

precede such action, becomes a matter of greater urgency and must be determined by evaluating the various factors discussed below.<sup>811</sup>

One such factor is whether agency action is subject to later judicial scrutiny.<sup>812</sup> In one of the initial decisions construing the Due Process Clause of the Fifth Amendment, the Court upheld the authority of the Secretary of the Treasury, acting pursuant to statute, to obtain money from a collector of customs alleged to be in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and requiring him to sue for recovery of his property. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable.<sup>813</sup>

In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issuing notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each stockholder to contest his liability for such an assessment by an affidavit of illegality. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.<sup>814</sup>

It is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.<sup>815</sup> With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment. The person may be

---

<sup>811</sup> 410 U.S. at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). See *Londoner v. City of Denver*, 210 U.S. 373 (1908).

<sup>812</sup> "It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 246-47 (1944).

<sup>813</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

<sup>814</sup> *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29 (1928).

<sup>815</sup> *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918); *Baker v. Baker, Eccles & Co.*, 242 U.S. 294, 403 (1917); *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230, 236 (1900).