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An Agricultural Law Research Article

Agricultural Law: Appealing Agricultural Allotments

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STUDENT COMMENTS

AGRICULTURAL LAW: APPEALING AGRICULTURAL ALLOTMENTS

I. Introduction

The cotton farmer, who is discontented with the size of his acreage allotment and who desires to appeal, faces what appears to be—at first glance and perhaps even after careful analysis—an uphill fight against a whole range of administrative units.

Congress, burdened with many pressing problems during the Depression years, placed into the hands of the President and hence into the hands of the Secretary of Agriculture a skeleton of delegated power. As with most governmental agencies, it was the function of the administrative head to put meat onto this skeleton by interpreting the Congressional grant of power and by promulgating additional rules and regulations. These rules and regulations, together with the initial grant of power by Congress to the Secretary of Agriculture, have created a system in which agents of the Department determine at every stage of allocation how much acreage an individual farmer will receive. In addition, agents investigate deviations from these determinations, prosecute such deviations, and make an initial and often final adjudication of any disputes arising within the allocative system. The attorney who seeks to aid the farmer needs to be acquainted with the administrative and judicial procedures—locally, statewide, and nationally—for handling acreage appeals. In Mississippi there is a particularly pressing need to be knowledgable with respect to cotton. While seeking to indicate the administrative and judicial appeal methods, an attempt will be made to characterize the administrative units so as to develop a certain "feel" for those principles which will produce the greatest effect upon the bodies hearing such acreage appeals.

II. The Agriculture Allotment System

It would be helpful and perhaps necessary before attempting to pursue the above goal, however, to explain briefly the administrative framework responsible for establishing the quotas and allotments, the appeals of which are the subject of this paper. The Agricultural Adjustment Act of 1938[1] provides the methods for establishing the marketing quotas for all crops, including cotton.[2] Within this Act, Congress clearly expressed its legislative intent and purpose for establishing a marketing quota for cotton, stating:

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[1] 7 U.S.C. §§ 1281 *et seq.* (1964).
[2] 7 U.S.C. §§ 1341-50 (1964).

> The provisions of this part affording a cooperative plan to cotton producers are necessary and appropriate to prevent the burdens on interstate and foreign commerce caused by the marketing in such commerce of excessive supplies, and to promote, foster, and maintain an orderly flow of an adequate supply of cotton in such commerce.[3]

To this end Congress provided that:

> Whenever during any calendar year the Secretary determines that the total supply of cotton for the marketing year beginning in such calendar year will exceed the normal supply for such marketing year, the Secretary shall proclaim such fact and a national marketing quota shall be in effect for the crop of cotton produced in the next calendar year.[4]

The Secretary is guided by certain standards contained within the statute. Approval of the quota by a referendum of farmers engaged in cotton production is necessary before the marketing quota becomes established.[5] It is interesting to note that a two-thirds vote of approval is required before the quota becomes effective.[6] That farmers overwhelmingly support the system is amply shown by the fact that annually since its enactment in 1938, the quota has been disapproved only rarely.[7]

The marketing quota having been approved, the next step for the Secretary is to establish a national acreage allotment for the crop.[8] The Secretary will then apportion the acreage "to the States on the basis of acreage planted to cotton . . . during the five calendar years immediately preceding the calendar year in which the national marketing quota is proclaimed. . . ."[9] Provision is also made for the Secretary to withhold a three hundred and ten thousand acre reserve.[10]

When the states have received their allotments, State Committees apportion it to the counties, retaining as a reserve generally ten percent of the total.[11] The Act tells us that this reserve is to be used for trends, abnormal conditions affecting plantings, small or new farms, the correction of inequities, and the prevention of hardships.[12]

After the county has received its allotment, a County Committee, which is composed of locally elected farmers, distributes it among the

[3] 7 U.S.C. § 1341 (1964).
[4] 7 U.S.C. § 1342 (1964).
[5] 7 U.S.C. § 1343 (1964).
[6] *Id.*
[7] The referendum has been passed generally with the exception of the war years.
[8] 7 U.S.C. § 1344(a) (1964).
[9] 7 U.S.C. § 1344(b) (1964).
[10] *Id.*
[11] 7 U.S.C. § 1344(e) (1964).
[12] *Id.*

farmers.[13] The county may retain fifteen percent to be used for the same exigencies as the state reserve, but with attention being given to such additional considerations as "land, labor, and equipment available for the production of cotton, crop-rotation practices, and the soil and other physical facilities affecting the production of cotton. . . ."[14] Finally, there are three schemes, one of which is initially adopted by the Secretary, which the County Committee may use for alloting the acreage to the individual. These are based upon either (1) all tillable acreage with the exclusion of certain crops,[15] (2) the average acreage planted to cotton during the past three years,[16] or (3) the acreage allotment for the previous one year.[17]

The only other administrative unit provided for within the Act is the local Review Committee. The function of this unit is basically to review the actions of the County Committee, and the Review Committee's three members are, like those of the County Committee, local residents.

This then, in the briefest fashion, is the Congressional scheme for the administration of the cotton program. Possible dissatisfaction, on the part of the farmer, with any number of aspects of this scheme is apparent. For example, the farmer may feel that the Secretary did not follow the statutory scheme in setting up the national marketing quota; or, the State Committee improperly utilized the reserve so as to discriminate against his county and thus ultimately against him; or, his County Committee failed to grant him a sufficiently large allotment. These are just a few of the myriad of complaints the farmer may have and from which he might desire relief against the national, state, or local administrators of the program. How is he to procede against each?

III. Appealing County Committee Determinations

A. *Failure to File Within Time Limit*

The largest number of appeals, and the only ones for which there is a congressionally established procedure, are those which relate to some determination by the County Committee.[18] The Act provides that any farmer who is dissatisfied with his farm marketing quota may appeal within fifteen days from the date he receives notice of his farm

[13] 7 U.S.C. § 1344(f) (1964).
[14] 7 U.S.C. § 1344(f) (3) (1964).
[15] 7 U.S.C. § 1344(f) (2) (1964).
[16] 7 U.S.C. § 1344(f) (6) (1964).
[17] 7 U.S.C. § 1344(f) (8) (1964).
[18] The statutory administrative procedures for review of determinations are found in 7 U.S.C. §§ 1361-68 (1964).

acreage allotment.[19] Care should be taken to insure that an appeal be filed within the time limit. In regulations promulgated by the Department the fifteen day requirement is imposed;[20] the statute itself provides: "Unless application for review is made within such period, the original determination of the farm marketing quota shall be final."[21] The case law is in complete accord with this regulation. In an action to obtain the refund of a penalty paid by the plaintiff, a tobacco farmer, to the county A.S.C. office, the Federal District Court concluded that:

> Section 1363, which provides that any farmer who is dissatisfied with his farm marketing quota may have this quota reviewed by a local review committee if he asks for such review within fifteen days of his notice of allotment, as provided by Section 1362. If he does not ask for review within this period the original determination of the quota becomes final.[22]

One should, however, not suppose that this fifteen day limitation has never been excused. In an action to challenge the determination of a Review Committee that a wheat farmer was precluded from appealing since he had not timely filed, the Federal District Court, after pointing to the plaintiff's absence from the state because of the illness of a relative, indicated:

> [T]here is a necessity of giving courts and administrative bodies some discretion in granting extension of time for appearance where the failure to appear within the prescribed time is clearly excusable. I feel this principle is applicable here, and that the Review Committee should determine whether plaintiff's failure to file his application within the prescribed period was unavoidable or clearly excusable. If so, the committee should afford him a hearing on his application.[23]

B. *Jurisdiction and Questions Considered by Review Committees*

Supposing that the complainant has made a timely application for review, a natural inquiry is directed to those matters which fall within the purview or jurisdiction of the Review Committee. The regulations provide that certain factors may be subject to review. These include:

> [A]ny of the following factors which enter into the establishment of such quota: farm acreage allotment, farm normal yield or projected farm yield as applicable, actual production for the farm, farm marketing excess, acreage of the commodity

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[19] 7 U.S.C. § 1363 (1964).

[20] 7 C.F.R. § 711.13 (1969).

[21] 7 U.S.C. § 1363 (1964).

[22] Paul v. United States, 222 F. Supp. 102, 103 (E.D.N.C. 1963).

[23] Howell v. Shannon, 170 F. Supp. 139, 142-43 (D. Mont. 1959).

> on the farm, determination by the county committee of the land constituting the farm . . . .[24]

The case law also defines the jurisdiction of the County Review Committee, which is to review only county, not state, ASCS determinations. In one of the more important cases in the interpretation of the role of the Review Committee, the Fifth Circuit Court of Appeals dealt with "another skirmish in the smoldering controversy between West Texas cotton farmers . . . and those of East Texas . . . ."[25] The court noted that:

> [I]n this complex scheme both County Committee and Review Committee have much importance. . . . [T]he legislative pattern shows that the function of the County Committee is fairly to distribute that which has been allocated to that county. But since the standards to be followed are invariably general, and many are so flexible that they would open up avenues for discrimination whether intentional, inadvertent, corrupt, or accidental, there was need for another agency, the County Review Committee, having local roots and hence local responsibility for the review of such actions. The system assures not only initial determination, but a complete review anew of the whole matter by neighbors who must live with their decisions. . . . Congress meant to establish an initial and a reviewing agency of *local* people having *local* responsibility for decisions concerning *local* factors having a definitive *local* impact.[26]

The vast majority of cases hold to the proposition that the County Review Committee is limited to considerations of determinations by the County Committee. The one case which might be interpreted as allowing the County Review Committee to review a determination of a State Committee may be explained on its very peculiar factual situation. The plaintiff in this case asserted that since the County Committee merely served as a "rubber stamp" for the improperly acting State ASCS Administrator, the exclusive review mechanism was inapplicable, i.e., the Review Committee could only review actions by the County Committee and this was the action of the State Administrator. The Fifth Circuit, in distinguishing *Fulford*, stated that:

> The questions presented here are not comparable in scope and impact to those in *Fulford v. Forman* . . . in which action of the state ASCS officials relating to the statewide policy of apportioning acreage allotments among various sections of the state was drawn into question. Instead, the present controversy relates to action which affects only the marketing quotas and acreage allotments of certain individual farmers. As such, it is

[24] 7 C.F.R. § 711.13 (1969) refers one to 7 C.F.R. § 711.2(d) (1969).
[25] Fulford v. Forman, 245 F.2d 145, 146 (5th Cir. 1957).
[26] *Id.* at 151.

a matter properly to be considered by the County Committee and reviewed by the Review Committee.[27]

The Fifth Circuit pointed out that even if the County Committee's action has been "induced, influenced, or instigated" by state ASCS officials, if the County Committee has acted, its actions are reviewable.[28] The rationale of *Fulford v. Forman*[29] is applicable, the court reasoned, only if a statewide policy formulation has been rendered by the State Committee.[30]

That the County Committee must act before the Review Committee can function was further amplified in *McDougald v. Local Review Committee.*[31] Here the plaintiff requested a peanut allotment, and the County Committee simply took no action. The plaintiff then applied for a hearing before the Review Committee, which alloted the plaintiff five acres. The Review Committee subsequently revoked the allotment on the grounds that it lacked authority to consider the application until the County Committee had made a determination. The plaintiff appealed this latter determination by the Review Committee. The court declared that "the determination of a quota by the County Committee is absolutely essential for exercise of the Review Committee's jurisdiction under the authority granted by Congress."[32] The court also noted that the remedy for a County Committee which refuses to act is "an order in the nature of a writ of mandamus."[33]

The real function of the Review Committee and of ultimate court review is to insure that the County Committee will not be guilty of "discrimination whether intentional, inadvertent, corrupt, or accidental."[34] The Review Committee, as has already been noted, is to consider only those factors which could have entered into a decision by the County Committee. This position was enacted as a regulation by the Secretary:

> In all cases, the review committee shall consider only such matters as, under applicable provisions of the act and regulations of the Secretary, are required or permitted to be considered by the county committee in the establishment of the quota sought to be reviewed.[35]

[27] Chandler v. David, 350 F.2d 669, 677 (5th Cir. 1965), *cert. denied,* 382 U.S. 977 (1965).

[28] *Id.*

[29] Fulford v. Forman, *supra* note 25.

[30] Chandler v. David, *supra* note 27.

[31] 149 F. Supp. 405 (E.D.N.C. 1965).

[32] *Id.* at 408.

[33] *Id.*

[34] Fulford v. Forman, *supra* note 26.

[35] 7 C.F.R. § 711.12 (1969).

The courts have upheld this regulation.[36]

With this principle clearly in mind, one can, with some sense of success, determine what the Review Committee will or will not consider. The Review Committee will, for example, consider the availability of additional land, since this is a matter which can be considered by the County Committee.[37] The Review Committee has no authority, however, to make a constitutional determination, since this is not within the purview of the County Committee.[38] The Review Committee must look at the facts upon which the plaintiff bases his constitutional claim and then see if the statute or regulations afford relief without resort to constitutional principles.[39]

Thus, the farmer's best hope when appearing before the Review Committee is to show that the County Committee did not act in harmony with a statute or regulation. As is observable from the cases, where a determination of the County Committee has been overruled, it was usually rejected because such determination was not in harmony with the regulations or the Act.[40] It should be pointed out, however, that even those determinations which may appear defective because of some irregularity of the County Committee, such as undue influence, may be cured if the Review Committee makes a *de novo* determination, utilizing the same factors the County Committee is permitted to use, minus, of course, those factors which constituted undue influence.[41]

C. *Protective Discretion and the Burden of Proof*

Before deciding to attempt an appeal from a County Committee, the farmer should be aware that the courts have granted to the County Committee a degree of protective discretion. Observe, for example, in an action to obtain additional cotton acreage, the court has indicated that:

> [A]t the outset we are reminded that the county committee, which is composed of laymen, must act under a law that is far from simple in its terms. The regulations are as technical, if not more technical, in detail than the Act.[42]

The Court further pointed out that a number of possibilities are

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[36] Fulford v. Forman, *supra* note 25, at n.6.

[37] Edwards v. Owens, 137 F. Supp. 63 (E.D. Mo. 1955).

[38] Simpson v. Laprade, 248 F. Supp. 399 (W.D. Va. 1965).

[39] *Id.*

[40] Review Committee, Venue II v. Reynolds, 391 F.2d 430 (5th Cir. 1968); Gladney v. Review Committee, 230 F. Supp. 35 (W.D. La. 1964), *aff'd*, 354 F.2d 990 (5th Cir. 1966).

[41] Kephart v. Wilson, 219 F. Supp. 801 (W.D. Tex. 1963).

[42] Edwards v. Owens, *supra* note 37, at 65-66.

given to the County Committee for the utilization of the reserve, but the County Committee has been granted the power to determine which of the classes will be recognized.[43] The degree to which the findings of the County Committee will be supported is observable from the statement that "[T]he findings of the county committee leave much to be desired. But we take note that we are dealing with documents prepared by laymen trying to follow a law and regulations written by highly trained lawyers."[44]

In support of the proposition which implies a certain favoritism for the County Committee, it should be noted that in all those cases in which the courts have spoken on the burden of proof, the obligation rests clearly on the plaintiff farmer. In *Owens*[45] the court spoke in terms of a "burden of demonstrating that the findings of the county committee have no basis in the law or regulations which are valid under the law."[46] More succinctly put, "[I]n a proceeding before the Review Committee, the burden of proof is on the respondent [plaintiff] as to all issues of fact raised by him."[47]

That the courts may be shifting the burden of proof somewhat has become apparent only recently. After noting the holding of *Lee v. DeBerry*, the district court in *Loutares v. Smith*[48] stated that:

> [A]ssuming that statement to be applicable in this case, the Court is of the opinion that a burden rests upon the County Committee prior to the time the appellant therefrom bears the burden before the Review Committee. The County Committee has the burden, or perhaps the obligation, to place before the Review Committee those facts upon which its ruling was founded. This obligation to present, if you please, a *prima facie* showing that its ruling was based upon some set of facts must be met prior to the time the burden of proof before the Review Committee is assumed by the appellant. . . .
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> The essential element of this obligation is that the County Committee inform the appellant and the Review Committee of those facts upon which its ruling is based. Until such time as the County Committee fulfills this function, the burden of proof does not rest upon the appellant.[49]

In conclusion, the usual measure of proof mentioned is, as with

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[43] *Id.* at 66-67.

[44] *Id.* at 66.

[45] Edwards v. Owens, *supra* note 37.

[46] *Id.* at 66.

[47] Lee v. DeBerry, 65 S.E.2d 775, 780 (S.C. 1951).

[48] 285 F. Supp. 578 (E.D.N.C. 1968).

[49] *Id.* at 583.

most civil cases, a preponderance of the evidence,[50] although some cases speak in terms of a heavy burden of proof.[51]

D. *Local Determinations: Finality v. Rehearing*

A moderate amount of confusion exists concerning the finality of a determination by the County Committee and the Review Committee. Regulations have been promulgated which allow the Review Committee's hearings to be reopened within fifteen days on the motion of the Review Committee; within fifteen days upon the written request of the applicant, the County Committee or another interested party, such written request showing new evidence; or within fifteen days upon written notice by the Secretary.[52] Confusion exists, however, because of a judicial remark that:

> [T]he administrative agency, as well as the farmer, is prohibited from re-opening proceedings unless an appeal has been filed timely under §1363 or there is an allegation of fraud or misrepresentation permitting the invocation of 7 C.F.R. §719.11 (f) (6) . . . .[53]

The problem is the reference to § 1363 not 7 C.F.R. § 719.11 (f) (6), which permits a reopening in the rather unusual situation where there has been misrepresentation by an owner who is displaced by an agency having the right of eminent domain. Section 1363 does not deal with reopening proceedings, but the remarks by the court imply that if a § 1363 appeal, i.e., an appeal to the Review Committee from a determination of the County Committee, is filed, the right to reopen a Review Committee hearing is automatically obtained. This is clearly not in harmony with the above cited regulations. The discord between whether the appeal must be filed within fifteen days or whether filing under § 1363 allows an automatic rehearing may be made to harmonize, however, by realizing that the court is probably not establishing a basis for reopening, but rather is stating a condition precedent which must be met before the regulations for reopening can be employed.

The difficult area was further confused by the remarks of the district court in *Lindsey Brothers v. Jones*.[54] Here the Secretary of Agriculture attempted to alter a cotton allotment and compliance determination which had been issued by personnel of the ASCS office and which had become final as to the producer, who had substantially complied with

[50] Hawkins v. State Agriculture Stabilization and Conversation Comm., 149 F. Supp. 681 (S.D. Tex. 1957), *aff'd*, 252 F.2d 570 (5th Cir. 1958).

[51] Fulford v. Forman, 144 F. Supp. 536 (N.D. Tex. 1956), *aff'd*, 245 F.2d 145 (5th Cir. 1957).

[52] 7 C.F.R. § 711.25 (1969).

[53] Gladney v. Review Comm., 257 F. Supp. 57, 61 (W.D. La. 1966).

[54] Lindsey Bros. v. Jones, 271 F. Supp. 933 (E.D. Ark. 1967).

the program. In this case the determination of compliance had been made on September 4, and the County Committee determination that the farmer was not in compliance had been made on October 31, after compliance had been attempted and the farmer had actually started to harvest. The district court felt that once the farmer had started and had substantially complied with any directives of the ASCS office, changes could not then be made. Otherwise, the farmers would be subject to a "unilateral" program. The court went on to say that the "A.S.C. County Committee cannot retroactively revise allotments without a grant of such powers by Congress."[55]

The implication of *Lindsey Brothers v. Jones*[56] is that appeals and requests by any party for the reopening of proceedings—be they of the County Committee or the Review Committee—must be made within the regulatory period, especially if the farmer has already complied with the determinations of the administrative unit. Apparently a hearing after the fifteen day limit would be impossible. Any doubts concerning the time limit, however, were largely cleared up by the Eighth Circuit Court of Appeals, which reversed the case and remanded it to the district court.[57] The appeals court pointed out that a determination of compliance and the farmer's actual compliance in no way produced finality. The farmer was not protected, since even if a penalty were assessed against him for overplanting after it had been determined that he was in compliance, he had a right to appeal the penalty, and the compliance determination is only one fact to be considered in refuting the penalty.[58] Finality came only when "the county committee notifie[d] the producer that it ha[d] assessed a penalty."[59]

The Eighth Circuit, in distinguishing *United States v. Kopf*,[60] pointed out that finality of a determination was related both to the individuals making such determination and to the nature of the determination. The court in *Jones* declared:

> In *Kopf*, the yield determination was made by the ASCS committee after a full evidentiary hearing. Here, it was made by the personnel of a county ASCS office without a hearing. We also note that the administrative action was of an executive, rather than an adjudicative, nature and was thus not binding in a *res judicata* sense.[61]

In summarizing this section one should note that:

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[55] *Id.* at 938.

[56] Lindsey Bros. v. Jones, *supra* note 54.

[57] Jones v. Hughes, 400 F.2d 585 (8th Cir. 1968).

[58] *Id.* at 589.

[59] *Id.*

[60] 379 F.2d 8 (8th Cir. 1967).

[61] Jones v. Hughes, *supra* note 57, at 589-90.

(1) Regulations and case law provide for reopening a County Committee or a Review Committee proceeding if:

(a) the initial condition precedent step of timely appealing to the Review Committee is complied with, and

(b) after such compliance, the regulations of the Department are followed.

(2) A determination, even though erroneous, may be considered binding on all parties, if:

(a) it was rendered after a full evidentiary hearing, and not by office personnel, and,

(b) the farmer had, in good faith, substantially relied upon and complied with the determination.

E. *Court Review*

1. Exhaustion of Administrative Remedies

If the farmer is convinced that the Review Committee has acted as capriciously as the County Committee, he may institute proceedings for court review of the determination of the Review Committee.[62] The farmer cannot, however, bypass the Review Committee and initially commence a judicial proceeding. The courts generally have been clear in demanding that a farmer must exhaust his administrative remedies before he can have access to the courts.[63] This appears to be especially true with non-constitutional matters. There is some question, however, on whether the failure to seek administrative review will extinguish a constitutional right. In *Miller v. United States*[64] the Sixth Circuit stated:

> It is unnecessary to cite the countless decisions with reference to the rule of exhaustion of administrative remedies and its application to the finality of determination. The doctrine applies to a remedy provided by regulation as well as by statute. . . . The District Court and this court are deprived of jurisdiction by defendant's failure to seek review. . . .
>
> Moreover, defendant's inaction precludes him from raising his constitutional questions, for these questions clearly bear upon the 'legal validity' of the determinations. 7 U.S.C. 1367. . . .[65]

The Third Circuit, however, declared in a case involving a plaintiff, who had not exhausted his administrative remedies by appealing to the local Review Committee, that it did not think that:

> Congress, by stipulating in the Act for the review of a farm

[62] The provisions for Court review are 7 U.S.C. §§ 1365-66 (1964).
[63] Weir v. United States, 310 F.2d 149 (8th Cir. 1962).
[64] 242 F.2d 392, 395 (6th Cir. 1957), *cert. denied*, 355 U.S. 833 (1957).
[65] *Id.* at 395.

> marketing quota by a review committee, can prevent an aggrieved farmer from raising the question of the Act's constitutionality for the first time in the district court as a defense to an action for penalties under the Act. For the question of the constitutionality of the Act is quite a different question from whether the farmer's quota is proper and it is a question with which a committee set up under the Act is not competent to deal . . . .[66]

Even the rule that the plaintiff must exhaust his administrative remedies, especially for non-constitutional complaints, is not without exceptions. In one case, involving a plaintiff who informed the local ASCS officials that she desired to appeal a decision, the local Committee erroneously informed her that her appeal should be to the State Committee. The plaintiff, therefore, failed to seek recovery from the local Review Committee on the advice of the local Committee. The court pointed out that:

> [D]efendants, having induced plaintiff to pursue the wrong course, cannot now successfully assert that this court is without jurisdiction to entertain the action because plaintiff has not exhausted her administrative remedies.[67]

A final, unanswered question in the area of exhaustion of administrative remedies concerns which administrative remedies must be exhausted. The Act only mentions the necessity of going to the Review Committee before one can seek the benefits of a court determination. The problem is that other administrative remedies exist and can be found within the regulations. When a court states that all administrative remedies must be exhausted, are they including these other regulatory administrative remedies as well?

Two such sets of alternate administrative remedies are found within the *Code of Federal Regulations*. One is primarily concerned with enlarging the provisions found within the Act.[68] No really new administrative remedies are found within the regulations. Another administrative procedure, however, permits a whole galaxy of new administrative remedies.[69] This alternative procedure allows the participant or producer who is dissatisfied with "any determination initially made by the county committee or office" to have such determination examined by the state and local authorities and even by the Deputy Administrator.[70]

Would all the above administrative remedies have to be exhausted? A personal observation produces a response in the negative. It is a well-

[66] United States v. Kissinger, 250 F.2d 940, 941-42 (3d Cir. 1957).
[67] Hart v. Hassell, 250 F. Supp. 893, 896 (E.D.N.C. 1966).
[68] 7 C.F.R. § 711 (1969).
[69] 7 C.F.R. § 780 (1969).
[70] 7 C.F.R. § 780.3 (1970).

established principle in the area of administrative law that when regulations and statutes differ, one must look to the statute as controlling.[71] It would appear for this reason that the plaintiff need only appeal to the Review Committee before invoking the authority of the courts.

2. Choice of Forum and Removal

The statute allows the plaintiff to institute his action "in the United States district court, or . . . in any court of record of the state having general jurisdiction, sitting in the county or the district in which his farm is located. . . ."[72] As was pointed out by the United States Court of Appeals for the Tenth Circuit, however, "[a]lthough the statute gives the farmer . . . a choice of forum, it does not guarantee that his choice shall remain undisturbed."[73] In this instance, the appellant had initially commenced an action in a state court of limited jurisdiction. The appellate court, after noting that the statute granted concurrent jurisdiction to the federal and to the state courts, noted that "where original jurisdiction exists in the federal courts removal is allowed by 28 U.S.C. 1441 (a) unless specifically prohibited by an act of Congress."[74] It should be observed, however, that although removal was in fact permissible, "the federal court has only such jurisdiction as was possessed by the state court from which the action was removed."[75] Since the plaintiff began his action in a state court of limited jurisdiction while the statute required a court of general jurisdiction, the state court had no jurisdiction and consequently the federal court received none and was required to dismiss the case.[76]

3. The Role of the Courts: Fact v. Law

Whether the plaintiff enters into a state or a federal court, he should be aware that the determination of the administrative bodies will usually be favorably supported.

The courts have consistently taken the position that:

> [T]he specialized agency charged with the duty of implementing the statutory program is entrusted by Congress with power to issue and apply regulations necessary to make that program effective. A reviewing court should not substitute its views for those of the agency, unless the interpretation and application of the regulation in and to a particular case is so unreasonable,

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[71] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 24 (1st ed. 1959).

[72] 7 U.S.C. § 1365 (1964).

[73] Beckmon v. Graves, 360 F.2d 148, 149 (10th Cir. 1966).

[74] *Id.* at 149.

[75] *Id.* at 150.

[76] *Id.*

> arbitrary or capricious that the court must conclude that the administrative action was unlawful.[77]

Other cases speak in terms of giving the administrative determinations controlling weight unless plainly erroneous[78] or of not overruling the Review Committee if there is substantial evidence to support the Committee's conclusions.[79] The usual judicial observation has been that:

> The committees possess varying ambits of power under the Agricultural programs for the different commodities, and abuse of their discretion or a misuse of their powers is of course correctable by the courts . . . .[80]

In what ways may the courts, cognizant of this need to support administrative determinations, operate? The most common qualification placed upon the courts as a result of interpretations of the statute,[81] and one which may be anticipated from the previous observations, is that the courts must not overturn the fact findings of the Review Committee. The judiciary is limited to questions of law. In an action to review the determinations of a Review Committee it has been pointed out that:

> This case is not a commonplace one in which the Court is clothed with its ordinary jurisdiction, legal or equitable. It is a special statutory proceeding in which jurisdiction extends only to review the action of the review committee, and the Court is limited in its scope of inquiry to questions of law and is bound by the findings of fact of the review committee if there is any competent evidence to support such findings. 7 U.S.C. § 1366.[82]

So strong is the inhibition against courts making determinations of fact that, if a court determines that the committee has arbitrarily not followed the law, the court must remand the case to the County Committee for new determinations of fact. A court cannot make these factual determinations itself.[83] It should be noted that the Act provides that if, after a court proceeding has been instituted, an application is made to adduce new evidence, this additional evidence is to be "taken before the review committee . . . ."[84] The court will then make a determination based upon the original record and the supplementary

[77] Mills v. Toppert, 185 F. Supp. 160, 164 (S.D. Ill. 1960).

[78] Dighton v. Coffman, 179 F. Supp. 682 (E.D. Ill. 1959).

[79] Lindsey Bros. v. Jones, *supra* note 54.

[80] Rakestraw v. Winchester, 254 F. Supp. 729, 734 (M.D.N.C. 1966).

[81] 7 U.S.C. § 1366 (1964) provides that "[t]he review by the court shall be limited to questions of law . . . ."

[82] Graham v. Lawrimore, 185 F. Supp. 761, 764 (E.D.S.C. 1960).

[83] Review Comm., Venue II v. Reynolds, 391 F.2d 430 (5th Cir. 1968).

[84] 7 U.S.C. § 1366 (1964).

record.[85] If the Review Committee's determinations were made in accordance with the law, the court shall affirm them;[86] if the law has not been complied with:

> [The court must] remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.[87]

4. Mootness v. Establishment of Histories

The nature of the allotment system prevents either party to the litigation from declaring that a moot question is involved. In an action in which the Review Committee was appealing the action of a federal district court which had overruled the Review Committee's refusal to interfere with a determination by the County Committee, the question of mootness was presented. The court disposed of this problem in one short paragraph:

> The question of mootness perhaps should initially be mentioned inasmuch as the plantings of the 1959 crop year in Nebraska have already been made. We feel that the case is not moot. This is because of the existence of possible penalties and because of the use of 1959 as one of the base period years in connection with the 1960 wheat crop.[88]

Thus, it would appear that the question of mootness could not bar a suit until the importance of the year in assessing penalties and in establishing a history no longer exists.

Not only is the administrative unit prevented from contending that once the crop has been planted and harvested it is not subject to review, but the farmer is also prevented from using such a defense. In *Gladney v. Review Committee*,[89] the plaintiff erroneously had received a large allotment for a number of years, and he contended that the "1964, 1965, and 1966 allotments were final and must stand and that they must serve as the basis for his 1967 allotment."[90] The court of appeals disposed of this contention declaring:

> Gladney [the plaintiff] has received a windfall for three years by enjoying the benefits of an allotment ultimately found to be erroneous. The District Court was correct in finding that Gladney may not continue to capitalize on the initial error and

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Review Comm., Venue VII v. Willey, 275 F.2d 264, 271 (8th Cir. 1960).
[89] 380 F.2d 929 (5th Cir. 1967).
[90] *Id.* at 932.

> that it should be left to the Committee to decide . . . how much of the reserve acreage should be allotted to him . . . .[91]

5. Appellate Review

The farmer can, of course, appeal a decision of the district court. Most of the principles which are applicable to the district court are also applicable to the appeals court. Not unexpectedly, it has been pointed out that the circuit court cannot "substitute its own factual determination for that of the County and Review Commitees."[92] In *Gladney* the plaintiff contended that by virtue of § 1366, if the appeals court found an error of law, it was obligated to remand the case.[93] The bench pointedly rejected this and held that "the power of the Court of Appeals to *modify* a judgment of the District Court lawfully before it without reversing or remanding the case is well established."[94]

Perhaps the most direct remark concerning the power of the appellate court was made by the Eighth Circuit. In an action which had originally been brought by cotton farmers in the district court to review a decision by the Review Committee, the Eighth Circuit disposed of any doubt concerning the power of the circuit courts with the simple statement that the "power of this Court [Circuit Court of Appeals] is coextensive with that of the District Court." (citation omitted).[95]

IV. Appealing Determinations of the State Committee

A. *Court Review*

Much rarer than an appeal of a County Committee determination is an appeal of a determination of the State Committee. Very often the farmer may feel he has been injured because the State Committee acted unfairly with respect to his county, i.e., his allotment was less than it might have been, not because of any action by the County Committee, but because of an arbitrary State Committee determination. What can the farmer do to protect such a determination?

Formerly, the chances of a successful appeal against the State Committee were marginal at best. As has previously been pointed out, the farmer can not seek relief against the State Committee through the local Review Committee.[96] Even more far reaching limitations, however,

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[91] *Id.* at 933.

[92] Gladney v. Review Comm., *supra* note 53, at 62.

[93] *Id.* at 62.

[94] *Id.* at 62-63.

[95] Jones v. Hughes, supra note 57, at 590.

[96] Fulford v. Forman, *supra* note 25.

were placed on suits against the State Committee in the case of *Hawkins v. State Agriculture Stabilization and Conservation Committee.*[97] Here several farmers were protesting the actions of the State Committee in distributing the state reserve. Various individuals, including the plaintiff, had appeared before the State Committee while it was considering how to allocate the state reserve. The plaintiffs sought an injunction and a declaratory judgment in the district court against the State Committee to prevent the reserve allocation from being made in the manner proposed when the State Committee establishes a system for allocating the reserve.

The court came to a number of conclusions:

> 1. Determination of the amount and allocation of the State reserve is committed by law to the discretion of the State Committee, subject to final approval or disapproval in the Secretary. *The Court has no authority to substitute its judgment* on these matters for that of the Committee and Secretary and *may not decree, fix and allocate the State reserve* or order the Committee and Secretary to fix and allocate it in a particular amount and in a specified manner. (citation omitted).
> 2. The determination and allocation of the State reserve is a rule-making function. The investigations and deliberations of the Committee and Secretary, on the basis of which this function is exercised, do not require formal hearings or a formal record. (emphasis added).[98]

In affirming on the basis that the State Committee had been within its congressionally granted power and discretion, the Fifth Circuit declared that there was a question which was not going to be decided, concerning whether "Congress has precluded a judicial review of acreage apportionment among counties."[99]

The above case was preceded by *Fulford v. Forman*[100] in which the circuit court had also avoided the issue of seeking relief against the State Committee. After observing that the Review Committee could not overrule the State Committee, the circuit court declared:

> This does not mean that the cotton farmers are necessarily without the means of judicial review for those acts by the State Committee, the Secretary, or his other agencies, deemed to be not in accordance with law. What those rights are, or where, or how they may be asserted is not before us.[101]

[97] Hawkins v. State Agriculture Stabilization and Conservation Comm., *supra* note 50.

[98] *Id.* at 687.

[99] Hawkins v. State Agriculture Stabilization and Conservation Comm., 252 F.2d 570, 571 (5th Cir. 1958).

[100] Fulford v. Forman, *supra* note 25.

[101] *Id.* at 153.

The court did, however, by way of a footnote, offer a suggestion on a means of getting a State Committee before the courts "without . . . holding that any such remedy is or is not open, or the conditions under which it might be available or used, and reserving all such questions for unfettered future decision . . . ."[102] The avenue suggested by the court is utilization of the provisions of the Administrative Procedure Act.[103] The *Fulford* court pointed out that unless the Agricultural Adjustment Act of 1938 indicated "a purpose to preclude all judicial review or commit all to the unreviewable discretion of the Administrator . . ." then the Administrative Procedure Act may be utilized.[104] The Procedure Act provides that in the absence of "any applicable form of legal action . . . agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."[105] The actions reviewable include any "preliminary, procedural, or intermediate agency action or ruling not directly reviewable . . . ."[106]

One might also suppose that the Administrative Procedures Act is made applicable by the general applicability section of the Procedure Act.[107] This section states that the Procedure Act applies unless statutes preclude judicial review or unless agency action is granted by law to the discretion of the agency. Neither of these two qualifications are present in the Agricultural Adjustment Act so as to preclude the application of the Procedure Act.

In subsequent cases, the Administrative Procedure Act has apparently been embraced by the courts. In *Morrow v. Clayton*,[108] an action was brought under the Administrative Procedure Act, and the question of whether courts have jurisdiction over the members of the State Agricultural Stabilization and Conservation Committee and its Executive Director was presented. The Tenth Circuit, after pointing out that the Review Committee had no jurisdiction over the State Committee under the *Fulford* rule,[109] declared that:

> A careful examination of the provisions of the [Agricultural Adjustment] Act reveals that Congress never intended for the Review Committee to have jurisdiction to review the administrative actions of the State Committee, the Administrator, the Secretary or their duly authorized agents at a level above the

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[102] *Id.* at 153 n.23.
[103] 5 U.S.C. §§ 701 *et seq.* (Supp. IV, 1968).
[104] Fulford v. Forman, *supra* note 25, at 153 n.23.
[105] 5 U.S.C. § 703 (Supp. IV, 1968).
[106] 5 U.S.C. § 704 (Supp. IV, 1968).
[107] 7 U.S.C. § 701 (Supp. IV, 1968).
[108] 326 F.2d 36 (10th Cir. 1963).
[109] *Id.* at 43.

> county committee. It follows that the appellees have no administrative remedy and they cannot be required to exhaust something which they do not have.[110]

In a later case the Secretary attacked the use of the Administrative Procedure Act on the ground that:

> [J]udicial review, and thus jurisdiction, is precluded under the provision of that section which excepts agency action from judicial review where a statute precludes judicial review, or where agency action is by law committed to agency discretion. § 1009 (a).[111]

The Fifth Circuit Court of Appeals disagreed by stating that the statute must clearly indicate an intention on the part of Congress to preclude judicial review.[112] Title 7 U.S.C. §§ 1363-66 does permit review by the local Review Committee, which is limited to County Committee determinations. The court of appeals, however, concluded that "there is no basis in the Agricultural Adjustment Act for attributing such an intention [to preclude a judicial challenge to a state committee determination] to Congress . . . ."[113] The Fifth Circuit further rejected the contention that the Administrative Procedure Act was unavailable because "the action of the Secretary was by law committed to his discretion."[114] The Secretary is not unfettered, declared the judges, but is required to operate within the statute.[115]

A final path which the farmer might employ as a means of obtaining entry into the federal courts was recently suggested. In *Drew v. Lawrimore*,[116] the plaintiff was not only suing the County Committee by virtue of §§ 1365 and 1366, but he was also suing the Secretary and the State Committee under three statutory sections which apparently had not been used previously.[117] These were 7 U.S.C. § 1376,[118]

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[110] *Id.*

[111] Freeman v. Brown, 342 F.2d 205, 212 (5th Cir. 1965).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Drew v. Lawrimore, 257 F. Supp. 659 (D.S.C. 1966).

[117] *Id.* at 662.

[118] Court jurisdiction; duties of United States attorneys; remedies and penalties as additional. The several district courts of the United States are vested with jurisdiction specifically to enforce the provisions of this subchapter. If and when the Secretary shall so request, it shall be the duty of the several United States attorneys in their respective districts, under the direction of the Attorney General, to institute proceedings to collect the penalties provided in this subchapter. The remedies and penalties provided for herein shall be in addition to, and not exclusive of, any of the remedies or penalties under existing law. 7 U.S.C. § 1376 (1964).

28 U.S.C. § 2201,[119] and § 1361.[120] The district court accepted this as a basis of jurisdiction without even considering it worthy of comment. It perhaps should be noted, however, that the Fourth Circuit, in reversing the district court on other grounds, pointed out that the district court had the power to issue a writ of mandamus but declared:

> We noted in Sleeth v. Dairy Prods. Co., 228 F.2d 165, at 167-168 (4th Cir. 1955), that the rule is well established that "courts will not issue a mandamus or other order to control the action of an executive or administrative officer in the discharge of statutory duties involving the exercise of judgment or discretion, unless the attempted performance of the duty amounts to an abuse of discretion.[121]

B. *Administrative Review*

Possibly because of the doubt left in some of the cases as to whether the State Committee could be brought into court or perhaps because there were no administrative provisions for reviewing a State Committee determination, regulations were promulgated so as to allow administrative review of State Committee determinations. It is now provided that:

> Any producer or participant who is dissatisfied with any determination initially made by . . . [the] State Committee . . . may obtain a reconsideration of such determination and an informal hearing in connection therewith by filing a request for reconsideration with the county committee. If the initial determination was made by the State committee . . . the county committee shall forward the request for reconsideration to the authority initially making the determination.[122]

It would, therefore, appear that there exists an administrative route which may be followed. It may be that this administrative reconsideration must be sought before the previously mentioned judicial review of a State Committee determination can be sought. The exhaustion of administrative remedies has never been specifically required before allowing judicial review of state committee determinations, since no

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[119] Creation of remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. 28 U.S.C. § 2201 (1964).

[120] Action to compel an officer of the United States to perform his duty. The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. 28 U.S.C. § 1361 (1964).

[121] Drew v. Lawrimore, 380 F.2d 479, 483 (5th Cir. 1967).

[122] 7 C.F.R. § 780.3 (1969).

remedy existed prior to 1964.[123] The implication of those cases which held that the Administrative Procedure Act could be employed since there were no administrative remedies[124] would appear to be that the administrative remedies must be exhausted before a judicial review of a State Committee determination is possible.

V. APPEALING DETERMINATIONS OF THE SECRETARY OF AGRICULTURE

The fewest number of appeals are lodged against the Secretary of Agriculture. If the farmer is injured by an action of the Secretary, however, he should not feel that the Secretary is immune from suit.

The methods of gaining jurisdiction against the State Committee are also applicable for use against the Secretary. In *Morrow v. Clayton*[125] and *Drew v. Lawrimore*[126] both the Secretary and the State Committee were being sued. In *Freeman v. Brown*[127] the Secretary of Agriculture was the only defendant involved in the litigation. Jurisdiction was granted in these cases.

Besides the methods mentioned above, there is an additional route that the distraught farmer may follow. The General Venue Section of the United States Code provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or any agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.[128]

Section 1391 goes on to say that the summons and complaint to the officer or agency "may be made by certified mail beyond the territorial limits of the district in which the action is brought."[129]

This section clearly grants venue to the district courts. Personal jurisdiction is granted, of course, by the mere fact that service is permitted and provided for. Subject matter jurisdiction is obtained since the dispute will be arising under a federal statutory scheme, the Agricultural Adjustment Act, or because a Constitutional question may be

[123] 7 C.F.R. § 780.3 first appeared in 29 F.R. 8200 (June 30, 1964).
[124] Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963).
[125] *Id.*
[126] Drew v. Lawrimore, *supra* note 116.
[127] Freeman v. Brown, *supra* note 111.
[128] 28 U.S.C. § 1391(e) (1964).
[129] *Id.*

involved. Section 1331 may be employed, since the federal district court "shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."[130]

Of course, the problem with using § 1331 is the $10,000 justiciable amount. Another route may be employed to gain subject matter jurisdiction which does not involve any required amount. This, of course, is § 1337 which provides that "[T]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."[131] The United States Supreme Court held that a suit under the provisions of the Agricultural Adjustment Act of 1938, "[T]hough no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction . . . the case falls within subsection (8)[132] which confers jurisdiction upon District Courts "of all suits and proceedings arising under any law regulating commerce."[133]

VI. SUMMARY

Thus, the farmer will note that both judicial and administrative procedures exist which permit a review of a determination by the County and the Review Committee. Judicial review of the Secretary is also possible, but there is no administrative review since he has an unspoken immunity as head of the agency.

One should observe that an appeal is an uphill fight and that the appeal procedures are designed to insure a sense of fair play and due process. The farmer may well succeed if any administrative link in the entire chain has acted capriciously or arbitrarily. If, however, the administrative units have merely exercised the discretion entrusted to them, then an appeal seems doomed to failure.

C. Michael Malski

[130] 28 U.S.C. § 1331 (1964).
[131] 28 U.S.C. § 1337 (1964).
[132] 28 U.S.C. § 1337 (1964) previously appeared under 28 U.S.C. § 41(8) (1940).
[133] Mulford v. Smith, 307 U.S. 38, 46 (1939).