n\)\(g\) \(\text{I}V\) prohibits consideration of testimony on the Board member's decisional process. This position is apparently based on the impossibility of reconstructing a decision: "[T]his practice is no more desirable than that of probing the minds of judges to try to fathom the reasons which prompt their decisions." \textit{Id.} at 290. The dissent's argument may have been suggested by M\(\text{o}\)\(n\)\(g\) \(\text{I}V\), but was not developed by the M\(\text{o}\)\(n\)\(g\) \(\text{I}V\) Court. A better presentation of the argument may be found in NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947). See text accompanying note 40 infra.

Professor Davis suggests that the Accardi \(\text{II}\) dissenters impair the strength of Accardi \(\text{I}\) since they were two of the five justices in the Accardi \(\text{I}\) majority. K. Davis, \textit{Administrative Law Treatise} § 11.05 n.10 (1965). Yet the dissenters' objection was only to a "probe of mental processes"; they found that the primary probe of surrounding circumstances was valid, and, in fact, sufficient in itself to require a new trial for Accardi.

foreclosed any inquiry into the mental processes of an administrator. Petitioners had failed to make the required strong showing of bad faith.

Petitioners had sought to distinguish *Morgan IV* as protecting only the administrator’s mental processes in making a decision, not prohibiting inquiry into whether an administrator followed statutorily-required procedures making a decision. It is submitted that the Second Circuit court erred in rejecting this distinction. Adherence to procedural steps in the decisional process should properly be considered separately from the actual exercise of judgment pursuant to those steps. The Second Circuit court in *National Nutritional Foods* read *Morgan IV* as preventing discovery of procedural steps specifically incorporated in the statute to ensure the proper exercise of the administrator’s judgment.

The Second Circuit court’s misunderstanding of the word “process” apparently led to this erroneous reading of *Morgan IV*. “Process” may be used, in this context, in one of two ways. First, the term may be applied to the reasoning act involved in making a decision. It is in this sense that *Morgan IV* prohibits discovery of an agency head’s “mental process.” For the sake of clarity, this sense of the term will be referred to as the “judgmental process.” In contrast, petitioner’s request involved the second meaning of “process,” i.e., the procedural steps that may be required by law in making a decision.

Of course, both processes are involved in an agency decision. This note will examine the reasons supporting protection of the administrator from judicial inquiry in light of cases suggesting a judgmental/nonjudgmental distinction. It will outline a form of limited discovery designed to examine only the procedural aspects of the administrator’s “mental process” and determine what reasons remain to deny or restrict the use of such limited inquiry.

I. THE DECISIONAL PROCESS: PROBLEMS IN JUDICIAL REVIEW

The *National Nutritional Foods* court dealt with a major characteristic of administrative agencies—the “institutional decision”; i.e., a decision by the agency as an entity rather than primarily by an identifiable, personally responsible decisionmaker. Such institutional decisions are a necessary evil since an agency can scarcely afford to
permit a highly placed decisionmaker to devote the time necessary to personally shepherd a problem from start to finish.

Generally, agencies divide the decisionmaking process into a series of tasks.\textsuperscript{18} Subordinates may make extensive findings of fact, analyze situations and provide recommendations to a superior. Often statutes go further and designate specific officials as decisionmakers.\textsuperscript{19} When such a designated decisionmaker does not personally make a required decision, the statutory scheme is thwarted and the quality (and validity) of the decision is suspect.\textsuperscript{20} Judicial review of this personal de-

\textsuperscript{18} See 2 K. Davis, Administrative Law Treatise § 11.10 (1965).


Procedural rules serve to guide the agency decisionmaking process and thus seek to eliminate erroneous decisions which may be completely protected from judicial interference by virtue of their inclusion within the agency's latitude in decisionmaking, e.g., not arbitrary and capricious. Rules structuring the decisionmaking process may appear worthless in a particular case but are enforced nevertheless. See Weekes v. O'Connell, 304 N.Y. 259, 107 N.E.2d 290 (1952). Stating, "findings being subject only to limited judicial review, administrative agencies should ever be mindful of the heavy responsibility thereby imposed," the New York court struck down a State Liquor Authority liquor license revocation done in violation of Authority rules. 107 N.E.2d at 293. See also United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) (Accardi I) (petitioner entitled to new hearing on showing that the Board of Immigration Appeals failed to exercise its own discretion, even where the same adverse decision may result); United States v. Heffner, 420 F.2d 809, 813 (4th Cir. 1969) (criminal tax fraud conviction based on statements obtained by Internal Revenue Service agents contrary to Service rules reversed and remanded for new determinations regardless of whether compliance with the procedures would produce a different result).

20. The real decisionmaker may be an eminently qualified subordinate, but then again may not be. One cannot be certain. Professor Schwartz uses the Morgan cases as an example:

The order was signed by the Secretary of Agriculture, but we know from the Morgan cases that the decision was his only in a formal sense. It is impossible to say who made the actual decision—what official in the Department really directed his mind to the evidence and arguments and drew therefrom the final conclusions adopted by the Secretary. The examiner probably discussed the case with his superior, and the latter discussed it with a bigger flea, and so ad infinitum. Ultimately, the order got the seal of the Secretary.

cision requirement is complicated by the protection provided by Morgan IV to administrators' “mental processes.”

Although the Morgan IV Court's apparently absolute prohibition against inquiry into an administrator's judgmental processes has been qualified by the lower courts, any inquiry must be supported by a substantial showing of misconduct. In Singer Sewing Machine Co. v. NLRB, the Court of Appeals for the Fourth Circuit held that, under Morgan IV, a reasonable showing of administrative misconduct entitles the aggrieved party to further investigation of an agency decision. Similarly, a federal district court, in Bank of Dearborn v. Saxon, found that circumstances surrounding a decision of a federal agency created a “prima facie” case of “sham or subterfuge” of a state statute and, therefore, held inapplicable the Morgan IV “mental process” privilege. The Supreme Court recognized and apparently endorsed this qualification of Morgan IV, in dictum, in Citizens to Preserve Overton Park, Inc. v. Volpe.

Judicial review of an administrator's decision is also complicated by the privilege granted in Kaiser Aluminum & Chemical Corp. v. United States to the agency's “internal reasoning process,” i.e., the exchange within the agency of documents containing frank communications between decisionmaker and staff. This reasoning process has been recog-

23. 401 U.S. 402, 420 (1971). Overton Park involved review of the Secretary of Transportation's authorization of an interstate highway through a public park. The Court noted that before an inquiry into an administrator's mental process (as used in the judgmental sense) when contemporaneous formal findings exist, there must be “a strong showing of bad faith or improper behavior . . . .” Id. In Overton Park there were no such formal findings and the Court hinted that inquiry into mental processes might be proper without this showing. But the Court suggested that the Secretary of Transportation could, even subsequent to the Court's decision, prepare formal findings which might prove sufficient to sustain his decision.

Also pertinent in this context is KFC Nat'l Management Corp. v. NLRB, 497 F.2d 298 (2d Cir. 1974). There, certification of a union as the representative of employees was delegated by the National Labor Relations Board to Regional Directors, subject to review by the Board on specified grounds. The grant of such review was to be formally decided by a three-member panel of the Board. Two of the three Board panel members gave their staff assistants general proxies for the purpose of serving in their place on this review granting panel. The court noted the general rule that once there is a “prima facie demonstration of impropriety,” inquiry into the decisionmaking process is allowed. But the court found the showing and inquiry unnecessary because there was no claim that the Board members who gave the proxies ever considered the case. The court required Board consideration of petitioner's request for review.

nized as "inextricably intertwined"\textsuperscript{25} with the administrator's mental process and, thus, the same qualifications applied to the \textit{Morgan IV} privilege have been applied to the \textit{Kaiser} privilege\textsuperscript{26} for intra-agency communications.\textsuperscript{27}

\section{Recognition of a Procedural/Judgmental Distinction in an Administrator's "Mental Process"}

\textit{Morgan IV} and \textit{Kaiser} protect the judgmental processes of both administrator and staff. Each case's rule complements the other and "in combination they operate to preserve the integrity of the delibera-

\textsuperscript{25} Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, 40 F.R.D. 318, 326 (D.D.C. 1966), aff'd per curiam sub nom. V.E.B. Carl Zeiss v. Clark, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967). The District Court for the District of Columbia outlined the interrelationship between the "administrator's mental process privilege" and the "internal agency reasoning process privilege":

Inextricably intertwined, both in purpose and objective, are these two principles. The rule immunizing intra-governmental advice safeguards free expression by eliminating the possibility of outside examination as an inhibiting factor, but expressions assisting the reaching of a decision are part of the decisionmaking process. Similarly, the so-called "mental process rule" impresses the stamp of secrecy more directly upon the decision than upon the advice, but it extends to all phases of the decisionmaking process, of which the advice is a part. Each rule complements the other, and in combination they operate to preserve the integrity of the deliberative process itself.

40 F.R.D. at 326 (footnotes omitted).

Moreover, courts have recognized that the administrator's judgmental processes might be compromised through interrogation of staff members. See Singer Sewing Machine Co. v. NLRB, 329 F.2d 200 (4th Cir. 1964), or disclosure of internal memoranda. See Davis v. Braswell Motor Freight Lines, 363 F.2d 600, 603 (5th Cir. 1966).

26. See Rosee v. Board of Trade, 36 F.R.D. 684, 690 (N.D. Ill. 1965), in which the plaintiff established a "reasonable basis" for requested discovery of intra-agency communications related to an alleged conspiracy against plaintiff by certain agency personnel.

\textit{Rosee} is apparently the only case in which the agency's intra-agency communications privilege was overcome when the government was not a party to the litigation. See, e.g., Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961) (special master allowed to privately examine NLRB files on request of employer accused of unfair labor practices by Board). In ruling on the opponent's motion for discovery, it is also significant whether the government is plaintiff or defendant. United States v. San Antonio Portland Cement Co., 33 F.R.D. 513, 515 (W.D. Tex. 1963).

27. An "intra-agency communications privilege" is most commonly invoked as an exception to the Freedom of Information Act, 5 U.S.C. §§ 552 et seq. (1970). The FOIA requires disclosure of any agency information not exempted under the Act upon request by any member of the public. Section 552(b)(5) of the Act exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." An overview of the statute is contained in K. Davis, \textit{Administrative Law Treatise} § 3A.28 (Supp. 1970).
tive process itself." Before permitting inquiry into such matters, predictably the courts require a strong showing of bad faith. Imposition, however, of the same strict standard to discovery of procedural irregularities is inappropriate. Courts applying the Kaiser rule have properly avoided application of the strict standard to nonjudgmental issues when considering discovery of intra-agency communication, and distinguish discovery of factual information from discovery of judgmental information. Factual information is generally discoverable; judgmental information privileged. The administrator's decisional process requires application of a similar distinction.

A. Judicial Support for a Procedural/Judgmental Distinction

The Supreme Court has treated an inquiry into procedural regularity differently than an inquiry into judgmental processes. In DeCambra v. Rogers, Morgan v. United States (Morgan II), and Morgan IV, the Court clearly prohibited examination and dissection of an administrator's judgment. But a close reading of both Morgan I and Accardi I reveals the petitioners were entitled to examine if—


29. See note 17 supra. Although no court has compared the showing required prior to discovery of communications of the agency staff's opinions with the "strong showing of bad faith" required prior to discovery of an administrator's "mental process," the fact that strong policies support the privilege from discovery in both instances, suggests the standard in both situations is equally strict. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, 40 F.R.D. 318, 325 (D.D.C. 1966), aff'd per curiam sub nom., V.E.B. Carl Zeiss v. Clark, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).


31. 189 U.S. 119, 122 (1903) (Secretary of Interior decided land claim adversely to DeCambra; decision appeared regular in all respects and the Court refused to inquire further).

32. 304 U.S. 1, 18 (1938).
not how—the decisionmakers had exercised their statutory authority, and thus indicates the Court’s willingness to allow inquiry into allegations of procedural irregularity.

Obviously, the best assurance of the proper personal consideration is a complete examination of the agency head’s mental process in reaching a decision; however, recognition and use of less intrusive means of discovery could provide a basic check on the agency and reconcile the superficially contradictory Supreme Court holdings. Such a limited-in-scope inquiry could guarantee personal consideration by the agency head, yet avoid inquiry into the area privileged under Morgan IV.

Limited discovery has been approved by two lower courts. In D.C. Federation of Civic Associations v. Volpe, a district court allowed counsel to interrogate the Secretary of Transportation to determine whether the Secretary had made necessary decisions prior to siting a highway inside a park. In allowing this examination, the court distinguished between investigation of the existence of steps followed or materials utilized in reaching a decision and investigation of the judgmental process:

[I]t was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis of the decisions.

The Court is aware that the Supreme Court in United States v. Morgan... prohibited the probing of the mental process of a decisionmaker to determine his reasoning in making a decision. The inter-

34. Id. at 769 & n.30, 771–72 & n.32.
35. Id. at 760–61 n.12; cf. United States v. Smith, 22 F.R.D. 482 (N.D. Ill. 1958). In Smith, defendants in a criminal prosecution, having received a grand jury subpoena of certain records, submitted the records but were not called before the grand jury. Charges were filed against the defendants solely on the basis of the records. Suspecting government subterfuge, defendants sought to inquire into the procedural regularity of the issuance of the subpoena. The government objected that the solicited responses would violate the traditional secrecy of grand jury proceedings. The court concluded, however, that the protected area, the deliberations of the grand jury, would not be violated by granting the request. Cases which allowed the discovery of grand jury transcripts only after a showing of misuse of grand jury process were distinguished:

In ... many similar cases, the transcript of the actual testimony before the grand jury was requested. Here, what is being sought is peripheral facts about the grand jury, not what occurred before it.

22 F.R.D. at 484. The court applied a less stringent standard to discovery of non-protected “peripheral facts” than to discovery of “actual testimony.” Thus, a showing of misuse was held unnecessary.
rogation of Secretary Volpe here was limited to the actions which he took, and the materials which he considered as a basis for his determination, rather than his mental process in considering these materials.

The D.C. Federation court thus equated the "reasoning in making a decision" with the protected "mental process" of the administrator. The actual components of a determination, such as facts and required findings, were regarded as discoverable, almost as a matter of course.

Similarly, a district court in Union Savings Bank v. Saxon\(^36\) granted plaintiffs permission to orally depose an agency head in circumstances much like those in National Nutritional Foods. The plaintiffs in Union Savings Bank alleged on "information and belief" that defendant Saxon made a decision on the basis of ex parte representations and a personal relationship with an interested party. The court recognized problems involved with indiscriminate discovery of an agency head following any agency action, but reasoned that the "peculiar circumstances" justified a limited discovery. The oral deposition was "limited to the procedural action taken by the Defendant as to the subject matter of this case, and not the workings of his (Saxon's) mind."\(^37\)

Neither the D.C. Federation nor the Union Savings Bank court applied the "strong showing of bad faith" standard necessary for inquiry into judgmental areas protected by Morgan IV. Both courts utilized a procedural/judgmental distinction in deciding the propriety and form of discovery. Since neither court set forth a new standard, yet permitted limited discovery, one might conclude that one need only show that information sought in a procedural inquiry is needed and relevant—the same standard which ordinarily must be met to justify discovery of facts in an agency's possession.\(^38\)

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37. Id. at 320 (emphasis added).
38. See, e.g., Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 899 (1963) (factual findings in Air Force investigative report, prepared immediately after accident, held discoverable by aircrew member in action against manufacturer of aircraft assembly); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960) (industry profit data, collected by United States Renegotiation Board, held discoverable for defense against an Internal Revenue Service action to tax alleged excess profits).

This standard may not, however, be applicable to nonenvironmental cases, since courts have permitted unusually searching inquiries in environmental actions. See Federal Administrative Law Developments—1971, 1972 DUKE L.J. 115, 323 n.35 (1972); The Supreme Court, 1970 Term, 85 HARV. L. REV. 3, 322 (1971). A stricter standard is suggested in Part II—C infra.
B. The Mental Process Rule of Morgan IV and Limited Discovery

An examination of the reasons supporting protection of an agency head's mental processes from discovery bolsters the conclusion, suggested by the preceding cases, that application of the strict "strong showing of bad faith" standard is inappropriate for discovery of procedural irregularities. Four basic reasons support the Morgan IV privilege against discovery of an administrator's mental processes:

1. such an examination would consume a valuable administrative resource—the chief administrator's time; 39
2. the examination of the factors that entered into the administrator's ultimate decision would be extremely difficult, perhaps impossible, since the exercise of judgment is a weighing process not susceptible to cross-examination; 40
3. such examination would lead to judicial usurpation of the administrator's role as decisionmaker; 41 and
4. the examination would offend the administrator and tend to undermine his or her sense of responsibility. 42

These reasons against discovery of an agency head are substantially obviated by a restricted form of discovery—an inquiry limited to whether the administrator substantively considered objections to proposed regulations. Such an inquiry could consist of simple interrogatories or, alternatively, an affidavit by the agency head indicating whether, realistically speaking, the administrator rendered a personal judgment on the matter. 43


41. The use of increasingly scarce judicial resources in the re-evaluation of an administrator's judgment must also be considered. Like appellate review of trial courts, judicial review of agency action must be selective to enable the administrative and judicial systems to function effectively.

42. See Morgan v. United States, 313 U.S. 409, 422 (1941) (Morgan IV).

43. The administrator's failure to submit to this inquiry should render the agency order unenforceable until such time as the administrator is willing to attest to its propriety. Of course, the veracity of a reply would be ascertainable only after a preliminary strong showing of impropriety since this probe involves a detailed inquiry into mental processes contrary to Morgan IV and three of the four reasons supporting that privilege. See text accompanying notes 39-42 supra. A false answer to an affidavit should dictate a penalty commensurate with abuse of a solemn proceeding. Cf. 18 U.S.C. § 1001 (1970) ("Whoever . . . knowingly and willfully falsifies . . . a material fact . . . shall be fined not more than $10,000 or imprisoned not more than five years.

750
"Mental Process" Privilege

This limitation would wholly eliminate two of the four objections noted. Such limited discovery would not require the detailed examination of the multitude of factors that enter into a decision,\textsuperscript{44} condemned by the \textit{Morgan IV} Court, nor could it lead to usurpation by the courts of the administrator's duties.\textsuperscript{45} The limited scope of the procedure would substantially eliminate aspersions on the administrator's veracity and the objectionable use of the administrator's time. An infrequent affidavit affirming that proper procedures had been observed would not unduly burden the administrator.\textsuperscript{46} Thus, the objections generally raised against examination of agency decisionmakers lose much of their persuasiveness when set against limited-in-scope discovery restricted to situations where there is unusual doubt about the regularity of agency action.

Similarly, this form of discovery, consistent with the policy expressed in \textit{Kaiser}, would not permit public examination of intra-agency communications furnished the agency head.\textsuperscript{47} Where staff memoranda and information are relied on, the administrator could affirm that not only did he or she make a personal judgment on the matter, but also that these materials embodied alternative solutions or conclusions, rather than merely the final one.

The court or the opposing parties would not be permitted to ex-

\footnotesize{\textsuperscript{44}} The efficacy of this inquiry does not depend primarily on penalties for false statements or the invalidation of improperly considered decisions. The administrator generally has no interest in the concealment of present agency procedures that would outweigh concern for personal integrity. The inquiry would act to remedy errors in a particular case by prompting administrative reconsideration, or in general by prompting changes in governing statutes and regulations. \textit{See} notes 54-55 and accompanying text \textit{infra}.

\footnotesize{\textsuperscript{45}} \textit{See} text accompanying note 40 supra.

\footnotesize{\textsuperscript{46}} \textit{See} text accompanying note 41 supra.

\footnotesize{\textsuperscript{47}} \textit{See} text accompanying notes 39 & 42 supra. Naturally, the effect will depend on the availability of such review. \textit{See} discussion in Part II-C \textit{infra}. Limitations on the scope of discovery should prevent a disappointed party from improperly using discovery procedures to harass the administrator and disrupt agency operations. The "agency reasoning process" privilege was set forth in \textit{Kaiser Aluminum & Chem. Corp. v. United States}, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958). Retired Justice Reed, sitting on the Court of Claims, reasoned that disclosure of subordinates' recommendations might inhibit frank intra-agency discussion and result in ill-considered agency decisions. \textit{See} text accompanying note 24 supra.

amine particular materials furnished the agency head. Public or private examination of the materials and evaluation of their validity as decisional foundations unavoidably involves consideration of the administrator's personal knowledge of the areas affected by his or her decision and the facts of the particular case. This examination should be measured against Morgan IV-type standards, for it goes beyond a basic check on the regularity of agency action to an evaluation of the administrator's judgmental process.

Moreover, the courts should respect the administrator's judgment concerning the degree of study of intra-agency materials necessary for a proper evaluation of the issues confronted. Nonetheless, statutes generally insist upon, and the courts can and should confirm, the fact of some examination. The statute\footnote{48} involved in National Nutritional Foods does not specify any particular amount of involvement by the administrator in any particular problem. An administrator can and will use staff to frame issues for decision, to analyze factual matters and to make recommendations based on agency experience and on the publicized decisional philosophy of the administrator.\footnote{49} For example, if "findings of fact" will constitute the "judgmental" part of a decision, the administrator must make such findings.\footnote{50} If, however, the crucial issues remain once findings of fact are made, the decisionmaker may properly leave such findings to subordinates. But the agency head should be trusted to sense and state whether he or she encountered the crucial issues, however denominated, of the decision.

C. Presumption of Regularity

The proposed limited form of inquiry fully rebuts only two objections to discovery of an agency head; two objections remain.\footnote{51} Abuse of the affidavit procedure to discover facts concerning the regularity

\footnotesize{\begin{itemize}
    \item $^{48}$ 21 U.S.C. §§ 301 et seq. (1970); see note 2 supra.
    \item $^{49}$ See note 4 supra.
    \item $^{50}$ The Department of Transportation's internal procedures, which were reviewed in D.C. Federation of Civic Ass'ns v. Volpe, 316 F. Supp. 754 (D.D.C. 1970), illustrates how a finding of fact may be sufficiently determinative of the final decision so as to be reserved to the agency head. The statute at issue there, 23 U.S.C. § 138 (1970), provides that a highway project through certain publicly owned lands shall not be approved unless the Secretary of Transportation has determined that (1) there is no feasible and prudent alternative to the use of such land and (2) such program includes all possible planning to minimize harm from such use. These determinations, although not "final" in the sense of the last decision, were crucial to the final outcome.\footnote{51} See text accompanying notes 44-46 supra.
\end{itemize}}
of agency action would add to the demands on the decisionmaker's time and may also detract from the solemnity and integrity of the administrative process. Affidavits could easily become as untrustworthy and as "boilerplate" as were the recitals preceding the regulations in *National Nutritional Foods*.

Commonly, agency actions are accorded a presumption of regularity. Application of this presumption would eliminate misuse of the limited discovery procedure by requiring a showing of unusual circumstances that suggest procedural irregularity before discovery would be permitted. The Second Circuit court should have measured the short period of "consideration" in *National Nutritional Foods* against this presumption. The facts of the case suggest the presumption would have been overcome had the court applied it. The facts did not, however, satisfy the court's test of a "strong showing of bad faith or impropriety"—appropriate only when considering discovery of the judgmental process protected by *Morgan IV*.

III. CONCLUSION

Under *Morgan IV* and *Kaiser*, the courts have properly provided governmental agencies with protection from unwarranted probing of the judgmental processes involved in decisionmaking. This protection,

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53. The fact that Commissioner Schmidt had only 13 days in which to consider numerous and lengthy objections to the proposed regulations strongly suggests irregularity in the agency process. The court's opinion clearly implies that a mere presumption would have been overcome: "It is plain enough that if this motion had come before us in the period between the first *Morgan* case . . . and the fourth and the last appearance of the *Morgan* case . . . we would have been obliged to grant it." 491 F.2d at 1144. Development of the presumption of regularity apparently reflects a concern about erosion of agency responsibility, which possibility is present in discovery of any agency personnel. The fact that discovery involves the agency head may strengthen the presumption slightly because it also reflects a general concern for the chief official's limited time. See, e.g., Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 YALE L.J. 647, 662 (1938). However, the amount of time an administrator spends verifying and attesting to proper procedures does not appear sufficient to warrant significant change in the presumption. Other circumstances, not present in *National Nutritional Foods*, might render a presumption of regularity effectively irrebuttable. Emergency mobilization by Selective Service boards, for example, requires swift administrative action and would likely preclude objections to procedural defects. *National Nutritional Foods*, however, presents no such justification; 11 years had elapsed between the first FDA consideration of regulations and adoption of final regulations. See 38 Fed. Reg. 20711 (1973). Similarly, a lack of feasible alternatives to the present decisionmaking scheme, e.g., a single authorized
however, should not abrogate a statutory requirement that a designated official personally consider and decide an issue. Compliance with this essentially procedural statutory requirement can be verified without encountering the problems inherent in a complete review of an administrator's reasoning process. The administrator should be required to confirm, either by affidavit or limited deposition, that all statutory procedures have been observed. This requirement would in turn be limited to instances, such as presented in National Nutritional Foods, where circumstances preclude a “presumption of regularity.”

The proposed form of discovery, limited as it may be, would serve to measure administrative realities against statutory requirements. The possibility that an affidavit may be demanded from the decision's signatory will encourage proper consideration by that individual. If this consideration is too burdensome for nominal decisionmakers, an agency may utilize other authorized officials to make and sign decisions,54 modify applicable regulations, or seek congressional action to authorize more decisionmakers or transfer decisionmaking functions.55 Thus, even limited and infrequent affidavits or depositions may produce far-reaching and beneficial changes in the structure of the decisional process.

Robert O'Callahan

decisionmaker, would tend to strengthen the presumption. The FDA, however, had two other officials fully qualified to perform the task Commissioner Schmidt nominally assumed. See note 2 supra. See also notes 54–55 and accompanying text infra.

54. The FDA could have chosen this alternative in National Nutritional Foods. See note 2 supra.

55. The experience of the NLRB is illustrative. Prior to 1959, the Board's caseload reduced its ability to perform effectively. Congress noted the problem and amended § 143(b) of the Labor Management Relations Act, 29 U.S.C. §§ 141 et seq. (1970), to authorize delegation of employee representation decisions to the Board's Regional Directors, subject to Board review if the appeal falls within specified categories. See KFC Nat'l Management Corp. v. NLRB, 497 F.2d 298, 302 (2d Cir. 1974); Hearings on S. 305, S. 748, S. 76, S. 1002, S. 1137 and S. 1311 before the Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess. 649 (1959); Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 before a Joint Subcommittee of the House Comm. on Education and Labor, 86th Cong., 1st Sess. 19 (1959). An alternative solution would permit the hearing examiner to personally render a decision subject to appellate-type review by top agency officials. This procedure creates personal responsibility for the decision, provides a known decisionmaker to which the parties can argue, and allows the decisionmaker with proper organization to effectively utilize much of the agency expertise. Both solutions are recommended by the Administrative Conference, a Federal agency formed to improve the administrative process. 1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 122–24 (1970). The Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. (1970), does not go so far; it essentially allows the agency to disregard the hearing examiner's decision. Id. § 557; see Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (Taft-Hartley Act, under which the NLRB was operating, construed in a similar manner to the APA).