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FAIRNESS AND EFFECTIVENESS IN ADMINISTRATIVE AGENCY ORGANIZATION AND PROCEDURES

RALPH F. FUCHS†

Public concern over the operation of administrative agencies of government, especially in the Federal system, has increased during the past several years. Congressional inquiries into agency performance and into "influence" upon it has led to startling, if limited, disclosures. More fundamentally, doubt has arisen whether the public interest entrusted to the agencies is being served at all adequately, while long-standing questions about the fairness of certain agency proceedings to the private parties involved have been raised with new urgency. As a result proposals for radical changes in agency organization, especially the separation of major policy functions from the function of adjudication, have been made with augmented force; measures to reform administrative procedure across the board have received increased attention; and numerous bills to cope with the influence problem have been introduced and made the subject of hearings.

People generally recognize today, as thoughtful lawyers and writers always have, that certain agencies are the principal means of keeping order in important areas of economic and social endeavor, such as radio and television broadcasting and public transportation; that others are required to dispense important benefits to individuals, to which society has become committed, such as workmen's compensation, unemployment compensation, and old age and survivors insurance; and that taxes will continue to have major economic consequences flowing not only from the statutory tax structure but also from the effectiveness of collection. Hence the old cry of less government interference gives way to one for improvement of administration; but the means of improvement are far from clear.

Sweeping answers to the problems presented should not be expected; for the inescapable variety of agency operations and the complexity of

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interests at stake are too great. Reorganization of particular agencies may be expected to occur, and efforts to improve agency processes, demanding the thought and effort of legislators, administrators, and counsel for private parties, are a continuing necessity. Administrative procedure legislation can be bettered. All such changes must draw on experience with existing law in order to establish new law, whether relating to fundamentals or merely to matters of meticulous detail. The law involved is, of course, administrative law—still rather new in the Anglo-American system, but embracing concepts and standards which make up an integrated though imperfect whole.

The purpose of the present article is to present some of the basic aspects of agency organization and procedures, which are fundamental to a consideration of current proposals for reform. Against this background later articles to be published elsewhere will review these proposals for the purpose of identifying the ones that seem sound and rejecting those that might endanger more of the benefits of agency operation than they would safeguard.

Variety of Agencies

Administrative agencies are established pursuant to statute, sometimes, in the States, by constitutional provision, to deal with specific, defined subjects. As a result, the province of each agency is limited, and the agency specializes in its particular field. With relation to the subjects with which they are thus required to deal, administrative agencies may be grouped in the following categories: (1) those that deal with personal conduct or status, such as the conduct or status of highway users or aliens or members of supposedly subversive organizations, or with conduct or conditions in the general community, affecting,
for example, the public health; (2) those that regulate certain aspects of business in general, such as competitive marketing practices, prices during emergencies, labor relations, or factory safety; (3) those that regulate a single industry or occupation, such as transportation, communication, banking, insurance, or the several trades and professions; (4) those that dispense benefits to individuals, such as copyrights and patents, payments to veterans, compensation for industrial accidents, and various forms of social security allotments; (5) those that manage public enterprises or property upon which legal rights or privileges depend, such as the post office and the public domain; and (6) those that assess and collect taxes or enforce other governmental demands such as military service.

The methods which various agencies employ are likely to differ somewhat according to the kinds of affairs to which they give attention. Those that are concerned with business enterprises, except under some local licensing laws, are usually required to afford substantial procedural safeguards to the interests they affect, unless acute danger to the public, such as the danger from spoiled food or adulterated drugs or from the continued operation of a failing bank, requires summary action. An agency that deals with a single industry is likely, in addition, to develop continuing contacts with the industry, such as may turn the regulatory process to some extent into one of cooperation, or at least of continuous interchange of information and views. The dispensing of benefits upon which individuals are dependent should, and often does, produce agency methods initially unaccompanied by hearings, that emphasize

2. The requirement of a judicial-type hearing was originally indicated on constitutional grounds in relation to administrative proceedings relative to public utility rates. C.M. & St. P.R.R. v. Minnesota, 134 U.S. 418, 457 (1890). Cf. People ex rel. McAleer v. French, 119 N.Y. 502, 23 N.E. 1061 (1890). The requirement was extended to other regulatory controls over utilities, see Southern Ry. v. Virginia, 290 U.S. 190 (1933), and came to be regarded as a procedural norm of wide application, designated by the term "fair hearing." See Morgan v. United States, 298 U.S. 468 (1936), 304 U.S. 1 (1938); United States v. Libby, McNeil & Libby, 107 F. Supp. 697 (D. Alaska 1952). The procedures of state utility commissions and many other state regulatory agencies are similar; but occupational licensing has traditionally been carried on through the informal processes developed by trade and professional groups or by local governments, rather than through quasi-judicial procedures. More careful procedures are gradually developing in the licensing area too, even apart from general administrative procedure legislation. Byse, Opportunity to be Heard in License Issuance, 101 U. Pa. L. Rev. 57 (1952).


4. See GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS Ch. IV (1941); Landis, The Development of the Administrative Commission, printed in GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 1, 3-5 (2d ed. 1947); Loss, SECURITIES REGULATION 762-784 (1951); Western Traffic Association—Agreement, 276 I.C.C. 183 (1949). As to consultation with private interests in rule-making see REPORT, [U.S.] ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 103-105 (1941) (hereinafter cited as A.G. COM. REPT.).
speed, accuracy, and uniformity in the handling of claims. Such is the case, for example, in the field of unemployment compensation, where thousands of applications a week may need to be processed and paid promptly if the purpose of the governing statute is to be fulfilled. Governmental requirements, such as the need for tax money for current operations, or the need for members of the armed forces, have traditionally led to the use of relatively informal, even summary, methods. Procedural processes developed in one administrative area are likely, however, to win wider acceptance and therefore to be transferred elsewhere. Thus, the Federal Government's method of income tax collection now permits a formal hearing to be had before payment of disputed amounts, both because of current general ideas about proper procedure and because a government possessing the economy's best credit rating scarcely needs prompt, unquestioning payment of taxes as acutely as did the English crown several centuries ago. Similarly, the traditionally summary methods of the post office, of deportation, and even of Selective Service have yielded strikingly to developed notions of due process of law; and the Supreme Court is strict in requiring procedural safeguards before freedom of speech can be indirectly restrained through administrative action. The Federal Administrative Procedure Act prescribes procedural safeguards for broad classes of agency proceedings. A similar development through state decisions and legislation is occurring.

9. Through their check upon deportation orders in habeas corpus actions, the courts were able in the name of due process of law to impose procedural requirements on deportation hearings which, with no statutory foundation, introduced many of the formal safeguards of fairness. See Deportation and Due Process, 5 STAN. L. REV. 722 (1953); Oppenheimer, Recent Developments in the Deportation Process, 36 MICH. L. REV. 355 (1938). The Immigration and Nationality Act of 1952 enacted these requirements into statute. 66 Stat. 209, 8 U.S.C.A. § 1252(b).
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SPECIALIZATION AND EXPERTNESS

Each agency’s personnel necessarily specializes in the agency’s duties. The agency should therefore either possess initially or soon acquire expertness in its work, unless it is, for example, a small local license bureau marked by frequent changes of officials. Expertness may come about because technically qualified agency heads or staff members, or both, are appointed, or may result simply from subsequently acquired experience in an agency’s special field. Of the latter variety is the expertness on some medical issues which commonly develops for example, among the members of a workmen’s com-


14. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT OF THE TASK FORCE ON INDEPENDENT REGULATORY COMMISSIONS 22-25, 34 (1949), indicates the extent to which specialization and expertness on the part of the members of certain Federal agencies are at times defeated by turnover in office occasioned by inadequate salaries and other causes. The staffs of these agencies are, however, not affected by these factors.
pensation commission having on it a lawyer, a businessman, and a former employee or union leader, as the members gain familiarity with the medical aspects of occupational injuries and diseases. More significant on the whole is the expertness which is intentionally created through the appointment of specially qualified agency heads, the employment of technically trained staffs, or both; for in these circumstances it is evident that a primary purpose of establishing the agency is to bring its expertness to bear in resolving the problems entrusted to it. It is also evident that, as an agency develops, its fund of knowledge and experience is stored not only in the minds of its personnel, but also in its records and files.

The "expertise" of agencies has often been said to be their raison d'etre; and so it is to a large extent. The tribunal "appointed by law and informed by experience" is necessary for the satisfactory solution of many problems which government must handle; and when such a tribunal has been established the courts meticulously defer, on the whole, to the conclusions it reaches. It may be difficult for a given agency to bring sufficient expertness to bear at a particular time, because its personnel may be quantitatively or qualitatively inadequate, or because the magnitude of the problems presented may outrun the agency's store of information or its ability to focus the resources it has; but it is difficult to see how economic and social problems could be better solved governmentally than by the operation of agencies equipped to apply an objective judgment, bringing expert knowledge and technical data to bear when needed, to problems that are carefully investigated, analyzed, and presented. In England, when an effort was made to regulate railroads through the Court of Common Pleas, the experiment was adjudged a failure; and a much later official inquiry in that country rejected the suggestion that either the courts or other non-specialized tribunals could undertake the

tasks performed by the then numerous specialized administrative tribunals.  

Political influences in the appointment of personnel, improper pressures upon agencies which may warp their decisions, and discouragements which cause qualified staff members to leave government service often produce wide gaps between the ideal of an expert agency, zealous to carry out the functions entrusted to it, and the spotted actuality of administrative performance. Procedural safeguards against abuses stemming from these causes, as well as against arbitrariness from other causes, are needed; but if they are given a form which is inconsistent with the methods that experts need to employ, the very purpose of establishing an expert agency may be defeated. The need to reconcile procedural safeguards with continued agency ability to render specialized service lies at the heart of many of the problems of administrative procedure. Problems not solvable in this way must be attacked through improved political processes bearing on appointments and on the conditions of public service.

Specialists and experts necessarily reach conclusions in part on the basis of knowledge and skill that lie beyond ordinary lay experience. In private affairs the managers of enterprises, arbitrators of disputes, and the members of professions reach decisions in their own ways, usually on the basis of direct inspection and informal inquiry. The manager receives reports, conducts interviews, and decides; the physician examines and diagnoses; the architect or engineer plans and prescribes. Their decisions are commonly accepted by those whom they affect, or become binding upon such persons under prior contracts or corporate charters. The fact that the similar determinations of government administrative officers are given statutory effect, defining the resulting rights and duties without the consent of the persons concerned, often requires that procedural safeguards, drawn from judicial experience and supplementing the safeguards residing in the methods natural to experts, be made available. These typically consist of proceedings that include opportunity for hearings at which interested parties may introduce evidence, meet the evidence offered by others, and make arguments to the deciding authorities, leading to reasoned decisions by these authorities. Such proceedings are commonly called "formal" or "trial type" proceedings or, in the words of the Federal Administrative Procedure Act, proceedings leading to action "on the record after opportunity for an agency hearing." The question arises, how far and in what way the formulation of expert judg-

ments can and should be subjected to proceedings of this type. Alternative safeguards, which also are common in administration, include supervision by superior officers of officials who gather data or make decisions, and subsequent administrative review of the actions taken.

Agency Discretion

The expertness of administrative agencies may relate either to determining matters of fact, such as the value of a piece of property or the danger of an epidemic of disease, or to settling issues of policy, such as the rates that a public utility may justly and reasonably charge, the desirability of licensing a new enterprise to serve the "public convenience and necessity," or the justification for imposing the inconvenience of a quarantine in order to avert an epidemic of disease. The former kind of determination requires an informed judgment of the available evidence; the latter necessitates, in addition, weighing the consequences of alternative courses of action and selecting the one that seems best. When this second kind of determination is made, "discretion" in a distinctive sense is exercised.21

Some agencies, such as those that handle social security claims, are not vested with discretion in this sense, because the statutes they administer are not intended to authorize the agencies to make choices of policy. The deciding officials are required to determine the facts in each case and apply the law to them. Even though these processes are actually far from mechanical, there are supposed to be external criteria in the facts themselves and in the law, whereby the outcome is determined. Discretion, on the other hand, involves an intended power of choice among alternatives.

When an agency exercises discretion in trial-type proceedings, as regulatory agencies commonly do, procedural problems of a special nature are likely to arise. Discretion, it has been said, means that "a determination may be reached, in part at least, upon considerations not entirely susceptible of proof or disproof."22 By the same token, the evidence ad-

21. "Administrative discretion is the freedom of choice or judgment with which an executive officer or an administrative agency is entrusted in order to insure the constant and complete effectuation of the legislative policy in any situation which might arise in connection with the enforcement of the statute." Cooper, Administrative Justice and the Role of Discretion, 47 YALE L.J. 577 (1938). Many meanings have been given to the term discretion, including one which embraces determinations of doubtful facts and interpretations of law as well as choices of policy; but as will appear, significant differences exist between these three operations. Cf. Patterson, Ministerial and Discretionary Official Acts, 20 MICH. L. REV. 848 (1922); Robson, Justice and Administrative Law 399-490 (3d ed. 1951).

22. Freund, Administrative Powers Over Persons and Property 71 (1928). Discretion in this sense is sometimes said to involve the exercise of "authority" or fiat, and to be necessary in a system of "law" as well as consistent with such a system, in situations where rules based on reason, including science, do not exist to guide decisions
duced in hearings for purposes of proof cannot fully cover the discretionary issues to be determined; the agency must add something more in the end. What it adds may be expressed in findings or a written decision. Expert or opinion testimony may be introduced at the hearing with relation to the discretionary issues, but be later rejected by reason of agency views, even when there is no conflict in the testimony. The question then arises whether the decision really results from the hearing; and affected private interests may be disquieted by the belief that it does not.

The check of judicial review operates imperfectly in such situations; for a discretionary determination, reached in a rational manner by an agency authorized to make it, must in the nature of things be final. Others may disagree with it, but they cannot prove it to be wrong; and the law, by vesting the discretion, has specified the authority whose view is to be given effect. The discretionary choice may later prove successful or unsuccessful under governing standards; but until changed by another exercise of discretion, it stands. The Federal Administrative Procedure Act recognizes the finality of agency discretion by providing that judicial review of agency action, when not precluded for other reasons, shall be accorded "[e]xcept so far as . . . agency action is by law committed to agency discretion." Since a court in a review proceeding may nevertheless determine whether a discretionary determination falls within the agency's authority and, usually, whether it is free of abuse, the Act does not mean that such a determination cannot come before the courts, but simply that the agency's conclusion is final if it is not ultra vires or arbitrary. There are instances, however, in which a court may decline to examine into the question of alleged abuse of discretion.

Discretion and the traditional conception of law are inconsistent with each other. Conventionally, law applies rules which already exist to facts after they have been ascertained; and there is no room for choice.

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23. See J. Hall, Authority and the Law, in Authority 63-66 (Friedrich ed. 1958); Fuller, Reason and Fiat in Case Law, 59 Harv. L. Rev. 376, 377-381 (1946).


If error transcending allowable limits occurs, it can be corrected on review. Discretion, on the other hand, invokes the judgments of men to reach decisions that are not prescribed by rules and that cannot be corrected at the instance of those who may disagree. Hence discretionary power may seem arbitrary, and may be regarded as "government by men" as opposed to a "government of laws." Yet the exercise of discretion is a growing feature of modern government, because of the increasing complexity of the problems to be dealt with. Rules generally specify relatively few factors in a total situation, such as the statutory qualifications for entry into marriage or the items of conduct that constitute theft, as a basis for reaching legal conclusions. More and more present-day problems, such as the decision of whether to authorize the adoption of a child or the allocation of radio and television frequencies, require the weighing of a host of factors that can only be indicated in advance and that must be judged flexibly, through the exercise of discretion, as circumstances may require. The propositions of law applied by the courts, as well as the statutory provisions which govern administrative agencies, reflect this change, as they more and more take the form of broad principles or standards, rather than of rigid rules.

It does not follow that there is no rule of law at all in connection with the exercise of discretion, or that arbitrary power is on the increase in modern government. Several safeguards surround the exercise of discretion. It is recognized, of course, that "equity," or the limited power to adjust law to meet the requirements of fairness, is an indispensable aspect of a system of law in operation; and equity implies discretion. Traditionally it operated only in particular areas of law.

In reality the facts with which official agencies must deal in their proceedings can rarely be directly apprehended and, therefore, be known with maximum certainty. They are ascertained, rather, by the receipt and consideration of evidence, much of which may be conflicting. The "facts," therefore, are typically inferences, or conclusions, even when they consist of physical events. Hence, on the same body of evidence, opposite conclusions as to the "facts" can frequently be reached rationally. In deciding one way rather than the other in such situations legal agencies can and do make choices. Since rules of law frequently are in conflict or lacking in precision, choices may also be made in applying them. Realistically, therefore, the antithesis between law and discretion is less than the conventional distinction allows; yet it is not, as has been asserted, without substance. Griffith & Street, Principles of Administrative Law 143-144 (2d ed. 1957). For it is conceded that discretionary administrative decisions should not be judicially reviewable (id. at 195), whereas judicial review of determinations of fact and of law stands in a different light (id. at 193-194).

Conventionally, a judicial determination of fact is accepted on appellate review unless "clearly erroneous"; and a jury's determination must stand unless the evidence in support of it does not satisfy minimum standards of sufficiency. Fed. R. Civ. P. 52; 6 Moore, Federal Practice 3814-3819 (2d ed. 1953). Error of law is fully subject to correction on appeal; but the "error," if any, often involves disagreement by the appellate court with the trial judge as to the applicable rules, rather than the correction of genuine mistakes.

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cretion by administrative agencies. In the first place, the range of administrative discretion is commonly limited to what is needed to carry out statutory purposes; and the limits imposed are legally enforceable. Transportation rates are determined by administrative agencies, for example, not entirely as the agencies see fit, but so as to be "just and reasonable" in a specialized sense which experience has defined. In the second place, expert discretion usually involves, not mere guesses as to the future, but the use of scientific and professional techniques for measuring, let us say, health hazards, or the economic effects of price changes. These techniques reduce the merely personal element or aspect of fiat in discretionary decisions by setting limits within which the discretion must operate. 30 In the third place, legal requirements relating to the procedure by which discretion is exercised often make it necessary to set forth the bases of decision in writing and to disclose the reasoning process of the deciding authority in a way that subjects the results to criticism and to some extent guards against error or abuse. Unexplained departure from previous standards of decision may result in judicial reversal of an exercise of discretion because of capriciousness. 31 These safeguards adapt the administrative discretion which is required in solving modern problems to the continued need for rationality and some degree of predictability in the operation of law.

It has been pointed out that the use of scientific methods, although governed by ascertained laws, is not part of that system of law directed to human values and possessing considerable continuity and consistency of its own, which the governmental "rule of law" envisages. 32 Yet the specialists and experts who constitute the core of most administrative agencies, including the lawyers who advise or restrict the others at critical points, are no less aware of the legal tradition, in so far as it forms part of the general culture, than are the members of legislatures from whom the great bulk of modern law stems. 33 Even such an administra-
tive determination, unattended by a hearing, as whether an airplane is airworthy and therefore eligible to carry passengers is not likely to be capricious or disregardful of the economic and human factors at stake; and the administrative prescription of a food standard by which the shipment and marketing of a product is to be governed, when reached after an elaborate trial-type proceeding, is surely not less an expression of the "rule of law" than a legislative prohibition of "filled milk" or even a judicial determination that the manufacturer of a product which has caused harm to a consumer must pay a certain sum as damages.

Judicial review plays an important part in keeping administrative discretion within bounds, as well as in correcting the abuse of discretion in other ways. A discretionary administrative action may, for example, be set aside as capricious because totally irrelevant factors have determined it. More frequently agency action may be held invalid because the discretion which has been exercised, although not inherently unreasonable, has taken account of factors which are simply not embraced by the governing legislation. The agency, in other words, has stepped beyond its field of special competence and has exercised too broad a discretion. For example, refusals of licenses under health or building safety statutes in order to further traffic safety or keep down the number of competitors in a trade have been held invalid, as have rate orders of the Inter-

38. For a discussion of judicial review of discretion in England see S.A. De Smith, Judicial Review of Administrative Action Ch. 6 (1959).
39. U.S. ex rel. Belfrage v. Shaughnessy, 212 F.2d 128 (2d Cir. 1954) (refusal of bail to alien who had invoked 5th Amendment before Congressional committee); Crocker v. United States, 127 F. Supp. 568 (Ct. Cl. 1955); U.S. ex rel. Bittelman v. District Director, 99 F. Supp. 306 (S.D.N.Y. 1951) (rejection of bondsman because of membership in "subversive" organization). In U.S. ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir. 1950), the opinion of the court, by Learned Hand, J., remarks that the exercise of a broad discretion is valid unless it affirmatively appears that it "has been actuated by considerations that Congress could not have intended to make relevant."
state Commerce Commission that resulted from the Commission's belief that it should secure the economic welfare of certain shippers, rather than confine itself to transportation factors. Sometimes agencies take too narrow a view which courts subsequently correct of the matters open to their consideration. It may be difficult to tell from the words used in a statute what, precisely, comes within the discretion they define. Such a broad statutory phrase as "public interest" or "just and reasonable" could embrace almost anything. Economic justice to shippers in rate fixing, which under some circumstances, as has been said, cannot be taken into account for its own sake, may enter the range of permissible agency discretion because the impact of rates on shippers has long been estimated by carriers in order to keep particular shippers in existence as sources of traffic, or because "discrimination" in rates, which carriers must avoid and the Commission exclude, relates closely to economic opportunity for shippers and localities.

In general, the scope of allowable discretion under broad statutory standards reflects historical and practical factors which may be more significant than the words used in determining what is relevant and what is not. The final determination as to the breadth of an agency's discretion is made by the courts if re-

Recognition Bd., 403 Ill. 442, 86 N.E.2d 357 (discretion to define "widow" under veterans bonus law); Lloyd v. Ramsey 192 Iowa 103, 183 N.W. 333 (1921) (discretion to disapprove financial structure of corporation); Weiss v. State Bd. of Equalization, 40 Cal. 2d 772, 256 P.2d 1 (1953); Barth v. DeCoursey, 69 Idaho 469, 207 P.2d 1165 (1949), and Harrison v. People, 222 Ill. 150, 78 N.E. 52 (1906) (breadth of discretion in liquor licensing); Pompeii Winery v. Board of Liquor Control, 167 Ohio St. 61, 146 N.E.2d 430 (1957) (bread interpretation of statutory authority to fix liquor prices).


view proceedings are available and cases are brought.  

Under case law which is mainly a matter of recent development, a purported exercise of administrative discretion in a particular case, if subject to judicial review, may be set aside by a court where the resulting action stems demonstrably from a fixed policy based on general considerations, instead of from an individualized judgment which the persons affected are entitled to receive. In other words, a stereotyped basis of action cannot validly be substituted for a discretion that should be exercised from case to case. Thus, it has been held that an alien denied a discretionary suspension of deportation simply because he fell within a class which had been arbitrarily designated as not to receive suspensions has been granted judicial relief. An agency may, however, formulate and announce general policies in advance of particular discretionary decisions, provided they are not made rigid so as to prevent changes from case to case, and there is authority for the view that unexplained departure from a consistent administrative policy, even though the policy need not have arisen, may under some circumstances result in judicial relief to a party adversely affected. On this ground, the Attorney General was prevented by a court from deporting an alien whom he had

45. In Harmon v. Brucker, 355 U.S. 579 (1958), the Court extended the previously recognized category of military actions subject to review, in order to strike down the issuance of an other-than-honorable discharge from the Army on account of pre-service factors which were beyond the lawful purview of the military authorities. Compare Panama Canal Co. v. Grace Line, 356 U.S. 309 (1958). See also American Overseas Airlines v. CAB, 254 F.2d 744 (D.C. Cir. 1958) (factors to be considered in determining financial need of carrier for purposes of air mail compensation).


47. Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950). See also Lim Fong v. Brownell, 215 F.2d 683 (D.C. Cir. 1954) (refusal by the Attorney General to consider withholding of deportation of Chinese under a statutory authorization to do so in the case of deportation of "any alien . . . to any country in which in his opinion the alien would be subject to physical persecution . . . for such period of time as he deems to be necessary for such reason"). And see Frank, J., dissenting, in U.S. ex rel. Accardi v. Shaughnessy, 206 F.2d 897 (2d Cir. 1953). (For subsequent decisions in the same case, turning on a different but related point, see U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Shaughnessy v. U.S. ex rel. Accardi, 349 U.S. 280 (1955). Compare Clair v. Barber, 258 F.2d 558 (9th Cir. 1958).

discretion to deport,\textsuperscript{49} where the threatened deportation violated a settled practice to withhold action pending Congressional disposal of a private bill to permit the alien to remain.\textsuperscript{50} The principle of mandatory consistency in the exercise of discretion has been said to possess especially great strength where a change in previous policy would operate with retroactive effect;\textsuperscript{51} but this view encounters the same well known difficulty as is involved in determining whether statutes operate retroactively.\textsuperscript{52} It is evident that a continuing power to exercise discretion permits changes of policy which are not capricious, and may require them when circumstances change or when the agency gains new insights.\textsuperscript{53} The readiness

\textsuperscript{49} U.S. \textit{ex rel.} Knauff v. Shaughnessy, 338 U.S. 537 (1950). Technically the deportation involved was an exclusion, since the alien had not been admitted finally to this country.

\textsuperscript{50} U.S. \textit{ex rel.} Knauff v. McGrath, 181 F.2d 839 (2d Cir. 1950).

\textsuperscript{51} NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960); NLRB v. Guy Atkinson Co., 195 F.2d 141 (9th Cir. 1952); See also Office Employees Int'l Union v. NLRB, 353 U.S. 313 (1957); Matlack v. United States, 119 F. Supp. 617 (E.D. Pa. 1954).

\textsuperscript{52} In the Atkinson case, supra note 51, an order for the reinstatement of a discharged employee was said to involve retroactivity where the employer had had the assurance of a previously "fixed and . . . notorious" policy of the National Labor Relations Board that jurisdiction over enterprises of the type the employer conducted would not be exercised. In NLRB v. Olaa Sugar Co., 242 F.2d 714 (9th Cir. 1957) the same court saw no danger of an invalidating retroactivity in a similar situation in which it directed the Board to consider departing from previous jurisdictional policy in relation to a discharge which the court thought was palpably illegal. See NLRB v. Gottfried Baking Co., 210 F.2d 772, 781 (9th Cir. 1954) (change of policy enlarging Board's exercise of jurisdiction could validly cover discharge, previously not covered, growing out of closed shop agreement known to be illegal at the time it was entered into); NLRB v. Chauffeurs, etc., Union, 274 F.2d 19 (7th Cir. 1960); NLRB v. National Container Corp., 211 F.2d 525, 534 (2d Cir. 1954). In NLRB v. Int'l Brotherhood, 225 F.2d 343 (8th Cir. 1955), the court declined to approve a Board order to the extent that it would "brand" as illegal a contract provision of a type which the Board had previously declared to be not unlawful in itself. In Atlas Tack Corp. v. New York Stock Exchange, 246 F.2d 311 (1st Cir. 1957), a policy of the Exchange, which the S.E.C. held valid and enforceable, enlarging a previous policy, was held not retroactive—certainly not "objectionably" so— even though it resulted in "delisting" the stock of a corporation on the Exchange for reasons which the corporation had no means of knowing, at the time the reasons arose, might later produce the delisting. See also Amshoff v. United States, 228 F.2d 261 (7th Cir. 1956) (no invalidating retroactivity, but new policy treated by the court in the court as required by law); Pederson v. NLRB, 234 F.2d 417 (2d Cir. 1956), and Smith v. Sutton, 135 F. Supp. 805 (D.D.C. 1955) (invalid retroactivity). The retroactivity discussed in certain other cases involved the development of new policies, reaching back in time, instead of changes in policies previously established. SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Stoller, 207 F.2d 305 (9th Cir. 1953); NLRB v. Pierce Bros., 206 F.2d 569 (9th Cir. 1953). The decision in Arizona Grocery Co. v. A.T. & S.F.R.R., 284 U.S. 370 (1932), invalidated a retroactive change in a policy previously embodied in "legislative" action by the Interstate Commerce Commission. As to retroactivity of statutes see Smith, \textit{Retroactive Laws and Vested Rights}, 5 Tex. L. Rev. 229 (1927); 6 Tex. L. Rev. 409 (1928); Stimson, \textit{The Supreme Court and the Constitutionality of Retroactive Legislation}, 73 Harv. L. Rev. 692 (1960).

\textsuperscript{53} NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); NLRB v. Olaa Sugar Co., 242 F.2d 714 (9th Cir. 1957); WIRL Television Co. v. United States, 253 F.2d 863 (D.C. Cir. 1958); Optical Workers Union v. NLRB, 227 F.2d 687 (5th Cir. 1955); Sun
of the courts to sustain administrative actions based on changeable policies varies in direct relation to the extent to which the public interest entrusted to the agency is deemed to outweigh the element of private interest in the situations covered.\(^5\)

**AGENCY INITIATIVE IN THE PUBLIC INTEREST**

To secure the ends for which they are established, administrative agencies typically have the duty to proceed affirmatively in the matters with which they are concerned, instead of waiting, as the courts do, until proceedings are brought before them.\(^5\) There are exceptions, of course, such as licensing, arbitration, and claims-adjudication proceedings, in which application must be made in order to set agency processes in motion. Under the Federal Social Security Act, for example, even though the agency administering old age and survivors insurance has records which in many instances show the insured worker's entitlement to benefits when his retirement becomes known, his failure to file an application, even when excusable, results in loss of benefits.\(^4\) Even such agencies often have powers of promotion or oversight, designed to extend the benefits they dispense to those who should receive them. The Secretary of Health, Education, and Welfare has "the duty of studying and making recommendations as to the most effective methods of providing economic security through social insurance, and as to legislation and matters of administrative policy. . . ."\(^5\) The same agency uses extensive methods of publicity to call the attention of persons insured under the old age and survivors insurance system to their rights. Under workmen's compensation laws settlements between claimants and employers or their insurance carriers must typically be filed with the agency and are subject to its approval for con-

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\(^{54}\) Oil Co. v. FPC 256 F.2d 233 (5th Cir. 1958); In Vitarelli v. Seaton, 359 U.S. 535 (1959), an order dismissing a Federal employee on valid grounds, but retroactively covering the period since a previous invalid dismissal, purportedly under a different statute, was held invalid by a divided court.


\(^{56}\) Bandeen v. Howard, 299 S.W.2d 249 (Ky. 1956), cert. den. 355 U.S. 813 (1957). If the criminal courts are considered to embrace the grand juries attached to them, as in a sense they do, these courts as institutions do not always "wait" for prosecutions to be brought, but possess an arm for instituting them.

\(^{56}\) Coy v. Folsom, 228 F.2d 276 (3d Cir. 1955); Jacobson v. Folsom, 158 F. Supp. 281 (S.D.N.Y. 1957). Under the workmen's compensation acts a claim must be filed in the manner prescribed by statute in order to permit benefits to be awarded, unless, under some laws, good cause is shown, Ladwig v. Travelers Ins. Co., 254 F.2d 840 (5th Cir. 1958), or the employer fails to file timely objection with the commission, 44 Stat. 1432 (1927), 33 U.S.C.A. § 913, or, under other laws, prejudice does not result, In re Clifford's Case, 337 Mass. 129, 148 N.E.2d 390 (1958). See generally 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 78.00-78.45 (1952).

formity to the statute, instead of being accepted merely because they are satisfactory to the parties. The power to initiate investigations and to use compulsory process to secure evidence is commonly conferred upon administrative agencies.

Many agencies have authority to initiate proceedings to enforce obligations owing to the government, such as taxes or military service; to suspend or revoke licenses; or to require, by order, the observance of agency-administered laws. Not infrequently the agencies are aided by registration or reporting requirements resting upon the individuals concerned, such as the duty to register for military service, to file tax returns, or to report current business operations; but active steps to secure compliance with the governing law may be taken by the agencies, whether or not the required information has been filed.

Some specialized agencies must, like prosecuting attorneys, proceed through the courts. The Wage-Hour Administrator, for example, who issues regulations and makes inspections under the Fair Labor Standards Act, must bring a court action to secure an order for compliance. More often the agency may initiate a proceeding before itself—sometimes of its own motion, sometimes only after a charge of violation of law has been made to it by an outside interest. All of the agencies regulating rates may initiate proceedings, looking to rate adjustments, before themselves. On the other hand the authority of the National Labor Relations Board to file a complaint concerning an unfair labor practice comes into play only after a charge has been filed with it. An agency proceeding may lead to a regulation or order which is legally binding and is enforceable in a court proceeding for a penalty or for a court order which is in

58. 2 Larson, op. cit. supra note 56, §§ 82.00-82.43.
60. Under the Federal income tax law, whether or not a return has been filed, the Commissioner of Internal Revenue may take steps to collect the amount he finds to be due from the taxpayer. Int. Rev. Code of 1954, § 6020 (b).
62. 61 Stat. 146 (1947), 29 U.S.C.A. § 160(b). Compare 3 Benjamin, Administrative Adjudication in the State of New York 22 (1942) (complaints against milk dealers). The Federal Trade Commission, possessing similar powers with relation to unfair methods of competition, may proceed “[w]henever it shall have reason to believe” that such methods are being used and “if it shall appear to the Commission that a proceeding . . . would be in the interest of the public,” 38 Stat. 719 (1914) as amended, 15 U.S.C.A. § 45(b); but it usually does so after a “[confidential] application for complaint” has been filed with it under its rules of practice. A.G. Com., Monograph on the F.T.C., S. Doc. No. 186, 76th Cong., 3d sess., Part 6, pp. 4-5 (1940).
turn enforceable by contempt process; or it may be enforceable through direct action by the agency, such as the destruction of a nuisance which has been ordered abated, or the seizure of property for taxes.

No matter how an agency proceeding may have been initiated, whether by an interested private party or by the agency, the responsibility for reaching a correct result rests upon the agency. The governing statute is to be given effect, and the outcome of the proceeding is not to be left to the energy, ability, or will of litigants. Once begun, many proceedings cannot be halted without agency consent, however they may have been started, except sometimes where they involve applications for licenses or benefits. No matter how much reliance may routinely be placed on private parties, responsibility for the ascertainment of facts, as well as for the interpretation of law and the development of policy, rests ultimately upon the agency, whether or not a proceeding is agency-

63. In 1938 the orders of the Federal Trade Commission under the Federal Trade Commission Act were changed from the latter category to the former, 52 Stat. 1028, 15 U.S.C.A. § 45(g) (1), and in 1959 the same change was made as to orders under the Clayton Act, 73 Stat. 243, 15 U.S.C.A. § 21.

64. 68A Stat. 783, 26 U.S.C.A. § 6331. Property is forfeited administratively, after opportunity for hearing, by collectors of customs when they act to declare forfeited and to sell merchandise, vehicles, and vessels worth less than $1,000, which they find to have been involved in violations of the customs laws. 46 Stat. 755 (1930) as amended, 19 U.S.C.A. § 1609.

65. Even where the burden of proof in the sense of risk of non-persuasion is on a private party, an agency decision against him because of want of evidence may be reversed where it appears that evidence exists. Martineau v. Director, 329 Mass. 44, 106 N.E.2d 420 (1952). In proceedings in the Interstate Commerce Commission and certain other agencies, begun by private complaint, the agency has discretion whether to proceed. 24 Stat. 383 (1887) as amended, 49 U.S.C.A. § 13(1) (I.C.C.); 48 Stat. 1071 (1934), 47 U.S.C.A. § 204 (F.C.C.); 52 Stat. 1018 (1938), 49 U.S.C.A. § 642 (C.A.B.). Cf. Pan American-Grace Airways v. CAB, 178 F.2d 34 (D.C. Cir. 1949), applying § 401(h) of the Civil Aeronautics Act, 52 Stat. 989 (1938), 49 U.S.C.A. § 481(h). Certain rules of practice of the Department of Agriculture provide specifically that an applicant to the Department for a complaint to issue has no subsequent standing in any proceedings that may follow, unless permitted to intervene. 9 C.F.R. § 202.3(c) (1949); 17 id. § 0.3(b); 18 id. § 0.53(b).

66. NLRB v. Kobritz, 193 F.2d 8 (1st Cir. 1951), pet. to vacate den. 201 F.2d 156 (1953); NLRB v. Robinson, 251 F.2d 639 (6th Cir. 1958); News Printing Co. v. NLRB, 231 F.2d 767 (D.C. Cir. 1956), cert. den. 352 U.S. 845 (1956); NLRB v. Local 450, 275 F.2d 413 (5th Cir. 1960). Rule of Practice 1.312(c) of the Federal Communications Commission, 47 C.F.R. § 1.312(c), provides that an application for broadcasting facilities may not be withdrawn after it has been designated for hearing, unless the Commission approves. See also Federal Power Commission, Rule of Practice 1.11(d), 18 C.F.R. § 1.11(d). A similar rule of the Securities and Exchange Commission with respect to registration statements for securities was held invalid by a divided Court in Jones v. SEC, 298 U.S. 1 (1936). Compare Columbia General Investment Corp. v. SEC, 265 F.2d 559 (5th Cir. 1959), and see the discussion of this problem, 10 Ad. Law Bull. at 207-218 (1958). Agencies may, of course, decide in a bona-fide exercise of discretion to defer to private interests. See C.A.B. Order Ser. No. E-7376, 17 C.A.B. Rep. 230 (1953), discussed in Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 Harv. L. Rev. 1105, 1111-1112 (1954).
It follows that normally an agency is not to proceed for the mere benefit of private interests, at their behest. Indications that an agency has lent itself to securing private advantage for its own sake to a private party may lead to judicial reversal of its action. Nevertheless, public reasons have caused certain administrative tribunals, as well as courts, to be established for the vindication of socially important private interests; and the Supreme Court has referred in this connection to "a private administrative remedy" before the Interstate Commerce Commission for the violation by a carrier of its statutory duty. Where a statute is directed to checking private economic power by strengthening a "counter-vailing [private] power," such as the power of organized labor as a check on big business, the line between public and mere private interest becomes especially difficult to draw. The agency may then be able to rest its action largely on the initiative of the favored group as a supposedly adequate guide to where the public interest lies. Referenda by farmers to decide whether certain crop controls shall go into effect are an example of identification by the legislature itself of private will with public interest, which is similar in this respect to local option laws. An agency may not, it has been held, allow its judgment of the public interest, even in a discretionary matter, to override cavalierly a private interest such as that of a workmen's compensation claimant, to which the governing statute has lent support; and where strong equities in favor of a private party have been created through reliance on an agency, as was the case where an employee testified adversely to his employer while under a National Labor Relations Board subpoena, the agency may be bound to protect his interest.

68. FTC v. Klesner, 280 U.S. 19 (1929); Flynn & Emrich Co. v. FTC, 52 F.2d 836 (4th Cir. 1931). Compare Moretrench Corp. v. FTC, 127 F.2d 792 (2d Cir. 1942).
70. The National Labor Relations Board, for example, adhered for a while to the policy of not considering objections to acts allegedly interfering with the fairness of a collective bargaining election, when the objections might have been made before the election but were not. This policy was changed in Great Atlantic & Pacific Tea Co., 101 N.L.R.B. 1118 (1952), cited in NLRB v. National Container Corp., 211 F.2d 525 (2d Cir. 1954).
71. See 7 U.S.C.A. §§ 1304(b), 1321(d), 1336, 1343, 1354(b), 1358(b).
73. Pederson v. NLRB, 234 F.2d 417 (2d Cir. 1956). See also Marine Engineers
Zeal in the public interest on the part of agencies is hard to maintain. Among other means of securing it, the courts sometimes apply a spur to compel agency consideration of essential public aspects of matters coming before them. The principal reliance in securing agency alertness must be certain political, organizational, and management measures which the agencies, the chief executive, and the legislature have at their command.

**Volume of Business**

It would be natural for agencies which are open to private applications or complaints in numerous matters, often of lesser moment, or which are charged with a duty to carry out laws affecting multitudes of transactions, to build up an impressive volume of proceedings. Such is in fact the case; and a large volume of business, handled by numerous personnel, is a leading characteristic of administrative agencies, especially in the Federal Government.

The great bulk of agency operations, whether commenced upon agency initiative or otherwise, consists not of proceedings akin to those in court or in a deliberative assembly, but of a variety of informal processes. Some of these are required by statute, such as proceedings on license applications. Others, such as the receipt and scrutiny of reports from regulated businesses, may result from agency regulations issued under general statutory authority. A flow of business involving, not disputes, but inspections, processing of applications, rulings on the basis of correspondence, and instructions to secure compliance with statutory requirements, is handled as a matter of course in the discharge of agency functions.

The nature of the activities administrative agencies carry on indicates that the agencies are in many ways analogous to business organizations rather than to other institutions of government. Insurance companies, the rate departments of transportation companies, firms of accountants, the adjustment bureaus of department stores, law offices, and scientific laboratories are more like many administrative agencies than are legislatures and courts. It is therefore misleading to assume a simi-
larity between the multitudinous determinations of agencies and those of
the courts, and to assert, as has so often been done, that the sheer volume
of agency deciding functions would preclude the assignment of these
functions to the courts. It is true that it requires an adequate volume of
a particular variety of business to warrant the creation of a specialized
agency to handle it; but the nature of the methods required for most of
this business, rather than its amount, accounts for its not being handled
judicially. It would, on the other hand, if it were desirable, be entirely
feasible to separate many of the controversies that grow out of agency
operations and assign them to judicial tribunals instead of letting the
agency handle them, just as disputes that arise in private affairs are car-
rried to court. Additional courts, but not an impossible number of them,
would be needed.

Even the exercise of discretion in the sense defined in this article
could frequently be entrusted to judicial bodies; for discretion in this
sense is not completely foreign to the courts, being often exercised when
injunctions are framed, sentences in criminal cases are imposed, alimony
is awarded, and child custody and adoption cases are decided. In so far
as courts in the judicial branch could not be assigned certain controver-
sies because they are deemed nonjudicial, administrative courts which,
unlike agencies, would be free of other duties, could be established to
handle them. The number of courts would, of course, have to be in-
creased. The wisdom of such a possible separation of disputes from the
bulk of administrative proceedings is an important question requiring
discussion.

Use of Informal Methods

It follows from the characteristics of the work administrative agen-
cies have to do that the methods they employ must in large part be of a
business, managerial, and professional nature, rather than conforming
in character to the methods of courts. Accountants, economists, engi-
neers, scientists, and legal advisors carry on within an agency in largely
the same manner as elsewhere, serving to some extent as witnesses or
advocates during adversary proceedings, but much more commonly act-

76. Largely for historical reasons, the assignment to the courts in the judicial
branch of some kinds of administrative determinations, even in controverted proceedings,
is deemed to violate the separation of powers. In the Federal system the Court of
Claims, Customs Court, and Court of Customs and Patent Appeals, which probably
are not judicial courts in the constitutional sense despite recent Congressional declara-
tions that they are, 67 Stat. 226 (1953), 70 Stat. 532 (1956), 72 Stat. 848 (1948), 28
v. Tidewater Transfer Co., 337 U.S. 582 (1949); Williams v. United States, 289 U.S.
553 (1933); Ex parte Bakelite Corp., 279 U.S. 438 (1929).
ing in the manner which is customary for their kinds of work. Where private interests are involved, these informal methods, employed in agency proceedings, are part of the subject matter of administrative law.

To secure accuracy and fairness in these informal proceedings a variety of management methods are employed. These include (1) written regulations, instructions, or directives from those near the top of the administrative hierarchy to those lower down; (2) oral and written interchange of data and views among collaborating personnel; (3) review by superior officers or by designated reviewers of the determinations of subordinates before these finally take effect; and (4) "spot checking" of a sample of the determinations made by a staff, not for the purpose of changing results, but for the purpose of diagnosing errors and taking corrective steps for the future. In the great bulk of the matters determined by many agencies the conformity of results to statutory requirements and the satisfaction of affected interests turn on the success of these methods and on the quality and training of the personnel employed, as well as on the availability, when dissatisfaction arises, of formal review proceedings and of opportunity for conferences between the private persons concerned and agency representatives.

Communication between agency personnel and those affected by agency proceedings, before final decisions are reached, is an indispensable safeguard to accuracy and fairness. The Federal Administrative Procedure Act secures such communication by providing that "[e]very party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding," and that "[s]o far as the orderly conduct of public business permits, any interested person may appear before the 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." Much of the time of lawyers engaged in practice before administrative agencies is taken up with communications, conferences, and appearances of an informal variety. Similarly, agency personnel must spend a large part of their time in the same manner. To increase the assurance that these informal contacts will be available before determinations are made, the Act

77. As to the validity of wholly informal methods of inquiry in the absence of statutory procedural requirements, see U.S. ex rel. Roop v. Douglass, 19 D.C. (8 Mackey) 99, 112 (1890): "As no mode of inquiry is prescribed by the statute, the Commissioner are, by implication, free to adopt any that may reasonably be used in attaining the end in view."

78. A.P.A. § 6(a).

further provides that "[e]very 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; [and] (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." Further, "No person shall in any manner be required to resort to organization or procedure not so published." Each agency must also publish in the Federal Register not only its substantive regulations authorized by law, but also "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public."

By providing the facilities and personnel of administrative agencies and enacting the foregoing provisions for agency operation in relation to private interests, Congress has created informal processes for agency determinations, including discretionary determinations, that could be relied upon altogether at the administrative level, to the exclusion of formal proceedings, if adequate judicial review were provided. Such is in fact the only provision made at both the Federal and State levels for some highly important decisions, such as those which determine the right to operate as a national or state bank, the issuance of many occupational licenses, the seaworthiness of vessels, entitling them to sail from port, the use of various resources of the national forests, income tax liability, subject to review in the Tax Court, and the patentability of an invention. Informal methods unaccompanied by opportunity for formal hearings have

80. A.P.A. § 3(a).
82. 2 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 13-16 (1942).
84. 4 BENJAMIN, op. cit. supra note 82 at 149-153.
85. A.G. Com. Rept. 36.
86. 36 C.F.R. § 211.2(b) (1960). Paragraph (a), since 1957, provides a formal hearing procedure in appeals involving rights under contracts of sale of timber and certain other resources of commercial value.
87. Marrs, Procedure in Practice before the Bureau of Internal Revenue, 19 U. Cinc. L. Rev. 460 (1950); Spencer, Income Tax Controversies with the Internal Revenue Agent in Charge, 64 Harv. L. Rev. 547 (1951). The initial determination on the basis of the taxpayer's return is made by calculating machine.
88. 35 U.S.C.A. §§ 131-134; 37 C.F.R. §§ 1.106, 1.111-1.113, 1.133, 1.191-1.198, as amended (1960). The procedure of the Patent Office has been largely formalized, but along lines that vary widely from the judicial process.
been denominated the “pure” administrative process.\textsuperscript{89}

It has been suggested that administrative proceedings would give greater satisfaction on the whole, because of the greater speed that would result, if all of them could be carried on as the agencies saw fit, subject to full court trials later concerning determinations of a “judicial” character, if court review were sought.\textsuperscript{90} On the continent of Europe many administrative powers are carried out in this manner, and full review is afforded in administrative courts which are outside the agencies but separate from the judicial courts.\textsuperscript{91} Because of the nationalization of industries which in the United States are regulated, administrative determinations affecting private parties in Europe do not commonly entail the vast economic consequences which often attach in this country. In England the courts have held to a varied extent that a formal hearing must be accorded at the stage where initial administrative determinations are made.\textsuperscript{92} In that country\textsuperscript{93} and to a lesser extent in the United States, provision is sometimes made for review of informal agency determinations by quasi-

\textsuperscript{89} GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 61 (1941). For a plea in behalf of income tax administration more nearly exclusively by such methods see May, Accountants and Income Taxation, 47 COLUM. L. REV. 377 (1947).

\textsuperscript{90} John Foster Dulles, testifying before a panel of the Attorney General's Committee on Administrative Procedure, Transcript of Proceedings, July 12, 1940, pp. 89-100. In his later testimony before Congress on proposed legislation, Mr. Dulles confessed his inability to devise a general formula whereby determinations judicial in nature could be distinguished from others. He suggested that, rather, the statutes governing particular agencies should specify which were which. Hearings on S. 674, 675, and 918, Before a Subcommittee of the Senate Committee on the Judiciary, 77th Cong., 1st sess., Part III, 1155-1156 (1941). See also the testimony of William J. Dempsey in id., pp. 1170-1175.

\textsuperscript{91} SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 207-211, 195 (1954). There are special French tribunals, largely engaged in administering benefit payments to individuals, in which quasi-judicial procedures are available early in the administrative stage. Riesenfeld, The French System of Administrative Justice: A Model for American Law?, 18 B.U.L. Rev. 48, 400, 713, at 737-743. In Germany even more such tribunals were established on the national level prior to the Nazi regime; the awarding of patents, for example, was handled by judicial processes. Uhlman & Rupp, The German System of Administrative Courts, 31 ILL. L. REV. 847, 858-867 (1937). In Sweden administrative processes have long been patterned after judicial processes, involving in that country a written procedure. Herlitz, Swedish Administrative Law, 2 INT. & COMP. L.Q. 224, 231-234 (1953).

\textsuperscript{92} S.A. deSmith, The Right to a Hearing in English Administrative Law, 68 HARV. L. REV. 569 (1955). Mr. deSmith's article, which treats of judicial decisions concerning the right to a hearing, may not stress sufficiently the large body of unchallenged statutory provisions and administrative practice under which informal administrative processes have been conducted throughout history. His subsequent book, of which the article forms a chapter, takes full account of this factor. S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 1-2, 17-18 (1959).

\textsuperscript{93} THE REPORT OF THE COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, Cmnd. 218 (1957), at paras. 140-278, gives an account of both the appellate tribunals and the tribunals of first instance in Great Britain. See also R. POLLARD, ADMINISTRATIVE TRIBUNALS AT WORK (1950), containing a detailed account of the operation of some of these bodies.
judicial tribunals established within the agency framework but largely
detached in actual operation, where more formal procedure prevails. The
Appeals Council in the American Old Age and Survivors Insurance sys-
tem\textsuperscript{94} operates in this way; and the Tax Court,\textsuperscript{95} Customs Court,\textsuperscript{96} and
Court of Customs and Patent Appeals\textsuperscript{97} are independent successors to
earlier intra-agency tribunals. State hearing tribunals in public assistance
and unemployment compensation administration are more closely linked
to the agencies which pass on applications initially; but they usually in-
volve another set of officials at the state level who review local deter-
minations on the basis of full hearings, and therefore supply an essen-
tially detached judgment.\textsuperscript{98} In a recent Michigan decision holding that
the Water Resources Commission must accord a record-type hearing ini-
tially with regard to an anti-pollution order, the court appears to have
overlooked altogether a statutory provision for informal processes lead-
ing to an order, and for a subsequent formal hearing if requested.\textsuperscript{99}

\textbf{USE OF TRIAL-TYPE PROCESSES}

In the United States a strong current, perhaps the main cur-
rent, of administrative procedural development has run in a different
direction. Formal hearing procedures are made available before in-
itial decisions are reached in many kinds of administrative proceed-
ings, on the theory that procedural safeguards are needed and that
it is better to seek sound decisions in the first instance than to rely more
largely on reviewing tribunals. If a workmen's compensation claim is
not settled, the initial administrative determination is based on the record
of an adversary hearing.\textsuperscript{100} The same is true with regard to complaint
proceedings directed against regulated rates,\textsuperscript{101} cease-and-desist order pro-
cceedings,\textsuperscript{102} and even some proceedings leading to the issuance of general

\textsuperscript{94} 53 Stat. 1368 (1939) as amended, 42 U.S.C.A. § 405(b); 20 C.F.R. §§ 403.709-
710, 422.6 (1949).
\textsuperscript{97} 62 Stat. 899 (1948) as amended, 28 U.S.C.A. § 211; \textit{Ex parte Bakelite Corp.},
279 U.S. 438 (1929).
Assistance Hearings}, 13 id. 16; Bur. of Employment Sec., \textit{Comparison of State Un-
employment Insurance Laws} 125-127 (1958).
(1955).
\textsuperscript{100} Dodd, \textit{Administration of Workmen's Compensation} 217 (1936).
\textsuperscript{101} 24 Stat. 384 (1887) as amended, 49 U.S.C.A. § 15(a) (I.C.C.); 48 Stat. 1071
(1934), 47 U.S.C.A. § 204 (F.C.C.); 52 Stat. 1018 (1938), 49 U.S.C.A. § 642(d)
(C.A.B.).
\textsuperscript{102} 38 Stat. 719 (1914) as amended, 15 U.S.C.A. § 45(b) (F.T.C.); 61 Stat. 146
regulations. In many proceedings in which there may be initial administrative decisions based on reports or requests, without hearings, such as a decision to permit a filed rate to go into effect or to issue a license on the basis of an unopposed application, the development of opposition from private sources or of serious question on the part of the agency results in formal hearing procedures at an early stage.

In this country, then, formal procedures are available in many proceedings before an administrative determination is made, or become available as soon as serious questions arise—subject almost always to settlements which the agency concerned and the private parties may be able to reach informally. The tendency to provide such procedures reaches its ultimate expression in some of the state administrative procedure acts which secure the right to a trial-type hearing in any agency "adjudication," broadly defined to include all determinations of personal or property rights, privileges, or immunities. It is not recorded that the right to a trial-type hearing has been claimed or accorded in connection with such matters as the privilege of using state park facilities or the receipt of an "A" grade in a given course in a state teachers college; but there seems to be no exception to the right to a trial-type hearing as it is bestowed in these statutory provisions. Under the Federal Administrative Procedure Act opportunity for a trial-type hearing, to which specific procedural requirements set out in the Act apply, is accorded whenever the statute under which the agency is proceeding requires a determination "on the record after opportunity for an agency hearing."

This ready infusion of trial-type processes into administrative pro-

106. See notes 104 and 105 supra.
107. A.P.A. § 5(b) provides that in advance of hearing, "The agency shall afford all interested parties opportunity for ... the consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit." See also Ind. Ann. Stat. § 63-3025 (Burns 1951 as supplemented); Mo. Stat. Ann. § 536.086 (1957 Supp.).
ceedings, which often is called the "judicialization" of those proceedings, results in part from the pressure of private groups to checkmate unwanted but inescapable regulation; but it is more basically the product of a tendency to extend the ideal of due process in the judicial sense to all proceedings in which private interests are at stake. That ideal in its modern form (which is by no means fully realized in many judicial proceedings, where lawyers may play upon the emotions, juries do not explain their verdicts, judges may fail adequately to explain their decisions, and juries may proceed quite irrationally) has come to include a number of significant elements. These are: (1) formulation of specific issues to which a proceeding is to be directed; (2) presentation in hearings, which are public except for special reasons, by the parties in interest, of all the evidence to be used, with opportunity for each party to test the evidence offered by others; (3) conduct of hearings by presiding officers who maintain fairness through the exercise of adequate powers; (4) argument by the parties respecting the outcome; (5) objectivity on the part of presiding and deciding officers; (6) rational decision of the issues on the basis of the evidence presented, through the application of criteria (consisting traditionally of doctrines of law) which are known in advance; (7) the right of assistance by counsel; (8) the availability of compulsory process to secure the attendance of witnesses; (9) adequate explanation by the deciding authorities of their decisions, and (10) since reportorial skills and modern recording devices have made it possible to reproduce testimony, the creation of complete records of hearings.

110. THE TASK FORCE REPORT supra, note 108, at 138, expressed the judgment that "The more closely that administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process." A recent instance of this tendency is the development of safeguarded procedures, similar to those specified in A.P.A. §§ 7 & 8, in the grazing and public lands determinations of the Department of the Interior. Important developments occurred in procedural regulations in grazing cases issued in 1946, 11 Fed. Reg. 14496, 43 C.F.R. §§ 161.9 (1946 Cum. Supp.), which were revised in 1955, 20 Fed. Reg. 9912, 43 C.F.R. §§ 161.9, 161.10 (Supp. 1960), and in a revision of the procedural regulations in land cases, 21 Fed. Reg. 1860, 7623, 43 C.F.R. Parts 220, 221 (Supp. 1960). For explanations and references to departmental decisions elaborating the changes see Reports of the Committee on Natural Resources and Interior Matters of the A.B.A. Section of Administrative Law, 5 AD. L. BULL. 125. See also Swenson, Administrative Procedure in the Bureau of Land Management, 1958 WASH. U.L.Q. 257.

111. In England the concept of "natural justice" has been developed to embrace the safeguards that are deemed essential when judicial and quasi-judicial procedures are employed. The Committee on Ministers' Powers specified three elements of natural justice: (1) that "a man may not be judge in his own cause," (2) that there be a hearing (not necessarily oral) after adequate notice, and (3) that parties be informed of the basis of the resulting decision, at least where an appeal lies to higher authority. Rev. Cmp. 4060 (1932), p. 75 et seq. That English law has not, in the absence of a statutory right of appeal, bestowed on private parties a right to disclosure of the reasons for administrative action, see S.A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 20 et seq. (1959). The judicial ideal of today is, of course, the result of a long process of
With the availability of agency procedures largely embodying this judicial ideal, problems have arisen with regard to accommodating these procedures to the traditional agency methods. These problems often involve issues as to whether given aspects of the judicial ideal shall prevail in particular proceedings. Spreading evidence on the record of a hearing may, for example, be time-consuming and may seem to the deciding authorities to confer no benefit.\(^{112}\) Demonstration of the falsity of claims for a cancer cure, for example, may not require evidence in the eyes of a tribunal of cancer specialists who, indeed, may be unwilling to serve as members of the tribunal if they are required to spend long periods of time in listening to such evidence.\(^{113}\) The use of newly available information which is pertinent to a proceeding, if it is published between the time of the hearing and the time of the decision, may seem desirable to experts who keep up with their specialties, without any need to reopen the hearing for the purpose of placing the information on the record.\(^{114}\) Consultation with agency staff members who have knowledge and judgment to contribute to a decision would certainly seem proper to an official who has the decision to formulate, even though the parties might like to preclude such consultation unless they were invited to attend.\(^{115}\) Hence the judicial ideal or some extension of it comes into conflict from time to time with a natural tendency toward self-reliance on the part of qualified persons, as they go about their business in accustomed professional ways. The need of judicial-type procedural correctives for this tendency, where important private interests, such as the career of a professional practitioner, are at stake, emerges strikingly in decided cases from time

evolution which started with procedures far different from those that are now deemed essential. “It matters little for our purposes that these procedural features appeared, historically, as more or less accidental phases of a scheme to minimize resort to the blood feud and other forms of self-help as methods of redressing private injuries. The ceremonial \textit{in jus vocatio} of the Romans and the Royal Writ of the Norman kings have developed into a formal system of notice and hearing because experience has shown that contentious litigation can thus be disposed of with least sacrifice of individual and social interests. The survival of legal institutions is more important than their origins.” E. Patterson, \textit{The Insurance Commissioner in the United States} 376 (1928).


to time.\textsuperscript{110} Even in the absence of strong pressure from judicial decisions or outside group insistence, agency processes sometimes evolve into proceedings that afford procedural protections of a judicial type, simply because more satisfactory results are secured in this way.\textsuperscript{117}

**The Administrative and the Judicial Ideal**

The standard which guides agency staffs in performing their functions is the "public interest." "Public interest" is to agency personnel what "due process" is to lawyers.\textsuperscript{118} Neither standard is at all precise. Each embraces a great variety of specific interests and procedures, which give effect in particular proceedings to the governing ideal; but each ideal has definable substance, embodying a fundamental value which is to be realized. The public interest embraces the social good which governments exist to secure, including the ends set forth in particular statutes, such as correction of economic abuse, extension of benefits to wage earners, or a prescribed contribution to victory in war. Due process involves the right of persons to be heard, so far as feasible, in all matters affecting their individual interests, together with the objective weighing of relevant factors by the deciding authority in reaching conclusions.

The ideals of public interest and due process are obviously not mutually exclusive. Indeed, if decisions are really to serve the public interest they must be attended by sufficient fairness and rationality to render them acceptable. Correlatively due process cannot be maintained except by a government which has enough success in serving social interests to enable itself to endure. Hence the pursuit of agency objectives cannot wisely be pushed to the length of overriding essential due process; and due process cannot validly be required to the extent of paralyzing important governmental operations. So much all would concede. Conflicts arise over questions of degree, as administrators pursue their objectives and lawyers attempt to provide procedural protections for the private interests at stake.

\textsuperscript{116} See, for example, Menning v. Department of Registration and Educ., 14 Ill. 2d 553, 153 N.E.2d 52 (1958).


\textsuperscript{118} Herrin, *Public Administration and the Public Interest* 23 (1936). For an excellent discussion of the relation of administrative to legal viewpoints and a suggestion that professional administration, distinguished from politics and legislation on the one hand and law on the other, may become a third force, see Grundstein, *Law and the Morality of Administration*, 21 Geo. Wash. L. Rev. 265 (1953). Compare Sisson, *The Spirit of British Administration* 23-24 (1959): "There is no need for the administrator to be a man of ideas. His distinguishing quality should be rather a certain freedom from ideas. The idealisms and the most vicious appetites of the populace are equal before him. He should be prepared to bow before any wisdom whose mouth is loud enough."
The progress that has been made in administrative law results largely from an accommodation of the administrative and the legal viewpoints. Such an accommodation is rendered easier in proportion to the understanding which each group has of the interests the other is seeking to serve, and the recognition by each that specific issues cannot be resolved simply on the basis of phrases or formulas. The methods which are practiced have always varied from one area of administration to another, and must continue to do so. Some governmental ends, such as taking possession of land, may be pursued swiftly, while others require a more leisurely pace; some applications for agency permission to conduct private activities get brief treatment with judicial approval, while others receive the full panoply of procedural protections. The treatment which any specific claim ought to receive is a matter of time, place, and circumstance, as well as of approximation of ideals.

Approached in this way, particular problems can be solved acceptably. To this end, both the dogmas of efficient administrative management, such as often underlie the publications of governmental experts, and the monolithic viewpoint that all administrative proceedings should approximate judicial trials, which members of the legal profession sometimes express, must yield to a more realistic approach.

**Internal Delegation and Coordination of Functions**

An agency's functions are commonly vested by statute in its director, commissioner, secretary, or other head, or in its members or commission-


120. See note 2 *infra*.

121. See note 77 *infra*.

122. License controls over exports, which have been in effect since before World War II, are exempted from the Administrative Procedure Act, 63 Stat. 9 (1949), 50 U.S.C.A. § 2027, and license applications are processed without any right to a hearing, 15 C.F.R. Part 372 (1959 supp.). Denial of participation in export trade is subject, however, to administratively proscribed hearing procedures. *Id.*, Part 382. As to the nature of the hearing accorded see the opinion of Tocker, Compliance Comm'r, in Willi Farner, 10 PIKE & FISHER, 2nd ed. 553 (1960).


124. See, for example, the Report of the President's Committee on Administrative Management (1937), commented on in Fuchs, *Current Proposals for the Reorganization of Federal Regulatory Agencies*, 16 Tex. L. Rev. 335 (1938).

ers as a body if more than one serves at the top. Upon these officials rests the responsibility for the proper conduct of all of the agency's operations. They may, accordingly, personally perform any act falling within the agency's province unless a statute or, possibly, an unrevoked agency regulation, establishing a specially safeguard procedure before subordinates, provides otherwise. The necessity for delegating authority in a large agency is apparent, since manifestly the agency heads cannot personally attend to the multitude of matters which typically are entrusted to it. Failure to resort to delegation may result in crippling delays or even a breakdown in the agency's operations.

There are legal limits to delegation within an agency. These result from the actual or assumed intention of the legislature to require that certain significant agency actions be performed personally by the agency head or heads. It may be difficult to determine just which acts these are; but it can scarcely be doubted that, for example, the members of a regulatory commission are required either to render personally a decision which the governing statute entrusts to the commission, or to hold themselves available to review it if objection is raised to the determination of subordinates acting for them. The principle involved is usually stated as one which forbids the delegation of final responsibility for "judicial" acts or acts "judicial in nature." In other words, officials who are

126. U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (Attorney General, having provided for review of deportation orders by the Board of Immigration Appeals, cannot influence the Board's decision while a case is pending); Service v. Dulles, 354 U.S. 363 (1957) (Secretary of State can by regulation delegate power to render final decision favorable to officer in dismissal proceeding and thereby disable himself from ordering dismissal after such a decision, even though statute confides the matter to his "absolute discretion"). There is a general requirement that agencies observe their own procedural regulations. Bridges v. Wixon, 326 U.S. 135, 153 (1945).


128. Despite its obscure origin, the maxim, "Delegata potestas non potest delegari" (delegated power may not be redelegated), dealt with in Duff and Whiteside's article of that name, 14 CORNELL L.Q. 168 (1929), states a valid principle with regard to the discharge of essential responsibilities by those who are entrusted with them. Cf. Lewis v. NLRB, supra note 127, at 15; Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942); Steiner v. Nelson, 259 F.2d 853 (7th Cir. 1958); Apice v. American Woolen Co., 74 R.I. 425, 60 A.2d 865 (1948); Florida Dry Cleaning & Laundry Bd. v. Economy Cash & Carry Cleaners, 143 Fla. 859, 197 So. 550 (1940).

designated to decide specific matters which are important to others, especially to persons outside of the government, must not foreclose themselves from giving personal attention to these matters, if they are not of a routine nature.\textsuperscript{130}

Where practical considerations seem to make it necessary that important matters be delegated completely, statutory provisions may bestow the power of delegation on agency heads, leaving them with overall responsibility for results but permitting them to divest themselves personally of such specific tasks as they may see fit. Such statutory authority may permit delegation to agency personnel without restriction,\textsuperscript{131} or may be limited to designated officials. The Secretary of Health, Education, and Welfare may delegate his authority in the administration of the Old Age and Survivors Insurance system to subordinates.\textsuperscript{132} The Secretary of Agriculture may delegate his adjudicative functions under the numerous regulatory acts he is called upon to administer to not more than two specially designated officers.\textsuperscript{133} Frequently the exercise of delegated authority is validated by a presumption that the delegation, when legally permissible, was duly made,\textsuperscript{134} or that the action finally taken by a subordinate was in fact that of the agency head.\textsuperscript{135} Under the Presidential Delegation Act the President is given express authority to delegate his powers to officials appointed with the advice and consent of the Senate,\textsuperscript{136} but his authority to delegate a considerable range of powers without statutory authorization has been recognized.\textsuperscript{137}

Delegation often does not involve transferring all the duties relating

\textsuperscript{130} N.J.L. 77, 45 A.2d 681 (1946), app. dismissed 329 U.S. 693 (1946); NLRB v. Elkland Leather Co., 114 F.2d 221 (3d Cir. 1940), cert. den. 311 U.S. 705 (1940).


\textsuperscript{132} The Secretary of Agriculture may delegate his adjudicative functions under the numerous regulatory acts he is called upon to administer to not more than two specially designated officers. Frequently the exercise of delegated authority is validated by a presumption that the delegation, when legally permissible, was duly made, or that the action finally taken by a subordinate was in fact that of the agency head. Under the Presidential Delegation Act the President is given express authority to delegate his powers to officials appointed with the advice and consent of the Senate, but his authority to delegate a considerable range of powers without statutory authorization has been recognized.

Delegation often does not involve transferring all the duties relating
to an entire matter to the same individual or group within an agency. It may consist instead of transferring different aspects of a single matter to different personnel. Various staff members may be required to report to the deciding authority on specific facts involved in a proceeding; or designated ones may, respectively, be selected to gather data for a hearing, arrange the material for presentation, conduct the hearing, and recommend a decision after the hearing has been held. The validity of the delegation, even without express statutory authority, of functions which prepare the way for final decisions by agency heads has been sustained. 138 The art of administering a large agency consists to a considerable extent, therefore, not only of wise delegation of authority, but also of skillful correlation of the work of the subordinates to whom partial delegations have been made. In this respect the task of administrators differs radically from that of legislators and judges, whose actions pertaining to their offices must be largely their own, with only such aid as personal assistants can render.

Within agencies that draw on more than one kind of expertness, delegation by agency heads is necessary to invoke the varieties of expertness which should be brought to bear. Different aspects of the same matters must then be delegated to different staff experts, so as to secure the data and the judgment which these different individuals can supply. The Federal Communications Commission, for example, formerly delegated the duty of reporting on license applications to its engineering, accounting, and legal staffs, and now calls for reports from similar groups of experts within divisions of the Commission. 139 Each division handles a single type of communications operation, such as broadcasting or wire services. Other agencies proceed in much the same way. 140


139. MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE ON THE FEDERAL COMMUNICATIONS COMMISSION, S. Doc. No. 186, 76th Cong., 3d sess., Part 3, 8-13 (1940). The Commission's staff has since been reorganized along "functional" lines which place the various categories of experts in bureaus related to the different types of communications services; but the essential process of collaboration is not altered by this change. See the Commission's 18th Annual Report (1952), pp. 9-17, and 25th Annual Report (1959), p. 19. KINTNER, THE REVITALIZED FEDERAL TRADE COMMISSION, PROCEEDINGS A.B.A. ANTITRUST SECTION 189, 195 (August, 1955), gives an account of a different type of reorganization of that agency.

140. Additional monographs of the Attorney General's Committee include accounts of agency methods of considering the matters that come before them, and may be found in the remaining twelve parts of the document cited in the preceding footnote and in the fourteen parts of S. Doc. No. 10, 78th Cong., 1st sess. (1941). Although the formal proceedings of the agencies have changed substantially as a result of the enactment of the
The kind of intra-agency delegation which is of greatest significance for administrative law creates a division of labor covering the successive steps in a formal agency proceeding. These are: (1) initiation of the proceeding by the issuance of an agency complaint or by a notice that a license application or a newly filed public utility rate will be questioned; (2) subsequent investigation of the issues involved; (3) negotiations for an agreement, which may be undertaken; (4) the presentation of evidence at a hearing; (5) the conduct of the hearing; (6) the formulation of an initial or recommended decision; (7) the consideration of arguments of the parties before final decision; and (8) the rendering of that decision. Each step builds on the preceding ones, and each makes its contribution to the outcome. Some call for zeal in ferreting out evidence or advocating a policy; others involve a high degree of objectivity. These qualities must coexist among the members of a single staff, and there is danger that one quality may displace another which is especially needed at a particular stage. If zeal prevails when objectivity should dominate, unfairness will result; if a sense of detachment permeates the agency as a whole, the public interest is likely to suffer. Much discussion of administrative procedure reform concerns the nature and effects of the division of labor within agencies, involving the foregoing stages of formal proceedings.  

ANONYMITY AND RESPONSIBILITY IN AGENCY OPERATIONS

The delegation that takes place within an agency, coupled with the continued responsibility of agency heads for the entire complex of agency operations, leads frequently to the practice of having officials act in the name of the agencies they serve or in the name of the agency heads, without disclosure of the identity of those who, within the agency, took part in determining the action. The consequent feeling on the part of many persons affected has been stated in a classic utterance of the chairman of the Attorney General's Committee on Administrative Procedure:

[T]he agency is one great obscure organization with which the citizen has to deal. It is absolutely amorphous. He pokes it in one place and it comes out another. No one seems to have specific authority; a metaphysical omniscient brooding thing

Administrative Procedure Act, these monographs continue to reflect with substantial accuracy the methods by which the agencies give consideration to a wide range of problems.

141. The writer proposes to deal with current discussions of reform in articles to be published.
which sort of floats around in the air and is not a human being. That is what is baffling.\textsuperscript{142}

Modern legislation\textsuperscript{143} applicable to agency proceedings in which formal hearings are accorded requires, by contrast, that the final action and in many situations certain preliminary steps, such as the preparation of an initial or recommended decision, be taken by the agency heads or other identified officials, such as hearing officers, with whom the affected parties may deal.\textsuperscript{144} The great bulk of ordinary matters in an agency, as to which a formal hearing is not available or is not demanded, continues to be carried on anonymously by personnel who function as a group, with free exchange of information and views among them and no right of affected persons to be informed of the content of this exchange or the identity of those who carry it on. There are few judicially enforceable safeguards against error in this process. Instead, the agency employs administrative checks and is responsible politically to higher executive and legislative authority and, in a democracy, to the people.

The significance of agency political responsibility, which, of course, does not operate through judicial channels, was noted in two of the opinions of the House of Lords in a famous case. There it was held that no legal requirement existed for a property owner, whose tenement was declared unfit for habitation, to have received an opportunity to offer testimony before the final deciding body or to see the report of the inspector who had conducted an informal hearing in the locality, which the agency took into account in reaching its decision.\textsuperscript{145} The decision was issued in the name of the minister at the head of the agency. Viscount Haldane pointed out in his opinion that the "Minister . . . is directly responsible to Parliament."\textsuperscript{146} Lord Shaw stressed that the Minister "becomes answerable in Parliament for every departmental act . . . This is

\textsuperscript{142} Hearings on S. 674, 675, and 918 before the Senate Committee on the Judiciary, 77th Cong., 1st sess. 807 (1941).

\textsuperscript{143} By way of exception to earlier practice, the procedure of the Patent Office has traditionally secured personalized consideration of applications by examiners. Although statutory functions in the initial consideration of patent applications have been conferred on the Commissioner (66 Stat. 801 (1952), 35 U.S.C.A. § 131) the practice has been for each application to be assigned to a division of examiners and, in turn, to a primary examiner with whom the applicant has dealt and by whom the initial determination has been made. 37 C.F.R. § 1.101 et seq.; 2 WALKER, PATENTS 827-833; (Deller's ed. 1937); 2 ROBINSON, PATENTS 192 (1890). See also Steinmetz v. Allen, 192 U.S. 543, 563-566 (1904). The concept of "jurisdiction" of examiners and appellate authorities within the Patent Office has arisen. McCrady, PATENT OFFICE PRACTICE 174, 208, 258 (1928). Variation among the attitudes of different examiners and divisions of the Patent Office has been noted and stressed as important to the practitioner. 1 HOPKINS, LAW OF PATENTS 130-133 (1911).

\textsuperscript{144} A.P.A. §§ 7, 8, 5 U.S.C.A. §§ 1006, 1007.

\textsuperscript{145} Local Gov't Bd. v. Arlidge, [1915], A.C. 120.

\textsuperscript{146} Id. at 133.
the general rule, acknowledged and familiar, of departmental action and responsibility.”

In relying so heavily upon ministerial responsibility the Law Lords undoubtedly had in mind the practice of Parliamentary interrogation of ministers, which prevails in England. Under that practice the minister responsible for an agency's action is required to submit to questioning with regard to it by members of the House of Commons. A person who feels aggrieved by a decision may request interrogation of the minister by his representative in Parliament. The nearest equivalents in this country are criticism of administrative action in legislative debates and investigation by legislative committees.

Even in England effective legislative attention to specific administrative action is likely to be confined to instances of alleged abuse that can be dramatized, or situations in which significant principles appear on the surface to be at stake. Hence, generally speaking, administrative responsibility to legislative authority cannot be relied upon as a safeguard against error or abuse in the bulk of proceedings affecting private persons and property. Sheer want of time would preclude more than occasional legislative consideration of particular cases. An additional obstacle to effective legislative control of agencies lies in the technical character of a large part of administration. Even a reviewing court, having access to the administrative record and the duty to examine it, may find it difficult to comprehend the mysteries of such matters as transportation rates, wireless communication, or the chemistry of foods, so as to exercise its powers effectively. Legislators and the over-all executive are likely to be still more handicapped. If, therefore, effective safeguards are to be established in relation to administrative functions, they must be incorporated quite largely into the administrative proceedings themselves, or else operate through judicial review. Nevertheless the political responsibility of an agency is very real, and it operates with some effectiveness, even in this country, to secure a reduction of abuses and, upon occasion, to apply a corrective to particular proceedings.

147. Id. at 136.
149. PHILLIPS, CONSTITUTIONAL LAW 153 (1952).
150. See generally CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 11-15 (1941).
151. In 1958 the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce gave attention, with much attendant publicity, to improper influences on certain determinations of the Federal Communications Commission and other agencies. Even though these were "independent" agencies, not subject to immediate control by the chief executive, the Attorney General called the attention of the Supreme Court to the likelihood that the type of influence in question had played a part in certain determinations then before the Court for possible review. The Court took no-
Publicity in news media is, of course, a powerful force in bringing public and political opinion to bear; and it often results from legislative concern over administrative affairs.

Representative Agencies

Certain agencies differ from the usual pattern because they are representative in one sense or another of the interests affected. Special considerations are applicable to them. Their procedure, like that of a legislature, might be expected to draw on the knowledge and views the members of the agency possessed or on the information and opinions they could derive from their constituencies, with secondary reliance on facts and arguments brought forth in proceedings in which affected parties might participate. Such are the traditional processes within small units of local government, where not only the enactment of ordinances by elected officers but many administrative items, even though they are of especial concern to certain inhabitants, may be handled informally by elected or appointed officers on the basis of knowledge which the deciding authorities already have or can readily acquire. So, for example, the revocation without a hearing of the license of a popcorn vendor on the streets of a community, in a case which has been cited as illustrative of want of procedural due process, was based on alleged persistent noisiness of the vendor despite warnings. His conduct was reported to the elected local council, which revoked the license. There may have been danger of injustice which a hearing might have corrected in the particular case, because the community was a resort town and the licensed operation a temporary one during the summers when there were many transients, and because the incident grew out of a controversy with the town police, who reported it. Hence the council may have acted without reliable information. In general, however, despite a growing belief that opportunity for an adequate hearing is desirable in license revocation and even license issuance cases, it is unlikely...
that injustice would often occur for procedural reasons, including the absence of a hearing, in the handling of such matters by the elected city fathers in small communities; for they would ordinarily either know the facts or be able readily to ascertain them. A more probable cause of abuse would be prejudice against an individual or a minority, which administrative or court review might counteract better than original hearings.

Appointed bodies may be drawn from localities for administrative purposes local in scope, and be permitted to act on previous knowledge or on information informally acquired. Local zoning appeal boards, which have power to grant or refuse variances to individual property owners after hearing, and selective service local boards fall in this category. Traditionally the former need not base their decisions solely on the record of the hearing, but may use their own knowledge which in many jurisdictions need not be stated in the record. Selective Service local boards are established in each county or in areas of not more than five counties, and are composed of three or more citizens of the United States residing within the county or in each of the several counties composing an area. The members do not receive compensation. They are directed to select registrants for military training and service in an impartial manner, under regulations prescribed by the President. Registrants must be given the opportunity to “appear” before the boards, before their classifications become final; but there is no hearing in the sense of a trial. Notes, rather than transcripts, are kept, and board members are entitled to use their knowledge, if any, of the applicant and his circumstances.

An available corrective for error or abuse in Selective Service local board action lies in administrative or judicial review proceedings. The

155. Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255, 268 (1958); Taub v. Pirnie, 3 N.Y.2d 188, 144 N.E.2d 3 (1957); Heffernan v. Zoning Bd. of Review, 50 R.I. 26, 144 Atl. 674 (1929); cf. People v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927), where, as to New York City, the board is regarded as “made up of men with special qualifications of training and experience,” rather than as representative in character.


157. 62 Stat. 608 as amended, 50 U.S.C.A. App § 455; 32 C.F.R. §§ 1624.1-1624.2 (1958); United States v. Nichols, 151 F.2d 155 (3d Cir. 1945); United States v. Pitt, 144 F.2d 169 (3d Cir. 1944). The board must, of course, accord fair consideration to the issues, United States v. Stepler, 258 F.2d 310 (3d Cir. 1958); Mintz v. Howlett, 207 F.2d 758 (2d Cir. 1953), and there probably is a requirement that the registrant be given an opportunity to rebut any information relied on by the board, by having it recorded in the file to which he has access. United States v. Bender, 206 F.2d 247 (3d Cir. 1953); U.S. ex rel. deGraw v. Toon, 151 F.2d 778 (2d Cir. 1945); Note, 18 A.L.R.2d 552, 556 (1951).

158. Section 6(j) of the Universal Military Training and Service Act, 62 Stat. 611, 50 U.S.C.A. App § 456(j), provides an opportunity for a registrant who claims to be a conscientious objector to appeal “to the appropriate appeal board.” In § 10(b)(3), 62 Stat. 619, 50 U.S.C.A. App. § 460(b)(3), the President is authorized to provide for
actions of zoning appeal boards are also subject to review. Review proceed-
ing in court may be inconvenient to bring, however, and may not lead to complete judicial re-examination of the issues. Hence, as local communities increase in size and complexity, and informed action by tri-

bunals relying partly on their own knowledge becomes more difficult, dis-
satisfaction with informal processes of initial decision is likely to grow. The typical methods of zoning boards of appeals have been criticized on this ground.159 Either for this reason or because of a general principle that a hearing should lead to decision based solely on the record, some courts have held that the previous knowledge of board members or the results of their viewing of the premises involved may not be relied upon unless entered of record.160

Agencies may be representative of affected interest on an occupa-
tional or economic rather than on a political or territorial basis. The requirement of occupational qualifications for positions in agencies is usually imposed, at least in theory, to secure expertness derived from oc-

cupational experience and knowledge. Often the requirement is also a means of enabling a trade or profession to practice self-regulation through members who become public officials, with the power of government behind them.161 Occasionally the requirement serves the purpose of securing the representation of varied groups in the operation of a regulatory scheme which affects them all, as is the case in agricultural marketing control and workmen's and unemployment compensation ad-

peals in other cases to the same boards, of which there is to be one in each Federal judicial district.

159. In addition to attributing lack of knowledge to the purposes of zoning to the members of typical zoning boards of appeal, a recent commentator states that "[t]he concept of the board of appeals as a kind of poor man's court where common sense jus-
tice is dispensed by one's friends and neighbors no longer has much validity." Reps, Discretionary Powers of the Board of Zoning Appeals, 20 Law & Contemp. Prob. 280, 284-296 (1955).


161. As respects state occupational regulation, in which the members of regulatory boards are almost uniformly drawn from the occupations involved, see U.S. Marketing Laws Survey, State Occupational Regulation 7, 18, and item 2 of the several charts (1942). See also Fesler, The Independence of State Regulatory Agencies 35, 46-48, 59 (1945). Boards to determine wages under minimum wage laws have frequently included employer and employee representatives. Id. at 26; Freund, Admin-

istrative Powers Over Persons and Property 51-52 (1928); Opp Cotton Mills v. Administrator of Wage and Hour Div., 312 U.S. 126 (1941). In England the regulation of occupations and of certain markets by professional organizations and their "domestic tribunals" or by representative boards, both exercising statutorily powers, has been carried quite far. See Robson, Justice and Administrative Law 336-359 (3d ed. 1951); Abel, The Bill of Rights in the United States, 37 Can. Bar Rev. 147, 152 (1959).
ministration under some statutes, and under an unusual zoning statute involved in a leading case. The state and county committees which determine acreage allotments under Federal crop control programs are composed of farmers drawn from the areas included. They combine geographical representativeness with the knowledge and experience incident to their occupations.

An important Federal statute in which a scheme of group representation is provided is the Railway Labor Act, under which one-half of the 36 members of the National Railroad Adjustment Board are selected by the carriers and one-half by such railway unions, "national in scope," as are agreed upon or are determined by arbitration, when necessary, to be entitled to participate in the selection. The Board has jurisdiction to make legally effective awards in disputes between a carrier and one or more employees, arising out of "grievances" or under collective agreements, when referred to it by either party or both parties. Its members are paid by the interests selecting them. Because of this provision as to compensation, the Adjustment Board scheme comes close to being one in which legal power is delegated to private groups, giving rise to constitutional issues; but, despite the manner of selection and compensa-

162. As to milk control boards under state price-fixing legislation of the 1930's, some of which has proven to be permanent, see U.S. MARKETING LAWS SURVEY, STATE MILK AND DAIRY LEGISLATION 27 (1941). As to workmen's compensation see FESLER, op. cit. supra, note 161, at 24; as to unemployment compensation, U.S. DEPT. OF LABOR, BUR. OF EMPLOYMENT SECURITY, COMPARISON OF STATE UNEMPLOYMENT SECURITY LAWS 118-119 (1958).

163. Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892 (1926). The function of the board was modification of the boundaries of use districts, rather than action in individual cases. Appointments by the Mayor of Boston to the Board were limited to the nominees of the Chamber of Commerce, Central Labor Union, Real Estate Exchange, Master Builder's Association, and certain technical and civic organizations. The Supreme Judicial Court, "with some hesitation," sustained the provision governing appointments, on the theory that it was designed to secure persons of "eminence sagacity" as Board members.

164. State boards are appointed by the Secretary of Agriculture; county boards are elected. 52 Stat. 31 (1938) as amended, 16 U.S.C.A. § 590(b). Their operations under specific crop programs are governed by the Agricultural Adjustment Act of 1938 as amended, 52 Stat. 31, 7 U.S.C.A. § 1281 et seq. Appointed review committees of local farmers entertain complaints by individual farmers with regard to their acreage allotments. 52 Stat. 63 (1938) as amended, 7 U.S.C.A. § 1363. The decisions of these committees must be based entirely on the record of a hearing. 52 Stat. 63 (1938), 7 U.S.C.A. § 1365, 7 C.F.R. § 711.23 (1959 Cum. Supp.). Two members of the 3-member Railroad Retirement Board are appointed by the President acting on recommendations of the carriers and employees respectively. 49 Stat. 973 as amended, 45 U.S.C.A. § 228.


tion of its members, the Board is a public authority and its members are public officials. Its manner of proceeding is radically different from that of other agencies engaged in adjudication.\textsuperscript{167}

It has been held that, unless a representative agency is so composed as to represent all interests fairly, its exercise of authority is unconstitutional.\textsuperscript{168} The prevailing view, however, is that so long as the agency is a public one by virtue of the manner in which its members are chosen and vested with authority, the fact that some or all of its members possess occupational interests in the matters arising does not render its operation invalid.\textsuperscript{169} The situations in which the representative character of such an agency may justify a less formal procedure than would otherwise be required cannot be stated on the basis of decisions or practice; but the same rationale as has been applied to geographically representative agencies would be pertinent. The Federal Administrative Procedure Act does not apply at all to representative agencies, except as to their publication of agency actions.\textsuperscript{170} Here too judicial review is an important safeguard; and a court may intensify its review in a particular case if there is reason to think that an occupationally representative agency may have been prejudiced.\textsuperscript{171}

KINDS OF AGENCY ACTION

In the Federal Administrative Procedure Act two broad categories of proceedings of administrative agencies, rule-making and adjudication, are recognized. Earlier there had been a tendency to look upon rule-making as a legislative process essentially different from the processes which form part of administration as normally regarded.\textsuperscript{172}

\begin{footnotesize}
\begin{itemize}
\item Board of Supervisors of Elizabeth City County v. State Milk Comm'n, 191 Va. 1, 60 S.E.2d 35 (1956); Lucas v. State, 229 Ind. 633, 99 N.E.2d 419 (1951); Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 134 Fla. 1, 183 So. 759 (1938); Ellis v. Industrial Comm'n, 91 Utah 432, 64 P.2d 363, 365-366 (1937).
\item A.P.A. § 2(a).
\item FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 15, 211 (1928); JELLINEK, VERWALTUNGSGEBEHR 4 (2d ed. 1929). There may be an echo of this view in the statement of Mr. Justice Jackson, dissenting in SEC v. Chenery Corp., 332 U.S. 194 at 217 (1947), that "the administrative process deserves fostering in our
\end{itemize}
\end{footnotesize}
But, because of the prevalence and practical significance of administrative rule-making functions, their importance was recognized and led to their study as part of administrative law.\textsuperscript{173} The English Committee on Ministers' Powers and the American Attorney General's Committee on Administrative Procedure dealt in their reports with rule-making and adjudication as separate categories, both of which were regarded as normal administrative functions. The current fact is that agencies may be armed with both rule-making and adjudicative functions, and both are governed by administrative procedure legislation.

The Federal Administrative Procedure Act defines "adjudication," to which the Act applies, as any "agency process for the formulation of an order," and "order" 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."\textsuperscript{174} Therefore rule-making and adjudication include, and the Act applies to, all agency determinations. Many of the provisions of the Act, however, are limited to proceedings in which a formal hearing is accorded. The Model State Administrative Procedure Act, on the other hand, applies only to rule-making and to "contested cases" that involve hearings.\textsuperscript{175}

Provisions, partially separate, of the Federal Administrative Procedure Act govern the proceedings in each of these two categories of functions. Section 4 of the Act governs rule-making; Section 5 applies to adjudication; and Sections 7 and 8 apply to those instances of both rule-making and adjudication which, under other statutes, require opportunity for determination on the record of a hearing. The latter two sections differentiate for some procedural purposes between the rule-making and

system as an expeditious and non-technical method of applying law in specialized fields." He was arguing, however, against the use of the process without, as he saw the matter, the existence of pre-existing law, and he urged the formulation of law through rule-making by administrative agencies, rather than by adjudication. Freund included a Note on Regulative or Rule-Making Powers in Chapter XI of his book.

173. Amos, THE SCIENCE OF LAW 399 (1894); ILBRY, METHODS OF LEGISLATION 146 (1912); CARR, DELEGATED LEGISLATION (1921); Stamp, Recent Tendencies Towards the Devolution of Legislative Functions to the Administration, 2 J. PUBLIC ADMINISTRATION 23 (1924); Allen, Law in the Making (1924) and Law and Orders (1945, 2d ed. 1956); Hart, The Ordinance Making Powers of the President (1925); Corer, Legislative Functions of National Administrative Authorities (1927); Willis, The Parliamentary Powers of English Government Departments (1933); Blachly & Oatman, Administrative Legislation and Adjudication (1934); Hart, The Exercise of Rule-Making Power (Special Study for the President's Committee on Administrative Management) (1937); Fuchs, Procedure in Administrative Rule-Making, 21 HARV. L. REV. 259 (1948).

174. A.P.A. § 2(d).

the adjudication that come under them, so as to alleviate for the former some of the procedural strictness required for the latter. Other sections, including Section 10 relating to judicial review, apply to agency action regardless of its nature. State administrative procedure legislation generally contains distinct provisions for rule-making and adjudication, sometimes in separate statutes.176

Various definitions of rule-making and adjudication have been given in statutes, judicial decisions, and legal literature. Without such definitions, practical problems of procedure could be settled case by case as they arise, without determining whether rule-making or adjudication is involved, simply on the basis of practical needs in each particular instance. The right to cross-examine, for example, could be extended or withheld in a given agency proceeding without deciding whether it should be called rule-making or adjudication.177 Reference might be made, however, to such factors as the number of parties involved and whether they were identified, which enter into the usual definitions of rule-making and adjudication.178 It is often convenient to reason by assigning particular proceedings to these categories as defined, before considering the procedural requirements which apply. Statutes laying down procedural requirements must ordinarily specify and define the categories to which their provisions apply.179 When a category has been defined for procedural purposes, courts and agencies must decide which particular instances come within it. If, for example, a statutory hearing must be accorded in adjudication but need not be offered in rule-making, it is necessary to determine whether a given proceeding is adjudication or rule-making in order to decide whether the requirement is applicable.180

176. See note 13 supra.
179. The English Tribunals and Inquiries Act of 1958, 6 & 7 Eliz. II, c. 66, applies to specific tribunals enumerated in a schedule, to which the Lord Chancellor and Secretary of State may add from time to time.
180. Air Lines Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960); Gart v. Cole, 263 F.2d 244 (2d Cir. 1959); City of Newton v. Department of Public Util. 160 N.E.2d 108 (Mass. 1959); Oklahoma Natural Gas Co. v. Texola Drilling Co., 214 F.2d 529 (10th Cir. 1954); United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir. 1950) (distinction between rate-making subject to A.F.A. §§ 7 and 8, rule-making subject only
larly, if a certain type of judicial proceeding is available to review adjudicative orders but not to review the products of rule-making, a court must determine which of the two is before it in a given instance if the reviewing function is to be properly carried out.\textsuperscript{181}

Conventionally rule-making is regarded as the function of laying down general regulations, whereas adjudication involves formulating judgments or orders that apply to named persons or, in in-rem proceedings, to specified situations.\textsuperscript{182} This distinction involves difficulties, for it does not necessarily determine, for example, whether an order fixing a rate on a named railroad, which will apply to shipments by a large number of unnamed shippers, is adjudication because it applies to the railroad or rule-making because it applies to the shippers. Some statutory provisions omit any meaningful definition, throwing the problem on to the courts, or provide one which does not settle this point.\textsuperscript{183} Where, however, a railroad is to be named in an agency order resulting from a proceeding, its interests are involved in a manner which justifies regarding the proceeding as basically adjudicative for procedural purposes. The conventional distinction, so interpreted, is embodied in much state legislation\textsuperscript{184} and was originally intended to divide the application of Section 4 of the Federal Administrative Procedure Act from the application of Section 5.\textsuperscript{185}

A different asserted distinction between rule-making and adjudication is that rule-making prescribes for the future, whereas adjudication

to § 4); Willapoint Oysters v. Ewing, 174 F.2d 676, 693-694 (9th Cir. 1949) (rule-making subject to A.P.A. §§ 7 and 8).


\textsuperscript{183} For example, \textsc{Cal. Gov't. Code} § 11371, defines "regulation" simply as a "rule." The Indiana definition of "rule" includes any agency "requirement . . . having the effect of law"; but "adjudication" embraces "cases applicable to particular parties." \textsc{Ind. Ann. Stat. §§ 60-1503, 63-3002} (Burns 1951, as supplemented). In Maryland, following the wording of the Model Act, "rule" means regulations "of general application and future effect," whereas "contested case" means a proceeding involving the rights "of specific parties." \textsc{Md. Ann. Code, art. 41, § 244} (1957). Many other statutes, usually containing the term "adjudication" instead of "contested case," are similar.

\textsuperscript{184} See note 176 \textit{supra}.

\textsuperscript{185} The Act as originally drafted defined "rule" to include only agency statements of "general" applicability, instead of embracing also certain statements of "particular" applicability, as set forth in the text below. It was expanded by the House Committee to its present scope. \textsc{A.P.A. Legis. Hist., S. Doc. No. 248, 79th Cong., 2d sess., pp. 13-14, 236, 253-254}. 
announces conclusions based on present or past facts;\textsuperscript{186} and it makes no difference whether or not particular parties are named in the proceedings or in the resulting action.\textsuperscript{187} The future, however, must necessarily be dealt with on the basis of present information; and the judgments of even the courts, based on present or past facts, must prescribe future conduct, such as the payment of damages or the transfer of title to a piece of property, and often embody discretionary determinations, such as those embraced in injunctions and criminal sentences, which are not rigidly determined by the past.\textsuperscript{188}

The Federal Administrative Procedure Act incorporates the criterion of futurity in its definition of rule-making, by making “rule” mean “the whole or any part of any statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . .” “Adjudication” is then defined to embrace “agency process for the formulation of an order”; and “order,” in turn, is defined to mean “the final disposition . . . of any agency in any matter other than rule-making.”\textsuperscript{189} The definition of “rule” in the Act goes on to state certain agency actions which constitute rules. These are “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 evaluations, costs, or accounting, or practices bearing upon any of the foregoing.” This enumeration is, however, illustrative rather than exclusive.\textsuperscript{190} Under the first part of the definition a cease-and-desist order of the Federal Trade Commission or National Labor Relations Board, directing a respondent to discontinue an unfair method of competition or unfair labor practice, would constitute a “rule,” and the proceeding which led to such an order would be rule-making; yet such was not the legislative intention, and it has not been contended that a cease-and-desist order involves anything other than adjudication. Under the Act, accordingly, rule-making includes the formulation of general regulations and of certain agency statements of “particular applicability,” the nature of which is indicated by the enumeration contained in the definition; and adjudication embraces all other agency


\textsuperscript{187} Commonwealth v. Sisson, 189 Mass. 247, 75 N.E. 619 (1905) (order directing cessation of the discharge of sawdust from a mill into a stream held “quasi-legislative” so as not to require notice and hearing in advance). The injunction decree of a court, however, even though directed against numerous unnamed persons, would be regarded as adjudicative. Cf. United Steelworkers of America v. United States, 361 U.S. 39 (1959).

\textsuperscript{188} Cf. Agency Discretion, supra.

\textsuperscript{189} A.P.A. § 2(c), (d).

\textsuperscript{190} Op. cit. supra note 185, at 254.
proceedings. Since those instances of rule-making under the Act which involve named parties are usually subject to record-type hearings under other statutes and therefore come under Sections 7 and 8 of the Act, the procedural protections prescribed in these sections are available. Rule-making which does not involve named parties, even though it may affect certain interests vitally by increasing their costs or curtailing their advantages in business competition, ordinarily comes only under Section 4 of the Act, which does not secure the right to a hearing but merely an opportunity to submit information or views informally.\textsuperscript{191}

Another reason for broadening the rule-making category so greatly in the Act is that considerations of policy often are prominent in the proceedings designated as rule-making\textsuperscript{192} and are thought to require somewhat different procedures from adjudication.\textsuperscript{193} Some kinds of adjudication such as licensing, however, not only relate to the future, but often involve policy considerations too, especially where the granting of a certificate of convenience and necessity, as distinguished from an occupational license to an individual, is in issue. Accordingly, initial licensing based on the record of a hearing, but not license renewal or revocation, is freed from some of the procedural requirements attaching to other instances of adjudication under Sections 7 and 8. Much other adjudication under the Act also turns prominently on policy considerations, however, notably under the Federal Trade Commission Act which requires that important issues of economic policy be resolved in cease-and-desist orders directed at "unfair methods of competition" by single firms. Hence the dichotomy in the Administrative Procedure Act, although it is deliberately fashioned to meet practical requirements, is not a perfect basis for procedural distinctions.

Rule-making and adjudication which establishes new precedents have similar effect in future proceedings; but the precedent value of administrative decisions is not the same as that of court decisions, since the strict rule of stare decisis has not been generally regarded as binding on administrative agencies. Agencies can and do use their own precedents


\textsuperscript{192} Since the definition of "rule" in the Act includes statements "interpreting" law as well as policy, it cannot be said that the formulation of new policy is a feature of all instances of rule-making under the Act. Either for this reason or because of the non-binding nature of interpretations, § 4 of the Act exempts interpretative rule-making from the procedural requirements imposed by that section.

for guidance, and subordinate personnel must necessarily feel bound by
the decisions of top personnel if the actions of a far-flung body of offi-
cials, such as the Internal Revenue Service, are to be kept tolerably con-
sistent. The same values of efficiency, predictability, and justice as have
led to the practice of the courts in using precedents have produced similar
practices on the part of especially those agencies which publish written
opinions. However, a binding obligation to follow a rule or principle
merely because it has been made the basis of prior action would be inconsis-
tent with the nature of administrative decisions. In so far as these
decisions are factual, the evidence and not prior utterances must deter-
mine them; in so far as they are discretionary, their essence lies in the
application of judgment to each case as it arises, subject to the obligation
to avoid capricious inconsistency; and in so far as decisions involve de-
terminations of law (such as gauging the meaning of statutory terms
which do not leave room for discretion) the tribunal which makes bind-
ing determinations is usually a reviewing court and not the agency.

Only if agency action is judicially unreviewable does a situation arise in
which the obligation to follow agency precedent for its own sake on is-
issues of law might attach; and here there would be no means to enforce
the obligation, unless the legislature should take a hand.

194. A.G. COM. REPT. 466-474; Davis, The Doctrine of Precedent as Applied to
Administrative Decisions, 59 W. Va. L. Rev. 111 (1957); Pittman, The Doctrine of Pre-
cedents and Public Service Commissions, 11 Mo. L. Rev. 31 (1946); Administrative Law-
Stare Decis in NLRB and SEC, 16 N.Y.U.L.Q. REV. 618 (1939); Pittman, The Doc-
trine of Precedents and the Interstate Commerce Commission, 5 Geo. Wash. L. Rev. 543
(1937); McClintock, The Administrative Determination of Public Land Controversies, 9
MINN. L. REV. 638, 639-642 (1925).

195. FCC v. WOKO, 329 U.S. 223 (1946); Virginian R.R. v. United States, 272
U.S. 653 (1926); Courier Post Publishing Co. v. FCC, 104 F.2d 213 (D.C. Cir. 1939);
of Equalization, 40 Cal. 2d 772, 256 P.2d 256 (1953); Butler Oak Tavern v. Division of
Alcoholic Beverage Control, 20 N.J. 373, 120 A.2d 24 (1956); Motor Transit Co. v. Rail-
road Com'n, 189 Cal. 573, 209 Pac. 586 (1922). See Hyneman, Administrative Adjudi-
cation: an Analysis, 51 POL. SCI. Q. S83, 516, at 528 (1936) (New York Public Service
Commission often cited precedents but did not rest decisions simply upon them).

196. NLRB v. Weyerhaeuser Co., 276 F.2d 865 (7th Cir. 1960); Shawmut Ass'n v.
SEC, 146 F.2d 971 (1st Cir. 1945).

197. In Duel v. State Farm Mutual Automobile Ins. Co., 240 Wis. 161, 1 N.W.2d
887 (1942), for example, holding that on an issue of law the state insurance commis-
sioner could not be bound by his predecessor's decision, the court meticulously examined
the issue presented, as part of its obligation as a reviewing court.

198. On certain questions of statutory interpretation, denominated "mixed ques-
tions of fact and law," on which the Supreme Court has deferred to agency conclusions,
Congress has sometimes supplanted these conclusions with its own specific prescriptions.
See NLRB v. Steinberg, 182 F.2d 850 (5th Cir. 1950), outlining the history of the defi-
nition of "employee" in the Labor-Management Relations Act. As to a different legis-
lative response see United States v. Silk, 331 U.S. 704 (1947), and the statement with
regard to 42 U.S.C.A. § 410 (k), contained in the conference report on the 1950 Social
When, as ordinarily is the case, adjudication provides statutory procedural safeguards that are different from those in rule-making, an agency may not require a party entitled to the former to vindicate his rights in the latter, even when specific attention to those rights is promised. Hence an applicant for a license to use a television frequency must be given the statutory adjudicative hearing upon such an application, and may not be compelled to submit to the Federal Communications Commission's choice among rival applicants as an incident to an allocation of television frequencies among various communities. For the same reason a holding company, exempted under a regulation of the Securities and Exchange Commission from a requirement of Commission approval for its reorganization, could challenge successfully the partial revocation of the regulation, which resulted in withdrawing the exemption from only the one company. Nevertheless an agency which has both rule-making and adjudicatory powers with relation to the same subject matter may often choose which to use. In so far as agency action can be taken soundly without detailed attention to each individual situation to be covered, there are several manifest advantages to rule-making. These are (1) economy of time and effort through governing many situations at once; (2) firm guidance to affected parties by means of regulations; and (3) confidence on the part of agency personnel in handling situations covered by agency regulations, whether in direct enforcement of the regulations or in applying them to issues in subsequent adjudication. Despite these advantages of rule-making, some agencies, under pressure of a continuous flow of adjudicative proceedings, become immersed in resolving the cases presented and fail to make full use of the rule-making device. As an alternative, general principles are often announced in adjudicative decisions and may be summarized in annual reports, but these may not become equally as well known as published regulations and do not carry

199. Zenith Radio Corp. v. FCC, 211 F.2d 629 (D.C. Cir. 1954). See also Campbell v. Galeno Chemical Co., 281 U.S. 599 1063 (1930) (regulation terminating existing licenses is not effective against licensees entitled to individual hearings in advance of termination).


the same force. Regulations are, however, widely employed by both Federal and state agencies, sometimes to the exclusion of case-by-case agency action or as a prerequisite to it, especially in such areas of regulation as health, safety, prescription of product standards, and control of financial institutions.

Certain other common kinds of agency actions, which come within the definition of adjudication in the Federal Administrative Procedure Act, but not within the category of "contested cases" under the Model State Act and some state administrative procedure legislation, are of importance. They include direct physical action, such as the abatement of nuisances, the seizure of persons or property for health reasons, and restraint for taxes. Also included is announcement by an agency of the results of inspections or tests, such as the grading of food products.

Interlocutory orders in the course of a proceeding are of course often made, and actions having only temporary effect, such as the suspension of a license or of a utility's rate, are taken from time to time by administrative agencies. Procedures in connection with such impermanent measures may be prescribed by statute; but they do not fall within the definition of "order," and therefore of "adjudication," under the Federal Act, which includes only the "final disposition" of a matter before an agency. The definition of "contested case" in the Model Act also excludes them except when a hearing is required by statute. The Federal

203. See note 194 supra. For a considerable period the National Labor Relations Board announced in opinions its changing policies as to the exercise of its jurisdiction over cases in which the effect of labor relations on interstate commerce is minimal. The Labor-Management Reporting and Disclosure Act of 1959 gives it explicit authority to do so in regulations adopted according to the Administrative Procedure Act. 73 Stat. 541, 29 U.S.C.A. § 164(c) (1). See the account of this development in Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 HARV. L. REV. 1086, 1089-1097 (1960), and The NLRB Prerogative: A Change of Policy, 7 STAN. L. REV. 554 (1955).

204. Administration of the Federal food, drug, and cosmetic laws has since 1938 involved an array of rule-making functions, coupled with authority to seize products and institute condemnation proceedings in court on account of alleged violations, but with administrative power to make binding determinations in particular cases only under exceptional circumstances. The outlines of the administrative processes established by the Act of that year, 52 Stat. 1040, 21 U.S.C.A. ch. 9, which has since been amended in details but not fundamentally, are set forth in articles in 6 LAW & CONTEMP. PROB. No. 1 (1939). Safety in transportation and employment, preservation of the public health, and the sound conduct of financial institutions and transactions require study of the problems involved and detailed prescription of desirable practices or prohibition of unsound ones, as well as investigations of failures and, at times, disciplinary proceedings. Hence rule-making is a principal administrative function exercised in relation to them. See generally, Andrews, Administrative Labor Legislation (1936); A.G. COM. MONOGRAPHS ON THE FEDERAL RESERVE SYSTEM AND BUREAU OF MARINE INSPECTION AND NAVIGATION, S. Doc. No. 186, 76th Cong., 3d sess., Parts 9, 10; Benjamin, The Board of Standards and Appeals in Vol. V of ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942).

205. A.P.A. § 2(d).
Act, however, contains a provision applicable to interim actions "in connection with any agency function," conferring a right of appearance on interested persons in connection with these actions "so far as the orderly conduct of public business permits." Here too informal processes are involved, even though they occur in the course of a formal proceeding.

The foregoing varieties and characteristics of administrative agencies, their processes, and the objectives sought to be attained through their operation are of central importance in the consideration of proposals for improving agency performance. There is scope for reform, which as to some matters is badly needed, on a basis consistent with the agency framework and methods that have been developed in response to social need.

206. Id. § 6(a).