Agency Development of Policy Through Rule-Making

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AGENCY DEVELOPMENT OF POLICY THROUGH RULE-MAKING

Ralph F. Fuchs*

INTRODUCTION

THE decision of the United States Supreme Court in Federal Power Commission v. Texaco, Inc. highlights a growing tendency of federal regulatory agencies to resort to rule-making in preference to adjudication as a means of settling difficult policy issues where a choice between the two processes exists. Increasing use by the Federal Trade Commission of Trade Regulation and Trade Practice rules to settle recurring problems illustrates this tendency, as do the Federal Communications Commission’s long-standing use of rule-making to regulate some aspects of broadcasting and the Federal Power Commission’s practice reflected in the Texaco case. Reluctance by the National Labor Relations Board to follow suit as to certain kinds of questions arising before it has given rise to searching criticism and to pressure on the Board to mend its ways. The choice of rule-making as an alternative method of proceeding, especially where it must rest merely upon a general power to adopt regulations for the enforcement of a statute, is nevertheless not an easy

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3 The most significant regulations are those that deal with policy questions which are intertwined with issues of the type presented in license application proceedings, such as geographical allocation of facilities and affiliation of stations. See 47 C.F.R. §§ 73.21-73.32, 73.131-73.138, 73.201-73.210, 73.231-73.241, 73.606-73.613, 73.636, 73.658-73.659 (1964), and the developments reflected in F.C.C., 1963 Ann. Rept. at 4, 5. For a discussion see Jones, Licensing of Major Broadcasting Facilities by the Federal Communications Commission: Report to the Administrative Conference of the United States 15-31, 157-161 (1962). See also Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954).
one for agencies to make; for it may give rise to difficult legal problems, as it did in *Texaco*, and usually involves disadvantages as well as advantages to the interests concerned.

The *Texaco* decision reaffirms the view taken in *United States v. Storer Broadcasting Co.*. In both cases a basic question involved was whether the agency concerned had power to adopt certain regulations by virtue of a general rule-making power, using the rule-making procedure of the Administrative Procedure Act, and to control subsequent licensing proceedings by them, when these proceedings were required by statute to afford trial-type adjudicative hearings, with action based on the resulting record. In both cases the conclusion as to this point was in the affirmative. The court noted in each case that the agency's procedural regulations provided for petitions for waiver, amendment, or repeal of regulations, and held that these provisions accorded all the rights to hearing that were due. The hearing that could be obtained pursuant to such petitions might be an informal rule-making hearing, however, and not a trial-type hearing such as could be had upon an application for a license or certificate.

**Operation of Rule-Making Authority**

*Texaco*, which highlights new facets of the rule-making device, involved two applications by natural gas producers pursuant to the Natural Gas Act for certificates of convenience and necessity to permit them to sell natural gas to interstate pipeline companies. The contracts filed,

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*351 U.S. 192 (1956).*


*Section 7(c) of the Natural Gas Act, 52 Stat. 824 (1938), as amended, 15 U.S.C. § 717c(f) (1958); Northeastern Gas Trans. Co. v. F.P.C., 195 F.2d 872, 876 (3d Cir. 1952); Atlantic Ref. Co. v. Public Service Commn., 360 U.S. 878 (1959); Pure Oil Co. v. F.P.C., 292 F.2d 350 (7th Cir. 1961); § 309(e), of the Communications Act, as amended, 74 Stat. 889 (1960), 47 U.S.C. § 309(e) (Sup. 1960).*


*The Court in *Storer* stated in a passage quoted in the *Texaco* opinion, *ibid.*, that the rule-making hearing accorded by the F.C.C. regulation upon petition would be a "full hearing" such as is required by the Communications Act before a license application can be denied, and in the same passage that such a "full hearing" would not be necessary for applicants whose qualifications did not conform to a valid regulation. It would have been clearer to say that an applicant who seeks a modification or waiver of the regulation gets an adequate hearing on that issue, and that the requirement of a "full hearing" had no application to matters covered by a valid regulation.*

*In the lower court, review proceedings involving additional applications were dismissed because of want of "standing" in the complainants to bring them. 317 F.2d 796, 803-804 (10th Cir. 1963). See text accompanying note 41, *infra.*

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under which gas would be sold, contained price escalation clauses which were prohibited by a previously adopted regulation of the Federal Power Commission.11 The Commission rejected the applications without offering a hearing, despite the provision of §7 of the Act12 that the Commission "shall set" such applications "for hearing." In sustaining the Commission's action the Court noted that the kind of regulations involved

merely prescribe qualifications for applicants. Those qualifications are in the category of conditions that relate to the ability of applicants to serve the consumer interest in this regulated field. They are kin to the kind of capital structure that an applicant has and to his ability by reason of the rate structure to serve the public interest.13

Regulations of another sort, that might attempt to determine the "merits of any rate structure" or of a particular certificate, were not embraced by the decision.14 The regulation in Storer restricted the number of broadcasting stations a licensee might own and hence involved, more clearly than Texaco, the qualifications of applicants. Thus, the decision in that case could also be interpreted to apply only to fixing qualifications of license applicants.

A different kind of agency pronouncement arose in Frozen Food Express v. United States,15 decided in the same term of Court as Storer. That case involved a "report and order" of the Interstate Commerce Commission enumerating certain food products which were not deemed by the Commission to be "agricultural . . . commodities (not including manufactured products thereof)" that could, under the Motor Carrier Act, be transported by truckers for hire without certificates of convenience and necessity. A motor carrier, engaged in transporting the products involved, brought suit in a three-judge court to set aside the order of the Commission.16 The order was given no specific legal effect by the Act and was not adopted with reference to any stated statutory authorization; but it was a long-standing Commission practice to issue general declarations from time to time, some of which, unlike the order in question, took the

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12 See note 7 supra.
14 Ibid.
16 The controversy involved primarily fresh and frozen dressed meats and poultry. The regulation was held invalid insofar as it covered these products in the companion case of East Texas Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49 (1956), involving a complaint proceeding for alleged unauthorized transportation of them.
form of "regulations." Failure to comply with the "order" might result in a criminal prosecution or a proceeding before the Commission leading to a cease-and-desist order enforceable by the courts. If the cease-and-desist order were willfully violated, the certificate or permit of the offending carrier might be revoked. The Court held that the "order" was more than a merely "abstract, theoretical, or academic" pronouncement, but did not state that it had binding legal effect.

The opinion in Frozen Food Express does not cite any controlling authority, but refers to the case of Columbia Broadcasting System v. United States in which the Chain Broadcasting Regulations of the Federal Communications Commission were challenged. These regulations excluded certain provisions from contracts between licensed radio stations and the networks, so as to limit the control of the networks over programming; but, since the Commission lacked authority to regulate directly the relations between networks and stations, the regulations

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17 See text accompanying note 28 infra.
19 Ibid. The Court stated that the order was in substance a declaratory one, such as is authorized by § 5(d) of the APA. That provision, however, is part of the section on adjudication, seemingly not designed to lead to general regulations but, rather, to "orders" which are defined in § 2(d) of the APA as "the final disposition . . . of any agency" in matters "other than rule making." In Boston & Maine R.R. v. United States, 162 F. Supp. 289 (D. Mass. 1958), it was held that the Interstate Commerce Commission might issue a declaratory order with respect to industry-wide car rental charges among railroads, notwithstanding its express authority to deal with the same subject in regulations pursuant to § 1(14)(a) of the Interstate Commerce Act, 54 Stat. 901 (1940), 49 U.S.C. § 1(14)(a) (1958). The Supreme Court found it unnecessary to review this issue on appeal because the proceeding would be returned to the Commission in any event and "the proceedings on remand may lose the characteristics of a § 5(d) [APA] declaration and take on those of a § 1(14)(a) [of the Interstate Commerce Act] rule-making procedure." Boston & Maine R.R. v. United States, 358 U.S. 68, 72 (1958). In other proceedings in which a declaratory order with regard to the scope of the agricultural exemption was sought the Commission has preferred to issue an "interpretation" not taking the form of an order, but nevertheless subject to judicial review. Frozen Cooked Vegetables—Status, 81 M.C.C. 649 (1959); Lester C. Newton Trucking Co. v. United States, 209 F. Supp. 600 (D. Del. 1962). In a similar case, Lease and Interchange of Vehicles by Motor Carriers, 79 M.C.C. 65 (1959), the Commission, noting that § 5(d) of the APA "applies only to matters involving adjudication which are required by statute to be determined on the record after opportunity for an agency hearing," held that "rule-making proceedings . . . are not such matters." In the Boston & Maine proceeding on remand, the Commission instituted a rule-making proceeding involving the same issues and consolidated it with the previous declaratory order proceeding. See Baltimore & Ohio R.R. Co. v. New York, N.H.R.R. Co., 196 F. Supp. 724, 748 (S.D.N.Y. 1961).
21 Id. at 412. The regulations were sustained in National Broadcasting Co. v. United States, 319 U.S. 198 (1943).
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could be applied only when station licenses came up for approval or in revocation proceedings. The Court stated that the regulations "presently determine rights on the basis of which the Commission is required to withhold licenses and authorized to cancel them." The Chain Broadcasting Regulations were authorized not merely by a general power to adopt regulations, but also by a specific provision of the Communications Act which gave the Federal Communications Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting." Similarly in Securities and Exchange Commission v. Chenery Corp., where the Commission's authority to issue binding general regulations with respect to holding company reorganizations requiring Commission approval was emphasized, the statute provided that reorganization approvals might be made dependent on "such rules and regulations . . . as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers. . . ." In American Trucking Associations v. United States, in which the validity of legally binding truck-leasing regulations affecting motor carriers was sustained, the regulations rested not only on the power of the Commission "to prescribe rules, regulations, and procedure" for the administration of the Motor Carrier Act, but on a specific power to make rules governing transfers of certificates or permits of motor carriers. Such transfers, according to the Court, were involved in the leasing of motor equipment; but the Court specifically stated that the "grant of general rule-making power necessary for enforcement" sufficed in itself as authority for the regulations. The court cited in support of this view only the case of United States v. Pennsylvania R.R. Co., which involved not a general regulation but a requirement which the Interstate Commerce Commission included in a through-route arrangement it imposed on certain carriers.

Dissenting opinions in several of the cases just discussed contended

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23 Id. at 418-422.
25 318 U.S. 80 (1943).
27 344 U.S. 298 (1953).
31 323 U.S. 612 (1945).
strongly that the pronouncements of the agencies which were before the Court did not, and in some instances probably could not, constitute legally binding regulations. The Tenth Circuit Court of Appeals in Texaco, disagreeing in this respect with the Ninth Circuit in Superior Oil Co. v. Federal Power Commission, held that the Commission lacked authority to adopt general regulations binding future adjudications; and Mr. Justice Stewart, dissenting in the Supreme Court, endorsed its opinion. Mr. Justice Harlan, who dissented in Frozen Food Express and Storer, joined in the decision of the Court in Texaco, perhaps because here the Commission had made it clear that the regulation was intended to be binding and it had been followed, whereas the earlier two cases were suits to challenge the validity of agency pronouncements before they had actually been applied.

Reviewability

The Texaco decision, which arose on review of the rejection of a certificate application, represents the first time that the Supreme Court has upheld the actual application of a regulation adopted pursuant to a merely general rule-making power, with the effect of altogether denying a hearing that would otherwise arise in a statutory adjudication. In Storer and the other cases previously discussed, persons dissatisfied with the regulations under attack brought direct review proceedings to have them set aside. The "ripeness" of the regulations for review and the "standing" of the challengers to attack them were the primary issues presented. These issues turned in part on whether the regulations embodied actual legal determinations and in part on whether immediate consequences were felt by the challengers. In each case these questions were answered affirmatively. In Storer, for example, not only was the regulation legally effective, but its existence impaired the business opportunities of the Storer Company, a multiple-station broadcasting concern, and endangered its status if its stock should be acquired by persons already owning stations. Hence Storer was a "party aggrieved by a final

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22 317 F.2d 796 (1963).
25 A pending application by Storer for an additional television station was rejected by the F.C.C. on the same day it amended the Multiple-Ownership Rules to the effect challenged in the suit brought by Storer. United States v. Storer Broadcasting Co., 351 U.S. 192, 206 (1956); Frozen Food Express v. United States, 351 U.S. 40, 45 (1956).
26 Twenty percent of Storer's voting shares were traded on the market. Under the regulation, acquisition of one percent of such shares by a party already owning stations would have placed Storer in violation. 351 U.S. 192, 196-97 (1956).
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order," authorized as such to procure judicial review of the regulation.\textsuperscript{37} Similarly, in the Columbia Broadcasting System case contract relations between the complaining networks and their affiliates were immediately affected;\textsuperscript{38} and in Frozen Food Express\textsuperscript{39} and American Trucking Associations\textsuperscript{40} the amount and kind of business the complainants could enjoy were curtailed by the regulations.

The Supreme Court in Texaco did not have before it the decisions of the Court of Appeals in companion cases, based on earlier decisions in the Fifth and Tenth Circuits,\textsuperscript{41} holding that natural gas producers lacked standing to attack the price escalation rules merely because these rules prevented new contracts and rate increases under existing contracts, which would conflict with the rules.\textsuperscript{42} On this basis, review would have to await the denial of a certificate, as in Texaco,\textsuperscript{43} or the rejection of a rate increase. The rules, nevertheless, are ripe for review at the instance of a party possessing standing, because they constitute final agency action as to the matters they embrace.\textsuperscript{44}

\textsuperscript{37} Id. at 199-200.
\textsuperscript{38} 316 U.S. 407 (1942).
\textsuperscript{39} 351 U.S. 40 (1956).
\textsuperscript{40} 344 U.S. 298 (1953).
\textsuperscript{41} Amerada Petroleum Corp. v. F.P.C., 231 F.2d 461 (10th Cir. 1956); Sun Oil Co. v. F.P.C., 304 F.2d 293 (5th Cir. 1962). The regulation challenged in these two cases did not require, as did the later one challenged in Texaco, the rejection of certificate applications involving contracts containing the objectionable escalation clauses, but only that such clauses should be without effect in establishing lawful rates for gas.
\textsuperscript{42} 317 F.2d 796, 804 (1963). This result may be inconsistent with the Supreme Court's willingness to review the regulation involved in F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954), discussed in 3 Davis, Administrative Law § 155 (1958), in which the question of standing was not raised. In that case the Court probably assumed that the regulation would immediately deprive the broadcasting company of business opportunities it had been enjoying, as was set forth in its complaint. If a party attacking the Power Commission's pricing regulation in a proper proceeding could make recitals as to interference with business by the regulation, he too might have standing to secure review in an injunction suit. Cf. Magnolia Petroleum Co. v. F.P.C., 236 F.2d 785, 801-05 (5th Cir. 1956), dissenting opinion of Brown, J. A statutory review proceeding under the Natural Gas Act, such as was here invoked, would not be appropriate, however. See text accompanying note 65 infra.
\textsuperscript{43} In the lower court the regulation was held invalid as a totally unauthorized means of dealing with escalation clauses. If binding regulations dealing with such escalation clauses had been deemed to be generally within the authority of the F.P.C., a particular regulation might still have been attacked on grounds peculiar to it when an adjudicative order based upon it was under review.
\textsuperscript{44} Standing to challenge a statute in a judicial proceeding must be established, even though the legal force, or "ripeness," of the statute is beyond question. The question may still be raised, whether a justiciable controversy with respect to it is presented by the challenger, or has ripened with respect to him. In this situation ripeness of the controversy and standing on the part of the challenger become identical issues, but
The Problem of a Limited Record

The Tenth Circuit emphasized in Texaco that any attack on the regulation as an incident to review of the action in a certificate proceeding would have to take place, under the Natural Gas Act, without the availability in court of a record relating to the adoption of the regulation. 45 Under the Act review of agency action as to a certificate takes place in a Court of Appeals on review of the record in the certificate proceeding. 46 This record would not include the basis for the regulation, established in a separate rule-making proceeding. The Court of Appeals, which does not receive evidence, would not possess a means of securing data relating to the regulation, except such as it might notice judicially. To the extent that validity of the regulation had been attacked before the agency and had been considered by it, a limited record relating to that point, but not broadly to the merits of the regulation, would become available on judicial review.

The Rule-Making Device

The Storer decision perhaps encouraged Federal regulatory agencies to attempt to settle important policy questions by regulations, so as to give firm guidance to persons affected and reduce the burden of formal adjudicatory proceedings. 47 It may also have increased the urging of critics that rule-making, leading to binding regulations, be used more frequently. 48 The Texaco decision is likely to provide a new impetus in the ripeness of the statute is not in controversy. When administrative action is challenged, the separable question of the nature of that action in the sense of the binding force it possesses, determining whether anything has been done that anyone can attack, must also be answered. See Rochester Telephone Corp. v. United States, 207 U.S. 125, 129-31 (1939). In the present discussion the term ripeness is used in relation to this question, concerning the nature of the administrative action under attack, not in relation to the state of the controversy between the challenger and the agency.

45 317 F.2d 796, 806 (10th Cir. 1963).
47 See notes 2 and 3 supra. See also, F.P.C., 1962 ANN. REPT. 23. The Supreme Court observed in 1927 that “[t]he authority to adopt reasonable rules . . . includes the power to prescribe a rule of universal application,” dispensing with the necessity of inquiring into the individual situations affected by it. Assigned Car Cases, 274 U.S. 564, 580-82 (1927). See Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954); WIRL-TV v. United States, 253 F.2d 843 (D.C. Cir. 1958); Air Line Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960).
the same direction. Significant questions still surround the enlarged use of rule-making as an alternative to formal adjudication in the elaboration of agency policies, however. To gauge their importance, it is desirable to summarize briefly some aspects of the rule-making device, including the procedures employed at the agency level, varieties of judicial review, and the notice which regulations give to persons affected by them.

Rule-making under the Federal Administrative Procedure Act provides a means whereby policy may be framed by regulations in the light of broadly available data and opinion. Notice of the regulations themselves may be conveyed to all concerned through publication in the Federal Register as well as other channels. The notice so conveyed, in so far as the regulations are clear, provides guidance to persons outside the government who are affected and, within the issuing agency, enables enforcement personnel to administer the policies embodied in the regulations uniformly and with confidence. Economy of time and effort is obtained by covering an entire category of situations in a single rule-making proceeding. Such a proceeding focuses on the essential policy issues and enables policy-making officers to concentrate attention upon them, without diversion to adjudicatory issues surrounding the immediate interests of particular parties. By the same token, however, solutions in rule-making will sometimes be reached to a large extent without detailed


Section 4 of the APA provides that, except in limited circumstances, general notice shall be published with respect to proposed rule-making involving legally effective regulations, followed by opportunity for interested persons to submit data and views orally or in some other manner. The resulting regulations shall be accompanied by a concise general statement of their basic purpose.


evidence as to the specific situations to be governed by the regulations, such as formal adjudicatory proceedings would supply. For this reason, until an agency believes that its knowledge and experience give it a realistic sense of the actual impact of proposed policies, it may prefer not to start formulating regulations, even with the aid of data that can be obtained through rule-making proceedings.

From the standpoint of the private interests affected, disadvantages as well as advantages attach to rule-making processes as compared to formal adjudication. Advance notice of rule-making may not reach some persons affected, or they may not be able to respond if it does, because of inadequate knowledge or funds; yet they may be bound by the resulting regulations. This disadvantage is not always overcome when, as the Supreme Court has observed in sustaining the enforcement of a regulation, organizations of affected interests have received notice and have participated in the rule-making proceedings; for the organizations may not be entirely representative and cannot in any event present full details with regard to each individual or enterprise concerned. There may not be oral hearings at all in connection with rule-making, and the basis for the agency's action may not be fully disclosed. Private participation in rule-making normally consists mainly of the presentation of data and points of view which are volunteered, without opportunity for rebuttal or cross-examination. Insofar as affected interests are few in number, like pipeline companies, or highly organized like railroads and electrical utilities, they can and do, however, keep closely in touch with the activities of agencies having authority over them and are able to make

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5 These circumstances are likely to arise, in an era of trade associations and trade publications, to say nothing of agency mailing lists, only when small enterprises, such as local merchants or truckers, or the individual members of a profession, are subject to regulation. For an instance of non-appearance of truckers vitally affected by proposed regulations see Christian v. United States, 152 F. Supp. 561 (D. Md. 1957).


54 Section 4(b) of the APA provides that there shall be an opportunity to submit "written data, views, or arguments with or without opportunity to present the same orally in any manner."

55 There is no requirement that the agency present data at a rule-making hearing. In issuing regulations it is required to include only "a concise general statement of their basis and purpose." Ibid. Proposals of bar association committees that private interests be given greater opportunity to "contest issues of fact and to make oral presentations" in rule-making proceedings, 16 ADMIN. L. REV. 322 (1964), and that in such proceedings comments by other private participants be made available to them, 11 ADMIN. L. REV. 281, 282 (1959), would, of course, greatly complicate and prolong the agencies' rule-making processes.
effective presentations in the light of rather full knowledge of proceedings that are under way.  

Differences between rule-making and formal adjudication are reduced if, as sometimes happens because of statutory requirements or agency choice, a trial-type hearing, leading to a determination on the record, takes place in connection with rule-making; for then the interests represented in the rule-making hearings are fully apprised of the information relied upon by the agency and are enabled to present relevant data of their own at greater length, as well as to engage in rebuttal and cross-examination. Such processes are especially likely to be followed when agencies also engage continuously in formal adjudication, with organized interests appearing frequently before them. They are necessarily cumbersome, with resulting loss of some of the desired advantage in efficiency over formal adjudication; but a single rule-making hearing still suffices to resolve the policy issues covered, with binding effect in subsequent adjudications. A statute requiring these procedures as to contested issues may become acceptable to all concerned, including the agency.

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56 Id. at 108-11. See text infra at note 60. The more elaborate "investigations" of the federal regulatory boards and commissions, which frequently eventuate in actions of some sort, including regulations, are often conducted by means of trial-type hearings leading to a record on which the action is based. So far as appears, in many instances nothing actually turns procedurally on whether actions that result from Interstate Commerce Commission proceedings to particularize the law (discussed supra at note 19) are regarded as regulations, orders, or simply interpretations; trial-type hearings are conducted to resolve issues of fact.

The monographs of the Attorney General's Committee, cited infra at note 58, with respect to the prevalence of judicial formality in some rule-making hearings, also give an account of instances of informal rule-making processes such as the Administrative Procedure Act now sanctions.

When, as is generally true of rate proceedings, statutes require opportunity for trial-type hearings or actions based on the records of hearings, the usual safeguards to the accuracy of the evidence are implied; but considerable discretion as to the allowance of cross-examination remains.

58 See William W. Goodrich, Simplifying the Trial of Scientific Issues in Formal Rule-Making under the Federal Food, Drug, and Cosmetic Act, 8 Food Drug Cosm. L.J. 578 (1953), in which the author, counsel to the Food and Drug Administration, while deploring the cumbersomeness of trial-type hearings required by statute for the formulation of food standards, recommends improvement of the formal processes rather than abolition of the requirement that they be followed. As to limiting the required hearings
Trial-type process was employed voluntarily in the Federal Communications Commission's formulation of the Chain Broadcasting Regulations and gave rise to a Supreme Court holding that judicial review of the regulations should be confined to the record of the rule-making hearing. Such a holding would be unsound in a case in which the agency used the less formal procedures permitted by § 4 of the Administrative Procedure Act, not leading to an inclusive record. The review proceeding in the chain broadcasting case was a statutory injunction suit in a three-judge district court, challenging the regulations. Both in such a suit and in the substituted method of review in the Courts of Appeals under the Review Act of 1950 evidence may be introduced if needed. Injunction or declaratory judgment suits, whether or not specifically authorized by statute, brought by persons having "standing" to sue, are the traditional method of securing judicial review of regulations. Review proceedings to controverted issues, rather than requiring that entire regulations be based on the records of hearings, see Austern, The Future of Mandatory Food Standards, 9 Food Drug Cosm. L.J. (1954). This change was subsequently made by Congress. 70 Stat. 919 (1956), 21 U.S.C. § 371 (1958). For the earlier practice see also Heady, Administrative Rule-Making Under § 701 (e) of the Food, Drug, and Cosmetic Act, 10 Geo. Wash. L. Rev. 406 (1942).


61 Orsens of the Interstate Commerce Commission are not subject to the Act, 64 Stat. 1129 (1950) as amended, 5 U.S.C. §§ 1081, 1082 (1958); but those of the Federal Communications Commission that were previously subject to three-judge district court review, such as the Chain Broadcasting Regulations, are subject to it.

62 The practice of restricting review in a three-judge court to the administrative record developed as a matter of practice in cases in which there was a complete record, and did not preclude the reception of additional evidence when necessary. Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282 (1934), established the necessity of placing the agency record before the reviewing court if the findings were not to be accepted as conclusive. In B. & O.R. Co. v. United States, 298 U.S. 349 (1936), evidence going beyond the administrative record was held admissible in the reviewing three-judge court on an issue of confiscation, and in United States v. Idaho, 298 U.S. 105 (1936), on an issue relating to the jurisdiction of the agency. Section 7(b) of the Review Act, supra note 61 at 1130-31, provides for the transfer of a proceeding to a district court if the agency "has held no hearing," and a genuine issue of controverted fact is presented. In this context, "hearing" should, it is believed, be taken to mean a hearing leading to a record on which the agency action sought to be reviewed is based, and which provides a record sufficient for review. A hearing as an incident to proceedings under § 4 of the Administrative Procedure Act is not of this kind. The brief House and Senate committee reports accompanying the Review Act bill state that it was intended to provide for review on the record before the administrative agency. The House report notes that the provision for transfer to a district court and, under other circumstances, for remand to the agency for additional evidence to be taken, covers situations in which, for one reason or another, a "suitable" hearing was not held. H.R. Rep. No. 2122; S. Rep. No. 2618, 81st Cong., 2d Sess. (1950). 63 Davis, Administrative Law § 23.04 (1958); Houston v. St. Louis Independent
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in the Courts of Appeals under the Natural Gas Act\(^6\) and other statutes, which are applicable to "orders" based on the records of hearings, do not apply to rules not so based, originating in proceedings under § 4 of the Administrative Procedure Act.\(^6\) Review of orders may, however, as in Texaco, give rise to decisions as to the validity of regulations underlying the orders.\(^6\) Direct review by the Courts of Appeals of food standards and other regulations under the Food, Drug, and Cosmetic Act, which must be based on the records of hearings, is provided by the statute.\(^6\)

A commonly recognized difference between rule-making and adjudication is that the latter usually operates retroactively, without prior notice to the parties concerned, when new legal ground is broken by a decision, whereas the kind of rule-making which enacts new law, binding in subsequent adjudication, ordinarily takes effect only as of its date.\(^6\) In S.E.C. v. Chenery Corporation\(^6\) the affected parties claimed they should have been given advance notice that certain profitable transactions of theirs would violate the Public Utility Holding Company Act, as the Securities and Exchange Commission for the first time held in the case itself. The Supreme Court ultimately upheld the Commission's freedom to choose between rule-making, giving advance notice of new policies, and adjudication without such notice, as means of elaborating policy under the statute.\(^7\) The dissent of Mr. Justice Jackson, charging that the Commission's decision was reached in the absence of "law," was bitter, how-


\(^{65}\) 1 Davis, Administrative Law, § 5.01, at pp. 286-87 (1958); 29 Fed. Reg. 8324, 8367-68 (1964).

\(^{66}\) 332 U.S. 194 (1947).

\(^{67}\) Id. at 201-203. The Court said, at 202, that "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through . . . quasi-legislative promulgation or rules to be applied in the future"; but this statement related to desirable practice, not agency obligation.
ever; and suggestions that there are legal and constitutional limits to the retroactive development of grounds of adjudication under broad statutory formulae, where important interests are at stake, appear from time to time. Sudden changes of previously understood policy, when they have retroactive effects, may seem even more aggravated and consequently be held to constitute abuses of discretion.

Under various circumstances agency rule-making may operate retroactively, as does adjudication. When regulations simply interpret a statute and do not purport to lay down new law, they relate back to the enactment of the statute unless, as some statutes provide, the agency may cause them to take effect (i.e., guide the interpretation) only with respect to subsequent conduct or transactions. Even a "legislative" regulation which prescribes binding new law may, like a statute, be made to do so retroactively within the limits of due process; and retroactivity may be necessary when a statute has been in effect but cannot actually operate without a regulation to implement it. Such was held to be the situation in Addison v. Holly Hill Fruit Products Co., involving the Fair Labor Standards Act. The Act contained a provision exempting from its re-

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71 Id. at 212-218.
72 "Serious questions of elemental fairness would be raised if the Committee [of Bar Examiners] had excluded Konigsberg simply because he failed to answer questions without first explicitly warning him that he could be barred for this reason alone..." Konigsberg v. State Bar of California, 353 U.S. 252, 261 (1957). See Hill v. F.P.C., 335 F.2d 355 (5th Cir. 1964); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964). Camp v. Herzog, 104 F. Supp. 194 (D.D.C. 1952), held as a matter of statutory interpretation that disbarment of an attorney for a period of time could be ordered by the N.L.R.B. only pursuant to a previous regulation. See also Schwegel v. Orrick, 153 F. Supp. 701,704 (D.D.C. 1957) and Heitmeyer v. F.C.C., 95 F.2d 91, 98 (D.C. Cir. 1937).
74 The Internal Revenue Code authorizes the Secretary of the Treasury or Commissioner of Internal Revenue to prescribe the extent to which any regulation or ruling "shall be applied without retroactive effect." 26 U.S.C. § 7805(b) (1958). Non-retroactivity in instances of reliance upon earlier regulations is secured by provisions such as that of the Securities Exchange Act, whereby liability for violation of the requirements of the statute is excluded on account of "any act done or omitted in good faith in conformity with any rule or regulation" notwithstanding its later amendment or rescission. 15 U.S.C. § 78w(a) (1958).
75 See the excellent discussions in I Davis, ADMINISTRATIVE LAW, § 5.08 (1958), and Note, Retroactive Operation of Administrative Regulations, 60 HARY. L. REV. 627 (1947).
76 322 U.S. 607 (1944). Rate cases involving essentially the same point are discussed in the Harvard Law Review Note, Ibid.
requirements the processing of agricultural commodities in areas of production as defined by the Administrator of the Act. His definition, challenged in the litigation, was held invalid. Until areas of production had been validly defined, the scope of the exemption and the requirements of the Act as to agricultural processing claimed to be in the area of production were not established. The Court held that disposition of the rights of the parties and of others similarly situated, relating to employment from the effective date of the law, must await the Administrator's corrected definition.

THE CHOICE BETWEEN RULE-MAKING AND ADJUDICATION

The clearest basis for agency authority to issue legally binding regulations is, of course, a statute which specifically confers the power or the duty to issue them with respect to a defined subject, and prescribes the effect which they or violations of them shall have. Sanctions to secure their effectiveness may consist of penalties assessable in court or administratively, the revocation or withholding of licenses, specific enforcement proceedings, or numerous others.\(^7\) It has been settled at least since United States v. Grimaud\(^8\) that the formulation of penally enforceable regulations, even without antecedent procedures in which affected persons may participate, does not, as to a wide range of subjects, violate due process; and it follows that, absent special considerations, the use of regulations operating in other ways is also consistent with due process. Once a regulation has been adopted in a manner prescribed by statute, the agency may not act contrary to it, adversely to an affected party, until it has been changed in the same manner, whether the regulation be substantive\(^7\) or procedural.\(^8\)

Agencies have an implied power to convey information concerning their organization, procedure, intentions, and policies to persons subject to their authority. This power, which may also be conferred by statute, includes the issuance of regulations interpreting a governing statute

\(^7\) See McKay, Sanctions in Motion: The Administrative Process, 49 IOWA L. REV. 441 (1964).

\(^8\) 220 U.S. 506 (1911). See McKay, op. cit. supra at 443-444.


according to the agency's best understanding. As is well known, great weight is often given by the courts to such interpretative regulations; but no one is foreclosed from attacking such a regulation when the occasion to do so arises, and endeavoring to secure a new and authoritative determination by agency or court of any matter it embraces. When an agency is given statutory power to adopt such rules and regulations as it may deem appropriate or necessary, or as it may see fit, in the discharge of its duties or for the enforcement of the statute it administers, the power certainly extends to interpretative regulations. It also extends to procedural regulations and what are known as internal regulations "for the government" of the agency, "the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation" of its "records, papers, and property," which are binding on persons inside and outside of the agency to whom they apply or whom they affect collaterally.

Whether a general statutory power to adopt appropriate regulations in the administration of a statute extends to legally binding regulations determining in one way or another the substantive rights of persons outside the government is a crucial question involved in the recent decisions discussed above. In most of the cases decisions favorable to agency authority have been aided by more specific statutory grants of rule-making power over stated subjects, which were present in the governing statutes in addition to more general provisions. In the Texaco case, however, the general provision stood alone, except for an enumeration of procedural matters and a specification of power to define terms with which the regulations might deal. Under other statutes, notably the Federal Trade

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81 John P. Comer, Legislative Functions of National Administrative Authorities 140 (1927); Final Report, Attorney General's Committee, supra, note 56; Maryland Casualty Co. v. United States, 251 U.S. 342, 349 (1920).

82 1 Davis, Administrative Law §§5.03-5.05 (1958). Regulations which amplify statutory provisions may be considered interpretive even when they are binding in future agency action; but they are so in a different sense from regulations which merely state a position that is open to dispute.

83 The quoted words are those of Rev. Stat. § 161, 5 U.S.C. § 22 (1958), which confers authority on the heads of departments to prescribe regulations covering the matters stated.

84 Whiteside v. United States, 93 U.S. 247 (1876); United States v. Birdsall, 233 U.S. 223 (1914).

85 52 Stat. 830 (1938), 15 U.S.C. § 717 (1958): "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." In F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954), similar provisions of the Communications Act were construed to confer the power to make interpretive regulations applying criminal statutes to broadcasting. In the case itself the interpretation contained in a rule was held invalid.
Agency Policy Through Rule-Making

Commission and National Labor Relations Acts, the general agency rule-making authority stands even more starkly by itself. Variations in the wording of such statutory provisions, except for a reference in the Labor Act to the Administrative Procedure Act, seem without significance. Since the words are sweeping, exclusion from the authority they confer of "substantive" regulations binding in later agency adjudications must stem from either constitutional considerations or other provisions of the same statutes, to which the rule-making authority must be related.

Before the adoption of the Federal Administrative Procedure Act it would have been difficult to argue that the rule-making power bestowed in such statutes as the Federal Trade Commission Act and the Natural Gas Act enabled an agency to cover by legally binding regulations some of the same issues as might be involved in cease-and-desist order or licensing proceedings required by the governing statutes; for by the latter the persons concerned were entitled to be parties to trial-type adjudicatory hearings for the determination of matters at issue, whereas no applicable statute secured any procedural rights at all in rule-making. To substitute the latter for the former would have been to eliminate statutory procedural protections as to certain issues altogether. For this or other reasons, no claim seems to have been made until recently in the literature concerning the Federal Trade Commission that it might prohibit unfair methods of competition or unfair or deceptive acts or practices in commerce under the Federal Trade Commission Act, or define violations of those sections of the Clayton Act which it enforces, through binding general regulations; and there are significant statements that it possesses no such authority. By the time the National Labor Relations Act was

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68 38 Stat. 721 (1914), 15 U.S.C. § 46(8) (1958): "The Commission shall . . . have power . . . from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

69 49 Stat. 452 (1935), 29 U.S.C. § 156 (1958): "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

79 The Clayton Act does not confer rule-making power upon the Commission, but it is probable that the agency's authority under the Federal Trade Commission Act, supra, note 85, extends to its enforcement of the Clayton Act, as has been held with respect to its investigatory power. Menzies v. F.T.C., 242 F.2d 81 (4th Cir.), cert. denied, 353 U.S. 957 (1957); F.T.C. v. Reed, 243 F.2d 308 (7th Cir.), cert. denied, 355 U.S. 823 (1957); F.T.C. v. Tuttle, 244 F.2d 605 (2d Cir.), cert. denied, 354 U.S. 925 (1957).

80 An exception is its power to prescribe "quantity limits" relating to quantity discounts under the Robinson-Patman Act, 49 Stat. 1526 (1914), 15 U.S.C. § 13(a) (1958). Important statements concerning an absence of other power to adopt legally binding substantive rules include those in Final Report, Attorney General's Committee, supra note 56, at 58; and in House Select Committee on Small Business, Antitrust Law Enforcement by the Federal Trade Commission and the Antitrust Division, Department
reënacted by the Taft-Hartley Act in 1947, on the other hand, the Administrative Procedure Act, which provides for rule-making proceedings in which interested parties may participate, had been adopted. The legislative history indicates that the rule-making authority of the National Labor Relations Board was intended to include legally binding substantive regulations.90 The rule-making provision itself provides for the adoption of regulations by the Board "in the manner prescribed by the Administrative Procedure Act."91 This provision would be meaningless except in relation to legally binding substantive regulations, for the rule-making procedures prescribed by the Act do not apply to any other kind.92

The enactment of the Administrative Procedure Act placed in effect a legally secured rule-making procedure,98 including opportunity for interested persons to submit data and views in writing or through oral hearing. Hence if an agency such as the Federal Trade Commission now decides to substitute rule-making for adjudication, the persons concerned have the benefit, or at least opportunity for the benefit, of these procedures. It becomes possible to say that these constitute an appropriate "hearing" for particular kinds of determinations—which is all anyone is entitled to94—provided the statute does not impliedly render adjudicatory

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of Justice, H.R. REP. No. 3236, 81st Cong., 2d sess. 31 (1950). ("Certainly the Commission has never attempted to claim any general substantive rule-making power." The Commission today and Professor Carl A. Auerbach in his commentary on the Commission's internal organization and procedure, Federal Trade Commission: Internal Organization and Procedure, 48 MINN. L. REV. 383, 455-456 (1964), take the position that, while the Commission cannot adopt rules which are penal enforceable, it may issue regulations upon which it may subsequently "rely". See text infra notes 109-115. As to the authority of the Securities and Exchange Commission under the Securities Act see Loss, Securities Regulation 1942-43 (2d ed. 1961).


91 Note 87, supra.

92 Section 4(a) exempts "interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice."

93 In addition to the exemptions just quoted, the same provision of the Act enables the agency to dispense with the procedures when it "for good causes finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Ibid.

94 "The only hearing to which" the applicant "so far has been entitled was given when the regulations in question were adopted pursuant to § 4(b) of the Administrative Procedure Act." F.P.C. v. Texaco, Inc., 377 U.S. 33, 45 (1964). See also Transcontinent Television Corp. v. F.C.C., 308 F.2d 339, 349 (D.C. Cir. 1962). In Motor Convoy, Inc. v. United States, 235 F. Supp. 250 (N.D. Ga. 1964), competitors who had sought to be heard in a proceeding to amend a certificate were held not entitled to a hearing because the issues had been determined favorably to the applicant in an
proceedings exclusive. Whether it does or not will depend on whether it requires agency attention to be given in each individual case to the issues a regulation may foreclose and whether the Constitution or the statute itself secures the right to a determination of these issues on the record of a trial-type adjudicatory hearing.85

There is, however, a logical difficulty with applying this reasoning to statutes, such as the Natural Gas Act, which antedate the Administrative Procedure Act. The latter Act does not bestow new authority on the agencies, except some incidental powers in the conduct of proceedings. It imposes requirements and prescribes procedures for exercising the authority the agencies possess by virtue of other statutes; it does not say that they shall have new rule-making power or may use rule-making to perform tasks which otherwise would be accomplished by adjudication. The statutes establishing the agencies define both their rule-making and their adjudicatory powers. As to statutes enacted prior to the adoption of the Administrative Procedure Act, the scope of these powers should logically be ascertained as of the time of their enactment without reference to that Act. An agency's rule-making power which was of a certain scope before, has that scope still; and in driest logic it should not be enlarged by the present applicability to rule-making of procedural requirements of the Administrative Procedure Act.

Such logic is sterile, however, and it has been repudiated in the Texaco and other decisions, which have held that, under statutes enacted before as well as after the Administrative Procedure Act, regulations adopted under a general rule-making power may settle matters that otherwise would require adjudication, if the parties who are bound have had, by virtue of § 4 of the Administrative Procedure Act, the kind of hearing to which they were entitled. Like the Constitution, old statutes take on new meaning by reason of new facts, including such legal facts as the existence of the Administrative Procedure Act.86

earlier industry-wide proceeding which led to a declaratory order, at least in the absence of a showing that they had significant evidence to offer.82

82 The opinion in Texaco indicates that adjudication is required with respect to "the merits of any rate structure" and "the merits of a certificate of public convenience and necessity." Id. at 42.

82 In Transcontinent Television Corp. v. F.C.C., supra note 94, the United States Court of Appeals for the District of Columbia held that the adoption of the Administrative Procedure Act with its provision of rule-making procedures could render valid the adoption of regulations that changed a licensee's television frequency even if previously an adjudicatory hearing was required. See 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 158, note 1 (Horack's 3d ed. 1943): "It has not been uncommon for courts to refer to later statutes upon the subject in the interpretation of a statute to show legislative policy."
When the rule-making power of an agency depends on a general statutory authority to adopt rules and regulations, the crucial questions in each instance of its application to issues that are also subject to adjudication is whether the statute by implication requires these matters to be determined case by case and whether affected parties possess procedural rights not accorded in the rule-making hearing. The distinction in the *Texaco* opinion between "qualifications" of an applicant for a certificate of public convenience and necessity, which may be prescribed in a regulation, and the "merits" of a rate structure or a certificate, which may not be, seems artificial and unsatisfactory. Whether the promise contained in a price escalation clause is necessary to bring about the production and sale of gas enters as much into the "merit" of a rate which reflects such a clause as into the ability of applicants "by reason of the rate structure to serve the public interest." So would the capital structure of an applicant, the ratio of fixed charges to out-of-pocket costs in the contemplated operation, and perhaps the weather conditions against which provision must be made in the area in which the operations will occur.

It might be suggested more generally that there are certain matters relating especially to particular cases, which must be determined through adjudication, and certain others that involve general considerations common to numerous instances or bearing on over-all policy, which may be settled by regulations. This distinction is the one Professor Davis makes between "adjudicative facts," which may require a trial-type hearing for determination, and "legislative facts," which do not; and there is much utility in it. In a radio licensing proceeding, the programs an applicant proposes to offer and whether he intends to adhere to his proposals are matters relating specifically to him, whereas the kinds of programs that will best serve the public convenience and necessity involve general considerations. In a rate-fixing proceeding, the rate level which will produce a specified percentage of return on the investment of a concern involves the finances of that particular enterprise, whereas the rate of return necessary to attract an adequate supply of capital rests at least in part on general economic circumstances. The procedural methods employed in securing data on which to base these several determinations can, as Professor Davis urges, be adapted to the nature of the determinations, both within a proceeding and by using rule-making or adjudication as may be appropriate. General or legislative facts consist of a host of particulars, however. There are also few questions relating to a given situation that cannot be largely foreclosed by previous general policy determinations, when these are made sufficiently minute.

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97 Note 95, *supra*.
98 1 *Davis Administrative Law* §§ 7.02-7.06 (1958).
Agency Policy Through Rule-Making

If, for example, numerous varieties of radio program offerings are either required or forbidden as a matter of general policy, little will be left for decision concerning the merits of what a particular applicant proposes, and the hearing that may remain to him for purposes of adjudication will become relatively meaningless. Similarly, if a rate of return on investment, to be secured by rates under a particular statute, is fixed by regulation, nothing remains to be heard on this point in a subsequent adjudicatory proceeding in which circumstances justifying a waiver of the rule cannot be alleged. The rate of return can, on the other hand, be decided separately in each case. There is, in other words, an almost limitless range of possibilities about whether to cause the necessary determinations under a statute to be made in proceedings primarily designed to ascertain particular facts or fashioned to gather more general data. To some extent the statute will appear to have dictated these choices; to some extent they remain open.

Absent specific statutory provisions allocating some matters to rule-making and some exclusively to trial-type adjudication, it is necessary to decide from the factors relating to each kind of subsidiary determination involved in adjudication under any statute providing for trial-type adjudication, whether it is rational and fair to permit the determination to be made in a binding general regulation or to require that the issue remain open in each case. The answer may turn on constitutional considerations, tradition in the handling of particular subjects, the impact of the regulation, the probable intention of the legislature (if any can be inferred), and procedural considerations such as whether the relevant evidence will be adduced satisfactorily at a rule-making hearing in which general determinations are made.

Rate-fixing was the earliest kind of administrative determination to which the constitutional guaranty of a full hearing came to be attached, and a tradition that the hearing include trial-type processes grew up and has remained strong, even though rate-making is conceptually legislative. The reason undoubtedly has lain in judicial fear of "confiscation" of sub-

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It is true that, whichever choice is made, a mixture of specific facts and of more general data, as well as argument, will be offered in the proceeding, and that trial methods (primarily confrontation and cross-examination) can be granted or withheld according to whether particular issues are deemed to be "adjudicative" or "legislative" in nature. It is simply the practice in rule-making, which it would be very cumbersome to change, to withhold these safeguards in all but exceptional instances. They are, in any event, not legally secured to interested persons; and the opportunity to participate in rule-making may, for reasons already outlined, not always be available. Hence the choice of type of proceeding is important.

90 C. M. & St. P. R. Co. v. Minnesota, 194 U.S. 418 (1890); Morgan v. United States, 304 U.S. 1, 14-15 (1938).
stantial investments through unduly low rates. On the other hand, when agency proceedings involve primarily regulations governing the conduct of businesses rather than the financial aspects directly, judicial reluctance to permit rule-making to operate with even lethal effect on the regulated enterprises has not been similarly manifested.\textsuperscript{101} How far the Federal Power Commission can supplant rate-making as to each producer by a resort to rule-making under § 4 of the Administrative Procedure Act remains to be seen.\textsuperscript{102}

The recent land-mark decision of the Court of Claims\textsuperscript{103} which regards the Armed Services Procurement Regulations as by their own force part of the defense contracts to which they are applicable, drastically affecting contractors' rights,\textsuperscript{104} may reflect a judicial "mood" that favors liberal recognition of the validity of rule-making—even "internal" rule-making unattended by the processes laid down in § 4 of the Administrative Procedure Act. Here, however, the process of contracting, not that of agency adjudication, stood opposed to rule-making as the means of determining contractors' rights. To bind a contractor by a regulation duly published, entering into the Government's offer at the time he made his contract, however harshly the doctrine may operate in certain instances,\textsuperscript{106} is not the same as binding a party by a regulation previously issued, when he would otherwise be entitled to an agency determination in an adjudicative hearing.

In a different administrative area, it seems unlikely despite the liberalization which has taken place that the Federal Trade Commission could, pursuant to a § 4 rule-making hearing, make a legally binding general determination that in a particular industry all further intercorporate acquisitions of capital stock or assets would violate § 7 of the Clayton Act because they would have the probable effect of substantially lessening competition or tending to create a monopoly.\textsuperscript{108} Such a determination,


\textsuperscript{104} The regulation in the Christian case authorized termination of contracts for the convenience of the Government.


based on an adequate inquiry in which members of the industry participated, might well be realistic and sound, but at least a visceral judgment leads to the conclusion that it would run afoul of § 11 of the Act which specifies that enforcement shall take place in a complaint proceeding against "any person" who the Commission has reason to believe is violating or has violated the Act.\textsuperscript{107} Unfair methods of competition through advertising and deceptive acts and practices toward consumers under § 5 of the Federal Trade Commission Act,\textsuperscript{108} on the other hand, present a closer case, even though enforcement is subject to the same kind of complaint procedure against individual violators\textsuperscript{109} as under the merger law. Fraud and injury to health and welfare, which such practices threaten to produce, are traditionally outlawed by statutes or general regulations, and the likelihood of variation from case to case of the merits of defined types of advertising or labeling is not great. The essentials of opportunity for business enterprise seem less involved in such a matter, moreover, than when corporate ownership is regulated. One's intuitive judgment as to the possible validity of giving binding force to

\textsuperscript{107} 38 Stat. 734 (1914) as amended, 15 U.S.C. § 21 (1959). If several violations of the merger provision of the Act are thought to be in progress or to have taken place, the Commission might possibly, however, treat them together in a consolidated proceeding. In Permanente Cement Company, C.C.H. \textit{TRADE REG. REP.} ¶ 16,885 (1964), the Commission announced a Trade Regulation Rule proceeding for "study and consideration" of vertical mergers in the cement industry, since it would "be uneconomical, inefficient, and inequitable to proceed exclusively on the basis of individual adjudicative proceedings" in dealing with an industry-wide problem. In a subsequent address by Commissioner Elman, who wrote the Permanente opinion, it is stated that the purpose is to provide "standards, guidelines, pointers, criteria, or presumptions" to serve "as a frame of reference for dealing with particular cases or transactions," rather than "\textit{per se} rules or codes rigidly demarcating the lawful limits of merger activity." The findings, however, "might be so complete and precise as to provide a framework within which the probable legality of prospective mergers could be appraised quickly and with a fair degree of certainty." B.N.A., \textit{ANTITR. \& TRADE REG. REP.}, No. 169, p. A-6 (Oct. 6, 1964). The Commission's rule of practice for Trade Regulation Rules provides that in an adjudication "the Commission may rely upon" such a Rule "to resolve [an] issue" to which it is relevant, "provided that the respondent shall have been given a fair hearing on the legality and propriety of applying the rule to the particular case." 16 C.F.R. § 1.63 (Supp. 1964). In a dissenting opinion by Commissioner Elman in Callaway Mills Company, C.C.H. \textit{TRADE REG. REP.} ¶ 16,800 (1964), it is stated that a respondent in a cease-and-desist order proceeding "will not be heard" to contend that price discrimination through volume discounts, which the Commission has "authoritatively determined" by regulation to be unlawful, should be regarded as lawful when the discrimination is defensive. For an excellent discussion of the Commission's use of regulations see Weston, Advertising and the Federal Trade Commission: Decline of \textit{Caveat Emptor}, 24 \textit{FED. BAR. J.} 548, 567-73 (1964).


\textsuperscript{109} Id. at § 45(b).
regulations in the deceptive practices field is therefore relatively favorable. The matter can be fairly and sensibly handled in this manner, and appropriate rights of hearing secured.

It scarcely aids the case in favor of the validity of regulations upon which an agency proposes to rely without further opportunity for a hearing on their merits, to contend as the Federal Trade Commission has, that the regulations are in reality elaborations of the statute which are not dependent on any statutory rule-making authorization. It is true, as has been pointed out, that the power to issue interpretative regulations may be implied; but elaborations of policy are not the same; and it is not true that the agency may refuse to reconsider issues such elaborations seemingly settle, when those issues are involved in a later adjudication that carries with it rights to a trial-type hearing, unless the statute in some manner provides for superseding those rights. We are back to the original question.

It does help to provide, as the Federal Communications Commission, the Federal Power Commission, and the Federal Trade Commission have, that a party objecting to a regulation may, in addition to seeking its revision or repeal in a subsequent rule-making proceeding, apply for a waiver of its application to him. If, as has not always been made clear, the waiver application will be determined in a trial-

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110 F.T.C. statement, supra note 51, at 8369.
111 See text at note 81 supra.
112 The fact that the Federal Trade Commission Act "does not in terms provide for a trial-type hearing, but only for a summary proceeding to show cause," F.T.C. statement, supra note 51, at 8370, scarcely establishes at this late date that there is no legal right of respondents in cease-and-desist proceedings under the Act to such a hearing. As to the invalidity of substituting rule-making for trial-type adjudication when the latter is secured by statute, see Zenith Radio Corp. v. F.C.C., 211 F.2d 629 (D.C. Cir. 1954); Philadelphia Co. v. S.E.C., 175 F.2d 808 (D.C. Cir. 1948), jm. vacated with directions to dismiss petn. as moot, 337 U.S. 901 (1949); Campbell v. Galeno Chemical Co., 281 U.S. 599 (1930); Campbell v. Long & Co., 281 U.S. 610 (1930).
115 16 C.F.R. § 1.63 (Supp. 1964); F.T.C. statement, supra note 51, at 8372-8373.
116 Section 4(d) of the Administrative Procedure Act, 5 U.S.C. § 1003(d) (1946), requires every agency to "accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."
117 The Federal Trade Commission's cigarette advertising Trade Regulation Rule, Par. 4, provides for waiver to be sought in a rule-making proceeding. Supra note 115. Doubtless, however, a respondent in a cease-and-desist proceeding might in that proceeding defend on the ground that circumstances existed which should call for a waiver. The Federal Communications Commission's rule, quoted loc. cit. supra note 113, provided that a request for waiver might accompany a license application. The Federal
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type hearing, at least the “adjudicative” facts concerning the applicant will arise in that proceeding. The proceeding will, however, not reopen the merits of the regulation; and they may well be the matter of greatest moment to the applicant. Again we are back to the original question of whether this issue, or set of issues, may be foreclosed.

If, in addition to entertaining applications for waiver of a regulation, the agency will consider its possible invalidity, or whether it falls within the agency’s authority, in a later adjudication involving it, its preclusive effect will be still further diminished. It is not at all clear, however, that the issue of validity need be regarded as open at that stage. The agency has determined this point in the rule-making proceeding, and it may regard it as not subject to reopening unless the regulation is attacked in another proceeding of the same sort. A party wishing to attack the validity of the regulation may, however, certainly do so on judicial review of an agency order based on the regulation, unless a statute precludes review;\textsuperscript{118} and if the court needs facts on which to base its decision of the point, it can remand the proceeding to the agency for additional evidence or facts officially noticed to be placed in the record. In the end, therefore, the attacker gets his hearing on the issue of validity, relating both to the facts pertinent to that issue and, by way of argument before the agency or in court, to the issues of law. All that remains foreclosed by a “binding” regulation are its merits within the range of agency fact determinations and choices of policy by which the courts are bound.\textsuperscript{119}

The Federal Trade Commission has likened the force of Trade Regu-

\textsuperscript{118} Text \textit{supra} at note 66; \textit{cf.} Yakus v. United States, 321 U.S. 414 (1944).

\textsuperscript{119} A regulation adopted pursuant to A.P.A. § 4(a) procedures would be reviewable “on the record of an agency hearing” within the meaning of A.P.A. § 10(e)(5), 5 U.S.C. § 1009(e)(5) (1946), if the agency had voluntarily or because of a statutory requirement conducted a hearing that provided such a record. In such a case, review of fact determinations would be limited to the scope allowed by the substantial evidence rule. If, as would more often be the case, no such record had been provided, the court would, under A.P.A. § 10(e)(6), 5 U.S.C. § 1009(e)(6) (1946), have power to determine whether the agency determinations, underlying the regulation, were “unwarranted by the facts,” leaving only choices of policy by the agency (properly subject to argument and not evidence) beyond judicial check. It may be doubted, however, that the judicial province under the Constitution would be considered to extend to such “fact” determinations as whether, on all the evidence, certain price escalation clauses in natural gas contracts tend to “trigger” widespread price increases, or whether cigarette advertising that omits mention of the health hazards of smoking cigarettes actually creates a false sense of security among potential smokers. \textit{Cf.} Houston v. St. Louis Independent Packing Co., 249 U.S. 479 (1919). Judicial review, whatever its formal scope, can scarcely be a complete substitute for a determination by an agency on the basis of an original hearing.
lation Rules, as envisaged by the Commission, to that of facts judicially or officially noticed,\textsuperscript{120} such as the facts, now “noticed” by the Commission,\textsuperscript{121} that “a substantial segment of the public assumes that unmarked” products “are American-made” and that it prefers them. Only facts may be “noticed,” however, whereas regulations contain prescriptions or commands, based on facts that are either “noticed” or established by evidence. A hearing on an issue into which “noticed” facts enter is still a hearing in which, if other facts are involved, evidence concerning them will be received and in which, under one view, the noticed facts themselves may be challenged.\textsuperscript{122} A rule which has legal force, on the other hand, such as one which provides that goods of foreign origin must be marked as such, if an order prohibiting their sale is to be avoided, forecloses the issues completely and leaves nothing to be heard concerning unmarked goods of this description. The rule is fixed and cannot be attacked by efforts to show that American consumer understanding and preferences are, in reality, different from those the Commission ascertained, or that additional facts, such as resentment abroad of compulsory marking of goods produced there, are true and should be considered. The Commission’s regulation may, however, be attacked on the ground that it is not supported by evidence and is therefore invalid, or that the regulation is arbitrary and capricious or beyond the agency’s authority.\textsuperscript{123}

If applications for waiver of the rule are permitted, a respondent in an adjudicatory proceeding may also be allowed to show that as to his product the facts are different.\textsuperscript{124} The policy of requiring goods to be marked is fixed, however, and may not be reopened except on the limited grounds just stated. The regulation may be sound and the resulting posture of affairs may be good; but the situation is not the same as with relation to facts officially noticed. Under it the procedural opportunities of the parties to later adjudications are restricted and the outcome of these proceedings is wholly or partially predetermined.

In the light of this discussion, the issue of power to base substantive rules, binding in subsequent agency adjudications, on a general statutory authority to prescribe regulations emerges as a narrow one. Nevertheless, battles over it have probably just begun.\textsuperscript{125} They will be avoided in so far

\textsuperscript{120} F.T.C. statement, \textit{supra} note 51, at 8372.
\textsuperscript{122} See 2 Davis, \textit{Administrative Law} § 15.09 (1958).
\textsuperscript{123} As to the scope of judicial review of discretionary regulations see Nathanson, \textit{Administrative Discretion in the Interpretation of Statutes}, 3 Vand. L. Rev. 470, 481-492 (1950).
\textsuperscript{124} Interstate Broadcasting Co. v. F.C.C., 323 F.2d 797 (D.C. Cir. 1963).
\textsuperscript{125} The Federal Power Commission’s statement of the intended effect of its area rates for natural gas, 18 C.F.R. § 2.56 (Supp. 1964), although it expresses the intention that
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as the agencies find it adequate for their purposes to frame regulations which lay down policy guides that may be relatively firm but are statements of intention rather than fixed rules and are not immunized from attack on the merits in later adjudications. The use of such regulations does not avoid the hazard of occasional trial-type hearings over matters of general policy; but the incidence of these hearings relating to a given regulation should diminish after a single such attack has been withstood, especially if judicial affirmance follows. In some circumstances this kind of partial avoidance of cumbersome adjudicative hearings may be sufficient; in others the use of a general authority to make regulations in order to issue binding rules and so reduce further the scope of adjudication may be justified. Legislative clarification of agency authority would, of course, be desirable. Given legislative preoccupation with larger matters, it must no doubt await comprehensive changes from time to time in the administrative provisions of particular statutes.

they shall be “guides” which will not deprive any party of substantive rights or procedural opportunities, specifies also that certificates for new producers will be granted only if the rates proposed conform to the area rates, unless “compelling evidence calling for other action” is presented. Much additional litigation is likely to ensue before the permissible limits of determining rates in general proceedings have been delineated for this sensitive industry. As to the Federal Trade Commission see note 107, supra.