# Attorney General's Manual

*on the*

# Administrative Procedure Act

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Prepared by the
United States Department of Justice
TOM C. CLARK
Attorney General
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## INTRODUCTION

June 11, 1946, the date on which the Administrative Procedure Act was approved by President Truman, is notable in the history of the governmental process. The Act sets a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government. It effectuates needed reforms in the administrative process and at the same time preserves the effectiveness of the laws which are enforced by the administrative agencies of the Government. The members of the Seventy-Ninth Congress who worked so assiduously on the McCarran-Sumners-Walter bill showed statesmanship and wisdom in dealing with the difficult problems thus presented.

The Department of Justice played an active role in the development of the Administrative Procedure Act. In 1938, at a time when there was criticism of Federal administrative agencies, Homer Cummings, as Attorney General, suggested to the late President Roosevelt that the Department of Justice be authorized to conduct a full inquiry into the administrative process. In response to this suggestion, President Roosevelt requested Attorney General Cummings to appoint a committee to make a thorough study of existing administrative procedures and to submit whatever recommendations were deemed advisable. For this purpose the Attorney General appointed a committee of eminent lawyers, jurists, scholars and administrators.

For a period of two years this committee, known as the Attorney General's Committee on Administrative Procedure, devoted itself to the study of the administrative process. Its work culminated in the issuance of 27 monographs on the operations of the more important Government agencies it had investigated, as well as in a Final Report to the President and to the Congress. This Final Report is a landmark in the field of administrative law. In fact, the main origins of the present Administrative Procedure Act may be found in that Report, and in the so-called majority and minority recommendations submitted by the Committee. These recommendations were the subject of extensive hearings held before a subcommittee of the Senate Committee on the Judiciary in 1941.

There was a lull in legislative activities in the field of administrative law during the next few years by reason of the impact of war. But when Congress in 1945 resumed consideration of legislation in this field, the Chairmen of both the Senate and House Committees on the Judiciary called upon this Department for its assistance. The invitation was accepted, and the task was assigned to the Office of the Assistant Solicitor General. For many months the members of that Office assisted in the drafting and revision of the bill (S. 7) which developed into the Administrative Procedure Act.

Finally, in a letter dated October 19, 1945, to the Chairmen of both Committees on the Judiciary, I endorsed S. 7 as revised. I concluded that "The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government." Sen. Rep. 752, 79th Cong., 1st sess., pp. 37-38. The bill then moved in regular course through both Committees with a few minor modifications (H.R. Rep. 1980, 79th Cong., 2nd sess., p. 57). It was subsequently adopted by both Houses of Congress without a dissenting vote.

After the Administrative Procedure Act was signed by President Truman on June 11, 1946, it became evident that a major phase of our work had just begun. Government agencies were calling upon us for advice on the meaning of various provisions of the Act. We endeavored to furnish that advice promptly and in detail to every agency which consulted us. At length I decided that we could offer a definite service by preparing a general analysis of the provisions of the Act in the light of our experience. This manual is the result of that effort. It does not purport to be exhaustive. It was intended primarily as a guide to the agencies in adjusting their procedures to the requirements of the Act.

George T. Washington, the Assistant Solicitor General, was assigned the tasks I have just described—both the rendition of advice to the agencies and the preparation of the manual. He had assisted in drafting the Act and was familiar with the administrative problems of the agencies. Two members of his staff, Robert Ginnane and David Reich, took the major burden of the work, under the supervision and direction of Mr. Washington and myself. The manner in which the task has been carried out has my full approval.



While the manual was intended originally for distribution only to Government agencies, public demand for it has been so great that I have decided to make it generally available. I trust that it will prove helpful to those who find a need for it.

A word of explanation as to the manner in which the manual is arranged should be helpful. It has been prepared mainly on a section by section analysis of the Act. Each of the major sections is treated in a separate chapter. There has been no separate treatment of section 11, covering the appointment of examiners, since the Civil Service Commission is entrusted with the responsibilities under that section and is presently engaged in working out the necessary requirements, assisted by an Advisory Committee of experts designated by the Commission. No chapter as such is being devoted to either section 2 (definitions) or to section 12 (construction and effect) for the reason that by themselves they have little meaning except in connection with the functional aspects of the Act. However, there is a separate chapter on two important phases of section 2, namely, the coverage of the Act and the fundamental distinction between rule making and adjudication.

Tom C. Clark
Attorney General

August 27, 1947

## NOTE CONCERNING MANNER OF CITATION OF LEGISLATIVE MATERIAL

*The legislative history of the Administrative Procedure Act really begins with the Final Report of the Attorney General's Committee on Administrative Procedure (cited hereinafter as Final Report). This Report led to the introduction in Congress of the so-called majority and minority bills, respectively designated as S. 675 and S. 674, 77th Cong., 1st sess. These bills, together with S. 918, formed the basis for the extensive and valuable hearings held in 1941 before a subcommittee of the Senate Committee on the Judiciary (cited hereinafter as Senate Hearings (1941)). In 1945, the House Committee on the Judiciary held brief hearings (cited hereinafter as House Hearings (1945)) on various administrative procedure bills, of which H.R. 1203, 79th Cong., 1st sess., was the precursor of the present Act. Also in June 1945, the Senate Committee on the Judiciary issued a comparative print, with comments, which is an essential part of the legislative history. The Committee reports on the Act are Sen. Rep. 752, 79th Cong., 1st sess. (cited hereinafter as Sen. Rep.). and H.R. Rep. 1980, 79th Cong., 2nd sess. (cited hereinafter as H.R. Rep.). In October 1945, the Attorney General, at the request of the Senate Committee on the Judiciary, submitted a letter, with memorandum attached, setting forth the understanding of the Department of Justice as to the purpose and meaning of the various provisions of the bill (S. 7). This letter and memorandum constitute Appendix B of the Senate Committee Report and have been printed as Appendix B to this manual.*

*There may be obtained from the Government Printing Office Sen. Doc. No. 248, 79th Cong., 2nd sess., entitled "Administrative Procedure Act—Legislative History" (cited hereinafter as Sen. Doc.), which contains the Senate and House debates on the Administrative Procedure Act, together with all the documents mentioned above, except the Final Report of the Attorney General's Committee on Administrative Procedure and the Senate Hearings (1941). Wherever appropriate, there will be two citations, one to the particular report or hearing in which the legislative material appears, the other a parenthetical reference to the corresponding page in the Senate Document.*



# I

## FUNDAMENTAL CONCEPTS

a. *Basic Purposes of the Administrative Procedure Act*

The Administrative Procedure Act may be said to have four basic purposes:

1. To require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3).

2. To provide for public participation in the rule making process (sec. 4).

3. To prescribe uniform standards for the conduct of formal rule making (sec. 4(b) and adjudicatory proceedings (sec. 5), i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8).

4. To restate the law of judicial review (sec. 10).

b. *Coverage of the Administrative Procedure Act*

The Administrative Procedure Act applies, with certain exceptions to be discussed, to every agency and authority of the Government. Section 2(a) of the Act reads, in part, as follows:

> "Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law.

It will be seen from the above that agency is defined as each authority of the Government of the United States, whether or not within or subject to review by another agency. This definition was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units which may have all the attributes of an agency insofar as rule making and adjudication are concerned.[1] For example, the Federal Security Agency is composed of many

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1 The legislative history of section 2(a) illustrates clearly the broad scope of the term "agency." In the Senate Comparative Print of June 1945, the term agency was explained as follows (p. 2): "It is necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or 'divisions' to have final authority. 'Authority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus, 'divisions' of the Interstate Commerce Commission and the judicial officers of the Department of Agriculture would be 'agencies' within this definition." (Sen. Doc. p. 13). And in the Senate Report the following appears at page 10: "The word 'authority' is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization." (Sen. Doc. p. 196). See also H.R. Rep. p. 19 (Sen. Doc. p. 253).

authorities which, while subject to the overall supervision of that agency, are generally independent in the exercise of their functions. Thus, the Social Security Administration within the Federal Security Agency is in complete charge of the Unemployment Compensation provisions of the Social Security Act. By virtue of the definition contained in section 2(a) of the Administrative Procedure Act, the Social Security Administration is an agency, as is its parent organization, the Federal Security Agency.

The Administrative Procedure Act applies to every authority of the Government of the United States other than Congress, the courts, the governments of the possessions, Territories, and the District of Columbia (sec. 2(a)). The term "courts" is not limited to constitutional courts, but includes the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and similar courts. Sen. Rep. p. 38 (Sen. Doc. p. 408).

While the Administrative Procedure Act covers generally all agencies of the United States, certain agencies and certain functions are specifically exempted from all the requirements of the Act with the exception of the public information requirements of section 3. Section 2(a) states, in part: "Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947;[2] Veterans' Emergency Housing Act[3] of 1946; and the Housing and Rent Act of 1947.[4]"

It will be helpful to consider each of these exceptions separately:

(1) "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them." This definition is intended to embrace such agencies as the National Railroad Adjustment Board, composed

2 This exception was added by Public Law 30, 80th Cong., 1st sess.
3 This exception was added by Public Laws 663 and 719, 79th Cong., 2d sess.
4 This exception was added by Public Law 129, 80th Cong., 1st sess.



of representatives of employers and employees. In addition, it includes agencies which have a tripartite composition in that they are composed of representatives of industry, labor and the public, such as the Railroad Retirement Board and special fact finding boards. H.R. Rep. p. 19 (Sen. Doc. p. 253); 92 Cong. Rec. 2152, 5649 (Sen. Doc. pp. 307, 355). The exemption, it will be seen, is not limited to boards which convene only occasionally, with per diem compensation, to determine, arbitrate or mediate particular disputes, but also includes similar boards or agencies composed wholly or partly of full-time paid officers of the Federal Government.

(2) "courts martial and military commissions."

(3) "military or naval authority exercised in the field in time of war or in occupied territory."

(4) "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947; Veterans' Emergency Housing Act of 1946; and the Housing and Rent Act of 1947." The functions thus exempted on the ground of their temporary nature may be classified, as to their termination, as follows:

(a) "On the termination of present hostilities"—A considerable number of statutes authorizing wartime programs and controls limit the duration of these functions by such phrases as "in time of war", "for the duration of the war", "upon cessation of hostilities as proclaimed by the President", "upon the termination of the unlimited national emergency proclaimed by the President on May 27, 1941", etc. It is clear from the legislative history of section 2(a) that the exemption is not to be limited to functions derived from statutes which provide for expiration "on the termination of present hostilities" *sic*, but rather extends to all functions which are limited as to duration by phrases such as those quoted above. House Hearings (1945) pp. 36-37 (Sen. Doc. pp. 82-83); 92 Cong. Rec., 5649 (Sen. Doc. p. 355). It is also clear that this exemption for temporary war functions is in no way affected by the circumstance that they may be continued in existence for a considerable period of time after combat operations have ceased. It is well established that statutes authorizing such temporary agencies and functions remain

in effect until a formal state of peace is restored or some earlier termination date is made effective by appropriate governmental action. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919); and the Attorney General's letter to the President, dated September 1, 1945, in H.R. Doc. 282, 79th Cong., 1st sess., p. 49. The conclusion that the exemption is not measured by the duration of actual combat operations is confirmed by the fact that this Act, containing the exemption, did not become law until June 11, 1946.

(b) "Within any fixed period thereafter (after the termination of present hostilities)"—This phrase provides exemption for functions which terminate, for example, "six months after the termination of the unlimited national emergency proclaimed by the President on May 27, 1941." It is unnecessary to repeat the discussion under (a), *supra*, as the meaning of the phrase "termination of present hostilities."

(c) "On or before July 1, 1947"—This encompasses such functions as expire on or before that date.

(d) The functions conferred by the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, the Surplus Property Act of 1944, the Veterans' Emergency Housing Act of 1946, the Sugar Control Extension Act of 1947 and the Housing and Rent Act of 1947 are specifically exempted, regardless of their expiration date. Thus the War Assets Administration, insofar as its functions are derived from the Surplus Property Act, is not subject to the provision of the Act, with the exception of section 3.

The foregoing agencies and functions have been specifically exempted from all the provisions of the Act with the exception of section 3. This means, in effect, that the rule making provisions of section 4, the adjudication provisions of section 5, and the judicial review provisions of section 10 are not applicable to them. These broad exceptions, accordingly, must be borne in mind in connection with the discussion of the other sections of the Act. Specific exceptions to various sections will be noted in the discussion of such sections.

c.—*Distinction Between Rule Making and Adjudication*

The Administrative Procedure Act prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rule making or adjudication is of fundamental importance.



"Rule" and "rule making", and "order" and "adjudication" are defined in section 2 as follows:

> (c) *Rule and rule making.* "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, cost, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.
>
> (d) *Order and adjudication.* "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.
>
> (e) *License and licensing.* "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

Since the definition of adjudication is largely a residual one, i.e., "other than rule making but including licensing", it is logical to determine first the scope of rule making. The definition of rule is not limited to substantive rules, but embraces interpretative, organizational and procedural rules as well.[5] Of particular importance is the fact that "rule" includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law. Accordingly, the approval of a corporate reorganization by the Securities and Exchange Commission, the prescription of future rates for a single named utility by the Federal Power Commission, and similar agency actions, although applicable only to named persons, constitute rule making. H.R. Rep. p. 49, fn. 1 (Sen. Doc. p. 283).

As applied to the various proceedings of Federal agencies, the definitions of "rule" and "rule making", and "order" and "adjudication" leave many questions as to whether particular proceedings are rule making or adjudication. For example, the question arises whether agency action on certain types of applications is to be deemed rule making or licensing (adjudication), in view of the fact that there is apparent overlapping between the defini-

[5] Note that section 4 (apart from 4(d)) is applicable only to substantive rules, i.e., rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards.

tion of "rule" in section 2(c) and of "license" in section 2(e). Thus, "rule" includes the "approval * * * for the future * * *", and "license" is defined to include "any agency permit, certificate, approval * * * or other form of permission."

An obvious principle of construction is that agency proceedings which fall within one of the specific categories of section 2(c), e.g., determining rates for the future, must be regarded as rule making, rather than as coming under the general and residual definition of adjudication. Furthermore, the listing of specific subjects in section 2 (c) as rule making is not intended to be exclusive. It is illustrative only. H.R. Rep. 20 (Sen. Doc. p. 254). Thus, in determining whether agency action on a particular type of application is "rule making", the purposes of the statute involved and the considerations which the agency is required to weigh in granting or withholding its approval will be relevant; if the factors governing such approval are the same, for example, as the agency would be required to apply in approving a recapitalization or reorganization (clearly rule making), this circumstance would tend to support the conclusion that agency action on such an application is rule making.

More broadly, the entire Act is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. Sen. Rep. p. 39 (Sen. Doc. p. 225); 92 Cong. Rec. 5648 (Sen. Doc. p. 353).



Not only were the draftsmen and proponents of the bill aware of this realistic distinction between rule making and adjudication, but they shaped the entire Act around it. Even in formal rule making proceedings subject to sections 7 and 8, the Act leaves the hearing officer entirely free to consult with any other member of the agency's staff. In fact, the intermediate decision may be made by the agency itself or by a responsible officer other than the hearing officer. This reflects the fact that the purpose of the rule making proceeding is to determine policy. Policy is not made in Federal agencies by individual hearing examiners; rather it is formulated by the agency heads relying heavily upon the the expert staffs which have been hired for that purpose. And so the Act recognizes that in rule making the intermediate decisions will be more useful to the parties in advising them of the real issues in the case if such decisions reflect the views of the agency heads or of their responsible officers who assist them in determining policy. In sharp contrast is the procedure required in cases of adjudication subject to section 5(c). There the hearing officer who presides at the hearing and observes the witnesses must personally prepare the initial or recommended decision required by section 8. Also, in such adjudicatory cases, the agency officers who performed investigative or prosecuting functions in that or a factually related case may not participate in the making of decisions. These requirements reflect the characteristics of adjudication discussed above.

The foregoing discussion indicates that the residual definition of "adjudication" in section 2(d) was intended to include such proceedings as the following:

1. Proceedings instituted by the Federal Trade Commission and the National Labor Relations Board leading to the issuance of orders to cease and desist from unfair methods of competition or unfair labor practices, respectively.
2. The determination of claims for money, such as compensation claims under the Longshoremen's and Harbor Workers' Compensation Act, and claims under Title II (Old Age and Survivors' Insurance) of the Social Security Act.

3. Reparation proceedings in which the agency determines whether a shipper or other consumer is entitled to damages arising out of the alleged *past* unreasonableness of rates.
4. The determination of individual claims for benefits, such as grants-in-aid and subsidies.
5. Licensing proceedings, including the grant, denial, renewal, revocation, suspension, etc. of, for example, radio broadcasting licenses, certificates of public convenience and necessity, airman certificates, and the like.



## II

### SECTION 3—PUBLIC INFORMATION

The purpose of section 3 is to assist the public in dealing with administrative agencies by requiring agencies to make their administrative materials available in precise and current form. Section 3 should be construed broadly in the light of this purpose so as to make such material most useful to the public. The public information requirements of section 3 do not supersede the Federal Register Act (44 U.S.C. 301 *et seq.*). They are to be integrated with the existing program for publication of material in the Federal Register and the Code of Federal Regulations. The Federal Register Regulations (11 F.R. 9833) govern the manner in which documents are to be prepared prior to submission to the Division of the Federal Register. All materials issued under section 3(a) of the Act will be included in the Code of Federal Regulations and should be prepared accordingly. The Division of the Federal Register is prepared to offer assistance to the agencies in this respect.

### AGENCIES SUBJECT TO SECTION 3

This section, unlike the other provisions of the Act, is applicable to all agencies of the United States, excluding Congress, the courts, and the governments of the Territories, possessions, and the District of Columbia. Every agency, whether or not it has rule making or adjudicating functions, must comply with this section. Section 2(a), defining agencies, states specifically that even the exemption for the functions enumerated in the last sentence of that section does not extend to section 3. Accordingly, agencies performing temporary war functions must comply with this section.

### EXCEPTIONS TO REQUIREMENTS OF SECTION 3

Two exceptions have been made to section 3, namely:

"(1) *Any function of the United States requiring secrecy in the public interest.*" This would include the confidential operations of any agency, such as the confidential operations of the Federal Bureau of Investigation and the Secret Service and, in general, those aspects of any agency's law enforcement procedures the disclosure of which would reduce the utility of such

procedures. It is not restricted, however, to investigatory functions. The Comptroller of the Currency, for example, may have occasion to issue rules to national banks under such circumstances that the public interest precludes publicity.

It should be noted that the exception is made only "to the extent" that the function requires secrecy in the public interest. Such a determination must be made by the agency concerned. To the extent that the function does not require such secrecy, the publication requirements apply. Thus, the War Department obviously is not required to publish confidential matters of military organization and operation, but it would be required to publish the organization and procedure applicable to the ordinary civil functions of the Corps of Engineers.

"(2) *Any matter relating solely to the internal management of an agency.*" This exception is in line with the spirit of the public information requirements of section 3. If a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3. Thus, an agency's internal personnel and budget procedures need not be published (e.g., rules as to leaves of absence, vacation, travel, etc.). However, in case of doubt as to whether a matter is or is not one of internal management, it is suggested that the matter be published in the Federal Register, assuming it does not require secrecy in the public interest.

"Internal management of an agency" should not be construed as intra-agency only; it includes functions of internal Federal management, such as most of the functions of the Bureau of the Budget, and interdepartmental committees which are established by the President for the handling of internal management problems.

It should be understood that the following discussion of the requirements of section 3 is not applicable to the above italicized functions since they are expressly exempted from the section.

### EFFECTIVE DATE—PROSPECTIVE OPERATION

Section 3, which took effect on September 11, 1946, is prospective in operation. 92nd Cong. Rec. 5650 (Sen. Doc. p. 357). It has no application to materials issued prior to that date. To the extent that an agency's procedures and organization had been published theretofore in the Federal Register (for example, formal rules of practice), it was not necessary to republish them. Appropriate citations were frequently made to such previously published materials. Under section 3(a)(3), publication in the Federal Register is required of substantive rules (and statements of general policy and interpretations formulated and adopted by the agency for the guidance of the public) issued on and after September 11, 1946.



The Federal Register of September 11, 1946, Part II, appearing in four sections and containing 966 pages, contains the material prepared by Government agencies in initial compliance with section 3.

### SECTION 3(a)—RULES

Section 3(a) directs each agency to "separately state and currently publish in the Federal Register" its organization, procedures and substantive rules.

### SEPARATE STATEMENT

The three classes of material—organizational, procedural, and substantive rules—must be published in the Federal Register under separate and appropriate headings. Such separate statement, however, should not be carried to so logical an extreme as to inconvenience the public. For example, if an agency grants public benefits, it would be proper to include in the substantive rules relative to those benefits a statement as to the form to be used in applying for such benefits and the place of filing; however, the same procedural information must also be set forth or referred to in the separate statement of the agency's procedure. This may be accomplished by inserting in the procedural statement a notation to the effect that the procedure for obtaining public benefits may be found at a designated part of the substantive rules relative to such benefits.

### DESCRIPTION OF ORGANIZATION

Section 3(a)(1) requires that every agency shall separately state and currently publish in the Federal Register "(1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests." It is only delegations of *final* authority

which need be listed. In this connection, it should be noted that there is no requirement to list in the rules the names of specific individuals to whom power is delegated, unless such specific designation is otherwise required by law, nor is there any requirement that isolated instances of delegation made on an *ad hoc* basis be published. Senate Hearings (1941) p. 1329. However, the agency should list by title the offices or officers to whom definite delegations of final authority have been made (e.g., Claims Division of the Department of Justice, or Regional Director of the War Assets Administration). Under this subsection, it may be advisable also for agencies to state specifically the powers which may be exercised by persons serving in an "acting" capacity.

An agency's central organization should be described by listing its divisions and principal subdivisions and the functions of each. Field organizations should be described by listing the location of such offices, together with a statement of their functions. For example, if certain field offices have authority to issue interpretative or advisory opinions, this should be specified together with a statement as to whether such opinions are subject to review or confirmation by the agency's central or other office. In general, there should be a statement of the information which may be obtained from, and the applications or requests which may be filed with, the different field offices. In view of the last sentence of section 3(a), it is important that each agency state clearly the types of applications, etc., if any, which it requires to be filed with designated agency offices.

## STATEMENT OF PROCEDURES

Section 3(a)(2) provides that every agency shall separately state and currently publish in the Federal Register "(2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations." This subsection is primarily concerned with the procedures by which an agency discharges its public functions —such as rule making, adjudication, and the administration of loan, grant and benefit programs. No categorical statement can be made as to the manner in which each agency should describe



"the general course and method by which its functions are channeled and determined."

Section 3 does not require an agency to "freeze" its procedures, nor does it force the adoption of procedures more formal than those previously prevailing. An agency need not invent procedures where it has no reason to establish any procedures. Senate Hearings (1941) p. 1337. However, the agency must, in accordance with section 3, keep the public currently informed of changes in the actual procedures available. Of course, the published procedures of the agency may provide (subject to applicable law) for emergency or exceptional cases.

Where there is an established procedure for the handling of certain functions, the routing of and responsibility for such functions may be stated with reasonable particularity. Some functions, however, may be exercised so seldom that it will not be practicable to prescribe a definite routine. In such cases, the published information should at least include a statement of the office to which inquiries may be directed.

In brief, section 3 (a)(2) requires an agency to disclose in general terms, designed to be realistically informative to the public, the manner in which its functions are channeled and determined. In this connection, it should be remembered that matters of internal management are exempted from the publication requirements of section 3.

Informal conference procedures used by an agency should be publicized with a view to both serving the convenience of the public and facilitating the agency's operations. Such procedures exist widely and are known to the specialized practitioners. The general public should be informed of their availability and as to how and where to take advantage of them.

Forms for application, registration, etc., and the instructions accompanying such forms need not be published in full; publication of a simple statement of the function and contents of the form, and of where copies of the form, if available, may be obtained, is sufficient. H.R. Rep. p. 22 (Sen. Doc. p. 256).

Attention is called to the last sentence of the section, stating "No person shall in any manner be required to resort to organization or procedure not so published." Should an agency fail to publish, for example, a listing of its field offices with their functions, persons who have not received actual notice of such agency

organization may contend that they are not bound to resort to a field office prior to institution of their case in the central office.

### SUBSTANTIVE RULES

Section 3(a) (3) provides that every agency shall separately state and currently publish in the Federal Register "(3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law." This exemption for "rules addressed to and served upon named persons in accordance with law" is designed to avoid filling the Federal Register with a great mass of particularized rule making, such as schedules of rates, which have always been satisfactorily handled without general publication in the Federal Register.

The phrase "substantive rules adopted as authorized by law" refers, of course, to rules issued by an agency to implement statutory policy. Examples are the Federal Power Commission's rules prescribing uniform systems of accounts and proxy rules issued by the Securities and Exchange Commission.

Statements of general policy and interpretations need be published only if they are formulated and adopted by the agency for the guidance of the public. The Act leaves each agency free to determine for itself the desirability of formulating policy statements for the guidance of the public. To the extent that an agency, however, enunciates such statements of general policy in the form of speeches, releases or otherwise, the Act requires them to be published in the Federal Register.

The term "public" would not seem to embrace states. For example, the Federal Security Agency sends interpretative guides to states to assist them in complying with the requirements of the Unemployment Compensation provisions of the Social Security laws. Such guides need not be published since they are not for the use of the "public" but only for the state governments.

Section 3(a) does not require publication in the Federal Register of statements of agency policy and interpretations which are developed and enunciated only in the course of adjudicatory orders and opinions; such orders and opinions are treated as a separate and distinct body of administrative materials under section 3(b).

An advisory interpretation relating to a specific set of facts



is not subject to section 3. 92 Cong. Rec. 5649 (Sen. Doc. p. 355). For example, a reply from the agency's general counsel to an inquiry from a member of the public as to the applicability of a statute to a specific set of facts need not be published.

### SECTION 3(b)—OPINIONS AND ORDERS

Section 3(b) provides that "Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules." Section 3(b) does not require publication of these materials in the Federal Register or in any other prescribed form. Regular publication of decisions in bound volumes or bulletins, as many agencies are now doing, will suffice; in such cases, however, the agency should publish a rule stating where copies of such orders and opinions may be obtained or inspected during the interval prior to publication. It should be noted that the materials specified by section 3(b) need not be published at all if, in accordance with the agency's rule published in the Federal Register pursuant to section 3(a)(1), they are available for public inspection. It is suggested that to the extent section 3(b) is complied with by making materials available for inspection, such inspection be made possible, where practicable, in regional offices as well as in the agency's central office.

The scope of the phrase "opinions or orders in the adjudication of cases" is governed by section 2(d) and, accordingly, includes orders or opinions issued with respect to licenses. Adjudicatory orders and opinions which are not "final" need not be published or made available for inspection. However, where intermediate orders and opinions would be useful to the public as, say, procedural precedents, agencies may wish to publish them or make them available for inspection in the same manner as final orders and opinions.

An agency may withhold from publication or inspection final orders and opinions "required for good cause to be held confidential and not cited as precedents." If it is desired, however, to rely upon the citation of confidential materials, the agency should first make available some abstract of the confidential material in such form as will show the principles relied upon without revealing the confidential facts.

The last three words of section 3(b) "and all rules" include "rules addressed to and served upon named persons in accordance with law" which are excluded from the publication requirement of section 3(a)(3). See H.R. Rep. p. 50, fn. 7 (Sen. Doc. p. 284). Thus rules involving corporate mergers and reorganizations where all the parties are served need not be published in the Federal Register pursuant to section 3(a); instead the provisions of section 3(b) apply. It is sufficient, therefore, if such rules are made available for public inspection.

### SECTION 3(c)—PUBLIC RECORDS

Section 3(c) provides that "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." The introductory saving clause is intended to preserve existing statutory requirements for confidential treatment of certain materials, such as income tax returns.

Each agency should publish in the Federal Register, under 3(a)(1), a rule listing the types of official records in its files, classifying them in terms of whether or not they are confidential in character, stating the manner in which information is available (as by inspection or sale of photostatic copies), the method of applying for information, and by what officials the application will be determined.

The term "official record" is difficult of definition. In general, it may be stated that matters of official record will include (a) applications, registrations, petitions, reports and returns filed by members of the public with the agency pursuant to statute or the agency's rules, and (b) all documents embodying agency actions, such as orders, rules and licenses. In formal proceedings, the pleadings, transcripts of testimony, exhibits, and all documents received in evidence or made a part of the record are "matters of official record."

Section 3 (c) does not purport to define "official record." Each agency must examine its functions and the substantive statutes under which it operates to determine which of its materials are to be treated as matters of official record for the purposes of the section. Indicative of the types of records which are considered official records by Congress are maps, plats, or diagrams in the custody of the Secretary of the Interior (5 U. S. C. 488), records, books or papers in the General Land Office (28 U. S. C. 672), and registration statements filed with the Securities and Exchange Commission under the Securities Act (15 U. S. C. 77f).



The great mass of material relating to the internal operation of an agency is not a matter of official record. For example, intra-agency memoranda and reports prepared by agency employees for use within the agency are not official records since they merely reflect the research and analysis preliminary to official agency action. Intra-agency reports of investigations are, in general, not matters of official record; in addition, they usually involve matters of internal management and, in view of their nature, must commonly be kept confidential.

But even matters of official record need be divulged only to "persons properly and directly concerned." It is clear that section 3(c) is not intended to open up Government files for general inspection. The phrase "persons properly and directly concerned" is descriptive of individuals who have a legitimate and valid reason for seeking access to an agency's records. See *United States ex rel. Stowell* v. *Deming*, 19 F. 2d, 697 (App. D.C., 1927), certiorari denied, 275 U.S. 531. Each agency is the primary judge of whether the person's interest is such as to require it to make its official records available for his inspection.

An agency may treat matters of official record as "confidential for good cause found" and upon that ground refuse to make them available for inspection. Information held "confidential for good cause found" may be either information held confidential by reason of an agency rule issued in advance (for good cause) making specific classes of material confidential, or such information as is held confidential for good cause found under a particular set of facts. The section does not change existing law as to those materials in Government files which have been heretofore treated as confidential. See *Boske* v. *Comingore*, 177 U.S. 459 (1900); *Boehm* v. *United States*, 123 F. 2d, 791, 805 (C.C.A. 8, 1941).

## III

### SECTION 4—RULE MAKING

In general, the purpose of section 4 is to guarantee to the public an opportunity to participate in the rule making process. With stated exceptions, each agency will be required under this section to give public notice of substantive rules which it proposes to adopt, and to grant interested persons an opportunity to present their views to it. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the provisions of sections 7 and 8 as to hearing and decision will apply in place of the less formal procedures contemplated by section 4(b). With certain exceptions, no substantive rule may be made effective until at least thirty days after its publication in the Federal Register. Section 4 also grants to interested persons the right to petition an agency for the issuance, amendment or repeal of a rule.

### EXCEPTIONS

In addition to the agencies and functions exempted by section 2(a), section 4 itself contains two broad exceptions to its requirements.

"(1) *any military, naval, or foreign affairs function of the United States*". The exemption for military and naval functions is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency. Thus, the exemption applies to the defense functions of the Coast Guard and to the function of the Federal Power Commission under section 202(c) of the Federal Power Act (16 U.S.C. 824a (c)). Sen. Rep. p. 39 (Sen. Doc. p. 225); Senate Hearings (1941) p. 502.

As to the meaning of "foreign affairs function", both the Senate and House reports state: "The phrase 'foreign affairs functions,' used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences." Sen. Rep. p. 13; H.R. Rep. p. 23 (Sen. Doc. pp. 199, 257). See also Representative Walter's statement to the House, 92 Cong. Rec. 5650 (Sen. Doc. p. 358). It is equally clear that the exemption is not limited to strictly diplomatic functions, because the phrase "diplomatic function" was employed in the January 6, 1945 draft of S. 7 (Senate Comparative Print of June 1945, p. 6; Sen. Doc. p. 157) and was discarded in favor of the broader and more generic phrase "foreign affairs function". In the light of this legislative history, it would seem clear that the exception must be construed as applicable to most functions of the State Department and to the foreign affairs functions of any other agency.



"(2) *any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts*". The exemption for matters relating to "agency management or personnel" is self-explanatory and has been considered in the discussion of "internal management" under section 3. The exemption of "any matter relating * * * to public property, loans, grants, benefits, or contracts" is intended generally to cover the "proprietary" functions of the Federal Government. 92 Cong. Rec. 5650 (Sen. Doc. p. 358). It will be helpful to consider the implication of each of these phrases separately.

*Public Property.* This embraces rules issued by any agency with respect to real or personal property owned by the United States or by any agency of the United States. Thus, the making of rules relating to the public domain, i.e., the sale or lease of public lands or of mineral, timber or grazing rights in such lands, is exempt from the requirements of section 4. The exemption extends, for example, to rules issued by the Tennessee Valley Authority in relation to the management of its properties, and by the Maritime Commission with respect to ships owned by the United States. The term "public property" includes property held by the United States in trust or as guardian; e.g., Indian property. H.R. Rep. p. 23 (Sen. Doc. p. 257).

*Loans.* This exempts rules issued with respect to loans by such agencies as the Reconstruction Finance Corporation, the Commodity Credit Corporation, and the Farm Credit Administration. It also exempts rules relating to guarantees of loans, such as are made by the Federal Housing Authority and the Veterans Administration, since they are matters relating to public loans.

*Grants.* Rule making with respect to subsidy programs is exempted from section 4. "Grants" also include grant-in-aid programs under which the Federal Government makes payments to state and local governments with respect to highways, airports,

unemployment compensation, etc.

*Benefits.* This refers to such programs as veterans' pensions and old-age insurance payments.

*Contracts.* All rules relating to public contracts are exempt from section 4. The exemption extends to wage determinations made by the Labor Department under the Davis Bacon Act (40 U.S.C. 276a et seq.) and the Walsh Healey Act (41 U.S.C. 35-45), as conditions to construction and procurement contracts entered into by the Federal Government. See *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

## SECTION 4(a)—NOTICE

Subsections (a) and (b) of section 4 must be read together because the procedural requirements of subsection (b) apply only where notice is required by subsection (a). It is clear that the requirements of "general notice of proposed rule making" apply only to rule making proposed or initiated by an agency; the filing of a petition under section 4 (d) does not require an agency to undertake rule making proceedings in accordance with subsections (a) and (b). H.R. Rep. p. 26 (Sen. Doc. p. 260).

An agency contemplating the issuance of a rule subject to section 4 (a) must publish in the Federal Register a notice of the proposed rule making, "unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law". The reason for the quoted exception is to avoid burdening the Federal Register with notices addressed to particular parties who have been personally served or otherwise have notice. H.R. Rep. p. 51, fn. 8 (Sen. Doc. p. 285). For example, where a proceeding is commenced to establish rates for named carriers or utilities, if a notice complying with section 4(a) is personally served upon such persons, publication in the Federal Register is not required by the subsection.

*Contents of notice.* In both formal[1] and informal rule making, the required notice, whether published in the Federal Register or personally served, must include the following information:

1. "A statement of the time, place, and nature of public rule making proceedings". While section 4(a) does not specify how much notice must be given by an agency before it may conduct public rule making proceedings, it is presumed that each agency

1 As used here, "formal" rule making means those public rule making proceedings which must be conducted in accordance with sections 7 and 8.



will give reasonable notice.[2] In this connection, each agency should take into account the fact that section 4(c) provides that thirty days must ordinarily elapse prior to a rule becoming effective. Accordingly, each agency should schedule its rule making in such fashion that there will be sufficient time for affording interested persons an opportunity to participate in the rule making as well as for insuring final publication of the rule at least thirty days prior to the desired effective date.

The nature of public rule making may vary considerably from case to case. Under section 4(b) each agency, as this memorandum will indicate *infra*, may conduct its rule making by affording interested persons opportunity to submit written data only, or by receiving a combination of written and oral evidence, or by adopting any other method it finds most appropriate for public participation in the rule making process. However, where an agency is required by statute to conduct a hearing and to reach a decision upon the basis of the record made at such hearing, the formal procedures prescribed by sections 7 and 8 must be pursued. Therefore, the notice, required by section 4(a) should specify the procedure to be employed, that is, formal or informal hearings, submission of written statements with or without opportunity for oral argument, etc.

2. "Reference to the authority under which the rule is proposed". The reference must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule.

3. "Either the terms or substance of the proposed rule or a description of the subjects and issues involved". Where able to do so, an agency may state the proposed rule itself or the substance of the rule in the notice required by section 4(a). On the other hand, the agency, if it desires, may issue a more general "description of the subjects and issues involved". It is suggested that each agency consider the desirability of using the latter method if publication of a proposed rule in full would unduly burden the Federal Register or would in fact be less informative to the public. In such a case, the agency may inform interested persons that copies of the proposed rule may be obtained from the agency upon request—this, of course, in addition to the "description of the subjects and issues involved" in the Federal Register. Where there is a "description of the subjects and issues

2 See section 8 of the Federal Register Act (44 U.S.C. 308) for a general statutory standard of reasonable notice.

involved", the notice should be sufficiently informative to assure interested persons an opportunity to participate intelligently in the rule making process. Final Report, p. 108.

*Section* 4(a) *and* (b) *applicable only to substantive rules.* The last sentence of section 4(a) exempts from the requirements of section 4(a) and (b), unless otherwise required by statute, "interpretative rules, general statements of policy, rules of agency organization, procedure, or practice". Thus, the rules of organization and procedure which an agency must publish pursuant to section 3(a)(1) and (2) are not ordinarily subject to the requirements of section 4(a) and (b). The further exemption of "interpretative rules" and "general statements of policy" restricts the application of section 4(a) and (b) to substantive rules issued pursuant to statutory authority.[3] See Senate Comparative Print of June 1945, p. 6 (Sen. Doc. p. 19).

*Omission of notice and public procedure for good cause.* The last sentence of section 4(a) authorizes any agency to omit the notice required by that subsection (and the procedure specified by section 4(b)) "in any situation in which the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest". It should be noted that the reasons for which an agency may dispense with notice under section 4(a) are written in the alternative so that if it is "impracticable" or "unnecessary" or "contrary to the public interest" the agency may dispense with notice. Should this be done, the agency must incorporate in the rule issued its finding of "good cause" and "a brief statement of the reasons therefor". In general, it may be said that a situation is "impracticable" when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in section 4 (a). For example, the Civil Aeronautics Board may learn, from an accident investigation, that certain rules as to air safety should be issued or amended without delay; with the safety of the traveling public at stake, the Board could find that notice

3 In this connection, the following working definitions are offered:
*Substantive rules*—rules, other than organizational or procedural under section 3(a) (1) and (2), issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commisson pursuant to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78 n). Such rules have the force and effect of law.
*Interpretative rules*—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. See Final Report, p. 27; Senate Comparative Print of June 1945, p. 6 (Sen. Doc. p. 18); Senate Hearings (1941) p. 330.
*General statements of policy*—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.



and public rule making procedures would be "impracticable", and issue its rules immediately. "Unnecessary" refers to the issuance of a minor rule or amendment in which the public is not particularly interested. Senate Hearings (1941) p. 828. "Public interest" connotes a situation in which the interest of the public would be defeated by any requirement of advance notice. For example, an agency may contemplate the issuance of financial controls under such circumstances that advance notice of such rules would tend to defeat their purpose; in such circumstances, the "public interest" might well justify the omission of notice and public rule making proceedings. Senate Hearings (1941) p. 812.

### SECTION 4(b)—PROCEDURES

*Informal rule making.* In every case of proposed informal rule making subject to the notice requirements of section 4(a), section 4(b) provides that "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner." The quoted language confers discretion upon the agency, except where statutes require "formal" rule making subject to sections 7 and 8, to designate in each case the procedure for public participation in rule making. Such informal rule making procedure may take a variety of forms: informal hearings (with or without a stenographic transcript), conferences, consultation with industry committees, submission of written views, or any combination of these. These informal procedures have already been extensively employed by Federal agencies. Final Report, pp. 103-105. In each case, the selection of the procedure to be followed will depend largely upon the nature of the rules involved. The objective should be to assure informed administrative action and adequate protection to private interests.

Each agency is affirmatively required to consider "all relevant matter presented" in the proceeding; it is recommended that all rules issued after such informal proceedings be accompanied by an express recital that such material has been considered. It is entirely clear, however, that section 4(b) does not require the formulation of rules upon the exclusive basis of any "record" made in informal rule making proceedings. Senate Hearings (1941) p. 444. Accordingly, except in formal rule making governed by sections 7 and 8, an agency is free to formulate rules upon the basis of

materials in its files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making proceedings.

Section 4 (b) provides that upon the completion of public rule making proceedings "after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose". The required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules. The statement is to be "concise" and "general". Except as required by statutes providing for "formal" rule making procedure, findings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the considerations upon which the rules were issued. Rather, the statement is intended to advise the public of the general basis and purpose of the rules.

*Formal rule making.* Section 4 (b) provides that "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." Thus, where a rule is required by some other statute to be issued on the basis of a record after opportunity for an agency hearing, the public rule making proceedings must consist of hearing and decision in accordance with sections 7 and 8. The provisions of section 5 are in no way applicable to rule making. It should be noted that sections 7 and 8 did not become effective until December 11, 1946, and, pursuant to section 12, do not apply to any public rule making proceedings initiated prior to that date.

Statutes rarely require hearings prior to the issuance of rules of general applicability. Such requirements, where they exist, appear in radically different contexts. The Federal Food, Drug and Cosmetic Act (21 U.S.C. 301) is almost unique in that it specifically provides that agency action issuing, amending or repealing specified classes of substantive rules may be taken only after notice and hearing, and that "The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based." Upon review in a circuit court of appeals, a transcript of the record is filed, and "the findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive" (21 U.S.C. 371). It is clear that such rules are "required by statute to be made on the record after opportunity



for an agency hearing". Accordingly, the rule making hearings required by the Federal Food, Drug and Cosmetic Act, initiated on and after December 11, 1946, must be conducted in accordance with sections 7 and 8 of the Administrative Procedure Act.

Statutes authorizing agencies to prescribe future rates (i.e., rules of either general or particular applicability) for public utilities and common carriers typically require that such rates be established only after an opportunity for a hearing before the agency. Such statutes rarely specify in terms that the agency action must be taken on the basis of the "record" developed in the hearing. However, where rates or prices are established by an agency after a hearing required by statute, the agencies themselves and the courts have long assumed that the agency's action must be based upon the evidence adduced at the hearing. Sometimes the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review. For example, rate orders issued by the Federal Power Commission pursuant to the Natural Gas Act (15 U.S.C. 717) may be made only after hearing; upon review in a circuit court of appeals or the Court of Appeals for the District of Columbia, the Commission certifies and files with the court "a transcript of the record upon which the order complained of was entered", and the Commission's findings of fact "if supported by substantial evidence, shall be conclusive". It seems clear that these provisions of the Natural Gas Act must be construed as requiring the Commission to determine rates "on the record after opportunity for an agency hearing". See H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285). The same conclusion would be reached with respect to the determination of minimum wages under the Fair Labor Standards Act (29 U.S.C. 201), which contains substantially the same provisions for hearing and judicial review.

The Interstate Commerce Commission and the Secretary of Agriculture may, after hearing, prescribe rates for carriers and stockyard agencies, respectively. Both types of rate orders are reviewable under the Urgent Deficiencies Act of 1913 (28 U.S.C. 47). Nothing in the Interstate Commerce Act, the Packers and Stockyards Act, or the Urgent Deficiencies Act requires in terms that such rate orders be "made on the record", or provides for the filing of a transcript of the administrative record with the reviewing court, or defines the scope of judicial review. However, both of these agencies and the courts have long assumed

that such rate orders must be based upon the record made in the hearing; furthermore, it has long been the practice under the Urgent Deficiencies Act to review such orders on the basis of the administrative record which is submitted to the reviewing court. *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934); *Acker* v. *United States*, 298 U.S. 426 (1936). It appears, therefore, that rules (as defined in section 2(c)) which are issued after a hearing required by statute, and which are reviewable under the Urgent Deficiencies Act on the basis of the evidence adduced at the agency hearing, must be regarded as "required by statute to be made on the record after opportunity for an agency hearing".

With respect to the types of rule making discussed above, the statutes not only specifically require the agencies to hold hearings but also, specifically, or by clear implication, or by established administrative and judicial construction, require such rules to be formulated upon the basis of the evidentiary record made in the hearing. In these situations, the public rule making procedures required by section 4(b) will consist of a hearing conducted in accordance with sections 7 and 8.

There are other statutes which require agencies to hold hearings before issuing rules, but contain no language from which the further requirement of decision "on the record" can be inferred, nor any provision for judicial review on the record (as does the Natural Gas Act, *supra*). For example, the Federal Seed Act (7 U.S.C. 1561) simply provides that "prior to the promulgation of any rule or regulation under this chapter, due notice shall be given by publication in the Federal Register of intention to promulgate and the time and place of a public hearing to be held with reference thereto, and no rule or regulation may be promulgated until after such hearing". See also the so-called Dangerous Cargoes Act (46 U.S.C. 170(9)) and the Tanker Act (46 U.S.C. 391a(3)) discussed in Senate Hearings (1941) p. 589. In this type of statute, there is no requirement, express or implied, that rules be formulated "on the record".

There is persuasive legislative history to the effect that the Congress did not intend sections 7 and 8 to apply to rule making where the substantive statute merely required a hearing. In 1941, a subcommittee of the Senate Committee on the Judiciary held hearings on S. 674 (77th Cong., 1st sess.) and other administrative procedure bills. Section 209(d) of S. 674 provided with



respect to rule making that "where legislation specifically requires the holding of hearings prior to the making of rules, formal rule-making hearings shall be held". Mr. Ashley Sellers, testifying on behalf of the Department of Agriculture, called the subcommittee's attention to the fact that in various statutes, such as the Federal Seed Act, in which the Congress had required hearings to be held prior to the issuance of rules, the obvious purpose "was simply to require that the persons interested in the proposed rule should be permitted to express their views". Mr. Sellers drew a sharp distinction between such hearing requirements and the formal rule making requirements of the Federal Food, Drug and Cosmetic Act. Senate Hearings (1941) pp. 78-81, 1515, 1520.[4] Since this situation was thus specifically called to the subcommittee's attention, it is a legitimate inference that with respect to rule making the present dual requirement, i.e., "after opportunity for an agency hearing" *and* "on the record", was intended to avoid the application of formal procedural requirements in cases where the Congress intended only to provide an opportunity for the expression of views. See Mr. Carl McFarland's statement in Senate Hearings (1941) pp. 1343, 1386. See also *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186 (1935).

*Publication of procedures.* Each agency which will be affected by section 4 should publish under section 3(a)(2) the procedures, formal and informal, pursuant to which the public may participate in the formulation of its rules. The statement of informal rule making procedures may be couched in either specific or general terms, depending on whether the agency has adopted a fixed procedure for all its rule making or varies it according to the type of rule to be promulgated. In the latter instance, it would be sufficient to state that proposed substantive rules will be adopted after allowing the public to participate in the rule making process either through submission of written data, oral testimony, etc., the method of participation in each case to be specified in the published notice in the Federal Register. H.R. Rep. p. 25 (Sen. Doc. p. 259).

### SECTION 4(C)—EFFECTIVE DATES

Section 4(c) provides that "The required publication or service of any substantive rule (other than one granting or recog-

[4] See, also, the statement of Acting Attorney General Biddle citing examples of "statutes which require hearings as a part of the rule making procedure without imposing a requirement of formal adversary judicial methods". Senate Hearings (1941) p. 1468.

nizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule." This requirement applies regardless of whether the rules are issued after formal or informal procedure.

The discussion on section 4(c) in the reports of both the Senate and House Committees on the Judiciary makes clear that the phrase "The required publication or service of any substantive rule" does not relate back or refer to the publication of "general notice of proposed rule making" required by section 4(a); rather it is a requirement that substantive rules which must be published in the Federal Register (see section 3(a) (3) ) shall be so published at least thirty days prior to their effective date. Similarly, "rules addressed to and served upon named persons", when they are substantive in nature, are subject to section 4(c). The purpose of the time lag required by section 4(c) is to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt". Sen. Rep. p. 15; H.R. Rep. p. 25 (Sen. Doc. pp. 201, 259).

It is possible that section 4(c) will be interpreted as amending the Federal Register Act so as to require, with respect to rules subject to section 4(c), actual publication in the Federal Register (or service) at least thirty days prior to their effective date, rather than the mere filing of such rules with the Division of the Federal Register as heretofore. In any event, section 4(c) applies only to such *substantive rules* as are not excepted from all the provisions of section 4 by its introductory clause or by section 2(a) of the Act. It is clear, for example, that the effective date of rules issued within the scope of the functions exempted from all of the requirements of section 4 by the introductory clause of that section, will continue to be governed by section 7 of the Federal Register Act (44 U.S.C. 307), rather than by section 4(c) of the Administrative Procedure Act. Thus, where an agency issues rules relating to public property, such rules may be made effective upon filing with the Division of the Federal Register.

Also, section 7 of the Federal Register Act is not superseded in so far as there are involved rules granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy. Thus, there still may be made effective upon filing with the Division of the Federal Register statements of policy



and interpretative rules. Likewise excepted from the thirty-day requirement of section 4 (c) are rules "granting or recognizing exemption or relieving restriction". For example, if a statute prohibits the doing of an act without prior agency approval and such approval falls within the definition of "rule" in section 2(c), the action of the agency in approving such act, i.e., removing the restriction or providing an exemption, may be made effective without regard to the thirty-day requirement. Senate Hearings (1941) p. 1296. Also, the relaxation of a restrictive rule by an amendment, or the repeal of such a rule, would seem to be within the scope of the exception. The reason for this exception would appear to be that the persons affected by such rules are benefited by them and therefore need no time to conform their conduct so as to avoid the legal conseqences of violation. The fact that an interested person may object to such issuance, amendment, or repeal of a rule does not change the character of the rule as being one "granting or recognizing exemption or relieving restriction", thereby exempting it from the thirty-day requirement.

The requirement of publication not less than thirty days prior to the effective date may be shortened by an agency "upon good cause found and published with the rule". This discretionary exception was provided primarily to take care of the cases in which the public interest requires the agency to act immediately or within a period less than thirty days. Senate Hearings (1941) pp. 70, 441, 588, 650, 812, 1506. Where the persons concerned request that a rule be made effective within a shorter period, this circumstance would ordinarily constitute good cause. Also, it is clear from the legislative history that for good cause an agency may put a substantive rule into effect immediately; in such event, the requirement of prior publication is altogether absent, and the rule will become effective upon issuance as to persons with actual notice, and as to others upon filing with the Division of the Federal Register in accordance with section 7 of the Federal Register Act. Senate Hearings (1941) pp. 594, 599, 1340, 1455. Nothing in the Act precludes the issuance of retroactive rules when otherwise legal and accompanied by the finding required by section 4 (c). H.R. Rep. p. 49, fn. 1 (Sen. Doc. p. 283).

Where an agency, pursuant to the last clause of section 4(a), omits the procedures of section 4 (a) and (b) because "notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest", subsection (c) does not thereby

become automatically inoperative. If the situation is such as to compel the agency, in addition, to dispense with the thirty-day provision, the rule should also contain the finding required by the last clause of section 4 (c).

Section 4 (c) is not intended to repeal provisions of other statutes which require a period of longer than thirty days between the issuance and effective date of certain rules. For example, the Cotton Standards Act authorizes the Secretary of Agriculture to set cotton classification standards which may not become effective in less than one year (7 U. S. C. 56). The thirty-day period prescribed by section 4(c) of the Administrative Procedure Act does not supersede the one-year period thus required by the Cotton Standards Act.

### SECTION 4(d)—PETITIONS

Section 4(d) provides that "Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule." Section 4(d) applies not only to substantive rules but also to interpretations and statements of general policy, and to organizational and procedural rules. It is applicable both to existing rules and to proposed or tentative rules.

The right to petition under section 4(d) must be accorded to any "interested person". It will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule.

Every agency with rule making powers subject to section 4 should establish, and publish under section 3(a)(2), procedural rules governing the receipt, consideration and disposition of petitions filed pursuant to section 4(d). These procedural rules may call, for example, for a statement of the rule making action which the petitioner seeks, together with any data available in support of his petition, a declaration of the petitioner's interest in the proposed action, and compliance with reasonable formal requirements.

If the agency is inclined to grant the petition, the nature of the proposed rule would determine whether public rule making proceedings under section 4(a) and (b) are required. However, the mere filing of a petition does not require the agency to grant it or to hold a hearing or to engage in any other public rule making proceedings. For example, under section 701(e) of the



Federal Food, Drug and Cosmetic Act (21 U.S.C. 371(e)), the Federal Security Administrator must provide a hearing on a proposed rule only where an application, stating reasonable grounds, is made by an interested industry or a substantial portion of the industry. Section 4(d) was not intended to modify that statute so as to require the Federal Security Administrator to hold a hearing on the petition of a single individual.

The agency need act on the petition only in accordance with its procedures as published in compliance with section 3(a)(2). The denial of a petition is governed by section 6(d). Sen. Rep. p. 15; H.R. Rep. p. 26 (Sen. Doc. pp. 201, 260). Accordingly, prompt notice of such denial should be given to the petitioner, together with a simple statement of the procedural or other grounds therefor.

Neither the denial of a petition under section 4(d), nor an agency's refusal to hold public rule making proceedings thereon, is subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230).

This subsection (as in the case of the preceding portions of section 4) does not apply to rules relating to the functions and matters enumerated in the first sentence of section 4. The reports of the Senate and House Committees on the Judiciary state that "The introductory clause exempts from *all of the requirements* of section 4 any rule making so far as there are involved (1) military, naval, or foreign affairs functions or (2) matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." (Underscoring supplied). Sen. Rep. p. 13; H.R. Rep. p. 23 (Sen. Doc. pp. 199, 257). The petition procedure of section 4(d) is not applicable, for example, to the rules which an agency has issued or is empowered to issue with respect to loans or pensions.

## IV

### SECTION 5—ADJUDICATIONS

Section 5, together with sections 7 and 8, governs the procedure in formal administrative adjudication. In addition, section 5 lists the types of adjudication which are exempted from the detailed procedural requirements of sections 5, 7 and 8. It is to be noted that the excepted types of adjudication are exempt from *all* of the provisions of section 5, as well as of sections 7 and 8. Thus, if a particular matter is "subject to a subsequent trial of the law and the facts de novo in any court", subsection (d), authorizing agencies to issue declaratory judgments, is not applicable.

### GENERAL SCOPE OF FORMAL PROCEDURAL REQUIREMENTS

"Adjudication" is defined as "agency process for the formulation of an order"; "order" is in turn defined as "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing" (section 2 (d)). Thus, investigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication. For example, accident investigations conducted by the Civil Aeronautics Authority pursuant to Title VII of the Civil Aeronautics Act do not result in orders, and therefore do not involve adjudication within the meaning of section 5.[1]

After examining the definition of "rule making" in section 2(c), it is apparent that the residual definition of "adjudication" in section 2 (d) might include many governmental functions, such as the administration of loan programs, which traditionally have never been regarded as adjudicative in nature and as a rule have never been exercised through other than business procedures. The exclusion of such functions from the formal procedural requirements of sections 5, 7 and 8 is accomplished by the introductory phrase of section 5 which limits its application (and, therefore, the application of sections 7 and 8) to cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing". It has been pointed out that "Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing." Senate Comparative Print of June 1945, p. 7 (Sen. Doc. p. 22).

1 In the Senate Comparative Print of June 1945, p. 2 (Sen. Doc. p. 13), it is stated: "It should be noted that the definition of agencies does not mean that all acts of such agencies are subject to the procedural requirements. * * * If an agency is subject to the proposal under this section, nevertheless it is subject thereto only to the extent that acts, rules, or orders are defined and not further excluded in the following sections and subsections."



It will be noted that the formal procedural requirements of the Act are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other *statute*. The legislative history makes clear that the word "statute" was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. Senate Hearings (1941) pp. 453, 577; Senate Comparative Print of June 1945, p. 7 (Sen. Doc. p. 22); House Hearings (1945) p. 33 (Sen. Doc. p. 79); Sen. Rep. p. 40 (Sen. Doc. p. 226); 92 Cong. Rec. 5651 (Sen. Doc. p. 359). Mere statutory authorization to hold hearings (e.g., "such hearings as may be deemed necessary") does not constitute such a requirement. In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply. Senate Hearings (1941) p. 1456.

Under section 5 of the Federal Trade Commission Act, for example, it is clear that orders to cease and desist from unfair methods of competition must be issued on the basis of the record made in the hearing which is required by that Act (15 U. S. C. 45). See also section 10 of the National Labor Relations Act (29 U. S. C. 160). Licensing proceedings constitute adjudication by definition and where they are required by statute to be "determined on the record after opportunity for an agency hearing", sections 5, 7 and 8 are applicable. Thus, under section 15 of the Securities Exchange Act (15 U. S. C. 78o), the Securities and Exchange Commission may deny an application for broker-dealer registration or revoke such registration after notice and opportunity for hearing; while the Securities Exchange Act does not expressly require orders of denial or revocation of registration to be made "on the record", such a requirement is clearly implied in the provision for judicial review of these orders in the circuit courts of appeal. Upon such review, the Commission files "a

transcript of the record upon which the order complained of was entered", and "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." (15 U. S. C. 78y).

Other statutes authorizing agency action which is clearly adjudicatory in nature, such as the revocation of licenses, specifically require the agency to hold a hearing but contain no provision expressly requiring decision "on the record". For example, the Secretary of Agriculture may issue cease and desist orders under section 312 of the Packers and Stockyards Act, 1921 (7 U. S. C. 213), only after "notice and full hearing", and these orders are made reviewable under the Urgent Deficiencies Act. The Department of Agriculture has always assumed that these orders must be based upon the evidentiary record made in the hearing, and the courts have held that upon review the validity of an order issued under the Packers and Stockyards Act must be determined upon the administrative record. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420 (1930). It seems clear that administrative adjudication exercised in this context is subject to sections 5, 7 and 8.

A further group of statutes merely authorizes adjudicatory action after hearing, and contains no reference to decision "on the record" nor any specific provision for judicial review. Thus, under the United States Warehouse Act, the Secretary of Agriculture may suspend or revoke warehousemen's licenses "after opportunity for hearing" (7 U.S.C. 246). It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing.[2] With respect to rule making, it was concluded, *supra*, that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record", but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale

[2] It is clear that nothing in the Administrative Procedure Act precludes private parties from waiving their right to a hearing. Similarily, an agency is not prevented from requiring parties to indicate within a reasonable time their desire for a hearing.



applies to administrative adjudication. In fact, it is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing. H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285). Of course, the foregoing discussion is inapplicable to any situation in which the legislative history or the context of the pertinent statute indicates a contrary congressional intent.

Certain licensing statutes provide that an application for a license may be granted or become effective upon lapse of time without a hearing, but that there must be an opportunity for hearing prior to the denial of the application. See Securities Exchange Act of 1934, section 15(b), (15 U. S. C. 78o(b)) and Communications Act of 1934, section 309 (47 U. S. C. 309). Nothing in section 5 of the Administrative Procedure Act is intended to require hearings where such statutes now permit the granting of licenses without a hearing.

*Exempted adjudications.* Section 5 specifically exempts from its provisions (and, accordingly, from the provisions of sections 7 and 8) six types of adjudicatory functions or proceedings which are discussed hereafter. It is important to note that these exemptions extend to *all* of the provisions of section 5. Furthermore, the exemption is applicable even where the exempted function is required by statute to be exercised "on the record after opportunity for an agency hearing". Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260).

1. "Any matter subject to a subsequent trial of the law and the facts de novo in any court". This exemption was explained in the reports of the Senate and House Committees on the Judiciary, as follows: "Where the adjudication is subject to a judicial trial de novo [it] is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision." Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260). Exempt under this heading are certain proceedings which lead to reparation orders awarding damages, such as are issued by the Interstate Commerce Commission (49 U. S. C. 16) and the Secretary of Agriculture (7 U. S. C. 210). Senate Hearings (1941) pp. 75, 1389, 1508. In the Senate Comparative Print of June 1945

(p. 8) (Sen. Doc. p. 22) the scope of the exemption was described as follows:

> This exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement.

2. "The selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11". This exemption of adjudications involving the selection and tenure of officers other than examiners was made "because the selection and control of public personnel has been traditionally regarded as a largely discretionary function". Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260). There is excluded from this exemption the selection or tenure of "examiners appointed pursuant to section 11"; this refers to the provision of section 11 that "Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission * * * after opportunity for hearing and upon the record thereof." Proceedings for the removal of such examiners must be conducted in accordance with sections 5, 7 and 8.

3. "Proceedings in which decisions rest solely on inspections, tests, or elections". The reason for the exemption is that "those methods of determination do not lend themselves to the hearing process". Sen. Rep. p. 16; H.R. Rep. p. 27 (Sen. Doc. pp. 202, 261). This exemption is applicable even though a statute requires an opportunity for an agency hearing; thus the words "rest solely" do not mean that the exemption is available only where decisions are based solely upon inspections, tests, or elections, without opportunity for hearing or other proceedings. Rather, "rest solely" appears to mean that the exemption shall apply where all the issues involved in the decision are determined mainly on the basis of an inspection, test, or election. The legislative history of the Act, commencing with the Final Report of the Attorney General's Committee on Administrative Procedure, pp. 36-38, suggests the following as examples of "proceedings in which decisions rest solely on inspections, tests, or elections":

(a) the denial of airman certificates under section 602 of the Civil Aeronautics Act (49 U. S. C. 552) (statute provides for a hearing); Senate Hearings (1941) pp. 602-3;

(b) the denial or revocation of certificates of seaworthiness by local inspectors of the Coast Guard (46 U. S. C. 391); Senate Hearings (1941) pp. 833-4;

(c) locomotive inspections by the Interstate Commerce Commission (45 U. S. C. 29) (statute provides for a hearing); Senate Hearings (1941) pp. 833-4;

(d) the grading of grain under the United States Grain Standards Act (7 U. S. C. 71 et seq.); Senate Hearings (1941) pp. 833-4.



The rationale for exempting such adjudications from formal procedural requirements was well stated by the Attorney General's Committee on Administrative Procedure in the following passage:

> In all these cases, as well as in others not here described, the most important element in the decision is the judgment of the man who saw and tested the ship or grain or fruit or locomotive, or who examined the prospective airplane pilot, or seaman, or proposed periodical. Formal proceedings are not, of course, impossible. A trial examiner could be designated; the inspector could be summoned to testify, under oath, concerning his observations just as a traffic officer who gives a driving test to an applicant for a motor operator's permit could be required to describe the applicant's performance to a second officer who could, in turn, decide whether the permit should be issued. But resort to formal procedure in this type of administrative matter, although sometimes provided for as in certain of the instances noted above, is not desired or utilized by the person whose rights or privileges are being adjudicated, because it gives no added protection. The judgment of the inspector who examined the applicant or tested the article would necessarily remain the determining element in the decision, and, in any event, some immediate decision concerning the fitness of an applicant, or of an airplane, or a locomotive, or a ship, is necessary to protect the public interest. That cannot await a formal hearing. Nor would formal procedure give greater assurance of a correct decision. The surest way to ascertain what is the grade of grain is for a skilled inspector to test it; the best way to discover whether the radio equipment of a ship is in proper working order is for a radio mechanic to examine it and test it. (Final Report, p. 37)

For further legislative history relating to this exemption, see Senate Hearings (1941) pp. 590, 602, 833.

4. "The conduct of military, naval, or foreign affairs functions". Both Committee reports state that the section "exempts military, naval, and foreign affairs functions for the same reasons that they are exempted from section 4; and, in any event, rarely if ever do statutes require such functions to be exercised upon hearing." Sen. Rep. p. 16; H.R. Rep. p. 27 (Sen. Doc. pp. 202, 261). Thus, the exercise of adjudicatory functions by the War and Navy Departments or by any other agency is exempt to the extent that the conduct of military or naval affairs is involved. Senate Hearings (1941) pp. 502-3. The term "foreign affairs functions" appears to be used in the same sense as in section 4. H.R. Rep. p. 27 (Sen. Doc. p. 261).

5. "Cases in which an agency is acting as an agent for a

court". This is self-explanatory. Senate Hearings (1941) pp. 422, 474, 1457.

6. "The certification of employee representatives". This exemption for "the certification of employee representatives such as the Labor Board operations under section 9(c) of the National Labor Relations Act, is included because those determinations rest so largely upon an election or the availability of an election". Sen. Rep. p. 16; H.R. Rep. p. 27 (Sen. Doc. pp. 202, 261). And see Senate Hearings (1941) pp. 260, 271. It also exempts the certification of employee representatives by the National Mediation Board pursuant to section 2(9) of the Railway Labor Act (45 U. S. C. 152).

### SECTION 5(a)—NOTICE

The first sentence of section 5(a) provides that "Persons entitled to notice of an agency hearing shall be timely informed of—

(1) "the time, place, and nature thereof". The subsection does not specify the period of notice of hearing to be given by an agency, other than to require "timely" notice. Whether a given period of time constitutes timely notice will depend upon the circumstances, including the urgency of the situation and the complexity of the issues involved in the proceeding. It is clear that nothing in the subsection revokes the specific provisions of other statutes as to the amount of notice which must be given in various proceedings. See generally section 8 of the Federal Register Act (44 U.S.C. 308) and specific statutory provisions such as section 5 of the Federal Trade Commission Act, requiring 30 days' notice of hearing (15 U. S. C. 45). In addition to specifying the time and place of hearing, the notice should specify the nature of the hearing, e.g., whether a cease and desist order should issue.

The last sentence of section 5(a) provides that "In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." This simply means that consistent with the public interest and the due execution of the agency's functions, each agency shall attempt to schedule hearings at times and places which will be convenient for the parties and their representatives. Sen. Rep. p. 17 (Sen. Doc. p. 203).

(2) "the legal authority and jurisdiction under which the hearing is to be held". The notice should contain reference to the agency's authority sufficient to inform the parties of the legal powers and jurisdiction which the agency is invoking in the particular case, and thus enable the parties to raise any legal issues they consider relevant.



(3) "The matters of fact and law asserted". It is not required to set forth evidentiary facts or legal argument. All that is necessary is to advise the parties of the legal and factual issues involved.

*Responsive pleading.* The second sentence of section 5(a) provides that "In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading." In the Committee reports, it is stated that "The second sentence of the subsection applies in those cases where the agency does not control the matter of notice because private persons are the moving parties; and in such cases the respondent parties must give notice of the issues of law and fact which they controvert so that the moving party will be apprised of the issues he must sustain." Sen. Rep. p. 17; H.R. Rep. p. 27 (Sen. Doc. pp. 203, 261). The first clause of this sentence is mandatory. This provision for responsive pleading appears to be applicable, for example, where the moving party is applying for a license and the agency admits as parties or intervenors competitors of the applicant who are opposing the application. Under section 5(a), the agency should require such additional parties to disclose their position promptly. While the subsection does not specify the consequences to be attached to a party's failure so to plead, it would clearly support an agency rule requiring a party to answer specifically the allegations of the moving party, or be deemed to have admitted such allegations.

The second sentence of section 5(a) also provides that "in other instances agencies may by rule require responsive pleading". "In other instances" apparently refers to cases in which the agency, rather than a private party, is the moving party. Thus, the quoted clause authorizes an agency, in adjudicatory proceedings which it has initiated, such as for the suspension or revocation of licenses, to require the respondent to plead responsively, i.e., to "give prompt notice of issues controverted in fact or law".

### SECTION 5(b)—PROCEDURE

Section 5(b) provides that "The agency shall afford all interested parties opportunity for (1) the submission and considera-

tion of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing,[3] and decision upon notice and in conformity with section 7 and 8." The settlement of cases and issues by informal methods is nothing new in Federal administrative procedure. In its Final Report, the Attorney General's Committee on Administrative Procedure pointed out (p. 35) that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process".

Like section 5 generally, subsection 5(b) applies only to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing". The purpose of this subsection is to provide, so far as practicable, for the informal settlement or adjustment of controversies in lieu of formal adjudicatory proceedings. Section 5(b), however, does not require agencies to settle informally all cases which the parties desire to settle. Rather it requires the agencies to make available opportunities for such settlements, "where time, the nature of the proceeding, and the public interest permit".

Agencies must in some way provide opportunities for informal disposition of controversies. However, the precise manner in which such opportunities are to be afforded has been deliberately left by Congress to development by the agencies themselves. See Senate Comparative Print of June 1945, p. 9 (Sen. Doc. p. 24). The subsection apparently leaves the agencies free to provide such opportunity either before or after the initiation of a formal proceeding (e.g., the issuance of a complaint). If the opportunity is to be made available prior to the issuance of a complaint or notice, the agency must in some way advise the parties that formal proceedings are contemplated. In such a situation, the agency should advise the party at some preliminary stage (investigatory or otherwise) that it is contemplating the initiation of a formal proceeding and that it is giving him an opportunity to settle or adjust the matter. Where the opportunity is made available after the issuance of a notice or complaint, it is sufficient if the agency's published procedures

3 The comma after "hearing" in section 5(b) is a printer's error.



advise parties as to how an informal settlement or adjustment may be sought.

Whether such opportunity is provided before or after the initiation of the formal proceeding, it should enable parties to present their proposals for settlement to responsible officers or employees of the agency. Since section 5(b) does not prescribe adjustment procedures, they may consist entirely of oral conferences or agencies may require proposals for adjustment or settlement to be submitted in writing. If proposals are submitted and they are unsatisfactory, the agency should consider the advisability of informing the parties involved of the conditions, if any, on which the agency is willing to settle the controversy or accept compliance without formal proceedings. It is clear that section 5(b) does not require an agency to defer formal proceedings indefinitely while parties submit a series of proposals for the purpose of delay.

In the settlement of cases pursuant to section 5(b), agencies may, as heretofore, require parties to enter into consent decrees or orders or stipulations to cease and desist as a part of the settlement. As Representative Walter stated: "The settlement by consent provision is extremely important because agencies ought not to engage in formal proceedings where the parties are perfectly willing to *consent to judgments* or adjust situations informally." [Italics supplied] 92 Cong. Rec. 5651 (Sen. Doc. p. 361). Final Report, pp. 41-42.

The requirement of section 5(b) that agencies provide opportunity for informal settlement is limited to cases "where time, the nature of the proceeding, and the public interest permit". The quoted language is to be treated in the alternative. Where an agency is confronted with the necessity for emergency action or where a statutue requires that a hearing be held within a limited period of time, the agency may be obliged to limit or refuse opportunity for informal settlement. The "nature of the proceeding" may be said to preclude negotiation in situations where the party has declared that he does not intend to comply with a known requirement of the agency or where statutes require that hearings be held in any event.[4] Senate Hearings (1941) p. 1474. Where an agency believes that the informal settlement of an alleged violation or certain classes of violations will not insure future compliance with law, it would be justified in concluding that

4 For example, the Civil Aeronautics Board is required to hold hearings before granting a certificate of public convenience and necessity for a new route (49 U. S. C. 481).

such settlement by consent would not be in the public interest.

Each agency should make public, pursuant to section 3(a), the manner in which it will provide interested parties an opportunity for the informal settlement or adjustment of the matters in issue. H.R. Rep. p. 27 (Sen. Doc. p. 261).

### SECTION 5(c)—SEPARATION OF FUNCTIONS

Section 5(c) generally requires each agency, in the adjudication of cases subject to section 5, to establish an internal separation of functions between the officials who hear and decide and those who investigate or prosecute. The discussion will be simplified if the exceptions from the requirements of section 5(c) are considered first.

*Exceptions.* Section 5(c), like the rest of section 5, applies only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing", and if the subject matter of the proceeding is not exempted by the first paragraph of section 5. Rule making, of course, is not subject to section 5(c). Section 5(c), in addition, provides that the provisions of that subsection "shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers".

Section 5(c) does not apply to agency proceedings to determine applications for initial licenses—regardless of whether the agency grants or denies the license. "License" is defined in section 2(d). The phrase "initial license" must be interpreted from the context and legislative history.

The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions. See Chapter I. The legislative history of section 5(c) reveals that "determining applications for initial licenses" was exempted from the requirements of the subsection on the ground that such proceedings are similar to rule making. In the Committee reports, it is explained that "The exemption of applications for initial licenses frees from the requirements of the section such matters as the granting of certificates of convenience and necessity, upon the theory that in most licensing cases the original application may be much like rule making. The latter, of course, is not subject to any provision of section 5." Sen. Rep. p. 17; H.R. Rep. p. 30 (Sen. Doc. pp. 203, 262). The rationale for the exemption was further developed by Representative Walter on the floor of the House, as follows: "However, the subsection does not apply in determining applications for initial licenses, because it is felt that the determination of such matters is much like rule making and hence the parties will be better served if the proposed decision—later required by section 8—reflects the views of the responsible officers in the agencies whether or not they have actually taken the evidence." 92 Cong. Rec. 5651 (Sen. Doc. p. 361).



In view of the function of the exemption, the phrase "application for initial licenses" must be construed to include applications by the licensee for modifications of his original license. In effect, this gives full meaning to the broad definition of "license" in section 2(e), i.e., "the whole or part of any agency *permit*, certificate, *approval*, registration, charter, membership, statutory exemption *or other form of permission*". [Italics supplied] In other words, the definition clearly suggests that any agency "approval" or "permission" is a license, regardless of whether it is in addition to or related to an earlier license.[5] Only by such a construction can the appropriate procedures be made applicable to those aspects of licensing which are dominated by policy making considerations and in which accusatory and disciplinary factors are absent. Senate Hearings (1941) p. 1451. In this way, the basic dichotomy of the Act between rule making and adjudication is preserved, because section 5(c) will remain applicable to licensing proceedings involving the renewal, revocation, suspension, annulment, withdrawal or the *agency-initiated* modification or amendment of licenses—i.e., all those phases of licensing in which the accusatory or disciplinary factors are, or are likely to be, present.

This interpretation of the scope of the exemption is consistent with the remainder of its legislative history. When the ad-

[5] Any other interpretation of the exemption will largely destroy it and will result in an erratic application of section 5(c). For example, the function of the Civil Aeronautics Board with respect to certificates of public convenience and necessity increasingly relates to applications for modifications or extensions of existing routes rather than to original applications for entirely new routes. Thus, A, with a certificate for a route from New York to Chicago with a stop at Cleveland, may apply for a modification of the certificate to permit an additional stop at Pittsburgh. The considerations involved in determining such an application for modification of A's certificate are the same as those involved in his original application—traffic flow, availability of facilities, effect on competing carriers, etc. The accusatory and disciplinary elements are entirely lacking. Another example clearly illustrates the inconsistent results of such a narrow construction of the exemption for initial licensing: A has a certificate for a route from New York to St. Louis, and he applies for a modification which will authorize extension of the route to Omaha; B applies for a new certificate authorizing him to operate a route between St. Louis and Omaha. Under the narrow construction of the exemption, section 5(c) would apply to the Board's determination of A's application, but would not be applicable with respect to B's application. Similar anomalies would exist under the Federal Power Act, the Communications Act and the Natural Gas Act, particularly the latter.

ministrative procedure bill (S. 7) was introduced by Senator McCarran in January 1945, the provision that was then section 5(b) contained an exemption for "determining applications for licenses". When S. 7 was reported by the Senate Committee on the Judiciary in November 1945, section 5(c) contained the present language exempting "determining applications for initial licenses". In the discussion of the definitions of "adjudication" and "licensing" in the Committee reports, it is stated that "Licensing is specifically included [in adjudication] to remove any question, since licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance. Licensing as such is later exempted from some of the provisions of sections 5, 7 and 8 relating to hearings and decisions. * * * *Later provisions of the bill distinguish between initial licensing and renewals or other licensing proceedings.*" [Italics supplied] Sen. Rep. p. 11; H.R. Rep. p. 20 (Sen. Doc. pp. 197, 254). It is apparent from the legislative history that the word "initial" was inserted in the exception to distinguish original applications for licenses, i.e., any agency "approval" or "permission", from applications for renewals of licenses. This is entirely consistent with the underlying analogy of initial licensing to rule making, because renewal proceedings frequently involve a review of the licensee's past conduct and thus resemble adjudication rather than rule making.

The insertion of "initial" similarly distinguishes applications for licenses from modifications or limitations imposed by an agency upon an existing license. Thus, the Senate Committee Report also contains a memorandum from the Attorney General in which it is stated that "The section does apply, however, to licensing, with the exception that section 5(c), relating to the separation of functions, does not apply in determining applications for initial licenses, i.e., original licenses as contradistinguished from renewals or amendments of existing licenses." Sen. Rep. p. 40 (Sen. Doc. p. 226). In referring to "amendments", the quoted language contemplated amendments or modifications imposed by the agency on the ground that in such proceedings, as in renewal proceedings, the issues would often relate to the licensee's past conduct.

It is concluded, therefore, that the exemption from the provisions of section 5(c) of proceedings to determine "applications for initial licenses" extends not only to applications for original licenses but also to applications by licensees for modification of licenses.



The exception of "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers" originally read "in determining * * * the past reasonableness of rates". See S. 7, 79th Cong. 2nd sess., as passed by the Senate on March 12, 1946. H.R. Rep. p. 52 (Sen. Doc. p. 286). The exemption was apparently created on the ground that questions as to the past reasonableness of rates are sometimes consolidated with the making of future rates—a rule making function—and that the exception would encourage such consolidation. In the House, the exemption was broadened to include the validity or application of facilities and practices on the theory that such matters also are often consolidated with rule making. H.R. Rep. pp. 30, 52 (Sen. Doc. pp. 262, 286). However, it should be noted that the Act itself does not limit the exception to cases where there is consolidation with rule making proceedings.

*Hearing officers.* The first sentence of section 5(c) provides that "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency." Section 8(a) provides that in cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to section 5(c), such as initial licensing, any other officer or officers qualified to preside at hearings pursuant to section 7) shall make the initial decision or recommended decision as the case may be. Thus, apart from the exceptions referred to above, the officer who presides at the adjudicatory hearing and hears the evidence must prepare the initial or recommended decision, as the case may be, unless he becomes unavailable (as by illness or leaving the agency). Where the hearing officer becomes unavailable to the agency, the agency may itself complete the hearing or substitute another hearing officer to do so.

The second and third sentences of section 5(c) make provision for the separation of the functions of hearing and decision from the functions of investigation and prosecution. The second sentence of section 5(c) provides that:

> Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the sup-

> ervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

The third sentence provides:

> No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings.

It is thus apparent that the second sentence applies generally to the hearing process or the making of the record; the third, to the decisional process or the making of the initial or recommended decision by the hearing officer. The broad purpose of the second sentence is to assure that hearings be conducted by hearing officers who have not received or obtained factual information outside the record and who are neither supervised nor directed in the conduct of the hearing by agency officials engaged in the performance of investigative or prosecuting functions. To achieve fairness and independence in the hearing process it is first provided that (except for ex parte matters) no hearing officer "shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate". That is, the officer is prohibited from obtaining or receiving evidentiary or factual information bearing on the issues unless, after notice, all parties are permitted to participate. This would apply as well to expert testimony; the officer may not informally obtain evidentiary material from such experts either during or after the hearing, any more than he may from other witnesses.

The broad purpose of the third sentence is to insure that hearing officers make initial or recommended decisions free from the participation or advice of agency personnel engaged in the performance of investigative or prosecuting functions in that or a factually related case.[6] As to the decisional process it is clear that, to insure the separation of the functions of hearing

[6] The limitation of the prohibition against consultation to those who performed investigative or prosecuting functions "in that or a factually related case", should be construed literally. As this provision originally appeared in H.R. 1203, 79th Cong., 1st sess. (1945), it was a complete prohibition against consultation with investigative and prosecuting personnel, as follows: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." See Sen. Doc. p. 157.

The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded from rendering any assistance to the agency, not only in the decision of the cease and desist proceeding, but also in the decision of the revocation proceeding. However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted.



and decision from the functions of investigation and prosecution and to insure the independence of the hearing officer, he may not consult or receive advice from any employee of the agency who is engaged in the performance of investigative or prosecuting functions in that or a factually related case. Likewise, under fundamental principles of due process, he may not receive advice or opinions from private parties or their counsel, unless, after notice, all parties are permitted to participate.

Further, it is manifest from the third sentence of section 5(c) that the hearing officer may obtain advice from or consult with agency personnel not engaged in investigative or prosecuting functions in that or a factually related case. The agency personnel in question may include, for example, the agency heads, the supervisors of the hearing officers, and persons assigned to assist the hearing officer in analyzing the record. Permitting the hearing officer to engage with appropriate agency personnel in an analytical discussion of the record is thoroughly consistent with the purposes of the Act. A principal purpose is that the hearing be followed by an initial or recommended decision proposed by the hearing officer which will focus the parties' attention upon the issues and conclusions of law, fact and policy which, in the hearing officer's judgment, govern the case. The availability to the hearing officer of appropriate assistance and advice will result normally in a more accurate initial or recommended decision and one that better reflects the views of the agency on questions of law and policy. Thus, the parties are better advised on the real issues that must be met in the subsequent procedure before final decision. See Senate Hearings (1941) pp. 266, 465, 646, 662, 836, 1487.

The exemption for the "disposition of ex parte matters as authorized by law" would permit the hearing examiner to act without notice on such matters as requests for adjournments, continuances, and the filing of papers. Sen. Rep. p. 17; H.R. Rep. p. 30 (Sen. Doc. pp. 203, 262). Also, it would apparently permit an examiner to act *ex parte* on requests for subpenas.

The independence of hearing officers is further assured by the requirement that they shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative functions for any agency". As a practical matter this means that an agency's hearing examiners should be placed in an organizational unit

apart from those to which investigative and prosecuting personnel are assigned, and that the examiners' unit should be under the supervision only of the agency itself or of agency officers who exercise no investigative or prosecuting functions. For example, if the agency's general counsel supervises the investigation and prosecution activities of the agency, the examiners' unit should not be subject to his supervision or control. However, section 5(c) would not prevent the trial examiners from being under the supervision of the general counsel where in fact the supervision of investigative and prosecuting functions is exercised by an associate or assistant general counsel who has no responsibility to the general counsel for such functions but is responsible therefor directly to the agency.

It is clear that nothing in the separation of functions requirements of section 5(c) is intended to preclude agency officials, regardless of their functions, from participating in necesary administrative arrangements, such as the efficient scheduling of hearings.

*The agency.* The third sentence of section 5(c) provides that "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." Thus, on "agency review", the agency heads, as well as the hearing examiner, will be precluded from consulting or obtaining advice from any officer or employee with respect to any case in which, or in a factually related case,[7] such officer or employee has participated in the investigation or prosecution. In other words, the views of officials who investigated and prosecuted the case (or a factually related case) must be presented to hearing examiners and to agency heads in the public proceedings, i.e., hearings or oral argument, or by requested findings, exceptions, and briefs which are served upon the parties. Before discussing the scope of these requirements, it will be useful to consider some aspects of the administrative process.

The expertise of an administrative agency is not limited to the heads of the agency; it includes also the staff of specialists through whom and with whose assistance most of the agency's functions are carried on. The issues in adjudicatory cases, while

7 See discussion of "factually related case" in footnote 6.



frequently less complex and with narrower policy implications than are often involved in rule making, present in many cases difficult questions of law and policy. The determination of whether an industry-wide trade practice violates the Federal Trade Commission Act, or whether a certain series of stock market transactions constitute unlawful manipulation, often involves important and difficult issues. In determining such issues, agency heads have consulted with their principal advisers and specialists. Indeed, it is clearly in the public interest that they continue to do so. Section 5(c) does not purport to isolate the agency heads from their staffs. Rather, in the interest of fair procedure, it merely excludes from any such participation in the decision of a case those employees of the agency who have had such previous participation in an adversary capacity in that or a factually related case that they may be "disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions". Final Report, p. 56.

An agency officer or employee may not participate or advise in the decision, recommended decision, or agency review of an examiner's initial decision if in that or a factually related case he performed investigative or prosecuting functions. For example, if the agency's general counsel or chief accountant engages in the performance of investigative or prosecuting functions in a case, he becomes unavailable to the agency for consultation on the decision of that or a factually related case. Of course, he could always present his views as witness or counsel in the public proceedings, including the filing of briefs.

Assuming that an agency will in many cases wish to consult with certain of its staff members, it may proceed in one of two ways. It may in a particular case consult with staff members who in fact have not performed investigative or prosecuting functions in that or a factually related case. In the alternative, the agency may find it feasible so to organize its staff assignments that the staff members whom it most frequently desires to consult will be free of all investigative and prosecuting functions. The latter method appears to offer two distinct advantages, particularly where the agency has a considerable volume of cases subject to section 5(c).

First, using the agency's general counsel for an example: If

the investigation and prosecution of adjudicatory cases are performed by the legal division under his supervision, it could be argued that his personal consideration of the routine cases has been so limited that he should be permitted to advise the agency in the decision of such cases. Even assuming that this is permitted by section 5(c), it would seem to be immaterial since his counsel will not be particularly needed in the routine cases. It is in the difficult and novel cases that the agency most needs his advice, and it is in these cases that he is most likely to be consulted extensively by his subordinates. Thus, he becomes unavailable to advise the agency in the very cases in which his advice would be most useful. On the other hand, if the agency so organizes its staff that the general counsel is not responsible for the investigative and prosecuting functions, he would be regularly available to the agency for consultation on the decision of cases.[8]

Second, if an agency thus organizes its staff and, accordingly, identifies the officers with whom it is free to consult in the decision of cases subject to section 5(c), these matters can be spelled out in the agency's published rules of procedure. Such publication would, in effect, inform the public of the identity (by title or group) of the staff members who advise in the decision of such cases. In any litigation on the issue of compliance with section 5(c), the published rules, embodying an organization and division of functions in the light of section 5(c), would assist in establishing proof of compliance with the separation of functions requirements.

The last sentence of section 5(c) sets forth certain exemptions from the requirements of the subsection. These have already been discussed, except the provision that "nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency". It was pointed out that this exemption "of the agency itself or the members of the board who comprise it—is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases". Sen. Rep. p. 18; H.R. Rep. p. 30 (Sen. Doc. pp. 204, 262). Thus, if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case. Sen. Rep. p. 41 (Sen. Doc. p. 227).

8 The general counsel's participation in rule making and in court litigation would be entirely compatible with his role in advising the agency in the decision of adjudicatory cases subject to section 5(c).



## SECTION 5(d)—DECLARATORY ORDERS

Section 5(d) provides that "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The purpose of section 5(d), like that of the Declaratory Judgment Act (28 U.S.C. 400), is to develop predictability in the law by authorizing binding determinations "which dispose of legal controversies without the necessity of any party's acting at his peril upon his own view". Final Report, p. 30.

This grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined "on the record after opportunity for an agency hearing". In addition, if the subject matter falls within one of the numbered exceptions in the introductory clause of section 5, such as a matter in which an agency is acting as an agent for a court, section 5(d) does not apply. Sen. Rep. p. 18; H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263). For example, where an agency is authorized after hearing to issue orders to cease and desist from specified illegal conduct, it may, under section 5(d), if it otherwise has jurisdiction, issue a declaratory order declaring whether or not specified facts constitute illegal conduct. On the other hand, while the Securities and Exchange Commission has long issued informal advisory interpretations through its principal officers as to whether a proposed issue of securities would be exempt from the registration requirements of the Securities Act, there is no statutory agency hearing procedure in which this question can be determined; if securities are sold without registration and the Commission believes that registration was required, it can only institute civil or criminal proceedings. Accordingly, section 5(d) does not authorize the Commission to issue declaratory orders as to whether particular securities must be registered under the Securities Act.[9]

Agencies are authorized in their "sound discretion" to issue declaratory orders. They are not required to issue such orders merely because request is made therefor. Sen. Rep. p. 18; H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263). By "sound dis-

9 Of course, this does not affect the Securities and Exchange Commission's advisory service described above.

cretion", it is meant that agencies shall issue declaratory orders only under such circumstances that both the public interest and the interest of the party are protected. Thus, "a necessary condition of its [declaratory order] ready use is that it be employed only in situations where the critical facts can be explicity stated, without possibility that subsequent events will alter them. This is necessary to avoid later litigation concerning the applicability of a declaratory ruling which an agency may seek to disregard because, in its opinion, the facts to which it related have changed". Final Report, p. 32. Again, since the issuance of declaratory orders is a matter of sound discretion, it is clear that an agency need not issue such orders where it appears that the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances. More broadly, it appears that "The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts." Sen. Rep. p. 18; H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263).



## V

### SECTION 6—ANCILLARY MATTERS

Section 6 defines various procedural rights of private parties which may be incidental to rule making, adjudication, or the exercise of any other agency authority. The introductory words of section 6, "Except as otherwise provided in this Act," are intended to assure that its provisions do not override contrary provisions in other parts of the act. Thus, the opportunity for informal appearance contemplated by section 6(a) is not to be construed so as to authorize *ex parte* conferences during formal proceedings when such conferences are forbidden by other sections of the act. Sen. Rep. p. 18, H.R. Rep. p. 31 (Sen. Doc. pp. 204, 263).

*Governing Definitions.* The provisions of section 6 hinge to a considerable extent upon the definition of the terms "party", "person" and "agency proceeding". These terms are defined in section 2 of the act as follows:

> (b) "Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.
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> * * * *
>
> (g) "Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. [Defining rule making, adjudication and licensing, respectively.]

### SECTION 6(a)—APPEARANCE

*Formal Appearance.* The first sentence of section 6(a) provides that "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." This restates existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel. Such persons are also entitled to have counsel act as their spokesmen in argument and where otherwise appropriate. Senate Comparative Print of June 1945, p. 10 (Sen. Doc. p. 26). It is clear, of course, that this provision relates only to persons whose appearance is compelled or commanded, and does not extend to persons who appear volun-

tarily or in response to mere request by an agency. Where appearance is compelled, whether as a party or as a witness, the right to counsel exists.

The phrase "or, if permitted by the agency, by other qualified representative" refers to the present practice of some agencies of permitting appearance or representation in certain matters by non-lawyers, such as accountants. The phrasing of this clause, together with the last sentence of the subsection, makes it clear that nothing in the first sentence was intended to change the existing powers of agencies in this respect. See discussion, *infra* at pp. 65-6.

The second sentence of the subsection relates to the rights of "parties" to "agency proceedings". It provides that every "party" shall have the right to appear in any agency proceeding "in person or by or with counsel or other duly qualified representative."[1] The right of a party to appear personally or by or with counsel extends, in view of the definition of "agency proceeding", to proceedings involving rule making, adjudication or licensing. The identity of the "parties" is usually clear in adjudication, licensing and formal rule making proceedings. However, since the provision is not limited to formal proceedings (those governed by sections 7 and 8), but extends to informal rule making proceedings, the term "party", in the latter type of proceeding, means any person showing the requisite interest in the matters involved. Sen. Rep. p. 19; H.R. Rep. p. 31 (Sen. Doc. pp. 205, 263). It is entirely clear that this right to appear in informal rule making proceedings is limited by the nature of the procedure adopted by an agency, pursuant to section 4(b). If the agency, under section 4(b), provides interested persons an opportunity to present their views orally, the agency must allow any person with the requisite interest to appear personally or by counsel or other qualified representative. On the other hand, if the agency desires to hold informal rule making proceedings consisting of the submission of written data, views, or arguments, nothing in section 6(a) requires the agency to provide in addition for personal appearance. In other words, the second sentence of section 6(a) is not intended to limit an agency's discretion as to the type of rule making proceedings to be held in a particular case. (See opening clause of section 6: "Except as otherwise provided in this Act").

1 The phrase "qualified representative", as used in the second sentence of subsection 6(a), relates to non-lawyers whose appearance as representatives for others is left, as under the first sentence of the subsection, to the control of the agencies. See *infra*, pp. 65-6.



*Informal Appearance.* The third sentence of section 6(a) provides that "So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function." This sentence contemplates that interested persons may appear not only in matters involving rule making, adjudication, and licensing, but also in connection with other agency functions. This provision is not to be construed as requiring an agency to give notice of its proposed action and to invite appearances by interested persons; an agency is not required to provide an opportunity for appearance and adjustment to interested persons unless they request it. Sen. Rep. p. 19 (Sen. Doc. p. 205).

The opportunity for informal appearance contemplated by the third sentence of section 6(a) means that any person should be given an opportunity to confer or discuss with responsible officers or employees of the agency matters in which he is properly interested. This opportunity should be with a responsible officer or employee—one who can decide the matter or whose function it is to make recommendations on such matters—rather than officers or employees whose duties are merely mechanical or formal. Sen. Rep. p. 19; H.R. Rep. p. 32 (Sen. Doc. pp. 205, 264).

This provision for informal appearance is expressly limited by the subsection to "so far as the orderly conduct of public business permits." Clearly, both the right and its limitation should be construed to achieve practical and fair results. Appearance should be allowed except where it would be inconsistent with the orderly conduct of public business. A properly interested person who is permitted to appear should be accorded an opportunity to present his case or proposals to a responsible officer or employee as defined above. Repeated opportunities to present the same arguments or proposals are not required. Further, the act does not require that every interested person be permitted to follow the chain of command to the head of the agency. It was not intended to require the directors of the Reconstruction Finance Corporation, for example, to confer personally with every applicant for a loan. It is sufficient if the opportunity to confer is with an official of such status that he knows the agency's policy, and is able to

bring unusual or meritorious cases to the attention of the officials who shape the policy or make final decisions.

The opportunity thus to appear "for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding"—or "in connection with any agency function" relates not only to "agency proceedings" as defined in section 2(g), but also to all other agency functions. It means, for example, that upon request any person should be allowed, where this is feasible, to present his reasons as to why a particular loan or benefit should be made or granted to him. It would also seem to mean that he can present his reasons as to why a particular controversy should be settled informally rather than in formal proceedings with attendant publicity. However, there is no requirement that the agency accept such proposals for informal settlement; if, for example, the agency believes that formal public proceedings will best serve the public interest, it is free to conduct such proceedings.

The reference to "interlocutory" or "summary" proceedings appears to be intended to provide an opportunity for informal appearance and discussion in those situations where an agency takes significant action without prior formal proceedings. H.R. Rep. p. 32 (Sen. Doc. p. 264). For example, section 609 of the Civil Aeronautics Act of 1938 (49 U. S. C. 559) provides that "In cases of emergency, any such certificate [airworthiness certificate, airman certificate, etc.] may be suspended, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing." Under section 6(a) of the Administrative Procedure Act, the persons who would be affected by such summary action should, if feasible, be allowed to appear and present their views on the proposed action. It is absolutely clear, however, that nothing in this subsection was intended to interfere with the primary objective of assuring safety in air travel. To the extent that the timely execution of the Administrator's duties, i.e., the "orderly conduct of public business," precludes discussion and negotiation, he need not hold such discussions.

There will doubtless be many cases in which an agency will find it necessary to notice a matter for public hearing without preliminary discussion because a statute or the subject matter or the special circumstances so require. Sen. Rep. p. 41 (Sen. Doc. p. 227).



The fourth sentence of section 6(a) provides that "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives." This provision merely restates a principle of good administration.

*Practice Before Agencies.* The last sentence of section 6(a) provides that "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." The question of the extent to which non-lawyers should be permitted to practice before administrative agencies was deliberately left to the determination of the various agencies, as heretofore. House Hearings (1945) p. 34 (Sen. Doc. p. 80); H. R. Rep. p. 32 (Sen. Doc. p. 264).

More broadly, section 6(a) leaves intact the agencies' control over both lawyers and non-lawyers who practice before them. The reports of the Senate and House Judiciary Committees contain expressions of opinion to the effect that, as to lawyers desiring to practice before an agency, the agency should normally require no more than a statement from a lawyer that he is in good standing before the courts. Sen. Rep. p. 19; H.R. Rep. p. 32 (Sen. Doc. pp. 205, 264). However, the legislative history leaves no doubt that the Congress intended to keep unchanged the agencies' existing powers to regulate practice before them. When the House Committee on the Judiciary held hearings in 1945 on H.R. 1203 (79th Cong., 1st sess.) which, under the title of S. 7, was enacted as the Administrative Procedure Act, the Committee was specifically aware of the fact that H.R. 1203 contained no provision relating to attorneys practicing before agencies, while H.R. 339, and H.R. 1117, also pending before the Committee, contained such provisions. House Hearings (1945) p. 34 (Sen. Doc. p. 80). Finally, during the House debate on S. 7, Representative Kefauver offered the following amendment to section 6:

> Any member of the bar who is in good standing and who has been admitted to the bar of the Supreme Court of the United States or of the highest court of the State of his or her residence shall be eligible to practice before any agency: Provided, however, That an agency shall for good cause be authorized by order to suspend or deny the right to practice before such agency.

The amendment was rejected by the House, apparently on the ground that the subject should be covered by separate legislation. 92 Cong. Rec. 5666-8 (Sen. Doc. pp. 401-405).

It is clear, therefore, that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act. For example, an agency may exclude, after notice and opportunity for hearing, persons of improper character from practice before it, *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926), or exclude parties or counsel from participation in proceedings by reason of unruly conduct, *Okin* v. *Securities and Exchange Commission*, 137 F. (2d) 398 (C.C.A. 2, 1943), or impose reasonable time limits during which former employees may not practice before the agency.

### SECTION 6(b)—INVESTIGATIONS

The first sentence of section 6(b) provides that "No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law." This is a restatement of existing law. Senate Comparative Print of June 1945, p. 11, Sen. Rep. p. 41 (Sen. Doc. pp. 27, 227).

The second sentence of subsection 6(b) provides that "Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." Under this, any person compelled to submit data or evidence, either as a party or as a witness, must be accorded the right to retain copies of written data submitted in response to a *subpena duces tecum* or other demand, or, upon payment of lawfully prescribed costs, to procure from the agency a copy of the data thus submitted or a transcript of the oral testimony which he was required to give. This right, it will be noted, is limited to the data and evidence submitted by the particular witness, and does not entitle him to copies or transcripts of the data and evidence submitted by other persons. Moreover, it extends only to persons "compelled" to testify or to submit data, and not to those who are merely requested to do so or who do so voluntarily.

The right defined in the second sentence of section 6(b) is subject to the limitation "That in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." In the Committee reports, it is stated that this limitation was deemed necessary "where evidence is taken in a case in which prosecutions may be brought later and it is obviously detrimental to the due execution of the laws to permit copies to be circulated." Sen. Rep. p. 19, H.R. Rep. p. 33 (Sen. Doc. pp. 205, 265). Thus, the phrase "nonpublic investigatory proceeding" covers all confidential phases of investigations, formal or informal, conducted by agencies to determine whether there have been violations of law. In such situations, the witness may be limited to inspection of such portions of the transcript of investigation as contain his own testimony. This right to inspect the transcript extends only to persons who have been compelled to testify.



### SECTION 6(c)—SUBPENAS

The first sentence of section 6(c) provides that "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." The purpose of this provision is to make agency subpenas available to private parties to the same extent as to agency representatives. Sen. Rep. p. 20, H.R. Rep. p. 33 (Sen. Doc. pp. 206, 265); 92 Cong. Rec. 5652 (Sen. Doc. p. 363). It applies to both subpenas *ad testificandum* and subpenas *duces tecum*. It should be emphasized that section 6(c) relates only to existing subpena powers conferred upon agencies; it does not grant power to issue subpenas to agencies which are not so empowered by other statutes. Senate Comparative Print of June 1945, p. 14 (Sen. Doc. pp. 29-30).

The subsection requires the issuance of subpenas to any party "upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." It may be argued from the quoted language that agency subpenas must be issued merely upon request of a party unless the agency requires, by its published procedural rules, a "statement or showing of general relevance and reasonable scope of the evidence sought"; accordingly, each agency which is empowered to issue subpenas should issue rules of procedure stating the manner in which parties are to request subpenas and the contents of such requests. The standard of "general relevance and reasonable scope" should be interpreted and applied in the light of the statutory purpose of making administrative subpenas equally available to private parties and

It is clear, therefore, that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act. For example, an agency may exclude, after notice and opportunity for hearing, persons of improper character from practice before it, *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926), or exclude parties or counsel from participation in proceedings by reason of unruly conduct, *Okin* v. *Securities and Exchange Commission*, 137 F. (2d) 398 (C.C.A. 2, 1943), or impose reasonable time limits during which former employees may not practice before the agency.

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The second sentence of subsection 6(b) provides that "Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." Under this, any person compelled to submit data or evidence, either as a party or as a witness, must be accorded the right to retain copies of written data submitted in response to a *subpena duces tecum* or other demand, or, upon payment of lawfully prescribed costs, to procure from the agency a copy of the data thus submitted or a transcript of the oral testimony which he was required to give. This right, it will be noted, is limited to the data and evidence submitted by the particular witness, and does not entitle him to copies or transcripts of the data and evidence submitted by other persons. Moreover, it extends only to persons "compelled" to testify or to submit data, and not to those who are merely requested to do so or who do so voluntarily.

The right defined in the second sentence of section 6(b) is subject to the limitation "That in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony." In the Committee reports, it is stated that this limitation was deemed necessary "where evidence is taken in a case in which prosecutions may be brought later and it is obviously detrimental to the due execution of the laws to permit copies to be circulated." Sen. Rep. p. 19, H.R. Rep. p. 33 (Sen. Doc. pp. 205, 265). Thus, the phrase "nonpublic investigatory proceeding" covers all confidential phases of investigations, formal or informal, conducted by agencies to determine whether there have been violations of law. In such situations, the witness may be limited to inspection of such portions of the transcript of investigation as contain his own testimony. This right to inspect the transcript extends only to persons who have been compelled to testify.



### SECTION 6(c)—SUBPENAS

The first sentence of section 6(c) provides that "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." The purpose of this provision is to make agency subpenas available to private parties to the same extent as to agency representatives. Sen. Rep. p. 20, H.R. Rep. p. 33 (Sen. Doc. pp. 206, 265); 92 Cong. Rec. 5652 (Sen. Doc. p. 363). It applies to both subpenas *ad testificandum* and subpenas *duces tecum*. It should be emphasized that section 6(c) relates only to existing subpena powers conferred upon agencies; it does not grant power to issue subpenas to agencies which are not so empowered by other statutes. Senate Comparative Print of June 1945, p. 14 (Sen. Doc. pp. 29-30).

The subsection requires the issuance of subpenas to any party "upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." It may be argued from the quoted language that agency subpenas must be issued merely upon request of a party unless the agency requires, by its published procedural rules, a "statement or showing of general relevance and reasonable scope of the evidence sought"; accordingly, each agency which is empowered to issue subpenas should issue rules of procedure stating the manner in which parties are to request subpenas and the contents of such requests. The standard of "general relevance and reasonable scope" should be interpreted and applied in the light of the statutory purpose of making administrative subpenas equally available to private parties and

where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds." This requirement relates to applications, petitions and requests made by "interested persons" in connection with any "agency proceeding", i.e., rule making, adjudication and licensing proceedings. It applies to such proceedings regardless of whether they are formal or informal. Sen. Rep. p. 20, H.R. Rep. p. 33 (Sen. Doc. pp. 206, 265). As in the case of section 4(d), an "interested person" may be defined generally as one whose interests are or will be affected by the agency action which may result from the proceeding. It is clear that with respect to formal proceedings, the only interested persons are those who are "parties" to such proceedings within the meaning of section 2(b).

Section 6(d) has no application to matters which do not relate to rule making, adjudication or licensing. Generally, it is not applicable to the mass of administrative routine unrelated to those proceedings.

The prompt notice of denial required by section 6(d) may be given in writing, addressed to the applicant, or orally (e.g., in the case of a proceeding conducted by an examiner). The required statement of grounds for denial, while simple in nature, must be sufficient to advise the party of the general basis of the denial.

Where the denial is self-explanatory or affirms a previous denial, it need not be accompanied by a statement of reasons; in such cases, it is assumed that the applicant has knowledge of the grounds for denial.



## VI

### SECTION 7—HEARINGS

The provisions of section 7 govern the conduct of hearings in those cases of rule making and adjudication which are required by sections 4 and 5 to be conducted in accordance with sections 7 and 8. The requirements of section 7 are closely integrated with those of sections 5(c) (as to certain types of adjudication) and 8. Section 7, together with sections 5(c) and 8, became effective on December 11, 1946, and is applicable to proceedings commenced on and after that date. See section 12.

### SECTION 7(a)—PRESIDING OFFICERS

The first sentence of section 7(a) provides that "There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Inasmuch as the provisions of section 11 relating to the selection and status of hearing examiners did not become effective until June 11, 1947 (see section 12), it is obvious that until then the agencies could continue to utilize their usual hearing examiners or officers, in compliance, of course, with the other requirements of sections 5(c), 7 and 8.

The last clause of the sentence is designed to permit agencies to continue to utilize hearing officers or boards "specially provided for by or designated pursuant to statute." An earlier draft referred to "other officers specially designated by statute." See Senate Comparative Print, June 1945 pp. 12-13 (Sen. Doc. p. 28). Under the original language, it might have been necessary for such an officer to be designated specifically by a statute to conduct a particular hearing, e.g., in the manner that 19 U.S.C. 1641 requires that hearings to determine whether a customhouse broker's license should be suspended or revoked must be held by the collector or chief officer of the customs. Under the present broader language, the exception will also apply if a statute authorizes the agency to designate a specific officer or employee or one of a specific class of officers or employees to conduct the

hearing. Examples of statutory provisions for hearing officers who may be utilized without regard to section 11 are: (1) joint hearings before officers of Federal agencies and persons designated by one or more States (e.g., section 13(3) of the Interstate Commerce Act, 49 U.S.C. 13(3)), as well as hearings before joint State boards under section 209(a) of the Federal Power Act (16 U.S.C. 824h), (2) where officers of more than one agency sit, as joint boards composed of members of the Interstate Commerce Commission and the Civil Aeronautics Board pursuant to section 1003 of the Civil Aeronautics Act (49 U.S.C. 643), (3) quota review committees under the Agricultural Adjustment Act of 1938 (7 U.S.C. 1363), and (4) boards of employees under the Interstate Commerce Act (49 U.S.C. 17(2)). Sen. Rep. pp. 41-42, (Sen. Doc. pp. 227-228). A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exception so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11. H.R. Rep. p. 34 (Sen. Doc. p. 268).

Generally, whoever presides at the hearing (whether an examiner appointed pursuant to section 11, a member of the agency or a special statutory board or hearing officer) is subject to the remaining provisions of the Act. Sen. Rep. p. 21; H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). However, where a member of the agency acts as presiding officer, the exception in the last clause of section 5(c) applies, with the result that he is not disqualified, as an examiner would be, by previous participation in the investigation of the case. Similarly, a statute requiring or authorizing a hearing to be conducted by a particular board or officer may have the further effect of requiring such board or officer to participate in the investigation or prosecution or of placing the board or officer under the supervision or direction of investigating or prosecuting officials. See 19 U.S.C. 1641. In the latter case, it would seem that to the extent the general requirements of section 5(c) are inconsistent they are inapplicable.

The second sentence of section 7(a) provides that "The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner." This means, of course, that "They must conduct the hearing in a strictly impartial manner, rather than as the representative of an investigative or prosecuting authority, but this does not mean that they do not have the authority and duty—as a court does—to make sure that all necessary evidence is adduced and to keep the hearing orderly and efficient." Sen. Rep. p. 21, H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). This is not intended to prohibit a hearing officer from questioning witnesses and otherwise encouraging the making of a complete record.



The third sentence of section 7(a) provides that "Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case." This provision authorizes any presiding officer to withdraw from a proceeding if he considers himself disqualified, for example, as being related to a party. In addition, a party may, by the "filing in good faith of a timely and sufficient affidavit", present to the agency the issue of the "personal bias or disqualification of any such officer"; thereupon "the agency shall determine the matter as a part of the record and decision in the case". Hearings are not required on every charge of bias or disqualification of a presiding officer.[1] If the affidavit is insufficient upon its face, it may be dismissed summarily. In other cases, the agency may consider it appropriate to investigate the charge itself or by another hearing officer. In any event, the agency's decision and the proceedings upon such an affidavit must be made a part of the record of the case in which the affidavit is filed. Sen. Rep. pp. 21, 42, H.R. Rep. p. 35 (Sen. Doc. pp. 207, 228, 269).

If a court in reviewing the agency's final action finds, contrary to the agency, that the hearing officer was biased or disqualified, the agency action based upon the recommended or initial decision made by such officer is not thereby automatically void; rather, the question is whether the private party was prejudiced by such error. See last sentence of section 10(e). The consequences of such bias or disqualification on the part of a presiding officer are alluded to in the reports of the Senate and House Committees on the Judiciary as follows: "The effect which bias or disqualification shown upon the record might have would be determined by the ordinary rules of law and the other provisions of this bill. If it appeared or were discovered late, it would have the effect—where issues of fact or discretion were important and the con-

1 This is emphasized by the fact that an earlier draft of the bill required such hearings. See Senate Comparative Print, June 1945, p. 13 (Sen. Doc. p. 158).

duct and demeanor of witnesses relevant in determining them—of rendering the recommended decisions or initial decisions of such officers invalid." Sen. Rep. p. 21, H.R. Rep. p. 35 (Sen. Doc. pp. 207, 269).

### SECTION 7(b)—HEARING POWERS

Section 7(b) provides that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act."

The quoted language automatically vests[2] in hearing officers the enumerated powers to the extent that such powers have been given to the agency itself, i.e., "within its powers." In other words, not only are the enumerated powers thus given to hearing officers by section 7(b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, "shall have authority", but from the general statutory purpose of enhancing the status and role of hearing officers. Thus, in the Senate Comparative Print of June 1945, p. 14 (Sen. Doc. p. 29), it is stated that "The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (Final Report, pp. 43-53 particularly at pp. 45-46 and 50)." See also Sen. Rep. p. 21, H.R. Rep. p. 35, 92 Cong. Rec. 2157 (Sen. Doc. pp. 207, 269, 319-320); cf. Sen. Rep. p. 42 (Sen. Doc. p. 228).

As noted above, the subsection vests in hearing officers only such of the enumerated powers as the agency itself possesses. If an agency lacks the authority to issue subpenas, subsection 7(b) does not grant the subpena power to that agency's hearing

2 Since section 7(b) itself vests these powers (including the subpena power) in hearing officers, *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942), and *Fleming* v. *Mohawk Co.*, 331 U. S. 111 (1947), dealing with the authority of agencies to delegate such powers, have no application here.



officers. Senate Comparative Print, June 1945, p. 14 (Sen. Doc. pp. 29-30). The phrase "subject to the published rules of the agency" is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers. Senate Hearings (1941) pp. 653, 1457-1458. For example, if an agency provides by rule that the fact of citizenship must be established in a prescribed manner, the hearing officer must conform to such rule in exercising his power to "rule upon offers of proof and receive relevant evidence". Similarly, if an agency provides that subpenas duces tecum shall be issued only upon written application specifying the documents desired and their relevance, the hearing officer is bound to comply.

Agencies remain free to provide for appeals to the agency heads from rulings of hearing officers in the exercise of the powers enumerated in section 7(b). For example, when a ruling excluding certain evidence, if reversed by the agency, would necessitate reopening of the hearing and recalling witnesses, it may be desirable to permit an immediate appeal from the ruling.

### SECTION 7(c)—EVIDENCE

*Burden of proof.* The first sentence of section 7(c) provides that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." In the Senate Comparative Print, June 1945, p. 15 (Sen. Doc. p. 31), it is stated that "The provision relating to burden of proof is the standard rule." There is some indication that the term "burden of proof" was not employed in any strict sense, but rather as synonymous with the "burden of going forward".[3] In either case, it is clear from the introductory clause that this general statement was not intended to repeal specific provisions of other statutes which, as by establishing presumptions, alter what would otherwise be the "burden of proof" or the "burden of going forward". Sen. Rep. p. 42 (Sen. Doc. p. 228).

*Evidence.* The second sentence of section 7(c) provides that "Any oral or documentary evidence may be received, but every

3 Thus, in Sen. Rep. p. 22 (Sen. Doc. p. 208), it is stated: "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." See also H.R. Rep. p. 36 (Sen. Doc. p. 270).

agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

Under section 7(c) it is clear that, as heretofore, the technical rules of evidence will not be applicable to administrative hearings. See also Final Report, p. 70. Thus, it is stated that "the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice." H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208). To carry out this policy, it is advisable that each agency direct its hearing officers to exclude from the record so far as practicable irrelevant, immaterial or unduly repetitious evidence.

Agency action must be supported by "reliable, probative, and substantial evidence." It is said that "These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand." H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208). This restates the present law. H.R. Rep. p. 53, fn. 18 (Sen. Doc. p. 287); *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 230 (1938); Senate Comparative Print, p. 14 (Sen. Doc. p. 31). It is clear that nothing in section 7(c) is intended to change the standard or scope of judicial review; section 10(e)(5) specifically restates the "substantial evidence rule", as developed by the Congress and the courts, under which the reviewing court ascertains whether the agency's findings of fact are supported by substantial evidence.

Nothing in section 7(c) is intended to preclude an agency from imposing reasonable requirements as to how particular facts must be established—such as age, citizenship, marital status, etc. Nor is an agency forbidden to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist.



Furthermore, section 7(c) does not repeal provisions of other statutes which establish certain presumptions of fact.[4]

*Presentation of evidence.* Section 7(c) provides further that "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." It is concluded that the provision is intended to emphasize the right of parties in cases of adjudication (other than determining claims for money or benefits or applications for initial licenses) to present their evidence orally, and in addition to present such "documentary evidence" as would be admissible in judicial proceedings, such as writings and records made in regular course of business. 28 U.S.C. 695. As here used "documentary evidence" does not mean affidavits and written evidence of any kind. Such a construction would flood agency proceedings with hearsay evidence. In the last sentence of the subsection, there appears the phrase "evidence in written form," thus indicating that the Congress distinguished between "written evidence" and "documentary evidence." See also section 203(c) of the Emergency Price Control Act. Again, the subsection expressly states the right to adequate cross-examination. Against this background, it is clear that the "right to present his case or defense by oral or documentary evidence" does not extend to presenting evidence in affidavit or other written form so as to deprive the agency or opposing parties of opportunity for cross-examination, nor so as to force them to assume the expense of calling the affiants for cross-examination. See *Powhatan Mining Co.* v. *Ickes,* 118 F. 2d 105, 109 (C.C.A. 6, 1941).

Of course, the agency may, if it desires, receive such written evidence as it determines would tend to be reliable and probative and the admission of which would not prejudicially deprive other parties or the agency of opportunity for cross-examination. Thus, technical and statistical data may be introduced in convenient written form subject to adequate opportunity for cross-examination and rebuttal. Sen. Rep. p. 42, H.R. Rep. p. 37 (Sen. Doc. pp. 228, 271). Any evidence may be admitted by agreement or if no

4 For example, section 20(d) of the Longshoremen's and Harbor Workers' Compensaton Act (33 U.S.C. 920(d)), provides that "In any proceedings for the enforcement of a claim for compensation it shall be presumed, in the absence of substantial evidence to the contrary—(d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." See *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935). See also section 2(a)9 of the Investment Company Act of 1940 (15 U.S.C. 80a-2(9)).

objection is made. *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 155 (1941).

The provision for "such cross-examination as may be required for a full and true disclosure of the facts" does not, according to the House Committee Report, "confer a right of so-called 'unlimited' cross-examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the 'full and true disclosure of the facts' stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required 'for a full and true disclosure of the facts.' In many rule making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings." H.R. Rep. p. 37 (Sen. Doc. p. 271).

In proceedings involving rule making or determining claims for money or benefits or applications for initial licenses, an agency may adopt procedures for the submission of all or part of the evidence in written form. Thus, in rate making and licensing proceedings, which frequently involve extensive technical or statistical data, the agency may require that the mass of such material be submitted in orderly exhibit form rather than be read into the record by witnesses. Similarly, in determining claims for money or benefits, the agency may require that the papers filed in support of the application contain the factual material. Such procedures may be required only "where the interest of any party will not be prejudiced thereby." Typically, in these cases, the veracity and demeanor of witnesses are not important. It is difficult to see how any party's interests would be prejudiced by such procedures where sufficient opportunity for rebuttal exists. However, "To the extent that cross-examination is necessary to bring out the truth, the party should have it." Sen. Rep. p. 23, H.R. Rep. p. 37 (Sen. Doc. pp. 209, 271). Such is the present practice of such agencies as the Civil Aeronautics Board, which has made extensive use of written evidence procedures to simplify records and shorten formal hearings.



## SECTION 7(d)—RECORD

*Record.* The first sentence of section 7(d) provides that "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties." The record must include any agency proceedings upon an affidavit of personal bias or disqualification of a hearing officer pursuant to section 7(a). All decisions (initial, recommended or tentative) are required by section 8(b) to be made a part of the record. It is believed, by analogy to judicial practice, that the subsection does not require the transcription of oral arguments for inclusion in the record.

In the interests of economy, certain agencies have followed the practice of not transcribing the stenographic record of the hearing unless there is an appeal from the decision of the officer presiding at the hearing. Section 7(d) does not require an agency to have the record transcribed automatically in every case, but it does require transcription in any case where a party demands a copy of the record, so that it will be available to him "upon payment of lawfully prescribed costs." This requirement is satisfied by the present agency practice of contracting with private stenographic agencies for reporting service on terms that enable parties to obtain copies at a reasonable price.

*Official notice.* The second sentence of section 7(d) provides that "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." In the Senate Comparative Print, June 1945, p. 15 (Sen. Doc. p. 32), it is stated that "The rule of official notice is that recommended by the Attorney General's Committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an 'opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed.' (Final Report pp. 71-73)." The recommendation of the Attorney General's Committee, which is thus apparently adopted was that "the permissible area of official notice be extended" so as to avoid "laborious proof of what is obvious and notorious," subject to opportunity for rebuttal or explanation, as provided in section 7(d). See the excellent discussion in Final Report, pp. 71-73, pointing out that the process of

official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge. Cf. H.R. Rep. p. 38 (Sen. Doc. p. 272).

Agencies may take official notice of facts at any stage in a proceeding—even in the final decision[5]—but the matters thus noticed should be specified and "any party shall on timely request be afforded an opportunity to show the contrary." The matters thus noticed become a part of the record and, unless successfully controverted, furnish the same basis for findings of fact as does "evidence" in the usual sense.

5 "Where agencies take such notice they must so state on the record or in their decisions and then afford the parties an opportunity to show the contrary." Sen. Rep. p. 23, H.R. Rep. pp. 37-38 (Sen. Doc. pp. 209, 271). If official notice is taken of facts in the course of the final decision, the proceeding need not be reopened automatically, but the parties will be entitled to request reopening for the purpose of contesting the facts thus officially noticed by the agency.



## VII

### SECTION 8—DECISIONS

The provisions of section 8, together with those of section 5(c), govern the procedure subsequent to hearing. Section 8 applies to cases of rule making and adjudication which are required by sections 4 and 5 to be conducted in accordance with sections 7 and 8. It became effective on December 11, 1946, and is applicable to proceedings commenced on and after that date. See section 12.

### SECTION 8(a)—WHO DECIDES

Section 8(a) provides for intermediate and final decisions, prescribes who shall make them, and defines the decisional relationship between the agency heads and presiding officers.[1] The subsection reads as follows:

> *Action by subordinates.* In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

At the outset, it should be noted that section 8(a) has no application to cases in which the agency itself has presided at the reception of the evidence. The procedures required by this subsection are intended "to bridge the gap between the officials who hear and those who decide cases." H.R. Rep. p. 38 (Sen. Doc. p. 272). If the agency itself, e.g., the Interstate Commerce Commission, hears the evidence, it may decide the case without the use of any intermediate decision. In such cases, however, the agency may, if it desires, preface its final decision with a tentative decision to which the parties may file exceptions.

1 Any of the requirements of section 8 may be waived by the parties. Sen. Rep. p. 23 (Sen. Doc. p. 209).

In cases of adjudication subject to section 5(c) and in which the agency itself has not presided at the reception of evidence, the presiding officer[2] must "initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision." It is further provided that "Whenever the agency makes the initial decision without having presided at the reception of the evidence [the presiding officer] shall first recommend a decision." That is, in cases of adjudication subject to section 5(c), the presiding officer must make either (a) an "initial" decision which will become the agency's final decision in the absence of an appeal to or review by the agency, or (b) a "recommended" decision which will be followed by an "initial" decision by the agency.

Under the terms of the subsection, the presiding officer's decision will constitute an initial decision unless the agency provides otherwise either by general rule published in the Federal Register or by order in the particular case. Accordingly, each agency should determine whether it desires the decisions of its presiding officers to be "initial" decisions or recommended decisions.

In cases not subject to section 5(c), the agency may provide for the making of initial decisions by "any other officer or officers qualified to preside at hearings pursuant to section 7." That is, in rule making, in "determining applications for initial licenses," and in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers," an "initial" decision may be made, for example, by a hearing examiner other than the one who heard the evidence. Further, the fourth sentence of section 8(a) provides that in rule making and in determining applications for initial licenses the agency may issue a tentative decision or *any* of its responsible officers may recommend a decision in lieu of a recommended decision by the hearing examiner who conducted the hearing. This last clause permits, in rule making and determining applications for initial licenses, "the continuation of the widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency report, a report prepared by the staff of specialists and technicians normally engaged in that portion of

2 As here used, presiding officer means the member of the agency, the examiner appointed pursuant to section 11, or the special statutory board or hearing officer who conducted the hearing. See section 7(a). Where the presiding officer becomes unavailable as by illness or leaving the agency, the agency may direct another hearing officer to make an initial or recommended decision, or it may issue a tentative decision, or it may order a rehearing.



the agency's operations to which the proceeding in question relates." Sen. Rep. p. 43[3] (Sen. Doc. p. 229).

Finally, in rule making or determining applications for initial licenses, the agency may itself decide the case without any prior initial, recommended or tentative decision, even though it has not presided at the reception of the evidence, "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

*Appeals and review.* Where the agency permits a hearing officer to make an "initial" decision, "in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency." Parties may appeal from the hearing officer's initial decision to the agency, which must thereupon itself consider and decide the case. Also, the agency may review the hearing officer's initial decision even though the parties fail to appeal. Each agency should publish a rule prescribing the time within which parties may appeal or the agency may call up the case for review.[4] Where the hearing examiner (or other officer where permitted by the subsection) makes a recommended decision, the agency must always make an "initial" or final decision.

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. 2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705. Similarly, the third sentence of section 8(a) provides that "On appeal from or review of the initial decisions of such [hearing] officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision." This is not to say that hearing

3 It is to be noted that in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers" (if they do not constitute either rule making or the determination of an application for an initial license), an intermediate (i.e., "initial" or "recommended") decision must be made by the hearing examiner who conducted the hearing or by some other officer or officers qualified to preside at hearings pursuant to section 7(a).

4 It is important to note that section 10(c) permits an agency to require parties to appeal from hearing officers' initial decisions to the agency as a prerequisite to obtaining judicial review. Such a requirement must be set forth in a published rule which must further provide that the hearing officer's initial decision shall be inoperative pending the agency's review of the case. Sen. Rep. p. 27, H.R. Rep. pp. 43, 55, fn. 21 (Sen. Doc. pp. 213, 277, 289).

examiners' initial or recommended decisions are without effect. "They become a part of the record [as required by subsection 8(b)] and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." Sen. Rep. p. 24, H.R. Rep. p. 38 (Sen. Doc. pp. 210, 272). In such cases, it is apparently assumed that agencies will attach considerable weight to the findings of the examiner who saw and heard the witnesses. However, in cases where the credibility of witnesses is not a material factor, or cases where the recommended or initial decision is made by an officer other than the one who heard the evidence, the function of such decision will be, rather, the sharpening of the issues for subsequent proceedings.

Section 8(a) empowers agencies to "limit the issues upon notice or by rule" on appeal from or review of the *initial* decisions of hearing officers. That is, an agency may limit the issues which it will consider in such cases by notice in a particular case or by a general rule published in the Federal Register. It may restrict its review to questions of law and policy or, where it is alleged that erroneous findings of fact have been made by the hearing officer, to determining whether cited portions of the record disclose that the findings are clearly wrong. Final Report, p. 51. See also Sen. Rep. p. 43 (Sen. Doc. p. 229).

Where the hearing officer makes a recommended decision, the agency must itself consider and determine all issues properly presented. However, it may provide that it will consider only such objections to its subordinates' decisions (recommended or initial) as are presented to it as exceptions to such decisions. See *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255 (1943); *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 387-88 (1946). It may also require that exceptions be precise and supported by specific citations to the record.[5] The agency in reviewing either initial or recommended decisions may adopt in whole or in part the findings, conclusions and basis therefor stated by the presiding

[5] See Final Report, p. 52: "The Committee strongly urges that the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commissioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified in the appeal."



officer. On the other hand, it may make entirely new findings either upon the record or upon new evidence which it takes. Also, it may remand the case to the hearing officer for any appropriate further proceedings. Sen. Rep. p. 43, H.R. Rep. pp. 38-39 (Sen. Doc. pp. 229, 272-273).

### SECTION 8(b)—SUBMITTALS AND DECISIONS

*Submittals.* The first sentence of section 8(b) provides that "Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, *or* (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions." [Italics supplied]. The procedure thus prescribed for the focusing of issues and arguments is a codification of the present general practice. Senate Comparative Print, June 1945, p. 16 (Sen. Doc. p. 33). "Ordinarily proposed findings and conclusions are submitted only to the officers making the initial [or recommended] decision, and the parties present exceptions thereafter if they contest the result. However, such exceptions may in form or effect include proposed findings or conclusions for the reviewing authority to consider as part of the exceptions." Sen. Rep. pp. 24, 43 (Sen. Doc. pp. 210, 229).

Agencies may require that proposed findings and conclusions and exceptions be supported by precise citation of the record or legal authorities as the case may be. Reasonable time limits for the submission of such materials may be imposed. The opportunity to submit supporting reasons means that briefs on the law and facts which are filed by parties in support of their proposed findings and conclusions and exceptions must be received and considered. Sen. Rep. p. 24, H.R. Rep. p. 39 (Sen. Doc. pp. 210, 273). Section 8(b) does not purport to prescribe opportunities for oral argument. Accordingly, subject to the provisions of particular statutes, each agency must itself determine in what cases oral argument before hearing officers or the agency is necessary or appropriate.[6]

[6] See *Morgan* v. *United States*, 298 U.S. 468, 481 (1936): "Argument may be oral or written."

*Decisions.* Section 8(b) further provides: "The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Since all decisions, whether made by the agency or by a subordinate officer, become a part of the record, the requirement of the first quoted sentence will be satisfied if such decisions in some way indicate the ruling of the agency or such officer upon each requested finding or conclusion or exception presented to the agency or to such officer. The purpose of this requirement is "to preclude later controversy as to what the agency had done." H.R. Rep. p. 54, fn. 19 (Sen. Doc. p. 288).

The form and content of decisions, as prescribed in the last sentence of section 8(b), are discussed in the Committee reports as follows:

> The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require.
>
> Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa. Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material. It should also be noted that the relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often determine whether they have power to act rather than whether their discretion should be exercised or how it should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine what other or additional facts they might offer by way of rehearing or reconsideration of decisions. Sen. Rep. pp. 24-25, H.R. Rep. p. 39. (Sen. Doc. pp. 210-211, 273).

An agency which issues opinions in narrative and expository form may continue to do so without making separate findings of fact and conclusions of law. However, such opinions must indicate the agency's findings and conclusions on material issues of fact, law or discretion with such specificity "as to advise the parties and any reviewing court of their record and legal basis."[7] The requirement that such decisions indicate the reasons for the exercise of discretionary power is a codification of existing good practice. See *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194-197 (1941).

[7] Agencies should keep in mind that pursuant to section 3(b) they may cite as precedents only such previous orders and opinions as have been published or made available for public inspection.



Nothing in the Act is intended to preclude agency heads from utilizing the services of agency employees as assistants for analysis and drafting. *Morgan* v. *United States,* 298 U.S. 468, 481 (1936). Of course, in adjudicatory cases subject to section 5(c), such assistants could not have performed investigative or prosecuting functions in the cases (or in factually related cases) in which they are so employed. Also, the agency heads are free to employ the hearing officer who heard a particular case as the draftsman of their final decision and otherwise to assist in its formulation. Compare generally section 4(a) of the National Labor Relations Act, as amended.

*Appeals to superior agency.* Nothing in section 8 is intended to cut off any rights which parties may have for appeal to or review by a superior agency. Sen. Rep. p. 23 (Sen. Doc. p. 209). The requirements of subsection 8(b) as to the form and content of decisions do not apply to decisions of a superior agency upon such appeal from or review of the agency's decision.

## VIII

### SECTION 9—SANCTIONS AND POWERS

Section 9 generally prohibits unauthorized action by agencies and prescribes certain rules to govern licensing proceedings. The provisions of section 9 apply to all relevant cases (other than the agencies and functions exempted by section 2(a)) regardless of the applicability of the other sections of the Act.

### SECTION 9(a)—SANCTIONS

Section 9(a) provides that "in the exercise of any power or authority no sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." The term sanction is broadly defined in section 2(f) to include the whole or part of any agency "(1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license;[1] or (7) taking of other compulsory or restrictive action."

The original draft of section 9(a) limited the imposition of sanctions to those "as specified and authorized by statute." Senate Comparative Print, June 1945, p. 17 (Sen. Doc. p. 159). The change of the word "statute" to "law" was intentional so as to recognize that an agency may impose a sanction or issue a substantive rule or order if such power is authorized not only by statutes but by treaties, court decisions, commonly recognized administrative practices, or other law. See *United States* v. *MacDaniel*, 7 Pet. (32 U.S.) 1, 13-14 (1833). Both the Senate and House reports recognize that the source of authority for the imposition of a sanction or the issuance of a substantive rule or order may be either specific or general, as the case may be. Sen. Rep. p. 25, H.R. Rep. p. 40 (Sen. Doc. pp. 211, 274).

The purpose of section 9(a) is, evidently, to assure that agencies will not appropriate to themselves powers Congress has not intended them to exercise. Section 9(a) merely restates existing law. Sen. Rep. p. 43 (Sen. Doc. p. 229). Many agencies' powers

1 The denial of an application for a renewal of a license is not a penal measure. *Federal Communications Commission* v. *WOKO*, 329 U.S. 223 (1946). It is, by definition in section 2(f), a form of agency sanction.



are very clear; they are set forth specifically in the act creating the agency. Still other powers may be readily inferred from the framework of the act creating the agency or may be logically necessary for the conduct of the powers granted to the agency. But whether an agency's powers are express or implied, in either case they may be exercised. Particularly pertinent in this connection is the language of the Supreme Court in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194 (1941):

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. *But in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations.* Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.*** the relation of remedy to policy is peculiarly a matter for administrative competence. [*Italics* supplied].

### SECTION 9(b)—LICENSES

Section 9(b) is composed of three sentences, each of which is mutually exclusive of the others. The first sentence applies specifically to applications for licenses, the second to suspension or revocation of licenses, and the third to renewals. Each of these will be considered separately.

*Applications for licenses.* The first sentence of section 9(b) provides: "In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision." The import of this sentence is that an agency shall hear and decide licensing proceedings as quickly as possible. Should the licensing proceedings be required by statute to be determined upon the record after opportunity for an agency hearing, an agency will be required to follow the provisions as to hearing and decision contained in sections 7 and 8 of the Act. As to other types of licensing proceedings, the Act does not formulate any fixed procedure (just as no fixed procedure has been formulated for adjudications other than those that are required

by statute to be determined on the record after opportunity for an agency hearing).

The requirement that licensing proceedings be completed with reasonable dispatch is merely a statement of fair administrative procedure. Congress decided not to set any maximum period of time for agency consideration of applications for licenses. In the first draft of S. 7 there was a provision to the effect that an application for a license would be deemed granted unless the agency within 60 days after the application was made, rendered its decision or set the matter down for hearing. Senate Comparative Print, June 1945, p. 17 (Sen. Doc. p. 159). This provision was dropped in later drafts and replaced with the phrase "with reasonable dispatch."

The term "reasonable dispatch" is not an absolute one and cannot be described in precise terms. What is reasonable for one agency may not be reasonable for another agency. The time necessary to consider license applications for certificates of public convenience and necessity is much greater, as a rule, than that needed for issuing warehousemen's licenses under 7 U.S.C. 244. Similarly, variations in an agency's work-load, reflecting developments in an industry, may result in unavoidable temporary backlogs. Of course, where another statute prescribes a specific period of time for agency consideration of an application for a license, such specific provision will be controlling. For example, under section 355(c) of Title 21, U.S.C., an application for a license for the sale of new drugs becomes effective on the sixtieth day after the filing of the application unless the Federal Security Administrator takes appropriate action.

*Suspension or revocation of licenses.* The second sentence of section 9(b) provides: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." This sentence requires an agency to give a licensee an opportunity to change his conduct before his license can be revoked by the agency unless the licensee's conduct is willful or the public health, interest or safety requires otherwise.



Thus, if a particular licensee should under ordinary circumstances transcend the bounds of the privilege granted to him, the agency which has granted him the license must inform him in writing of such conduct and afford him an opportunity to comply with the requirements of the agency before it can revoke, withdraw, suspend or annul his license. While the warning must be in writing, it need not take any special form.

No prior notice need be given if the licensee's conduct is willful. In such a situation the license may be revoked immediately without "another chance." Also, "another chance" need not be given where "the public health, interest, or safety requires otherwise." The latter phrase refers to a situation where immediate cancellation of a license is necessary in the public interest irrespective "of the equities or injuries to the licensee." Sen. Rep. p. 26 (Sen. Doc. p. 212). For example, in case of an accident involving aircraft, the Administrator of Civil Aeronautics may suspend the license of the pilot pending investigation. The public safety and interest require such immediate suspension. 49 U.S.C. 559.

It is clear that the provisions of this second sentence do not apply to temporary permits or temporary licenses. Sen. Rep. p. 26, H.R. Rep. p. 41 (Sen. Doc. pp. 212, 275). Such permits or licenses may be revoked without "another chance" and regardless of whether there is willfulness or whether the public health, interest, or safety is involved. And it is clear, too, that the provisions of this sentence do not apply to renewal of licenses. Renewals are treated specifically in the next sentence.

*Renewal of licenses.* The last sentence of section 9(b) provides: "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency." This sentence states the best existing law and practice. Sen. Rep. p. 43 (Sen. Doc. p. 229). It is only fair where a licensee has filed his application for a renewal or a new license in ample time prior to the expiration of his license, and where the application itself is sufficient, that his license should not expire until his application shall have been determined by the agency. In such a case the licensee has done everything that is within his power to do and he should not suffer if the agency has failed, for one reason or another, to con-

sider his application prior to the lapse of his license. Agencies, of course, may make reasonable rules requiring sufficient advance application.[2]

2 The Office of Alien Property of the Department of Justice has adopted such a rule with reference to renewal of licenses. 11 F.R. 177A-629.



# IX

## SECTION 10—JUDICIAL REVIEW

The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions.[1] Section 10, it must be emphasized, deals largely with principles. It not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules. For example, many statutes provide that where the reviewing court finds that the taking of new evidence would be warranted, such evidence must be presented to the agency with opportunity to modify its findings. See section 9 of the Securities Act (15 U.S.C. 77i). Such provisions continue in effect. Similarly, the time within which review must be sought will be governed, as in the past, by relevant statutory provisions or by judicial application of the doctrine of laches. See Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45 (c)) and *U.S. ex rel. Arant* v. *Lane*, 249 U.S. 367 (1919). Accordingly, the general principles stated in section 10 must be carefully coordinated with existing statutory provisions and case law.[2]

Section 10 is applicable irrespective of whether the agency action for which review is sought was governed by the procedural provisions of sections 4, 5, 7 and 8. However, section 10 does not apply to those agencies and functions which are excepted by section 2(a) from all provisions of the Act except section 3. For example, the provisions of section 10 are in no way applicable to the review of agency action taken pursuant to the Housing and Rent Act of 1947.

Section 10 became effective on September 11, 1946, and is applicable from that date to the judicial review of agency action.[3] However, the Department of Justice, in briefs filed in the Supreme Court, has taken the position that section 10 does not apply to cases which were pending in the courts on September 11, 1946. While these cases were decided by the Supreme Court without

1 See statements of Carl McFarland, Chairman of the Committee on Administrative Procedure of the American Bar Association, in House Hearings (1945) pp. 87-88 (Sen. Doc. pp. 83-84), and of the Attorney General in Sen. Rep. pp. 38, 43 (Sen. Doc. pp. 224, 229); 92 Cong. Rec. A2982 (Sen. Doc. pp. 406-407).

2 Recognizing the delicacy of this problem and the obligation of Government counsel to render every assistance to the courts in this task, the Attorney General has established a committee within the Department of Justice to assist in developing a uniform approach to the problems which arise in litigation.

3 See section 12 of the Act as to the effective dates of the various provisions of the Act.

any express reference to section 10, it seems fair to infer that the Court has accepted this construction. *United States* v. *Ruzicka*, 329 U.S. 287 (1946); *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441 (1947); *Krug* v. *Santa Fe Pacific Rd. Co.*, 329 U.S. 591 (1947); *Patterson* v. *Lamb*, 329 U.S. 539 (1947).

## SCOPE OF SECTION 10

Section 10 applies "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". The intended result of the introductory clause of section 10 is to restate the existing law as to the area of reviewable agency action. House Hearings (1945) p. 38 (Sen. Doc. p. 84).

A statute may in terms preclude, or be interpreted as intended to preclude, judicial review altogether. An example of a statute expressly precluding any judicial review is the Act of March 20, 1933 (38 U.S.C. 705) providing that "All decisions rendered by the Administrator of Veterans' Affairs under the provisions [of designated statutory sections] shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." Senate Hearings (1941) p. 1358. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943), illustrates the interpretation of a statute as intended to preclude judicial review although the statute does not expressly so provide.[4] Sen. Rep. pp. 43-44 (Sen. Doc. pp. 229-230).

The provisions of section 10 are applicable "Except so far as agency action is by law committed to agency discretion." For an example of such unreviewable agency action, see *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940) (action by the President under section 336(c) of the Tariff Act "if in his judgment" such action is necessary). More broadly, there are many statutory provisions which merely authorize agencies to make loans; under such statutes, the agencies' discretion is usually so complete that the refusal to make a loan is not reviewable under section 10 or

4 As S. 7 was introduced in the Senate in January 1945, the introductory phrase of section 10 read "Except (1) so far as statutes *expressly* preclude judicial review". [Italics supplied]. As reported in its present form by the Senate Committee on the Judiciary, the word "expressly" was omitted. This omission provides strong support for the conclusion that the courts remain free to deduce from the statutory context of particular agency action that the Congress intended to preclude judicial review of such action.



any other statute. Also, the refusal by the National Labor Relations Board to issue a complaint is, as heretofore, an exercise of discretion unreviewable by the courts. See *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96 (C.C.A. 3, 1941), and Senate Comparative Print of June 1945, p. 19, para. (3) (Sen. Doc. p. 38). For the same reason, the denial of a petition pursuant to section 4(d) of this Act for the issuance, amendment or repeal of a rule is not subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230).

In addition, the introductory clause of section 10 provides a most important principle of construction for reconciling the provisions of the section with other statutory provisions relating to judicial review. All of the provisions of section 10 are qualified by the introductory clause, "*Except so far as* (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion" [Emphasis supplied]. The emphasized phrase does not mean that every provision of section 10 is applicable except *where* statutes preclude judicial review altogether. Instead, it reads "*Except so far as* (1) statutes preclude judicial review", with the clear result that some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10. The net effect, clearly intended by the Congress, is to provide for a dovetailing of the general provisions of the Administrative Procedure Act with the particular statutory provisions which the Congress has moulded for special situations.[5] Thus, a civil service employee of the Federal Government who alleges unlawful removal from office, can obtain judicial review only of the question of whether the procedures of the Civil Service Act were followed. *Levine* v. *Farley*, 107 F. 2d 186 (App. D.C., 1939), certiorari denied, 308 U.S. 622. In such a case, the provisions of section 10(e), for example, relating to substantial evidence and to review of abuses of discretion, will not apply.

## SECTION 10(a)—RIGHT OF REVIEW

Section 10(a) provides that "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant

5 This conclusion is supported by the following statement in the Senate Comparative Print, p. 18 (Sen. Doc. p. 86): "The introductory exceptions state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold *judicial powers*." [Italics supplied].

statute, shall be entitled to judicial review thereof." This statement of the persons entitled to judicial review has occasioned considerable comment because of the use of the phrase "any person suffering legal wrong". This phrase was used as one of limitation and not for the purpose of making judicial review available to anyone adversely affected by governmental action.[6] The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, "legal wrong" means such wrong as particular statutes and the courts have recognized as constituting ground for judicial review. "Adversely affected or aggrieved" has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action.[7] The determination of who is "adversely affected or aggrieved * * * within the meaning of any relevant statute" has "been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme". Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); *The Chicago Junction Case*, 264 U.S. 258 (1924); *Sprunt & Son* v. *U. S.*, 281 U.S. 249 (1930); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940); and *Federal Communications Commission* v. *Sanders Brs. Radio Station*, 309 U.S. 470 (1940). Sen. Rep. p. 44 (Sen. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history.[8] Also implied is the continuing role of the courts in determining, in the context of constitutional requirements and the particular statutory pattern, who is entitled to judicial review.

### SECTION 10(b)—FORM AND VENUE OF ACTION

Section 10(b) provides that "The form of proceeding for judicial review shall be any special statutory review proceeding

6 Compare original provision of S. 7 as introduced in the Senate: "Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section."

7 See section 9 of the Securities Act (15 U.S.C. 77i), "any person aggrieved"; section 402(b)(2) of the Communications Act (46 U.S.C. 402), "person aggrieved or whose interests are adversely affected"; section 1006 of the Civil Aeronautics Act (49 U.S.C. 646), "person disclosing a substantial interest in such order".

8 See *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947).



relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

*Form of action.* Many regulatory statutes provide for judicial review of agency action by requiring the complaining party to file with a circuit court of appeals (or with a district court) a written petition praying that the agency action be modified or set aside; thereafter, the agency files with the reviewing court a transcript of the record.[9] Under such statutory provisions, the filing of a petition to modify or set aside agency action will continue to be the required form of proceeding for judicial review. Similarly, where agency action is now reviewable pursuant to the Urgent Deficiencies Act of 1913 (28 U.S.C. 47), the form of proceeding will consist of suits to enjoin[10] in accordance with the provisions of that Act.

In the absence of any special statutory review proceedings, other forms of action, as heretofore found by the courts to be appropriate in particular situations, will be used. Thus, habeas corpus proceedings should be used to obtain review of exclusion and deportation orders. *U.S. ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103 (1927). Likewise, an order of the Postmaster General suspending second-class mailing privileges may, as before, be tested by a suit to enjoin such action. *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946). In brief, where agency action is reviewable, but the Congress has not specified the form of review, the courts will continue to select the appropriate form of action.

Also, where a special statutory review proceeding is not legally adequate, the form of proceeding for judicial review will be "any applicable form of legal action * * * in any court of competent jurisdiction". The Act does not purport to define "inadequate",

9 See section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)); section 9 of the Securities Act (15 U.S.C. 77i); and section 701 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 371(f)).

10 "The expression 'special statutory review' means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by other statutes as the appropriate mode of review in given cases." Sen. Rep. p. 26; H.R. Rep. p. 42 (Sen. Doc. pp. 212, 276).

and thus leaves to the courts the determination of whether a particular statutory review proceeding is legally adequate. As stated by the Attorney General: "if the procedure is inadequate (*i.e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief*), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus, is available". [Emphasis supplied]. Sen. Rep. p. 44 (Sen. Doc. p. 230). Thus, the Act does not provide any new definition of "adequate", but rather assumes that the courts will determine the adequacy of statutory review procedures by the legal standards which the courts themselves have already developed. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

*Venue.* Section 10(b) does not purport to change existing venue requirements for judicial review. In fact, it specifically refers to review "in any court specified by statute", or "in any court of competent jurisdiction". In the report of the House Committee, it is stated that "The section does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law action variety." H.R. Rep. p. 42 (Sen. Doc. p. 276). See also Representative Walter's statement to the House, 92 Cong. Rec. 5654 (Sen. Doc. p. 369). Thus, for example, station and construction licensing orders issued by the Federal Communications Commission remain reviewable only by the Court of Appeals for the District of Columbia (47 U.S.C. 402(b)). More generally, statutes specifically providing for judicial review in a circuit court of appeals or a district court often designate the venue by relation to the matters involved, such as "any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein [the person aggrieved] resides or transacts business, or in the Court of Appeals of the District of Columbia". (Section 10(f) of the National Labor Relations Act).[11] Such provisions are continued in effect. So also are the general statutory provisions concerning venue, such as 28 U.S.C. 112 that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant". For the application of this section to suits against

11 For other examples, see 28 U.S.C. 43 for venue of suits to enjoin orders of the Interstate Commerce Commission, section 1006(b) of the Civil Aeronautics Act (49 U.S.C. 646(b)), and section 21 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 921).



Government agencies, see *Kentucky Natural Gas Corp.* v. *Public Service Comm.*, 28 F. Supp. 509, affirmed 119 F. 2d 417 (C.C.A. 6, 1941); and *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M.D. Pa. 1941).

*Review in enforcement proceedings.* Section 10(b) also provides that "Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law". In the Committee reports it is stated that "The provision respecting 'prior, adequate, and exclusive * * * review' in the second sentence is operative only where statutes, *either expressly or as they are interpreted*, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case." [Emphasis supplied]. Sen. Rep. p. 27; H.R. Rep. p. 42 (Sen. Doc. pp. 213, 276). So interpreted, this provision restates existing law.[12] Thus, a statute may either expressly provide for an exclusive method of judicial review which precludes challenge of agency action in enforcement proceedings,[13] or a court may conclude from the statutory context that such was the legislative intention. *United States* v. *Ruzicka*, 329 U.S. 287 (1946), interpreting the Agricultural Marketing Agreement Act of 1937, is an excellent example of the latter situation.[14] Similarly, section 10(b) leaves intact the doctrine of primary jurisdiction developed by the courts in cases involving the reasonableness of the charges of carriers and public utilities. See *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945). It also leaves intact the requirements of the doctrine of exhaustion of administrative remedies. In many situations, however, an appropriate method of attacking the validity of agency action is to set up the alleged invalidity as a defense in a civil or criminal enforcement proceeding.

The adequacy of an exclusive method for judicial review would appear to be governed by the same considerations as the courts would apply in determining the adequacy or inadequacy of a

12 The Senate Committee changed the last phrase of the provision from "provided by statute" to "provided by law". See also Senate Comparative Print, June 1945, p. 18 (Sen. Doc. p. 37), stating that "The second sentence states the present rule as to enforcement proceedings." See Representative Walter's statement to the House, 92 Cong. Rec. 5654 (Sen. Doc. p. 369): "These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law."

13 See section 204(d) of the Emergency Price Control Act of 1942.

14 See also *Walling* v. *Cohen*, 48 F. Supp. 859 (E.D. Pa. 1943), affirmed 140 F. 2d 453 (C.C.A. 3, 1944) under the Fair Labor Standards Act, and *Piuma* v. *United States*, 126 F. 2d 601 (C.C.A. 9, 1942), certiorari denied, 317 U.S. 637, under the Federal Trade Commission Act.

statutory review proceeding for the purposes of the first sentence of section 10(b). Thus, the use of the word "prior" in the last sentence of section 10(b) does not mean that the validity of agency action may always be challenged collaterally by way of defense in enforcement proceedings whenever the method of review specified by the Congress does not result in a judicial determination as to the validity of such action prior to the commencement of enforcement proceedings. As indicated above, the Congress intended section 10 as a whole to be integrated and reconciled with existing statutory provisions for judicial review. Specifically, the general principle stated in the last sentence of section 10(b) was not regarded by the Congress as an innovation. Rather, it was said that "The second sentence states the present rule as to enforcement proceedings." Senate Comparative Print, p. 18 (Sen. Doc. p. 37). And further: "These provisions summarize the situation as it is now generally understood. The section [10(b)] does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law." Representative Walter, 92 Cong. Rec. 5654 (Sen. Doc. p. 369).

There are many situations in which the invalidity of agency action may be set up as a defense in enforcement proceedings. On the other hand, there are special statutory arrangements under which the Congress has provided for immediate and continuous enforcement while the exclusive route to judicial review is by first exhausting an administrative procedure; in such an agency proceeding, the agency and the parties make a record with a view toward (a) reconsideration by the agency itself, and (b) providing an adequate factual record as the basis for judicial review by a specified court. See *United States* v. *Ruzicka, supra.* There is nothing to indicate that the Congress intended to repeal by implication such special statutory arrangements for compliance pending orderly judicial review, or to preclude itself from making similar arrangements in the future. Similarly, it is believed that the courts are left free to apply the primary jurisdiction doctrine in enforcement proceedings so as to require issues relating to the alleged unreasonableness of filed tariffs to be first presented to the appropriate administrative agency rather than to an enforcement court. See *Ambassador, Inc.* v. *United States, supra.* In brief, the courts must determine in each case whether the Congress, by establishing a special review procedure,



intended to preclude or to permit judicial review of agency action in enforcement proceedings. And, the extent to which the "opportunity" for judicial review prior to the enforcement proceedings has been waived or disregarded by the defendant in those proceedings must also be considered.

### SECTION 10(c)—REVIEWABLE ACTS

The provisions of this subsection defining agency action subject to judicial review are said to "involve no departure from the usual and well understood rules of procedure in this field". Representative Walter, 92 Cong. Rec. 5654 (Sen. Doc. p. 369); Sen. Rep. p. 44 (Sen. Doc. p. 230).

First, it is provided that "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." Many statutes specifically provide for judicial review of particular agency action, and such action will continue to be reviewable. The second category, "and every final agency action for which there is no other adequate remedy in any court", must be interpreted in the light of other statutory and case law. To begin with, of course, it does not make reviewable agency action as to which "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." Furthermore, this provision does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures. See the first clause of section 10(b). Thus, the Customs Court and the Court of Customs and Patent Appeals retain their present exclusive jurisdictions.[15]

"Agency action", as used in section 10, is defined in section 2(g) as including "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Sen. Rep. p. 11; H.R. Rep. p. 21 (Sen. Doc. pp. 197, 255). While "final", as used to designate reviewable agency action, is not defined in the Act, its meaning may be gleaned from the second and third sentences of section 10(c). Moreover, many regulatory statutes, either expressly or as they are interpreted, have provided for review of (and only of) "final" agency orders, with the result that the judicial construction of such provisions

15 In the Attorney General's memorandum to the Senate Committee, he stated that "'Courts' includes the Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure nor affect the requirement of resort thereto." Sen. Rep. p. 38 (Sen. Doc. p. 224).

will carry over to the interpretation of "final" as used in section 10(b). See *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939).

Since "agency action" is defined to include "rule", the question arises as to whether the phrase, "final agency action for which there is no other adequate remedy in any court", provides for direct judicial review of all rules. Many statutes which give rule making powers (particularly rules of general applicability) to agencies make no provision for judicial review of such rules. The validity of such rules has generally been open to challenge in proceedings for their enforcement. In addition, it has been suggested that in appropriate circumstances, review could be obtained in proceedings under the Declaratory Judgment Act (28 U.S.C. 400). It is clear from the legislative history that section 10(c) was not intended to provide for judicial review in the abstract of all rules. Representative Walter stated to the House that "The provisions of this [sub] section are technical but involve no departure from the usual and well understood rules of procedure in this field." 92 Cong. Rec. 5654 (Sen. Doc. p. 369). Also, during the Senate Hearings in 1941, the subect of judicial review of rules was thoroughly discussed. Two of the bills then pending provided for direct judicial review of rules by declaratory judgment proceedings. (See S. 674 and S. 918). The inclusion of such a provision was strongly advocated by a minority of the Attorney General's Committee on Administrative Procedure who stated that their purpose was—

> to adapt declaratory judgment procedure to this special subject. The minority feels that it is unnecessary and unwise to provide for court review (except where otherwise required by particular statutes) of rules in the abstract. On the other hand, such review upon the application of the rule to a particular person, or upon accepted principles of declaratory judgment, should be expressly recognized. In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that—
>
> > under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an interest and present injury therefrom as to constitute a "case or controversy."
>
> However, the Declaratory Judgments Act does not altogether fit the subject and needs some limitation (not, it may be noted, extension) to care for the determination of fact issues, since under the Declaratory Judgments Act juries determine the facts under instructions from the presiding judge. In adapting declaratory judgment procedure to this field, some special provision must be made for the determination of facts, for otherwise the facts in the first instance would be determined through judicial rather than administrative process. (Senate Hearings (1941) pp. 1344, 1386.)

In other words, even the proponents of detailed provisions for judicial review of rules did not intend to prescribe an abstract form



of review going far beyond the limitations of the Declaratory Judgment Act. Thus, it is fair to conclude that the general statement in the first sentence of section 10(c) was not intended to achieve such a result.

The second sentence of section 10(c) provides that "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action." This language was designed "to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule." Senate Comparative Print, June 1945, p. 19[16] (Sen. Doc. p. 37). For example, intermediate orders such as orders setting matters for hearing are not reviewable either directly (*Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375 (1938)) or collaterally, as by suits for injunction (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)) or declaratory judgment (*Macauley* v. *Waterman S. S. Co.*, 327 U.S. 540 (1946); *Federal Power Commission* v. *Arkansas Power & Light Co.*, *per curiam*, 330 U. S. 802 (1947)). The provision for review of such questions as a part of the review of final agency action restates existing practice. See section 10(e) (4).

Section 10(c) further provides that "Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority." This provision, together with the preceding sentence of the subsection, embodies the doctrine of exhaustion of administrative remedies. H.R. Rep. p. 55, fn. 21 (Sen. Doc. p. 289). Agency action which is finally operative and decisive is reviewable. On the other hand, "Action which is automatically stayable on further proceedings invoked by a party is not final." H.R. Rep. p. 43 (Sen. Doc. p. 277).

It is specifically provided that agency action otherwise final is final for the purposes of the subsection notwithstanding a party's failure to apply for any form of agency reconsideration (reopening, rehearing, etc.), unless a statute expressly requires

16 See Final Report, pp. 85-86.

an application for such reconsideration as a prerequisite to judicial review. Under statutes such as the Federal Power Act (16 U.S.C. 791, 825l) and the Natural Gas Act (15 U.S.C. 717r) which expressly require that such reconsideration be sought, the filing of an application for reconsideration will continue to be a condition precedent to judicial review. In addition, it would seem that under the common statutory provision that no objection to agency action not urged before the agency shall be considered by the courts, an application for agency reconsideration remains a prerequisite to obtaining judicial review of such an objection. See 15 U.S.C. 77(i) and 49 U.S.C. 646(e). However, under a statute which merely confers upon parties the right to apply for rehearing, it is now clear that an application for such reconsideration need not precede judicial review. See generally, as to the effect of agency rules in this field, *Levers* v. *Anderson*, 326 U.S. 219 (1945).

The last clause of section 10(c) relates to two situations. First, pursuant to section 8(a), an agency may permit its hearing examiners to make initial decisions which will become the agency's final decisions in the absence of an appeal to or review by the agency. The last clause of section 10(c) permits an agency to require *by rule* that in such cases parties who are dissatisfied with the "initial" decisions of hearing officers must appeal to the agency before seeking judicial review, but only if the agency further provides that the hearing officers' decisions shall be inoperative pending such administrative appeals. Thus, an agency with licensing powers may by rule require a party to appeal to it from an initial decision of a hearing officer only if, for example, the license suspension or revocation determined upon by the hearing officer is held in abeyance pending the agency's action on the appeal. Sen. Rep. p. 27; H.R. Rep. pp. 43, 55, fn. 21 (Sen. Doc. pp. 213, 277, 289).

The second and similar application of the last clause of section 10(c) relates to appeals from agency decisions to a superior agency authority. For example, under some circumstances, it would seem that a bureau or other subdivision within an agency may itself be the agency with respect to a particular function. In such a situation, it may be desired to require appeal from the bureau's decision to the department head or other "superior agency authority" as a prerequisite to judicial review. Under section 10(c), such a requirement may be imposed, but only, as



in the case of required appeals from hearing officers' initial decisions, if the agency's decision is inoperative pending such appeal. Sen. Rep. p. 27; H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277).

The requirement that agency action be inoperative pending required appeals to the agency or to superior agency authority does not require the agency to take positive action for the benefit of an applicant. It was not intended to require the issuance of licenses or the payment of benefits in any case where an agency requires that the denial of licenses or benefits be appealed to it or to superior agency authority as a prerequisite to judicial review.[17]

### SECTION 10(d)—INTERIM RELIEF

Section 10(d) provides that "Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." The first sentence of the subsection is a restatement of existing law.

The second sentence of section 10(d) confers upon every "reviewing court" discretionary authority to stay agency action pending judicial review "to the extent necessary to prevent irreparable injury." The function of such a power is, as heretofore, to make judicial review effective. Sen. Rep. p. 27; H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277). *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4 (1942). The subsection does not permit a court to order the grant of an initial license pending judicial review of an agency's denial of such a license. Sen. Rep. p. 27; H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277). By the same logic, the subsection does not give to reviewing courts the power to order interim payment of grants or benefits the denial of which is the subject of review.

17 This conclusion is corollary to the following statement made with respect to section 10(d): "This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. While it would not permit a court to grant an initial license, it provides intermediate judicial relief for every other situation in order to make judicial review effective." Sen. Rep. p. 27, H.R. Rep. p. 43 (Sen. Doc. pp. 213, 277).

The stay power conferred upon reviewing courts is to be exercised only "to the extent necessary to prevent irreparable injury." In other words, irreparable injury, the historic condition of equity jurisdiction, is the indispensable condition to the exercise of the power conferred by section 10(d) upon reviewing courts. Sen. Rep. p. 44 (Sen. Doc. p. 230). Mere maintenance of the status quo for the convenience of parties pending judicial review of agency action will not be adequate ground for the exercise of this stay power.[18]

This power to stay agency action is an equitable power, to be exercised "upon such conditions as may be required." Section 10(d) does not require the issuance of stay orders automatically upon a showing of irreparable damage. As in the past, reviewing courts may "balance the equities" in determining whether to postpone the effective date of agency action. Thus, "In determining whether agency action should be postponed, the court should take into account that persons other than parties may be adversely affected by such postponement and in such cases the party seeking postponement may be required to furnish security to protect such other persons from loss resulting from postponement." H.R. Rep. p. 43 (Sen. Doc. p. 277). More broadly, it is clear that a reviewing court in exercising this power may do so under such conditions as the equities of the situation may require.

The "reviewing court" in which section 10(d) vests the power to stay agency action is the court, and only that court, which has obtained jurisdiction to review the final agency action in accordance with subsections (b) and (c) and the applicable provisions of particular statutes.[19] Section 10(d) confers no power upon a court in advance of the submission to it of final agency action for review on the merits. See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383 (1938). This is the only logical conclusion to be drawn from the employment of the phrase "reviewing court", rather than "any court." Any other construction would twist section 10(d) into a general grant of power to the Federal courts to review all kinds of questions presented by preliminary and intermediate agency action. The specific provisions of section 10(c) defining reviewable action negate such a result. The legislative history of section 10(d) is

18 This distinction and the Congressional intent with respect to it are clearly illustrated by the fact that when S. 7 was introduced in the Senate, it read: "to the extent necessary to preserve status or rights, afford an opportunity for judicial review of any question of law *or* prevent irreparable injury." [Emphasis supplied]

19 This was the holding in *Avon Dairy Company* v. *Eisaman*, 69 F. Supp. 500 (N. D. Ohio, 1946).



equally persuasive; as S. 7 was introduced in the Senate, section 10(d) provided for its exercise "to the extent necessary to * * * *afford an opportunity for judicial review of any question of law* or prevent irreparable injury." The italicized language was dropped by the Senate Committee, which reported the subsection in its present form. Finally, section 10(d) provides that the reviewing court may "issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights *pending conclusion of the review proceedings.*" [Emphasis supplied]. The italicized language is conclusive that the stay power conferred by the subsection is only ancillary to review proceedings—proceedings in which the court is reviewing final agency action within the meaning of section 10(c).

Section 10(d) prescribes no procedure for the exercise of the power which it confers upon reviewing courts to postpone the effective date of agency action. Section 381 of Title 28, U.S. Code,[20] contains general procedural provisions governing the issuance of preliminary injunctions and restraining orders. Since these procedural provisions are in no way inconsistent with section 10(d), they appear to be applicable to the exercise of the power conferred by that subsection. Similarly, the provisions of the Urgent Deficiencies Act (28 U.S.C. 47), governing the procedure for the issuance of interlocutory injunctions and temporary stays, remain applicable in proceedings for judicial review under that Act.

### SECTION 10(e)—SCOPE OF REVIEW

The scope of judicial review is defined in section 10(e) as follows:

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

20 See also Rule 65 of the Federal Rules of Civil Procedure.

This restates the present law as to the scope of judicial review. Senate Comparative Print, June 1945, p. 20[21] (Sen. Doc. p. 39); House Hearings (1945) pp. 37-38 (Sen. Doc. pp. 83-84); Sen. Rep. pp. 38, 43, 44 (Sen. Doc. pp. 224, 229, 230).

Clause (A) authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed", appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 U.S.C. 377). *Safeway Stores, Inc.* v. *Brown,* 138 F. 2d 278 (E.C.A., 1943), certiorari denied, 320 U.S. 797. The power thus stated is vested in "the reviewing court", which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action. See *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21, 25 (1943). Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown, supra,* or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.,* 224 U.S. 474 (1912), or to compel an agency or officer to perform a ministerial or non-discretionary act. Clause (A) of section 10(e) was apparently intended to codify these judicial functions.

Obviously, the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. In fact, with respect to constitutional courts, it could not do so. *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428 (1923); *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U.S. 693 (1927); *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464 (1930). However, as in *Safeway Stores* v. *Brown, supra,* a court may require an agency to take action upon a matter, without directing how it shall act.

The numbered clauses of section 10(e)(B) restate the scope of the judicial function in reviewing final agency action. Sen. Rep. p. 44 (Sen. Doc. p. 230); Senate Hearings (1941) pp. 1150, 1351, 1400, 1437. Courts having jurisdiction have always exercised the power in appropriate cases to set aside agency action which they found to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or

21 "Subsection (e), therefore, seeks merely to restate the several categories of law subject to judicial review."



short of statutory right; (4) without observance of procedure required by law."

Clause (5) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute." This is a general codification of the substantial evidence rule which, either by statute or judicial rule, has long been applied to the review of Federal administrative action. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197 (1938); *National Labor Relations Board* v. *Remington Rand,* 94 F. 2d 862 (C.C.A. 2, 1938). It will be noted that this codified substantial evidence rule is made applicable not only to cases governed by sections 7 and 8, but also to those types of cases in which statutes provide for agency hearings, but which are exempted from sections 7 and 8 by the introductory clause of section 5.

As to clause (6), the legislative history has resulted in misunderstanding. As S. 7 was introduced in the Senate, clause (6) was followed by a provision that "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing." When S. 7 was reported by the Senate Committee, the quoted provision was omitted. Notwithstanding, the subsequent legislative history contains repeated statements to the effect that clause (6) embodies the "established rule * * * [which requires a judicial] trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing." Senate Comparative Print, June 1945, p. 20 (Sen. Doc. pp. 39-40); H.R. Rep. p. 45 (Sen. Doc. p. 279).

To the contrary, the language of clause (6), "to the extent that the facts are subject to trial de novo by the reviewing court", obviously refers only to those existing situations in which judicial review has consisted of a trial de novo. For example, reparation orders under the Interstate Commerce Act and the Packers and Stockyards Act have only prima facie weight and are thus reviewable *de novo.* In addition, there is no "established rule" requiring a judicial trial *de novo* wherever statutes fail to require an agency hearing. Thus, in deportation (8 U.S.C. 155) and mail fraud (39 U.S.C. 259) cases, hearings are held as a matter of

due process although the statutes do not require agency hearings. In both types of cases, the judicial review of agency action has consisted of a review of the record made in the agency proceeding to determine whether the agency action is supported by evidence.[22] Accordingly, since clause (6) of section 10(e) prescribes a judicial trial *de novo* only in situations where other statutes or the courts have prescribed such review, it is clear that deportation and mail fraud orders will continue to be reviewable on the record made in the agency hearing, even though such hearing is not required by statute. Also, in *National Broadcasting Company* v. *United States*, 319 U.S. 190, 227 (1943), it was held that a trial *de novo* was not appropriate where, prior to the issuance of general regulations, the agency conducted a formal hearing although not required by statute to do so.

Finally, section 10(e) provides that "In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." This appears to restate existing law. Specifically, the phrase "whole record" was not intended to require reviewing courts to weigh the evidence and make independent findings of fact; rather, it means that in determining whether agency action is supported by substantial evidence, the reviewing court should consider all of the evidence and not merely the evidence favoring one side. Senate Hearings (1941) p. 1359.

The last phrase of section 10(e) sums up in succinct fashion the "harmless error" rule applied by the courts in the review of lower court decisions as well as of administrative bodies, namely, that errors which have no substantial bearing on the ultimate rights of the parties will be disregarded. *Market Street Ry.* v. *Comm'n.*, 324 U.S. 548, 561-2 (1945).

22 *Vajtauer* v. *Commissioner*, 273 U.S. 103, 106 (1927) and *Bridges* v. *Wixon*, 326 U.S. 135, 149 (1945) (deportation). In deportation proceedings, a judicial trial *de novo* may be had on the issue of citizenship. *Kessler* v. *Strecker*, 307 U.S. 22, 35 (1939). See *Farley* v. *Simmons*, 99 F. 2d 343, 347 (App. D.C. 1938) certiorari denied, 305 U.S. 651, for review of mail fraud orders; also Senate Hearings, (1941) p. 59.

THE END



# APPENDIX A

[PUBLIC LAW 404—79TH CONGRESS]
[CHAPTER 324—2D SESSION]

[S. 7]

AN ACT

To improve the administration of justice by prescribing fair administrative procedure.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## TITLE

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

## DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any

agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or perscription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.



## PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

## RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

## ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—



(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to

the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

### ANCILLARY MATTERS

SEC. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand



to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

### HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrevelant immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

## DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subect to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.



(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

## SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful

unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

### Judicial Review

Sec. 10. Except so far as (1) statutes precude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.



(d) Interim relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effectice date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

### Examiners

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (here-

inafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

### Construction and Effect

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.



## APPENDIX B

Office of the Attorney General,
*Washington, D. C., October 19, 1945.*

Hon. Pat McCarran,
Chairman, Senate Judiciary Committee,
United State Senate, Washington, D. C.

My Dear Senator: You have asked me to comment on S. 7, a bill to improve the administration of justice by prescribing fair administrative procedure, in the form in which it appears in the revised committee print issued October 5, 1945.

I appreciate the opportunity to comment on this proposed legislation.

For more than a decade there has been pending in the Congress legislation in one form or another designed to deal horizontally with the subject of administrative procedure, so as to overcome the confusion which inevitably has resulted from leaving to basic agency statutes the prescription of the procedures to be followed or, in many instances, the delegation of authority to agencies to prescribe their own procedures. Previous attempts to enact general procedural legislation have been unsuccessful generally because they failed to recognize the significant and inherent differences between the tasks of courts and those of administrative agencies or because, in their zeal for simplicity and uniformity, they propose too narrow and rigid a mold.

Nevertheless, the goal toward which these efforts have been directed is, in my opinion, worth while. Despite difficulties of draftsmanship, I believe that over-all procedural legislation is possible and desirable. The administrative process is now well developed. It has been subject in recent years to the most intensive and informed study—by various congressional committees, by the Attorney General's Committee on Administrative Procedure, by organizations such as the American Bar Association, and by many individual practitioners and legal scholars. We have in general—as we did not have until fairly recently—the materials and facts at hand. I think the time is ripe for some measure of control and prescription by legislation. I cannot agree that there is anything inherent in the subject of administrative procedure, however complex it may be, which defies workable codification.

Since the original introduction of S. 7, I understand that opportunity has been afforded to public and private interests to study its provisions and to suggest amendments. The agencies of the Government primarily concerned have been consulted and their views considered. In particular, I am happy to note that your committee and the House Committee on the Judiciary, in an effort to reconcile the views of the interested parties, have consulted officers of this Department and experts in administrative law made available by this Department.

The revised committee print issued October 5, 1945, seems to me to achieve a considerable degree of reconciliation between the views expressed by the various Government agencies and the views of the proponents of the legislation. The bill in its present form requires administrative agencies to publish or make available to the public an increased measure of information concerning their organization, functions, and procedures. It gives to that portion of the public which is to be affected by administrative regulations an opportunity to express its views before the regulations become effective. It prescribes, in instances in which existing statutes afford opportunity for hearing in connection with the formulation and issuance of administrative rules and orders, the procedures which shall govern such hearings. It provides for the selection of hearing officers on a basis designed to obtain highly qualified and impartial personnel and to insure their security of tenure. It also restates the law governing judicial review of administrative action.

The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government. Insofar as possible, the bill recognizes the needs of individual agencies by appropriate exemption of certain of their functions.

After reviewing the committee print, therefore, I have concluded that this Department should recommend its enactment.

My conclusion as to the workability of the proposed legislation rest on my belief that the provisions of the bill can and should be construed reasonably and in a sense which will fairly balance the requirements and interests of private persons and governmental agencies. I think it may be advisable for me to attach to this report an appendix discussing the principle provisions of the bill. This may serve to clarify some of the essential issues, and may



assist the committee in evaluating the impact of the bill on public and private interests.

I am advised by the Acting Director of the Bureau of the Budget that while there would be no objection to the submission of this report, he questions the appropriateness of the inclusion of the words "independently of agency recommendations or ratings," appearing after the words "Examiners shall receive compensation prescribed by the [Civil Service] Commission" in section 11 of the bill, inasmuch as he deems it highly desirable that agency recommendations and ratings be fully considered by the Commission.

With kind personal regards.

Sincerely yours,

TOM C. CLARK,
*Attorney General*

## APPENDIX TO ATTORNEY GENERAL'S STATEMENT REGARDING REVISED COMMITTEE PRINT OF OCTOBER 5, 1945

Section 2: The definitions given in section 2 are of very broad character. It is believed, however, that this scope of definition will not be found to have any unexpected or unfortunate consequences in particular cases, inasmuch as the operative sections of the act are themselves carefully limited.

"Courts" includes the Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure nor affect the requirement of resort thereto.

In section 2 (a) the words "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them" are intended to refer to the following, among others: National War Labor Board and the National Railroad Adjustment Board.

In section 2 (c) the phrase "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances," etc., is not, of course, intended to be an exhaustive enumeration of the types of subject matter of rule making. Specification of these particular subjects is deemed desirable, however, because there is no unanimity of recognition that they are, in fact, rule making. The phrase "for the future" is designed to differentiate, for example, between the process of prescribing rates for the future and the process of determining the lawfulness of rates charged in the past. The latter, of course, is "adjudication" and not "rule making." (*Arizona Grocery Co.* v. *Atchison, Topeka, and Santa Fe Railway Co.* (284 U.S. 370).)

The definitions of "rule making" and "adjudication," set forth in subsections (c) and (d) of section 2, are especially significant. The basic scheme underlying this legislation is to classify all administrative proceedings into these two categories. The pattern is familiar to those who have examined the various proposals for administrative procedure legislation which have been introduced during the past few years; it appears also in the recommendations of the Attorney General's Committee on Administrative Procedure. Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of



general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience. As defined in subsection (c), for example, rule making includes not only the formulation of rules of general applicability, but also the formulation of agency action whether of general or particular applicability, relating to the types of subject matter enumerated in subsection (c). In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged; in such cases, special procedural safeguards should be provided to insure fair judgments on the facts as they may properly appear of record. The statute carefully differentiates between these two basically different classes of proceedings so as to avoid, on the one hand, too cumbersome a procedure and to require, on the other hand, an adequate procedure.

Section 3: This section applies to all agencies covered by the act, including war agencies and war functions. The exception of any function of the United States requiring secrecy in the public interest is intended to cover (in addition to military, naval, and foreign affairs functions) the confidential operations of the Secret Service, the Federal Bureau of Investigation, United States attorneys, and other prosecuting agencies, as well as the confidential functions of any other agency.

Section 3 (a), by requiring publication of certain classes of information in the Federal Register, is not intended to repeal the Federal Register Act (44 U. S. C. 301 et seq.) but simply to require the publication of certain additional material.

Section 3 (a) (4) is intended to include (in addition to substantive rules) only such statements of general policy or interpretations as the agency believes may be formulated with a sufficient degree of definiteness and completeness to warrant their publication for the guidance of the public.

Section 3 (b) is designed to make available all final opinions or orders in the adjudication of cases. Even here material may be held confidential if the agency finds good cause. This confidential material, however, should not be cited as a precedent. If it is desired to rely upon the citation of confidential material, the agency should first make available some abstract of the confidential material in such form as will show the principles relied upon without revealing the confidential facts.

Section 3 (c) is not intended to open up Government files for

general inspection. What is intended is that the agencies, to the degree of specificity practicable, shall classify its material in terms of whether or not it is confidential in character and shall set forth in published rules the information or type of material which is confidential and that which is not.

Section 4. The term "naval" in the first exception clause is intended to include the defense functions of the Coast Guard and the Bureau of Marine Inspection and Navigation.

Section 4 (b), in requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based, but is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules. The requirement would also serve much the same function as the whereas clauses which are now customarily found in the preambles of Executive orders.

Section 4 (c): This subsection is not intended to hamper the agencies in cases in which there is good cause for putting a rule into effect immediately, or at some time earlier than 30 days. The section requires, however, that where an earlier effective date is desired the agency should make a finding of good cause therefor and publish its finding along with the rule.

Section 4 (d) simply permits any interested person to petition an agency for the issuance, amendment, or repeal of a rule. It requires the reception and consideration of petitions, but does not compel an agency to undertake any rule-making procedure merely because a petition is filed.

SEC. 5. Subject to the six exceptions set forth at the commencement of the section, section 5 applies to administrative adjudications "required by statute to be determined on the record after opportunity for an agency hearing." It is thus limited to cases in which the Congress has specifically required a certain type of hearing. The section has no application to rule making, as defined in section 2 (c). The section does apply, however, to licensing with the exception that section 5 (c), relating to the separation of functions, does not apply in determining applications for initial licenses, i. e., original licenses as contradistinguished from renewals or amendments of existing licenses.

If a case falls within one of the six exceptions listed at the opening of section 5, no provision of section 5 has any application



to that case; such a case would be governed by the requirements of other existing statutes.

The first exception is intended to exempt, among other matters, certain types of reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are admissible only as prima facie evidence in court upon attempted enforcement proceedings or (at least in the case of reparation orders issued by the Secretary of Agriculture under the Perishable Agricultural Commodities Act) on the appeal of the losing party. Reparation orders involving in part an admistrative determination of the reasonableness of rates in the past so far as they are not subject to trial de novo would be subject to the provisions of section 5 generally but they have been specifically exempted from the segregation provisions of section 5 (c). In the fourth exception the term "naval" is intended to include adjudicative defense functions of the Coast Guard and the Bureau of Marine Inspection and Navigation, where such functions pertain to national defense.

Section 5 (a) is intended to state minimum requirements for the giving of notice to persons who under existing law are entitled to notice of an agency hearing in a statutory adjudication. While in most types of proceedings all of the information required to be given in clauses (1), (2), and (3) may be included in the "notice of hearing" or other moving paper, in many instances the agency or other moving party may not be in position to set forth all of such information in the moving paper, or perhaps not even in advance of the hearing, especially the "matters of fact and law asserted." The first sentence of this subsection merely requires that the information specified should be given as soon as it can be set forth and, in any event, in a sufficiently timely manner as to afford those entitled to the information an adequate opportunity to meet it. The second sentence complements the first and requires agencies and other parties promptly to reply to moving papers of private persons or permits agencies to require responsive pleading in any proceedings.

Section 5 (c) applies only to the class of adjudicatory proceedings included within the scope of section 5, i. e., cases of adjudication required by statute to be determined after opportunity for an agency hearing, and then not falling within one of the six excepted situations listed at the opening of section 5. As explained in the comments with respect to section 5 generally, this

subsection does not apply either in proceedings to determine applications for initial licenses or in those to determine the reasonableness of rates in the past.

In the cases to which this subsection is applicable, if the informal procedures described in section 5 (b) (1) are not appropriate or have failed, a hearing is to be held as provided in sections 7 and 8. At such hearings the same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision "required by section 8" except where such officers become unavailable to the agency. The reference to section 8 is significant. Section 8 (a) provides that, in cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, an officer or officers qualified to preside at hearings pursuant to section 7) shall make the initial or recommended decision, as the case may be. It is plain, therefore, that in cases subject to section 5(c) only the officer who presided at the hearing (unless he is unavailable for reasons beyond the agency's control) is eligible to make the initial or recommended decision, as the case may be.

This subsection further provides that in the adjudicatory hearings covered by it no presiding officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate (except to the extent required for the disposition of ex parte matters as authorized by law). The term "fact in issue" is used in its technical, litigious sense.

In most of the agencies which conduct adjudicative proceedings of the types subject to this subsection, the examiners are placed in organizational units apart from those to which the investigative or prosecuting personnel are assigned. Under this subsection such an arrangement will become operative in all such agencies. Further, in the adjudicatory cases covered by section 5 (c), no officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 8 except as witness or counsel in public proceedings. However, section 5 (c) does not apply to the agency itself or, in the case of a multiheaded agency, any member thereof. It would not preclude, for example, a member of the Interstate Commerce Commission personally conducting or supervising an investigation



and subsequently participating in the determination of the agency action arising out of such investigation.

Section 5 (c), applying as it does only to cases of adjudication (except determining applications for initial licenses or determining reasonableness of rates in the past) within the scope of section 5 generally, has no application whatever to rule making, as defined in section 2 (c). As explained in the comment on section 2 (c), rule making includes a wide variety of subject matters, and within the scope of those matters it is not limited to the formulation of rules of general applicability but includes also the formulation of agency action whether of general or particular application, for example, the reorganization of a particular company.

Section 5 (d): Within the scope of section 5 (i. e., in cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing, subject to certain exceptions) the agency is authorized to issue a declaratory order to terminate a controversy or remove uncertainty. Where declaratory orders are found inappropriate to the subject matter, no agency is required to issue them.

Section 6: Subsection (a), in stating a right of appearance for the purpose of settling or informally determining the matter in controversy, would not obtain if the agency properly determines that the responsible conduct of public business does not permit. It may be necessary, for example, to set the matter down for public hearing without preliminary discussion because a statute or the subject matter or the special circumstances so require.

It is not intended by this provision to require the agency to give notice to all interested persons, unless such notice is otherwise required by law.

This subsection does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar. It expressly provides, moreover, that nothing in the act shall be construed either to grant or to deny the right of nonlawyers to appear before agencies in a representative capacity. Control over this matter remains in the respective agencies.

Section 6 (b): The first sentence states existing law. The second sentence is new.

Section 6 (c): The first sentence entitles a party to a subpena upon a statement or showing of general relevance and reasonable scope of the evidence sought. The second sentence is intended to

state the existing law with respect to the judicial enforcement of subpenas.

Section 6 (d): The statement of grounds required herein will be very simple, as contrasted with the more elaborate findings which are customarily issued to support an order.

Section 7: This section applies in those cases of statutory hearing which are required by sections 4 and 5 to be conducted pursuant to section 7. Subject to the numerous exceptions contained in sections 4 and 5, they are cases in which an order or rule is to be made upon the basis of the record in a statutory hearing.

Section 7 (a): The subsection is not intended to disturb presently existing statutory provisions which explicity provide for certain types of hearing officers. Among such are (1) joint hearings before officers of the Federal agencies and persons designated by one or more States, (2) where officers of more than one agency sit, (3) quota allotment cases under the Agricultural Adjustment Act of 1938, (4) Marine Casualty Investigation Boards, (5) registers of the General Land Office, (6) special boards set up to review the rights of disconnected servicemen (38 U. S. C. 693h) and the rights of veterans to special unemployment compensation (38 U.S.C. 696h), and (7) boards of employees authorized under the Interstate Commerce Act (49 U. S. C. 17 (2)).

Subject to this qualification, section 7 (a) requires that there shall preside at the taking of evidence one or more examiners appointed as provided in this act, unless the agency itself or one or more of its members presides. This provision is one of the most important provisions in the act. In many agencies of the Government this provision may mean the appointment of a substantial number of hearing officers having no other duties. The resulting expense to the Government may be increased, particularly in agencies where hearings are now conducted by employees of a subordinate status or by employees having duties in addition to presiding at hearings. On the other hand, it is contemplated that the Civil service Commission, which is empowered under the provisions of section 11 to prescribe salaries for hearing officers, will establish various salary grades in accordance with the nature and importance of the duties performed, and will assign those in the lower grades to duties now performed by employees in the lower brackets. It may also be possible for the agencies to reorganize their staffs so as to permit the appointment of full-time



hearing officers by reducing the number of employees engaged on other duties.

This subsection further provides for withdrawal or removal of examiners disqualified in a particular proceeding. Some of the agencies have voiced concern that this provision would permit undue delay in the conduct of their proceedings because of unnecessary hearings or other procedure to determine whether affidavits of bias are well founded. The provision does not require hearings in every instance but simply requires such procedure, formal or otherwise, as would be necessary to establish the merits of the allegations of bias. If it is manifest that the charge is groundless, there may be prompt disposition of the matter. On the other hand, if the affidavit appears to have substance, it should be inquired into. In any event, whatever procedure the agency deems appropriate must be made a part of the record in the proceeding in which the affidavit is filed.

Section 7 (b): The agency may delegate to a hearing officer any of the enumerated powers with which it is vested. The enumeration of the powers of hearing officers is not intended to be exclusive.

Section 7 (c): The first sentence states the customary rule that the proponent of a rule or order shall have the burden of proof. Statutory exceptions to the rule are preserved. Parties shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts. This is not intended to disturb the existing practice of submitting technical written reports, summaries, and analyses of material gathered in field surveys, and other devices appropriately adapted to the particular issues involved in specialized proceedings. Whether the agency must in such cases produce the maker of the report depends, as it does under the present law, on what is reasonable in all the circumstances.

It may be noted that agencies are empowered, in this subsection, to dispense with oral evidence only in the types of proceedings enumerated; that is, in instances in which normally it is not necessary to see and hear the witnesses in order properly to appraise the evidence. While there may be types of proceedings other than those enumerated in which the oral testimony of the witnesses is not essential, in such instances the parties generally consent to submission of the evidence in written form so that the

inability of the agency to compel submission of written evidence would not be burdensome.

The provision regarding "evidence in written form" does not limit the generality of the prevailing principle that "any evidence may be received"; that is, that the rules of evidence as such are not applicable in administrative proceedings, and that all types of pertinent evidentiary material may be considered. It is assumed, of course, that agencies will, in the words of the Attorney General's Committee on Administrative Procedure, rely only on such evidence (whether written or oral) as is "relevant, reliable, and probative." This is meant as a guide, but the courts in reviewing an order are governed by the provisions of section 10 (e), which states the "substantial evidence" rule.

Section 7 (d): The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision, in the cases covered by section 7. This follows from the proposition that sections 7 and 8 deal only with cases where by statute the decision is to be based on the record of hearing. Further, section 7 is limited by the exceptions contained in the opening sentences of sections 4 and 5; accordingly, certain special classes of cases, such as those where decisions rest solely on inspections, tests, or elections, are not covered. The second sentence of the subsection enables the agency to take official notice of material facts which do not appear in the record, provided the taking of such notice is stated in the record or decision, but in such cases any party affected shall, on timely request, be afforded an opportunity to show the contrary.

Section 8: This section applies to all hearings held under section 7.

Section 8 (a): Under this subsection either the agency or a subordinate hearing officer may make the initial decision. As previously observed with respect to subsection (c) of section 5, in cases to which that subsection is applicable the same officer who personally presided over the hearing shall make such decision if it is to be made by a subordinate hearing officer. The agency may provide that in all cases the agency itself is to make the initial decision, or after the hearing it may remove a particular case from a subordinate hearing officer and thereupon make the initial decision. The initial decision of the hearing officer, in the absence of appeal to or review by the agency, is (or becomes) the decision of the agency. Upon review the agency may restrict its decision to questions of law, or to the question of whether the findings are supported by substantial evidence or the weight of evidence, as the nature of the case may be. On the other hand, it may make entirely new findings either upon the record or upon new evidence which it takes. It may remand the matter to the hearing officer for any appropriate further proceedings.



The intention underlying the last sentence of this subsection is to require the adoption of a procedure which will give the parties an opportunity to make their contentions to the agency before the issuance of a final agency decision. This sentence states as a general requirement that, whenever the agency makes the initial decision without having presided at the reception of the evidence, a recommended decision shall be filed by the officer who presided at the hearing (or, in cases not subject to section 5 (c), by any other officer qualified to preside at section 7 hearings). However, this procedure need not be followed in rule making or in determining applications for initial licenses (1) if, in lieu of a recommended decision by such hearing officer, the agency issues a tentative decision; (2) if, in lieu of a recommended decision by such hearing officer, a recommended decision is submitted by any of the agency's responsible officers; or (3) if, in any event, the agency makes a record finding that "due and timely execution of its function imperatively and unavoidably so requires."

Subsection (c) of section 5, as explained in the comments on that subsection, does not apply to rule making. The broad scope of rule making is explained in the notes to subsection (c) of section 2.

The second exception permits, in proceedings to make rules and to determine applications for initial licenses, the continuation of the widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency report, a report prepared by the staff of specialists and technicians normally engaged in that portion of the agency's operations to which the proceeding in question relates. The third exception permits, in lieu of any sort of preliminary report, the agency to issue forthwith its final rule or its order granting or denying an initial license in the emergent instances indicated. The subsection, however, requires that an examiner issue either an initial or a recommended decision, as the case may be, in all cases subject to section 7 except rule making and determining applications for initial licenses. The act permits no deviation from

this requirement, unless, of course, the parties waive such procedure.

Section 8 (b): Prior to each recommended, initial, or tentative decision, parties shall have a timely opportunity to submit proposed findings and conclusions, and, prior to each decision upon agency review of either the decision of subordinate officers or of the agency's tentative decision, to submit exceptions to the initial, recommended, or tentative decision, as the case may be. Subject to the agency's rules, either the proposed findings or the exceptions may be oral in form where such mode of presentation is adequate.

Section 9: Subsection (a) is intended to declare the existing law. Subsection (b) is intended to codify the best existing law and practice. The second sentence of subsection (b) is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses.

Section 10: This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); *American Federation of Labor* v. *National Labor Relations Board* (308 U. S. 401); *Butte, Anaconda & Pacific Railway Co.* v. *United States* (290 U. S. 127). Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts (*Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96 (C. C. A. 3d); *Marine Engineers' Beneficial Assn.* v. *National Labor Relations Board*, decided April 8, 1943 (C. C. A. 2d). certiorari denied, 320 U. S. 777). In this act, for example, the failure to grant a petition filed under section 4 (d) would be similarly unreviewable.

Section 10 (a): Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co.* v. *Ickes* (302 U. S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are *Massachusetts* v. *Mellon* (262 U. S. 447), *The Chicago Junction Case* (264 U. S. 258), *Sprunt & Son* v. *United States* (281 U. S. 249), and *Perkins* v. *Lukens Steel Co.* (310 U. S. 113). An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is *Federal Communications Commission* v. *Sanders Bros. Radio Station* (309 U. S. 470).



Section 10 (b): This subsection requires that, where a specific statutory method is provided for reviewing a given type of case in the courts, that procedure shall be used. If there is no such procedure, or if the procedure is inadequate (i. e., where under existing law a court would regard the special statutory procedure as inadequate and would grant another form of relief), then any applicable procedure, such as prohibitory or mandatory injunction, declaratory judgment, or habeas corpus, is available. The final sentence of the subsection indicates that the question of the validity of an agency action may arise in a court proceeding to enforce the agency action. The statutes presently provide various procedures for judicial enforcement of agency action, and nothing in this act is intended to disturb those procedures. In such a proceeding the defendant may contest the validity of the agency action unless a prior, adequate, and exclusive opportunity to contest or review validity has been provided by law.

Section 10 (c): This subsection states (subject to the provisions of section 10 (a)) the acts which are reviewable under section 10. It is intended to state existing law. The last sentence makes it clear that the doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applicable only (1) where expressly required by statute (as, for example, is provided in 49 U. S. C. 17 (9)) or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review.

Section 10 (d): The first sentence states existing law. The second sentence may be said to change existing law only to the extent that the language of the opinion in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission* (316 U.S. 4, 14), may be interpreted to deny to reviewing courts the power to permit an applicant for a renewal of a license to continue to operate as if the original license had not expired, pending conclusion of the judicial review proceedings. In any event, the court must find,

of course, that granting of interim relief is necessary to prevent irreparable injury.

Section 10 (e): This declares the existing law concerning the scope of judicial review. The power of the court to direct or compel agency action unlawfully withheld or unreasonably delayed is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (309 U. S. 134). Clause (5) is intented to embody the law as declared, for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197). There the Chief Justice said: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (p. 229) * * * assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force" (p. 230).

The last sentence of this section makes it clear that not every failure to observe the requirements of this statute or of the law is ipso facto fatal to the validity of an order. The statute adopts the rule now well established as a matter of common law in all jurisdictions that error is not fatal unless prejudicial.

Sec. 11: This section provides for the appointment, compensation, and tenure of examiners who will preside over hearings and render decisions pursuant to section 7 and 8. The section provides that appointments shall be made "subject to the civil service and other laws to the extent not inconsistent with this act". Appointments are to be made by the respective employing agencies of personnel determined by the Civil Service Commission to be qualified and competent examiners. The examiners appointed are to serve only as examiners except that, in particular instances (especially where the volume of hearings under a given statute or in a given agency is not very great), examiners may be assigned additional duties which are not inconsistent with or which do not interfere with their duties as examiners. To insure equality of participation among examiners in the hearing and decision of cases, the agencies are required to use them in rotation so far as may be practicable.

Examiners are subject to removal only for good cause "established and determined" by the Commission. The Commission must afford the examiner a hearing, if requested, and must rest its



decision solely upon the basis of the record of such hearing. It should be noted that the hearing and the decision are to be conducted and made pursuant to the provisions of section 7 and 8.

Section 11 provides further that the Commission shall prescribe the compensation of examiners, in accordance with the compensation schedules provided in the Classification Act, except that the efficiency rating system set forth in that act shall not be applicable to examiners.

Sec. 12: The first sentence of section 12 is intended simply to indicate that the act will be interpreted as supplementing constitutional and legal requirements imposed by existing law.

The section further provides that "no subsequent legislation shall be held to supersede or modify the provisions of this act except to the extent that such legislation shall do so expressly". It is recognized that no congressional legislation can bind subsequent sessions of the Congress. The present act can be repealed in whole or in part at any time after its passage. However, the act is intended to express general standards of wide applicability. it is believed that the courts should as a rule of construction interpret the act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary.

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