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THE DISTINCTION BETWEEN A RULE AND AN ORDER IN THE ADMINISTRATIVE PROCEDURE ACT

IVAN C. RUTLEDGE*

The most comprehensive scheme of regulation of the activities of administrative agencies of government ever enacted is the Federal Administrative Procedure Act.1 Internal evidence in the structure of this legislation indicates that its drafters regarded the difference between rules and orders as fundamental to this scheme of regulation.2 The purpose of this study is two-fold: to explore the extent to which this conception is true under the terms of the Act; and to indicate the nature of the distinction between a rule and an order.

THE REQUIREMENTS OF THE ACT

Six of the twelve sections of the Act disclose explicit differences in the manner of treating rules and orders: Sections Three, Four, Five, Seven, Eight and Nine. Of the others, Section Eleven is an addendum to Section Seven, but Sections One, Two, Six, Ten, and Twelve have no explicit relationship to differences in procedure between rules and orders. Therefore Sections Three through Five and Seven through Nine are the most important sections here.

Promulgation. Section Three regulates the final stage of the administrative process, the promulgation or service of a final determination. It applies to both rules and orders.8 No distinction is made between them so far as they involve functions that require “secrecy in the public interest” or matters relating to internal agency management, because they are then exempt from the requirements of the section. Likewise, matters of official

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2. Section One is purely formal. Section Twelve deals with legislative matters such as effective date and relationship of the Act to other legislation. Section Ten does not concern agency procedure, being the judicial review section. Section Six concerns “ancillary matters” of agency procedure. Section Two deals with definitions and excludes the courts, the Congress, governments of territories and possessions, and certain mediation, military, and temporary agencies from all or most of the procedural requirements of the Act. However it defines “orders” as final dispositions in any matter other than rule making. And Section Three, on public information, has three subdivisions: “rules,” “opinions and orders,” and “public records.” Section Nine deals with licensing, which is defined as a type of adjudication, the process for making orders. The remaining five sections center around Section Four, on rules, and Section Five, on orders, as follows: Sections Seven and Eight depend for their operation on Sections Four and Five; and Section Seven incorporates the provisions of Section Eleven.

3. That is, it applies to all final dispositions of any agency in any matter. Unlike any of the other sections of the Act, it applies to the § 2 mediation, military, and temporary agencies.

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record do not have to be made available to persons concerned if to do so would be contrary to the requirements of any statute or if the information is "for good cause found" held confidential. Otherwise matters of official record must be made available to persons properly and directly concerned, and all rules and orders are to be either published or made available to public inspection. The distinction then comes into play: rules must be published in the Federal Register or else addressed to and served upon named persons, while orders are subject only to the general requirement of publication or availability to inspection in accordance with published rule; and there is an additional exception in the case of orders not cited as precedents, which may for good cause be held confidential. Thus when publication is required, the method of publication is prescribed in greater detail for rules than for orders, and there is one more exception to the requirement of publication for orders than for rules.

**Formal Notice, Hearing and Determination.** The remaining sections to be considered, Four, Five, and Seven through Nine, regulate agency proceedings prior to announcement of the final decision, beginning with the process of conducting the hearing. Section Four applies only to proceedings to make rules, while Sections Five and Nine apply only to adjudication, which is the process by which an order, as defined by the Act, is made. Sections Four, Five, Seven, and Eight provide a complexity of procedural requirements that are brought to bear upon a limited class of agency proceedings in which trial procedure is used. This class of proceedings is herein described as "formal" because the procedural standards of the Act are higher here than for any other agency proceedings. This class is determined in part by the distinction between rule and order, but other factors also enter into identification of an agency proceeding as formal. The criteria may be summarized as follows: the distinction between rule and order; the procedure that is otherwise by statute required of the agency; and the subject of the rule or order to be made.

The affirmative characteristic distinguishing formal proceedings is that the agency is required by statute to employ trial procedure in making the rule or order.\(^4\) That is, it must hold a hearing and make its determination on the basis of the record of that hearing. The Act itself requires trial procedure in only one kind of proceeding: the removal of trial examiners appointed in accordance with Section Eleven to preside over hearings. Thus, generally, identification of a proceeding as formal requires reference to materials outside the Act, including specific provisions of other statutes, regardless of whether the proceeding is to make a rule or an order. In other words, a proceeding is exempt from the formal requirements of the

\(^4\) Last sentence of § 4b: "Where rules are required by statute to be made on the record after opportunity for an agency hearing . . . " First sentence of § 5: "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ."
Act, whether it is adjudication or rule making, unless there is a statutory requirement that it embody trial procedure.

Notwithstanding the existence of a statutory requirement of trial procedure, however, there are negative criteria that may remove the proceeding from the class of formal proceedings. Some of them involve the distinction between rule making and adjudication but others do not. If the subject of consideration is military, naval, or foreign affairs functions, the proceeding is exempt from the formal requirements of the Act, notwithstanding the existence of a statutory requirement of trial procedure. The same is true of selection or, with the exception of removal of trial examiners noted above, tenure of federal officers or employees. In these instances the sole criterion is subject matter, regardless of the procedure otherwise required by statute or the distinction between rule and order.

On the other hand, the distinction between rule and order must be made in classification of other proceedings (in which trial procedure is required) as formal. In adjudication, if the agency has certain relationships to the courts the proceeding may be exempt from formal requirements, whereas in the case of rules these procedural or structural relationships are immaterial. These are cases in which the determination of the agency is subject to redetermination by a court or in which the agency is acting as agent for a court. Similarly, in the case of orders required to be made by trial procedure, the formal requirements of the Act are inapplicable if the decision rests solely on inspections, tests, or elections; but otherwise in the case of rules. That is, the formal procedure of the Act would have to be used in making a rule although it was based solely on an inspection, for example, if some other statute required trial procedure. Finally, a specific subject in adjudication, but not in rule making, enjoys exemption from formal procedure under the Act. That subject is the certification of employee representatives. Conversely, in rule making there are subjects that enjoy exemption from the formal procedure of the Act notwithstanding the existence of a statutory requirement of trial procedure. They are public property, loans, grants, benefits or contracts and (in addition to selection and tenure of federal officers and employees) any matter relating to agency management or personnel. The legislative history may indicate that it was assumed that the statutory requirement of trial procedure should be attributed more significance in adjudicating concerning these subjects than in making rules concerning them.

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5. They are found in the introductory exceptions contained in the first sentences of § 4 and § 5 respectively.

6. A specific extension of this area was accomplished by an appropriation rider exempting admission and deportation of aliens from formal requirements and ending the regime of Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). Pub. L. No. 843, 81st Cong., 2d Sess. c.3 (Sept. 27, 1950).

7. The Senate Judiciary Committee relied upon two factors that would in most instances exempt these proceedings from formal requirements. It explained that "pension and benefit proceedings" are not ordinarily required by statute to be made after agency hearing. The other factor is the exception in favor of matters subject to a subsequent
The distinction between rule and order is not "fundamental" in identifying the class of formal proceedings. Rather, the common characteristic is the type of procedure established by statute (other than the Act, save in one instance) for the particular type of proceeding. That is, the Act leans more heavily upon special decisions concerning the procedure to be used in a particular agency function than upon the general distinction between rules and orders. Likewise a general exemption of certain subjects is fully as important as the line between rule making and adjudication.

Among the requirements imposed by the Act upon formal proceedings there is some variation between the adjudication and rule making. In both classes of formal proceedings the Act amplifies the existing requirement of a hearing, by specifying the minimal content of the notice that a hearing is to be held. The notice must designate the time, place, and nature of the proceeding and the authority therefor. In the case of orders it must contain "the matters of fact and law asserted;" in the case of rules, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Notice of rule making may be published in the Federal Register, or personally served upon all persons "subject thereto," or the requirement may be satisfied by actual notice to such persons in accordance with law. Notice of adjudication is required only to be timely given to all persons entitled thereto. In adjudication, responsive pleading is required if private persons are the moving parties; it may otherwise be required by agency rule. Due regard for the convenience of parties and representatives in fixing the time and place of hearing is specified for adjudication, but not for rule making.

Another type of variation within the formal requirements of the Act occurs. Here the basis of variation is not the distinction between rules and orders as such, but a grouping of certain kinds of adjudication with rule making to form sub-classes of formal proceedings. These kinds of adjudication are: the determination of claims for money or benefits; proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers; and the determination of applications for initial licenses.

Initial licensing is bracketed with rule making in connection with delegation by the agency of the function of presiding at the hearing. In all other adjudication, if the presiding officer (or officers) is not also given the authority to decide the case as well as preside, the agency must at least obtain a recommended decision from some officer qualified to preside at hearings (a member of the agency or a trial examiner qualified under Section Eleven), before making its own decision. But in rule making and initial licensing the agency, though it has delegated the conduct of the

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8. Sections 4a and 5a.
9. Last sentence of § 8a.
hearing, may forthwith make its decision without such recommendation if it finds upon the record that due execution of its functions makes such a course unavoidable; or it may take a recommended decision from any of its "responsible officers;" or it may issue a tentative decision of its own in lieu of a recommendation from some of its members or subordinate officers. One significance of this process of using preliminary decisions is that parties are entitled to take exceptions to them, which may be supported by reasons, and the agency must rule upon each exception taken. These decisions and rulings become part of the record, which may in turn become part of the basis of judicial review of the rule or order. Thus, in initial licensing or rule making the record may have no record of a preliminary decision (recommended or tentative) with rulings on exceptions thereto. In these two types of proceedings the agency has greater latitude about who shall make the preliminary decision than elsewhere in formal adjudication. It may be made by the agency itself or any of its responsible officers, whereas otherwise in formal procedure the recommendation must come from an officer qualified to preside at hearings.

Rule making is grouped with adjudicative proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers, as well as initial licensing, in connection with who may make the recommended decision. In all other adjudications the recommendations must come from officers who preside at the hearings, if they are available, but in this group of formal proceedings it is not required that the officer be the one who presided.

There is a similar variation in connection with another method of delegation in the hearing process. The agency may delegate the making of the decision so that it does not itself participate in the case except in the event of appeal to it or review on its own motion. If such a method of arranging the work-load of the agency is used by the agency, the decision (called an "initial" decision) may be made by any agency member or trial examiner qualified under Section Eleven to preside at hearings, whereas if the proceeding is not rule making or does not involve initial licenses or public utilities or carriers the officer who presided must decide the case. Furthermore, except in rule making and in these special types of adjudication, the qualifications of the hearing examiner and the standards of his conduct are subject to special restrictions, unless he is a member of the agency. Besides being qualified under Section Eleven, he must not be engaged in investigative or prosecuting functions in the case in question or in any case factually related to it, and he must not be responsible to or subject to the supervision of investigative or prosecuting officers or employees. He must in the conduct of the case avoid ex parte consultation and advice, except where authorized by law, and may accept the assistance

10. Section 8b.
11. Section 5c.
of prosecuting or investigative officers and employees only as witnesses or counsel in public proceedings. Such requirements do not apply to formal determinations of rules, initial licenses, or rates, facilities or practices of public utilities or carriers. Here the agency may delegate the making of the initial decision to any officer qualified to preside at hearings and such officer may both prosecute and preside, or both prosecute and decide, but it is not required that he both preside and decide.\textsuperscript{12}

The remaining variation within formal procedure deals with the hearing process, as distinguished from the process of decision, and combines with rule making and initial licensing the processing of claims for money or benefits. In general, formal procedure under the Act involves an opportunity for each party to present his case or defense by oral as well as documentary evidence. However, in this sub-class oral presentation may be omitted unless to do so would prejudice a party to the proceeding.\textsuperscript{13}

The requirements of formal procedure under the Act include: a definition of the record of the hearing on which the determination must be based, along with a provision for official notice of extra-record material facts; the right to propose findings and conclusions, with the agency duty to make findings, and give reasons therefor, on all material issues; qualifications and powers of officers who preside at the reception of evidence, along with specification of procedures for disqualification; standards for the reception of evidence and its consideration; and regulation of the burden of proof. In all these requirements there is no variation based upon drawing a distinction between adjudication and rule making, except as previously noted. Those exceptions point to a somewhat larger agency discretion in favor of proceedings to make rules, but this policy is not clear-cut; rather, rule making seems to be but one kind of proceeding in which this larger agency discretion is appropriate.

There are a few provisions applicable exclusively to formal adjudication and not to any type of rule making.\textsuperscript{14} One is the authorization granted to agencies to issue declaratory orders, in their sound discretion, to terminate controversies or remove uncertainties. Another is the requirement that parties be given an opportunity to submit and consider facts, arguments, offers of settlement, or proposals of adjustment, where permitted by time, the nature of the proceeding, and the public interest. These provisions seem to be mainly hortatory in effect, because of their conditional phrasing.

On the other hand, the formal requirements are supplemented in the case of rule making by a provision having to do with promulgation, which does not apply in formal adjudication.\textsuperscript{15} This is the requirement that the publication or service of the rule required by Section Three take place at least thirty days prior to its effective date. However the agency has discre-

\textsuperscript{12} \textit{Ibid.}
\textsuperscript{13} Last sentence of § 7c.
\textsuperscript{14} Sections 5b and 5d.
\textsuperscript{15} Section 4e.
tion to dispense with this requirement "upon good cause found and pub-
lished with the rule." This provision is not applicable to certain kinds of
rules though they are otherwise subject to formal procedure. It does not
apply to adjective rules or to interpretative rules, or to rules that grant or
recognize exemption or relieve restriction, but only to substantive rules.
Another provision, applicable to all formal rule making, but not to adju-
cication, is the requirement that any interested person be given the right to
petition for the issuance, amendment, or repeal of a rule.¹⁶

The distinction between rule and order is not so pervasive, as has
been seen, in determining the class of formal proceedings, as is the dis-
tinction between the existence or non-existence of a statutory requirement
of trial procedure. The former distinction is a factor that combines with cer-
tain subjects, such as public benefits, though not with others, such as foreign
affairs, to identify those proceedings as exempt from the formal class. Simi-
larly it parallels other considerations, such as the fact that an applicant seeks
an initial license, to give the agency somewhat greater discretion within the
formal requirements in the conduct of trial procedure than it would otherwise
be allowed. The distinction between rule and order also affects the applica-
bility of provisions with respect to the giving of notice in formal proceedings,
although the respective provisions for rule making and adjudication are
very similar. Finally, the rule formally made is subject to promulgation
requirements wholly inapplicable to the order. So there is an increasing
importance of the distinction, depending upon whether the purpose for
which it is being used is to determine in general what type of procedure
to use, or whether the question is to the mode of handling some particular
detail, such as the place of publication of notice or the timing of promul-
gation. If the question is a matter of detail, the distinction between rule and
order, standing alone, may resolve it.

Semi-Formal Notice, Hearing, and Determination. In general, the
Act lays down more specifications of procedure for rule making than for
adjudication, not only with respect to promulgation in Section Three, and
its timing in relation to effective date in Section Four, but with respect
to the giving of notice of the proceeding, as seen in Section Four. There
is a further set of provisions in Section Four that creates a distinct class of
rule making proceedings. This class resembles formal proceedings in the
criteria that determine it: military, naval and foreign affairs, as well as
internal agency matters are excluded. Also excluded, if the proceeding is
rule making, are public property, loans, grants, benefits or contracts. That
is, some of the same criteria of subjects, and subjects combined with the
distinction between rule and order, are applied in identifying this class
of "semi-formal" proceedings as in segregating formal proceedings. How-
ever, no adjudication is included in this class of proceedings, so the distinc-
tion between rule and order is basic. Instead of an existing statutory re-

¹⁶ Section 4d.
requirement of trial procedure, as in formal proceedings, this class is identified by a statutory requirement of notice or hearing that falls short of requiring trial procedure. 17

Semi-formal proceedings, then, are proceedings to make rules without the use of trial procedure, but with some kind of opportunity to participate. Section Four elaborates the kind of procedure to be employed in this class of proceedings, just as Sections Four, Five, Seven and Eight elaborate the content of an existing requirement of a determination on the record of a hearing, or trial procedure. In semi-formal proceedings, the same provisions as to the giving of notice and delaying the effective date on promulgation apply as in formal proceedings. But instead of prescribing the qualifications of hearing officers, defining the record, and providing how the functions of hearing and deciding may be delegated, Section Four provides for an opportunity to submit information and opinion, and requires that such matter must be considered in reaching the decision.

In detail, the requirements specially applicable to semi-formal proceedings are not numerous. After the notice has been given, "interested persons" must be accorded a chance to submit data, views or arguments, though they do not have the right to present them orally. Instead of the elaborate formal requirements as to consideration of the record exclusively, and the making of findings and rulings, the agency in this class of proceedings need only give consideration to the relevant matter submitted and make a concise general statement of the basis and purpose of the rule. 18

One additional contrast may be drawn between the operation of the Act in formal and semi-formal proceedings. In formal proceedings there is only one instance in which the Act requires trial procedure, in the removal of trial examiners. On the other hand, there is a general requirement of notice and opportunity to be heard semi-formally. Instead of relying on existing or future statutory determinations of what kind of procedure an agency is to use, the Act itself prescribes an opportunity to be heard semi-formally even in the absence of an existing statutory requirement of notice or hearing. 19

The opportunity to be heard semi-formally conferred by the Act is, however, available only in limited circumstances. Not only are the subjects excluded from formal procedure excluded here, as well as all of adjudication; there are additional kinds of rules that would be subject to semi-formal procedure if there were an existing statutory requirement of notice or hearing, but are exempt from the requirement of the Act itself. These rules are described as "interpretative rules, general statements of policy, rules of agency organization, procedure or practice." 20 So although the Act requires formal procedure in only one instance in adjudication, and not

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17. Last sentence of § 4b.
18. Section 4b.
19. First sentence of § 4a.
20. Last sentence of § 4a.
at all in rule making, it sets up semi-formal procedure for a certain class of rules only, and prescribes it for many proceedings by force of its own requirement alone. That is, notwithstanding the absence of statutory requirement of participation in the proceeding the Act itself supplies it for substantive rules having the force of law (other than those concerning the subjects exempt from both formal and semi-formal procedure). However, the agency has discretion to dispense with semi-formal procedure if required only by force of this provision of the Act if also it finds for good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. The requirement that semi-formal procedure be used, notwithstanding the absence of such requirement *aliaunde* the Act, may be somewhat more than merely hortatory, as shown by the provision that if the agency exercises its discretion to dispense with it, the rule must contain the finding of good cause with supporting reasons.21

To recapitulate, if a party has a right to a determination (or a right to trial procedure) based on the hearing record, the proceeding must be formal under the Act, whether the agency proposes to make a rule or an order, with certain exceptions, some of which are based upon the distinction between rule and order combined with the subject involved, and some of which are not. The Act itself confers this right only on trial examiners in cases involving their removal. If “interested persons” have a right to notice or hearing, but not to trial procedure, the proceeding must be semi-formal under the Act, but only in rule making that does not involve certain subjects. The Act itself confers this right generally, in the area of rule making where semi-formal procedure is applicable, if the rule is a substantive regulation (as distinguished from a procedural or an advisory rule). Thus the Act not only specifies procedure in greater detail in connection with the publication of rules than orders, and not only does it specify more procedures for formal notice, hearing and determination in rule making than in adjudication; the Act also establishes a special procedure applicable only to rules. Furthermore, in connection with this class of semi-formal proceedings the Act itself confers a general right of participation where other legislation does not. The Act has no comparable procedure or right to participate for adjudication. Thus, in formal procedure the Act provides greater latitude for the agency, accompanied by more elaborate specification of details in rule making than in adjudication; it also prescribes a procedure for less formal participation in a limited class of rule making proceedings, while conferring rights of participation in such proceedings in many instances where they are not otherwise conferred by statute; and in both formal and semi-formal proceedings Section Four supplements the Section Three requirements as to promulgation of rules.

*Informal Proceedings.* The remaining “informal” proceedings consist

of the exceptions previously outlined in identifying formal and semi-formal proceedings. They include military, naval, and foreign affairs, and selection and, except for removal of trial examiners, tenure of public officers and employees. In the case of rules, they also include all other matters of agency management and personnel, as well as matters relating to public property, loans, grants, benefits or contracts. In the case of orders, they also include cases where the agency is acting as agent for a court or the decision is subject to redetermination by a court, where the decision rests solely on inspections, tests, or elections, and cases of certification of employee representatives. Also in adjudication, a proceeding is informal in the absence of a statutory requirement of trial procedure; whereas in rule making (because of the provisions constituting semi-formal procedure) the proceeding is informal if there is no statutory requirement of participation by interested persons amounting to a right to notice or hearing. Thus, the distinction between rule and order combines with other factors to identify informal proceedings in the same manner as in the identification of formal proceedings. However, it is significant in one additional respect, as compared with the determination of the class of formal proceedings: whereas the requirement of trial procedure is essential to a formal proceeding whether on a rule or an order, its absence necessarily means informal procedure only in the case of orders; in the case of rules the proceeding may not be informal if there is a statutory right to any substantial degree of participation.22

In the limbo of informal proceedings, only the provisions of Sections Three, Six, Nine and (outside the agency level of procedure) Ten are applicable. Section Nine makes special provision for procedure in the case of some orders, as Section Four provides semi-formal procedure for some rules. It requires an agency, before terminating the status of a licensee, to make a final determination of the application for a renewal, and in other cases to give the licensee an opportunity to demonstrate or achieve compliance with all lawful requirements.23

From the standpoint of right to participate, the provisions of the Act operate in one instance on a single type of adjudication (formal removal of hearing examiners); in another, on a sub-class of rule making (in certain semi-formal proceedings); and in a third, on a sub-class of adjudication (in the informal proceedings just described). While these requirements of the Act as to opportunity to participate do not apply to rule making as

22. The agencies and functions exempted in § 2a are at most within § 3 requirements, and are not subject to the informal requirements of § 6 and § 9, the semi-formal requirements of § 4, or the formal requirements of §§ 4, 5, 7, 8 and 11.

23. These opportunities are not available in cases of willfulness, or where public health, interest or safety requires otherwise. Section 9. It will be noted that opportunity to achieve, as distinguished from opportunity to demonstrate compliance, is a substantive rather than procedural right. This right seems to assure some "future effect" (prescribed as an essential characteristic of rules) to certain licensing action, such as imposing additional qualifications on an outstanding license.
such nor to adjudication as such, they do single out certain kinds of rules and orders respectively, rather than applying at once to rule making and adjudication.

The Section Six requirement of opportunity to participate, like all the requirements of this section, makes no distinction between rules and orders. The provision is that any interested person may appear in connection with any agency function for the adjustment of any controversy or to present any request, so far as the orderly conduct of public business permits. With this provision may be compared the Section Four right given interested persons in connection with rules other than those concerning the subjects exempt from formal and semi-formal procedure to petition for issuance, amendment or repeal. The Section Six provision is supported by another provision that the agency must answer all written requests in case of denial, explaining the reasons for the denial. Other Section Six requirements, applicable alike to rules and orders, have to do with reasonable promptness in making determinations (comparable to the Section Nine licensing requirement phrased in almost identical terms) and with the rights of parties and witnesses in respect to counsel and compulsion to appear or submit information. The requirements of Sections Six and Nine apply independently in formal proceedings also, as do the requirements of Section Six in semi-formal proceedings.

**Summary.** The requirements of the Act that most emphasize the distinction between rule and order have to do with promulgation. Whether informal, semi-formal, or formal procedure has been used in the making of a rule it must be published in the Federal Register unless it is served upon named persons in accordance with law, or the function involved requires secrecy in the public interest, or the matter relates solely to internal agency management. Such publication or service of a substantive rule must, with certain exceptions, take place at least thirty days before its effective date. Such rules include all rules made according to formal or semi-formal procedure or after an agency finding that semi-formal procedure is unnecessary, impracticable or contrary to the public interest, except rules granting or recognizing exemptions or relieving restrictions or interpretative rules and statements of policy. All rules must at least be published, or in accordance with published rule, be made available to public inspection, unless secrecy is required in the public interest or the matter relates solely to internal agency management. On the other hand orders not cited as precedents may for good cause be held confidential and not published or made available to public inspection.

The provision of a special procedure for limited participation in the making of certain rules, and the accompanying general requirement of adherence to such procedure may be taken as lending great significance to the distinction between rule and order. The semi-formal procedure provided by the Act suggests that while for adjudication there may be
either an elaborate trial procedure or a wide variety of less formal means of investigation and determination, in rule making there is a middle ground on which interested persons may enjoy a relatively uniform procedure that gives them limited participation. The protection of licensed status given by Section Nine, though it extends to both formal and informal proceedings, emphasizes the distinction between rule and order, since it applies only to a certain class of orders.

With the exception of Section Nine, the requirements of informal procedure are indifferent to the distinction, except as it distinguishes informal from semi-formal and formal proceedings. As previously outlined, the distinction is significant only when taken with other factors such as subject matter, the relation of the agency to the courts, and the procedure otherwise required by statute.

Within the confines of formal procedure a rule may be made with greater freedom on the part of an agency than an order. However, this greater latitude is in most instances extended to some types of formal adjudication along with formal rule making.

In sum, it may be suggested that while rule making is more extensively regulated by the Act than adjudication, formal adjudication is more intensively regulated than formal rule making. While the processes of hearing and determination may be conducted in more ways for making rules than orders, the hearing and determination requirements for rules bulk larger than those for orders, and in addition the publication of rules is subjected to more regulation than orders.

**Making the Distinction**

The foregoing description, in terms of the requirements of the Act, of the effect of the difference between rule and order provides a basis for considering how the distinction may be drawn. The Act itself draws the distinction by defining as an order the final disposition of any agency in any matter other than rule making but, as previously indicated, including licensing. So an order is that which is not a rule. A rule is an agency statement designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. It may be "of general or particular applicability," but it must have "future effect."  

The method of definition indicates caution in drawing the line between rules and orders in that certain determinations are specified as rules: "The approval or prescription for the future of rates, wages, cor-

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24. Section 2c. As passed by the Senate the bill read, "of general applicability" and did not prescribe "future effect." The definition of "order" (§ 2d) specified that it might be affirmative, negative, or declaratory in form, but as finally enacted the Act provides than an order may also be injunctive in form. These changes were made in the House Committee Report of May 3, 1946. It explained that "injunctive" had to be added to distinguish certain types of orders "because of the amendment of Section 2(c) to embrace clearly particularized rule making. . . ." H.R. REP. No. 1980, 79th Cong. 2d Sess., app. A, n. 1, op. cit., supra note 7, at 283.
porate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor of valuations, costs, or accounting, or practices bearing upon any of the foregoing.” Likewise, certain determinations are specified to be orders (grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification or conditioning of a license), and it is provided that an order may be in form either affirmative, negative, injunctive or declaratory. Various kinds of rules are referred to in other passages: interpretative rules, general statements of policy, rules of agency organization, procedure or practice, substantive rules, rules granting or recognizing exemptions or relieving restrictions. Likewise in Section Five, which deals only with adjudication, reference is made to proceedings involving the validity or application of rates, facilities or practices of public utilities or carriers.

These illustrative words are reminiscent of such distinctions as are traditional: that making rates is legislative or rule making, for example.\(^{25}\) Indeed there is judicial authority that the distinction is not “novel reasoning” but rather an explanation of existing concepts, that administrative rule making is analogous to the enactment of statutes by the legislature and administrative adjudication resembles the judicial function.\(^{26}\)

Conventionally, legislation is law making and adjudication is the vindication of existing law, a stage in its enforcement. More specifically, adjudication consists of “ascertaining” the operative facts in a situation and thereby equating it to the legal consequences in accordance with the legal norm delineating the relationship between situations and consequences. In the syllogistic schema, adjudication supplies the minor premise, selects the major premise and arrives at a conclusion. “The law” furnishes the major premise (fashioned by the tribunal from rules, standards, etc.) but the tribunal pronounces the conclusion. This conclusion is usually considered as a sufficient warrant for the exercise of official coercion, thus translating the abstract into the concrete, the general into the particular. If decision without rule is blind, rule without decision is meaningless.\(^{27}\) The process of adjudication classifies the situation by operative facts, thus interpreting it, but as it reacts upon “the facts” it also reacts upon “the law” in such a way as to interpret it or create new rules in many instances. Nevertheless, a rule of law is general rather than particular.\(^{28}\)

27. “... rules without cases are empty and cases without rules are blind.” COHEN, PHILOSOPHY AND LEGAL SCIENCE IN LAW AND THE SOCIAL ORDER 227 (1933). Decision here means the ordering of actual behavior conceived as “subject to realization by state force.” See 2 WIGMORE, CASES ON TORTS, app. A, § 3 (1911).
28. See for example HOLLAND, JURISPRUDENCE 22 (9th ed. 1900), where he collects the observations of Austin, Maine, Bentham, Ulpian, Cicero and Aristotle on the point. Bentham, in materials more recently brought to light, takes the position that even orders are general in respect to the persons they are intended “in the last instance” to favor. He sees three categories, general laws, particular laws and laws partly particular
and law making is the making of propositions, whereas the main business of adjudicating is to make dispositions. Even Professor Gray, who emphasized the law making function of courts, said: "Again, the function of a judge is not mainly to declare the Law, but to maintain the peace by deciding controversies."  

The disposition of a situation by command of the state is not invariably subject to adjudication in this sense, however, as shown by this argument of Lord Digby in the trial of the Earl of Stratford:

I know, Mr. Speaker, there is in Parliament a double Power of Life and Death by Bill, a Judicial Power, and a Legislative; the measure of the one, is what's legally just; of the other, what is Prudentially and Politically fit for the good and preservation of the Whole. But these two, under favour, are not to be confounded in Judgment: We must not piece up want of legality with matter of convenience, nor the defailance of prudential fitness with a pretense of Legal Justice.  

Dean Pound finds a different kind of contrast between judicial adjudication and administrative disposition of cases, in this remarkably antinominalist passage:

Typically judicial treatment of a controversy is a measuring of it by rule in order to reach a universal solution for a class of causes of which the cause at hand is but an example. Typically administrative treatment of a situation is a disposition of it as a unique occurrence, an individualization whereby effect is given to its special rather than to its general features.  

On the one hand stands the provision of the "Prudentially and Politically fit for the good and preservation of the Whole." On the other, the disposition of the situation as a unique occurrence. Between them may be seen the process of adjudication relating the two in cases where the ordinance of what is fit for the good of the whole takes the form of a general rule that is thought to be applicable. In such cases the apparently unique occurrence is found, as Dean Pound suggests, to have general features that make it but an example of a class of causes; or, to turn it around, the apparently abstract rule is found to be a reflection of the concretely existing situation.  


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30. Quoted in McILWAin, The High Court of Parliament 153 (1910). This work demonstrates the historical differentiation of legislation and adjudication as it developed in the Mother of Parliaments.  
32. This picture points towards the ideal of a government of laws and not of men, where the law making power sees every situation in advance and classifies it under general precepts, where retroactive legislation is never needed, and discretion in enforcement is superfluous. But because human generalization produces injustice and inexpli-
A distinction between legislation and adjudication asserts that "the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." This distinction is based upon a temporal analysis that would seem to question whether any retroactive legislation is law, but it suggests the hierarchy of norms propounded by Professor Kelsen. This hierarchy begins with the basic norm, goes down to the next level, the constitution, then the act of the legislature, and so on until the sheriff or other officer executes the final sanction by perhaps seizing the body, goods or land of the delinquent. Between making the basic norm and executing the final sanction law is in successive stages both made and executed. It is thus possible to visualize successive implementation of broad imperatives by ever-narrowing ones, accompanied by remote sanctions progressing to more and more immediate ones. In many instances, the introduction of administrative powers through special agencies has increased the degree of such elaboration. For example, the prescription of a reasonable rate rather than an after-the-fact adjudication that a charge under a given rate was unreasonable implements the general rule prohibiting unreasonable rates with specific rates approved as reasonable. It also adds to the general warning against unreasonable or discriminatory charges a more specific disapproval of particular schedules proposed, before more immediate sanctions accrue. Such extension or elaboration of the progression of rule making and sanctions renders the line between legislation and adjudication more tenuous than in the case of a statute under which the first proceeding following enactment is initiated by a private party or public prosecutor in court.

Another kind of law making is the creation of jurisdiction to dispose of individual situations without benefit of rules, or under very vague standards. Such jurisdiction may be assumed by the legislature, as in private relief acts or legislative divorces, or may be conferred on the legislature by specific constitutional provision, as in the case of impeachment and trial of public officers. It is perhaps most frequently created in the executive

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34. "A norm regulating the creation of another norm is 'applied' in the creation of the other norm. Creation of law is always application of law." Kelsen, General Theory of Law and State 133 (1945). Sed quaere, whether law is made by a judge if he considers the rule to be clear and the only question to be the credibility of a certain witness (in the pure sense of existential fact). It seems that norm-creation would in such a case have ended before the judicial process began, at least unless the sanction imposed were individually tailored for the particular defendant. But it is questionable whether, even so, the phrase "individual norm" is allowable.
branch, as in the case of prison terms under indeterminate-sentence statutes, but such jurisdiction is familiar in judicial administration, as for example in setting the amount of punishment for criminal contempt, or suspending sentence in criminal cases. In some instances the creation of such jurisdiction is intended to make possible the development of general rules by a case-to-case approach, but the instances mentioned above seem to be best classifiable as instances in which discretion is the only rule. In other instances, rule making power accompanies the power to dispose of specific cases, as where courts have the power not only to dispose of procedural points but to make rules of procedure. It has been held that the coexistence of both types of power in an agency does not justify requiring it to use the rule making power prior to application in a specific case.

It seems that in descending scale legislatures, administrative agencies, and courts have discretion to impose novel requirements not foreshadowed by previous legal materials, whether in their propositions or in their dispositions. Perhaps in ascending scale they are bound to make their individual dispositions succeed each other in a pattern that gives rise to generalization, and to explain them on the basis of rules considered as pre-existing.

Disposing of a situation as a unique occurrence by giving effect to its special rather than its general features is, then, not confined to administrative agencies, but occurs in courts and in legislatures. Nowadays, except for private bills, legislatures seldom essay to dispose of particular situations, partly because of constitutional restrictions, but rather they provide more or less general rules or grant jurisdiction to make such rules or to make individual dispositions, or a combination of the three may have occurred. Generally, the function of courts is considered as that of making individual dispositions under rule or standard, to the extent that rule or standard is provided; and it is recognized as the proper, and in most instances necessary, function of a court to enunciate (to find or to make) such law as supports its conclusion, even in the absence of previously established rules and standards. But courts are not generally conceived to be charged with the responsibility of otherwise developing general precepts for the disposition of particular cases, or of making individual dispositions without

37. SEC v. Chenery Corp., 332 U.S. 194 (1947). After having mistakenly selected a supposed rule or standard of equity to govern the disposition, 318 U.S. 80 (1943), the Commission acted again to reach the same result under its statutory authority, so that the major premise was no more than a standard, perhaps nearer the pole of discretion to decide individually within the jurisdiction granted, than the pole of application of rule to facts. A jurisdiction may be located so near the discretionary pole as to be classified as legislative or administrative and consequently be improperly exercisable under judicial power, though it deals with dispositions rather than propositions, e.g., denying a license to a radio station. Federal Radio Comm’n v. General Electric Co., 281 U.S. 464 (1930).
standard or general rules. In these two respects the traditional distinction between legislation “proper” and adjudication “proper” falls short in supplying guidance for discriminating between administrative rule making and administrative making of orders.

A conceptual difficulty inheres in the distinction between “general” and “particular.” When does a controversy involve the making of, or choice among, general rules and when is the question one of determining whether or not a given situation exists for which a given set of consequences is to be set in motion? A possible distinction is that between a command addressed to, or operating upon, an indefinite or indeterminate class, and a command issued to an individual or definite group. Another is the distinction between a permanent or continuing command as distinguished from one that creates a duty that can be discharged by a single act or a limited course of conduct. Professor Gray said that “it seems a trifling matter on which to spend much thought.”

Nevertheless, the distinction between rule and order has a degree of significance in the application of requirements of the Administrative Procedure Act. The process of interpreting language by the consequences of its application has a question-begging flavor, but the contextual approach to the problem cannot be ignored, and it should not be overlooked that the distinction was drawn with a purpose. In other words, it is submitted that the principle of polarity suggests that “rule” and “order” are within the same “field-concept” and conceptualism should yield to judgment of consequences in their application.

Thus, when the order issued by an agency is not to contribute to a general rule by being cited as a precedent, it may for good cause be held confidential; since it does not serve the law-making function in this way, reasons otherwise present for publication are absent. On the other hand, when there is substantial need for the public at least to be able to inspect an agency directive, even though it is addressed to and served upon named persons, it may be proper to classify it as a rule and require the agency to


40. An excellent suggestion from legislative history is made by Ginnane: “Significantly, while the definitions of ‘rule’ and ‘order’ were being drastically rewritten, the principal operating Sections—4, 5, 7 and 8—remained largely untouched. This suggests that the definitions were adjusted in order to fit the operating provisions to the needs of various agency functions, and that the rationalization of the definitions lies in the impact of those provisions upon various types of such functions.” “Rule Making,” “Adjudication” and Exemptions under the Administrative Procedure Act, 95 U. of Pa. L. Rev. 621, 627 (1947). The court referred to the twilight zone intermediating “the poles of clarity” of rule making and adjudication, where “the doctrine of primary purpose controls.” Willapoint Oysters, Inc. v. Ewing, supra note 26 at 676, 683.
make it available for inspection in accordance with published rule. Where
the agency is required to use formal procedure, but the subject, though
not in such an area as foreign affairs, is appropriately considered under
the "institutional decision" approach it may follow that the determina-
tion is a rule. The propriety of having a responsible officer other than the
one who presided at the hearing recommend a decision, or of having the
agency issue a tentative decision, may influence classification of the deter-
mination as a rule rather than an order. Or, if the agency should fail to
invite submittals from interested persons and otherwise grant semi-formal
procedure, it is possible that the determination should be considered an
order, even though it does not involve a subject like public contracts.

The perhaps surprising addition of "particular applicability" as a
possible characteristic of a rule emphasizes the fluidity of the distinction
between rules and orders. It also recognizes, as does the listing of prices,
wages, corporate structures, and the like, how determinations nominally
made respecting some juristic person like a corporation or association are
effective as general decisions of "what is Prudentially and Politickly fit for
the good and preservation of the whole." The lack of precision in the
distinction between rule making and adjudication is at once minimized in
its effect and paralleled in its function by the various exemptions from
procedural requirements in the Act based on other factors. The responsi-
bilities and functions of administrative agencies are so diverse that a
uniform procedure for them is probably in the realm of unworkable theory.
It is not surprising that the compromise with such theory represented by
the Administrative Procedure Act resulted in a complicated scheme. But
contrasting generalizations, such as the words "rule" and "order" them-
selves symbolize, are flexible enough to relieve against difficulties created
by efforts to provide for uniformity in instances where the factual basis for
it is lacking.

42. Supra note 30.
41. See Davis, Administrative Law c. 8 (1951).
APPENDIX

Tabular Summary of Investigation and Determination Requirements

A. Investigation

The letters in the table refer to requirements summarized below. “Benefactory” adjudication means processing applications for initial licenses or claims for money or benefits.

<table>
<thead>
<tr>
<th>Section 2-A Agencies and Proceedings</th>
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A. Acts or demands must be authorized by law. Section 6.

B. Right to retain or obtain a copy or inspect the record—evidence compulsorily obtained. Section 6.

   1. Right to petition for issuance, amendment or repeal of a rule. Section 4d.


F. Right to demonstrate compliance with requirements—licensees. Section 9.

G. 1. Notice of hearing, manner of service, content. Section 4a.
   2. Notice of hearing to parties, content, pleading requirements, pre-hearing opportunity for consent adjustments. Section 5.

H. 1. Opportunity to participate by submission of written data, views, arguments—interested persons. Section 4b.
   2. Right to present case, defense, and rebuttal by oral as well as documentary evidence—parties. Section 7c.

I. Exclusion of irrelevant, immaterial, unduly repetitious evidence, and right to cross-examine—parties. Section 7c.
### B. Determination

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A. Notice and explanation of denial of request—interested persons. Section 6.

B. Reasonable dispatch in concluding any matter presented. Section 6.  
1. Reasonable dispatch in processing license applications. Section 9.

C. Finding of good cause and brief statement of reasons for dispensing with notice and public procedure in substantive rule making that has the effect of law. Section 4a.

D. Finding of good cause for foreshortening promulgation notice, in case of substantive rules having effect of law and neither granting exemption nor relieving of restriction. Section 4c. (*Applicable in Informal only when C applies.)

E. 1. A concise general statement of the basis and purpose of any rule adopted. Section 4b.

2. Right to submit proposed findings and conclusions, to take exception to preliminary decisions, to submit reasons in support of proposals and exceptions, and to have rulings thereon, and rulings on every material is one of law, fact, or discretion presented on the record, and reasons for such rulings. Section 8b.

F. 1. Consideration of all relevant matter submitted, but without being confined to consideration of such matter. Section 4b.

2. The reliable, probative, and substantial evidence in the whole record to be the exclusive basis for decision, the moving party having the burden of proof in absence of contrary provision. Section 7.

G. Regulated qualifications and prescribed powers of officers who preside at the reception of evidence. Section 7.

1. Restrictions upon delegating the reception of evidence; requirement, except in emergencies, of initial, recommended, or tentative decisions. Section 8a.

2. Restrictions upon delegating the reception of evidence; requirement
of initial or recommended decisions made by officers qualified to preside. Sections 5c and 8a.

3. Restrictions upon delegating the function of receiving evidence; requirement of initial or recommended decisions by presiding officers insulated from investigative or prosecuting functions, and from \textit{ex parte} consultation. Section 5c.