

LETTER OF SUBMITTAL

ATTORNEY GENERAL'S COMMITTEE
ON ADMINISTRATIVE PROCEDURE,
DEPARTMENT OF JUSTICE,
Washington, D. C., January 22, 1941.

DEAR MR. ATTORNEY GENERAL: Pursuant to the Attorney General's request of February 23, 1939, and March 15, 1939, the Attorney General's Committee on Administrative Procedure has investigated the existing administrative practices and procedures of the several executive departments, independent establishments, and commissions, and has formulated its conclusions and recommendations for improvement. The inquiry, which was conducted in cooperation with the several administrative agencies and with the assistance of many members of the bar and other persons dealing with the agencies, has been completed.

We submit herewith this Committee's report, which describes the origin and development of the administrative process, the basic necessities of organization and procedure, the methods of informal and formal adjudication, rule-making procedures, and judicial review. This report also contains a description of the defects found in the rule-making and adjudicatory aspects of the administrative process, and recommendations for the correction of these defects.

The Committee, in addition, submits herewith the draft of a bill embodying certain of its recommendations.

The report and the bill have been approved by this Committee. The approval of certain members of the Committee is subject to their statements of additional views and recommendations which are appended to the report.

Respectfully,

DEAN ACHESON, *Chairman*,
FRANCIS BIDDLE,
RALPH F. FUCHS,
LLOYD K. GARRISON,
D. LAWRENCE GRONER,
HENRY M. HART, Jr.,
CARL MCFARLAND,
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E. BLYTHE STASON,
ARTHUR T. VANDERBILT,
WALTER GELLHORN, *Director*.

The Honorable The ATTORNEY GENERAL,
Washington, D. C.

11-7-41

LETTER OF TRANSMITTAL

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., January 24, 1941.

The VICE PRESIDENT,
United States Senate.

MY DEAR MR. VICE PRESIDENT: I have the honor to submit herewith the final report of the Committee on Administrative Procedure which was appointed by the Attorney General, at the suggestion of the President, to investigate the need for procedural reform in various administrative tribunals and to suggest improvements therein.

This report is the result of a comprehensive study of administrative procedures in the various agencies of the Federal Government. It makes many recommendations for specific improvements in procedure to be made administratively by the individual agencies and is being transmitted to such agencies for their consideration.

It also contains many general recommendations which it suggests could appropriately be the subject of legislation and reduces these recommendations to specific terms in a draft bill to facilitate more detailed consideration. The proposed bill is found on pages 191-202. I shall be glad if it will receive favorable consideration.

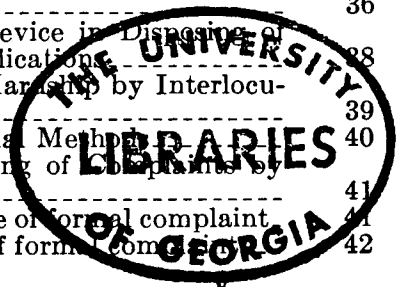
I am, therefore, making this report available at once both to the Congress and to the agencies affected by the recommendations.

Sincerely yours,

ROBERT H. JACKSON,
Attorney General.

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FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PRO- CEDURE

INTRODUCTION

On February 16, 1939, President Roosevelt, acting upon the earlier suggestion of former Attorney General Cummings, requested Attorney General Murphy to appoint a committee to investigate the "need for procedural reform in the field of administrative law." "A thorough and comprehensive study should be made of existing practices and procedures," wrote the President, "with a view to detecting any existing deficiencies and pointing the way to improvements." Accordingly on February 24, 1939, Mr. Murphy appointed "The Attorney General's Committee on Administrative Procedure" to make the study requested by the President and "to suggest improvements, if any are found advisable." In January 1940, Mr. Murphy was succeeded in office by Mr. Jackson, who directed that the inquiries already undertaken be carried forward vigorously to their conclusion.¹

At the outset it is essential to state clearly the boundaries of this Committee's work. The Committee has not concerned itself—it was not asked to concern itself—with the wisdom or efficacy of the legislation which is administered by the Federal agencies; nor with the wisdom or propriety of regulations promulgated by the agencies; nor with the correctness of their decisions in individual cases. It was not charged with the duty of studying the problems of selecting, training, and managing personnel in Government agencies. This latter task is being carried on by the President's Committee on Civil Service Improvement, of which Mr. Justice Stanley F. Reed is Chairman.

This Committee is concerned with the procedures and the procedural practices of the administrative agencies, and the general methods provided for judicial review of their decisions. Its task has been to make a thorough and comprehensive study of them to detect existing deficiencies and to point the way toward improvement.

For many years administrative procedure and practice have engaged the earnest attention not only of the bar but of private interests affected by administrative action. Administrative action has been vigorously criticized and defended. Much thoughtful study has been devoted to it and many suggestions have been made for its improvement. Broadly speaking both criticism and study have centered at three points: The exercise of the power to adjudicate in

¹ The letters and orders leading to the creation of this Committee and the appointment of its members, as well as other relevant documents prepared by this Committee, are set out in appendix A of this report, *infra*, pp. 251-260.

individual cases; the scope of review of administrative action by the courts; and the exercise of the delegated power to legislate by rules and regulations. There are many other matters which have received study, and some are discussed in this report, but these three are those to which public attention has chiefly been directed.

Running through the criticisms of administrative procedure is the desire to prevent either one of two major objectives from being furthered by the sacrifice of the other. It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which it has embodied in law, whether it be a unified transportation or communications system, or old-age security, or the prevention of unfair practices in competition or in labor relations. But everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others. Procedures must be judged by their contribution to the achievement of these ends.

But all would further agree that what has just been said is an oversimplification of the problem. There are competing interests to be recognized, which are clear enough in their extremes but soon reach a point of contact where their relations become obscured. A striking example of this lies in the field of rule-making: One can point out situations where obviously a regulation should not be made until all those to be regulated have been given an opportunity to present facts and arguments to those in authority for the purpose of enlightening or persuading them toward this or that choice among many alternatives. So much is plain. It is also plain that persons dealing with the Government have an interest—one might say a right—to prompt knowledge of the official understanding of the law, of the way in which it will be enforced, of the path by which it is intended to achieve the congressional purpose. Somewhere along the road these interests come together—one insisting upon formal proceedings before a rule is made; the other, upon more flexibility so that rules and interpretation may be quickly known and certainty achieved. The claims are not necessarily inconsistent, but they warn against hasty generalization that private interests gain by too broad restriction of rule-making procedure.

So the Committee was struck at the outset of its work with the fact that while much criticism is general in language, the thought behind it is specific. As a generality, it may not be sound, but as a specific criticism of a particular practice of a particular agency it may be justified. Accordingly it was decided, at the beginning of the Committee's work, that criticism and recommendation—both the Committee's own and those of others—arose from and must be tested by knowledge of the practices and procedures of each of the agencies which chiefly affect private interests. For it is from contact by the bar and the public with these agencies that both the criticisms and the problems of procedure arise.

In selecting the agencies for study the Committee accordingly confined itself to those agencies which in a substantial way affect private

interests by their power to make rules and regulations or by their power of adjudication in particular cases. Agencies like the Foreign Service Building Commission, the American Battle Monuments Commission, the Arlington Memorial Amphitheatre Commission, the Government Printing Office, the Commission of Fine Arts, the Coast and Geodetic Survey, the International Fisheries Commission, the Civilian Conservation Corps, the Postal Savings System, the Bureau of Standards, the Civil Service Commission, the Bureau of the Budget, the General Accounting Office, the Reconstruction Finance Corporation, the Federal Works Agency, the Alaska Railroad, and the Tennessee Valley Authority, however otherwise important, are not significant for possession of rule-making or adjudicatory powers.

The agencies which substantially affect persons outside the Government through the making of rules and regulations or the adjudication of rights are not so numerous as has commonly been supposed. These agencies to which the Committee's studies were confined are:

The Department of Agriculture (Agricultural Marketing Service; Commodity Exchange Administration; Bureau of Animal Industry; Bureau of Entomology and Plant Quarantine; Surplus Marketing Administration; and Sugar Division).

The Department of Commerce (Civil Aeronautics Administration; Bureau of Marine Inspection and Navigation; and Patent Office).

The Department of the Interior (Bituminous Coal Division; General Land Office; Grazing Service; Office of Indian Affairs; Bureau of Fisheries; and Bureau of Biological Survey).

The Department of Justice (Immigration and Naturalization Service).

The Department of Labor (Division of Public Contracts; Wage and Hour Division; and Children's Bureau).

The Post Office Department (fraud orders and second-class mailing privileges).

The Department of State (Passport Division, Visa Division, and the Division of Controls, having to do with the international traffic in arms and with the supervision and administration of neutrality laws).

The Department of the Treasury (Bureau of Internal Revenue [into which has been absorbed the Federal Alcohol Administration]; Processing Tax Board of Review; Bureau of the Comptroller of the Currency; and the Bureau of Customs).

The War Department (Office of the Chief of Engineers; the Selective Service Act was enacted after the completion of these studies).

The Commodity Exchange Commission.

The Federal Communications Commission.

The Federal Deposit Insurance Corporation.

The Federal Home Loan Bank Board.

The Federal Power Commission.

The Federal Reserve System.

The Federal Security Agency (Social Security Board, Public Health Service, and the Food and Drug Administration).

The Federal Trade Commission.

The Interstate Commerce Commission.

The National Labor Relations Board.
 The National Mediation Board.
 The National Railroad Adjustment Board.
 The Railroad Retirement Board.
 The Securities and Exchange Commission.
 The United States Board of Tax Appeals.
 The United States Employees' Compensation Commission (including the deputy commissioners).
 The United States Maritime Commission.
 The United States Tariff Commission.
 The Veterans' Administration.

The functions of these agencies are described in appendix B.

Having confined itself to the above list, the Committee assigned to a staff of lawyer-investigators the task of studying the procedure of these agencies.² The staff interviewed agency officials, attorneys who practice before these agencies, and members of the public affected by them. Staff members attended proceedings, read the records of cases, and examined administrative files to see how the proceedings are conducted. Upon the completion of these studies, the staff prepared for the Committee a description of each agency's procedures. As each study was made available to the appropriate agency for its consideration, the full Committee met for discussion of the study with agency officers. The Committee is pleased to note that in several cases these discussions stimulated agencies themselves toward the improvement of their own procedures. Some agencies, made conscious of procedural problems by the Committee's inquiries, have already substantially altered existing practices, either as a result of their own thinking or in accordance with informal suggestions of the Committee or its staff.

The reports of the staff, after final revision, were published in a series of 27 monographs and widely distributed. On June 26, 27, and 28 and on July 10, 11, and 12, 1940, the Committee held public hearings to receive opinions on administrative procedure and comment on the monographs. Notices of the hearings, as well as of the Committee's readiness to receive written communications, were widely published, and, in addition, over 100,000 copies of the notices were sent individually to persons whose presence on various lists indicated some measure of interest in the administrative problem.

² Staff reports were completed in connection with all the agencies above listed except the following, which are affected by special circumstances: Federal Home Loan Bank Board (preliminary investigation disclosed that problems involved so closely resembled those already studied elsewhere, notably in the Federal Reserve System, that further study was not essential); Immigration and Naturalization Service, Department of Justice (subsequent to this Committee's appointment, an exhaustive analysis of the Service, then a part of the Department of Labor, was completed by three investigators, one of them a member of this Committee; the results of their study were made available to the Committee); Department of State (a preliminary staff investigation adequately disclosed the nature of this Department's procedures; completion and publication of the staff report were deemed inadvisable because of the confidential character of the material); Public Health Service of the Federal Security Agency, whose important adjudicatory activities are related to immigration matters; Patent Office, Department of Commerce (the highly specialized character of the Patent Office and the insufficiency of the Committee's staff led first to postponement and then to abandonment of plans to study this agency); Department of Agriculture, Surplus Marketing Administration, Commodity Exchange Administration and Commission, Bureau of Entomology and Plant Quarantine, and Food and Drug Administration (prior to the Committee's creation, the Department of Agriculture had retained Ashley Sellers, Esquire, to make a critical study of its procedures; there were available to the Committee studies by Mr. Sellers or made under his direction, relating to work of the foregoing agencies; in order to avoid duplication of effort, the staff did not complete independent investigations of all the matters already touched upon in the Sellers' reports).

Careful consideration has been given to the testimony of the various persons who appeared at the public hearings, to the many communications received by the Committee, and to published commentaries on administrative practices. The Committee has sought to overlook nothing which might shed light on the subject of this study. Committee meetings, other than those in connection with the public hearings mentioned above, have been held on March 16, 1939, May 6, 1939, October 21, 1939, November 25-26, 1939, December 22-23, 1939, February 24-25, 1940, March 30, 1940, April 27, 1940, June 6-8, 1940, October 24-26, 1940, November 18-20, 1940, December 7-8, 1940, and January 3-4, 1941.

As a result of its public hearings, its meetings, and the studies made by its staff and embodied in the monographs, the Committee believes that certain general conclusions may fairly be reached in respect of the agencies which have been studied. Administrative adjudication has two more or less distinct phases. The first, described and discussed in chapter III of this report, is the phase which we have called "informal adjudication," where, in place of formal hearings, decisions are made after inspections, conferences, and negotiations. In most agencies, there is opportunity for these informal methods of considering issues which arise, and in all but a surprisingly small percentage of cases, these methods finally dispose of the matters at hand. The opportunity for informal disposition of cases is useful both to individuals outside the Government and to the Government itself and comprises an important and proper part of administrative justice.

If informal methods do not succeed in ending a matter, or if they have not been utilized at all, the second phase, which we have called "formal adjudication" is reached. This phase is marked by hearings in which the testimony is taken, subject to cross-examination, and embodied into a record. These relatively formal hearings are available in all but a handful of situations where special circumstances prevail. When formal hearings are held, the record is normally considered by officers of the agency and, after opportunity for oral argument before them, by the agency heads themselves. Thereafter, the agency's final decision, except in comparatively few situations where, again, special reasons obtain, is subject either by express statutory provision or by judicial construction, to complete judicial review on the law and more limited review on the facts. The Committee has discussed problems of organization and procedure related to formal adjudication in chapters IV and V of this report, and judicial review of such adjudication in chapter VI.

Chapter VII is devoted to the second branch of administrative activity—rule-making. In general, the Committee has been impressed with the fact that many agencies have employed rule-making processes going well beyond the minimum procedural requirements of the statutes. Hearings often are held although not demanded by law; and normally, where no hearings are held, there is extensive investigation as well as consultation and conference with interests which may be affected, before a rule is promulgated.

In the best existing practices are embodied the fundamentals of fair administration. In each of the phases—informal and formal adjudication, judicial review, and rule-making, as well as internal management which is discussed in part D of chapter I and general

information concerning the operation of an agency, which is considered in chapter II—there is, of course, room for improvement. In an effort to achieve these improvements, the Committee has made a number of both specific and general recommendations. The specific recommendations apply to particular agencies and appear in chapter IX of this report. The general recommendations appear and are discussed in chapters I to VIII, and are, in part, embodied in a bill drafted by the Committee and printed below as exhibit 1. Statements of additional views and recommendations of some of the Committee members are set out at the end of the report.

In general, the proposed bill has four major purposes. The first is to create an Office of Federal Administrative Procedure, composed of a director appointed by the President with the advice and consent of the Senate, a Justice of the Court of Appeals of the District of Columbia, to be designated by its Chief Justice, and the Director of the Administrative Office of the United States Courts, who is appointed by the United States Supreme Court. Assisted by representatives of the agencies and of the public, the Director of the Office is to study and coordinate administrative procedures, and in general through continuing studies and periodical recommendations, to achieve and stimulate practical improvements in a manner not possible through omnibus legislation.

Second, the Committee's proposed bill is intended to improve, without rigidifying, the rule-making process by emphasizing the importance of outside participation prior to the issuance of rules, and by permitting interested persons to petition for rules or for amendments. To assure general knowledge of a rule and to provide for timely objection by private interests, the bill proposes that in general no rule shall become effective until forty-five days after its publication. Further, an important recommendation in the bill is that full information concerning the structure, policies, procedures, and interpretations of an agency be published and report thereof made to Congress.

Third, the bill proposes to improve the process of formal adjudication by bringing about a more uniformly high quality of hearing officers. This is to be achieved by creating "hearing commissioners" with tenure, substantial salaries, full power to control and conduct hearings, and power to issue decisions of a considerable degree of finality. In order to assure that these hearing commissioners will be independent and of high calibre commensurate with their duties and powers, the bill proposes that they be appointed by the Office of Federal Administrative Procedure, after nomination by an agency and after the Office has investigated the nominee's qualifications. The bill proposes further that no hearing commissioner be removed before the expiration of his term except by the Office after hearing.

Fourth, in order to impart certainty to the administrative process, and to aid individual citizens seeking an authoritative statement of their rights and duties, the bill proposes to authorize agencies to issue binding declaratory rulings.

CHAPTER I

THE ORIGINS, DEVELOPMENT, AND CHARACTERISTICS OF THE ADMINISTRATIVE PROCESS

The administrative process in the Federal Government is not new. On the contrary, it is as old as the Government itself; and its growth has been virtually as steady as that of the Statutes at Large. The growth has been pragmatic. Congress has enacted statutes, and it has resorted to the administrative device in the framing of statutes, in the practical effort to meet particular needs. Because the administrative process has developed in this fashion, it invites comprehensive study with a view to coordination and improvement. But for the same reason such study must be carried on with understanding of the deep roots which the process has in American history and with recognition of the practical judgments of successive Congresses and Presidents, and of the people, which it embodies. At the outset, therefore, it is appropriate to call attention to the origins of existing administrative agencies, to the reasons for their coming into being, and to some of their fundamental characteristics which must be taken into account in the formulation of proposals for improvement.

A. GROWTH OF ADMINISTRATIVE AGENCIES

Many different, and sharply varying, figures of the number of Federal administrative agencies have been current in popular discussion. The particular total arrived at depends, of course, on the unit to be taken as constituting an "agency" as well as on the concept applied in designating a particular agency as "administrative." The Committee has regarded as the distinguishing feature of an "administrative" agency the power to determine, either by rule or by decision, private rights and obligations. If the largest possible units be taken as "agencies," there are in the Federal Government nine executive departments and eighteen independent agencies which possess significant administrative powers of this character. An accurate picture is not drawn, however, by regarding each executive department as constituting but a single agency. That term may as appropriately be applied to subdivisions of departments—variously termed "bureaus," "offices," "services," and the like—which have a substantial measure of independence in the departments' internal organization and in the conduct of their adjudicatory or rule-making activities. The Federal Security Agency, moreover, consists in substance of three agencies—the Social Security Board, the Food and Drug Administration, and the Public Health Service. By this mode of reckoning the total number of agencies may be considered to be increased from 27 to 51,

of which 22 are outside the regular executive departments and 29 are within.¹

Few agencies have been created at a stroke and have remained unchanged in organization and function. Some have been abolished; others have been merged; many have been transferred. Almost all have undergone changes of name and additions of function. In the account which follows of the origin of existing agencies, each agency has been placed in the period in which important powers of the kind which it now exercises were first authorized. Significant additions to, and alterations in, such powers and changes in name and organization are indicated in Appendix C.²

From 1789 to the close of the Civil War.—Of the 51 administrative agencies or subdivisions of agencies discussed below, no less than 11 trace their beginnings to statutes enacted prior to the close of the Civil War. The first session of the First Congress enacted 3 statutes conferring important administrative powers, 2 of which are antecedents of statutes now administered by the Bureau of Customs in the Treasury Department³ and the third of which initiated the long series of pension laws now in the charge of the Veterans' Administration.⁴ In the next year "An act to promote the progress of useful arts"⁵ became the progenitor of the many later laws administered by the Patent Office (Department of Commerce), relating to applications for patents and their issuance and recordation: A few years later, in 1796, "An act for establishing Trading Houses with Indian Tribes" made provision for trade with Indians "according to the rules and orders which the President shall prescribe"⁶: statutes dealing with such matters later became the concern of the Office of Indian Affairs which has existed in the Department of the Interior since the creation of the Department in 1849. Tax laws, of course, have been continuous since 1789; but the Bureau of Internal Revenue is perhaps best dated from the Act of July 1, 1862, which created

¹The United States Government Manual contains a complete list of the Federal agencies which, when the various divisions and bureaus of each executive department are included, total over 200. The large majority of these do not exercise functions of adjudication. The Code of Federal Regulations, in turn, list rules and regulations under 111 different departments, bureaus, divisions, and independent agencies. But, again, a very substantial number of these rules relate to office procedure and internal management, or to rules analogous to those which a business enterprise would post for its dealings. Thus the Government Manual includes the rules of lending agencies, the rules for admission and payment to hospitals in the District of Columbia, the general procedures of purely service groups, and the like.

As we have noted in the Introduction, *supra*, p. 3, important agencies such as the Tennessee Valley Authority, the Office of Education, the Federal Works Agency, the National Youth Administration and the Civil Conservation Corps are agencies which perform functions of great public significance, but they are here omitted because their importance lies in fields other than rule-making or adjudication. Further, it should be noted that the total number stated above may be varied within comparatively narrow limits by reasonable disagreement concerning the extent to which separate units in a department should be broken down, as well as concerning the importance and impact of their activities which may appear to be analogous to rule making and adjudication. Finally, some agencies, in the course of their business, may issue rules and, in a sense, "decide" controversies with or between individuals, but such functions may be deemed to be so incidental to their major executive functions, and of such limited importance to persons outside the Government, that their exclusion from computation is warranted.

²The general functions of the several administrative agencies are described in Appendix B, "Federal Administrative Activity Affecting Private Interests by Rule-Making or Adjudication," *infra*, pp. 261-275.

³Act of July 31, 1789, 1 Stat. 29 (1st Cong., 1st Sess.), Act of September 1, 1789, 1 Stat. 55 (1st Cong., 1st Sess.). See also the first tariff law passed at the same session, Act of July 4, 1789, 1 Stat. 24.

⁴Act of September 29, 1789, 1 Stat. 95 (1st Cong., 1st Sess.).

⁵Act of April 10, 1790, 1 Stat. 109 (1st Cong., 2d Sess.).

⁶Act of April 18, 1796, 1 Stat. 452 (4th Cong., 1st Sess.). See also the summary of the early history of the development of administrative rule-making, Part I-A of Chapter VII of this report, *infra*, pp. 97-98.

the office of Commissioner of Internal Revenue and constituted the beginning of the system of general internal revenue taxation which has continued with modifications to date. The six other agencies fairly to be dated from this period are the General Land Office established by the Act of April 1, 1812, in the Treasury Department and transferred to the Department of the Interior in 1849; the Bureau of Marine Inspection and Navigation (Department of Commerce), which exercises functions first conferred upon the Steamboat Inspection Service created in 1838; the Passport Division (Department of State); the Office of the Chief of Engineers (War Department); the Office of the Comptroller of the Currency, established by the National Bank Act of February 25, 1863; and the Office of the Third Assistant Postmaster General, which administers the laws relating to formal classification of mail matter first provided by the Act of March 3, 1863. In this period also came the first of the Federal independent commissions, the California Land Commission created in 1851⁷ by "An act to ascertain and settle the private land claims in the State of California"—an agency whose existence ended with the problems it solved.

From 1865 to the turn of the century.—Most spectacular of the administrative agencies created in the post civil-war period was, of course, the Interstate Commerce Commission established by the act of February 4, 1887. Five other agencies date from this period: The Office of the Solicitor in the Post Office Department, which administers the laws relating to mail frauds, dating from the act of June 8, 1872; the Bureau of Entomology and Plant Quarantine (Department of Agriculture), whose entomological work was well-established in the eighties; the Immigration and Naturalization Service, the first important functions of which trace back to the act of August 3, 1882; the Bureau of Animal Industry (Department of Agriculture) created by the act of May 29, 1884; and the Bureau of Fisheries, which dates for practical purposes from January 20, 1888, when a Commissioner of Fish and Fisheries was provided as a separate full-time officer.

From 1900 to the end of the World War.—Nine of the present Federal administrative agencies date from this period. The Bureau of Biological Survey in the Department of Agriculture was recognized as a permanent Bureau beginning with the appropriation act of 1905 and previously, as a Division, as far back as 1901. The Agricultural Marketing Service in the same department administers numerous statutes, of which important early ones were enacted in this period. The Public Health Service, now in the Federal Security Agency, was created in 1902, to administer quarantine statutes and regulations; in 1917, it was also given important powers to adjudicate medical questions in immigration cases. The present Food and Drug Administration goes back to the Pure Food and Drug Act of 1906. In 1913 the Federal Reserve System was established and a year later the Federal Trade Commission. In the year 1916 were created the United States Tariff Commission and the Shipping Board, predecessor of the present United States Maritime Commission.

⁷ Compare the earlier but less powerful Florida Land Commission created in 1822, whose work is discussed in Cummings and McFarland, *Federal Justice* (1937), 124 ff.

From 1918 to the beginning of the depression of 1929.—The post-war period, in addition to noteworthy extensions of the functions of existing agencies, witnessed the beginning of nine new agencies. The Federal Power Commission was established in 1920. The Grain Futures Act of 1922, was the beginning of what is now the Commodity Exchange Administration in the Department of Agriculture. The Immigration Act of 1924 resulted in the creation of the Visa Division in the Department of State. The Board of Tax Appeals was created by the revenue act of the same year. The Railway Labor Act of 1926 is the predecessor statute of the acts administered by both the National Mediation Board and the Railroad Adjustment Board; while from the Air Commerce Act of 1926 is derived what is now the Civil Aeronautics Administration in the Department of Commerce. The Radio Act of 1927 created the Federal Radio Commission, predecessor of the present Federal Communications Commission. Finally the Longshoremen's and Harbor Workers Compensation Act of 1927, and the District of Columbia Workmen's Compensation Act of 1928 set up deputy commissioners, acting under the general supervision of the United States Employees' Compensation Commission (which was itself created in 1916) to administer claims arising under these two acts.

From 1930 to 1940.—In the last decade belong 17 of the existing Federal administrative agencies. Listed in chronological order, they are:⁸

- Federal Home Loan Bank Board (1932).
- Surplus Marketing Administration (Department of Agriculture) (1933).
- Federal Deposit Insurance Corporation (1933).
- Securities and Exchange Commission (1934).
- Grazing Service (Department of the Interior) (1934).
- Social Security Board (1935).
- National Labor Relations Board (1935).
- Commodity Exchange Commission (1936).
- Public Contracts Division (Department of Labor) (1935).
- Processing Tax Board of Review (Treasury Department) (1936).⁹

⁸Of the 111 departments, bureaus, divisions, and independent agencies under whose names the Code of Federal Regulations lists rules and regulations (see note 1, *supra*), 19 (exclusive of those listed in the text) were created during this period. These 19 include the United States Employment Service (Federal Security Agency), the Petroleum Conservation Division (Interior), the Procurement Division (Treasury), the Farm Credit Administration (Agriculture), the Farm Security Administration (Agriculture), the Commodity Credit Corporation (Agriculture), the Reconstruction Finance Corporation (Federal Loan Agency), the Foreign-Trade Zones Board, the Committee for Reciprocity Information, the Bureau of Narcotics (Treasury), the Federal Housing Administration (Federal Loan Agency), the United States Housing Authority (Federal Works Agency), Indian Arts and Crafts Board (Interior), the National Archives, Public Works Administration (Federal Works Agency), the Civilian Conservation Corps (Federal Security Agency), Works Progress Administration (Federal Works Agency), the National Youth Administration (Federal Security Agency), and the Puerto Rico Reconstruction Administration (Interior). Of these 19, three (Procurement Division, Bureau of Narcotics and Farm Credit Administration) while created under these names during this period, trace their roots and activities to dates considerably prior to 1930. Of the remaining 16, it will be noted that only three (the Foreign-Trade Zones Board, the Petroleum Conservation Division and the Committee for Reciprocity Information) are to any degree "regulatory" in the sense that they may participate to a more or less limited extent in administrative adjudication or rule-making as defined in the text. The remaining 13 agencies created during this period and listed in the Code of Federal Regulations are not regulatory but are engaged solely in activities of a service, lending or similar character.

⁹This is a temporary agency created to adjudicate claims for refunds of processing taxes collected under the Agricultural Adjustment Act, which had been declared unconstitutional. The work of the Processing Tax Board of Review will be finished, and its life will come to an end, within a limited number of years.

Bituminous Coal Division (Department of the Interior) (1937).
 Railroad Retirement Board (1937).
 Sugar Division (Department of Agriculture) (1937).
 Wage and Hour Division (Department of Labor) (1938).¹⁰
 Division of Controls (Department of State) (1939).
 Selective Service Administration (Department of War) (1940).

B. REASONS FOR RESORT TO THE ADMINISTRATIVE PROCESS

What are the reasons why Congress thus resorted, continuously and with increasing frequency, to the administrative process as an instrument for the execution of the policies which it has enacted into law? No single or simple explanation can be given. The reasons are both varied and numerous, reflecting the variety and number of the agencies themselves. Discussion frequently requires classification in terms of the differing functions which the agencies perform.

1. *Advantages of administration as compared with executive action.*—One of the principal alternatives to the administrative process is the more extensive use of ordinary executive officers. This alternative appears in a distinctive field of governmental action, comprising those numerous functions which commonly are regarded, for historical or other reasons, as belonging peculiarly to the executive department. An instance is the issuance of passports, the task of the Passport Division in the Department of State. Another is the actual expenditure, as distinguished from the appropriation, of public funds. Congress itself cannot or should not issue passports or make payments of money. Nor have these been thought of as appropriate tasks for the courts. This being so, two alternatives, broadly speaking, are available. Congress can establish an administrative tribunal for the task. Or it can make use of executive officers, charged with acting substantially as officers of business enterprises act.

The difference between these alternatives is not easy of exact statement, yet it appears readily enough from a comparison of extremes. It can be illustrated by the contrast between the Works Progress Administration and the Veterans' Administration. Both agencies disburse benefits. The former, however, proceeds in fluid executive fashion under a statute so framed that it confers upon individuals no "rights" to relief in stated circumstances. It issues no regulations giving notice of how it will act or limiting its own discretion. The latter, administering law embodied in statute and regulations, adjudicates "rights" by a relatively formal hearing procedure. The former the Committee has not regarded as an "administrative" agency falling within its purview; the latter it has. In this and analogous situations weighty reasons may often lead Congress to frame statutes upon the executive, more broadly discretionary, pattern. But the alternative of administrative adjudication, where practicable, insures greater uniformity and impersonality of action. In this area

¹⁰ Certain rule-making powers under the Fair Labor Standards Act were vested in the Children's Bureau of the Department of Labor, which was established in 1912. Because the administrative activities, with which we are here concerned, of both the Wage and Hour Division and the Children's Bureau derive from this single integrated statute, they may be considered as one agency.

of Government the administrative process, far from being an encroachment upon the rule of law, is an extension of it.

A substantial number of existing administrative agencies represent an effort to discharge in a fashion analogous to the judicial a function which might have been discharged executively or even legislatively. Many of these, as we have noted in the preceding paragraph, are concerned with disbursing what, in legal theory, have been regarded as benefits. The Patent Office, so far as concerns the issuance of patents, is an early illustration. So also came to be the General Land Office. The United States Employees' Compensation Commission—so far as concerns payment of benefits to Federal employees—is an administrative agency doing what Congress formerly did by private acts. The Veterans' Administration illustrates increasing application of the adjudicatory method in the evolution of pension policy. Most recently, in the field of general social security, Congress in creating the Social Security Board and the Railroad Retirement Board directed action by adjudication as a matter of course; indeed, establishment of these agencies would scarcely have been possible, politically, on any other terms.

Extension of the rule of law through resort to the administrative process is by no means confined to the disbursing of benefits. In the assessment of taxes, for example, the development of an administrative procedure through the Bureau of Internal Revenue and the Board of Tax Appeals has operated in considerable measure to replace an executive procedure. The Public Contracts Division in the Department of Labor, in prescribing the wages which must be paid by employers contracting with the Government and enforcing the wage stipulations in these contracts, follows an administrative method of hearing and rule-making sharply at variance with the executive methods by which other than labor terms of public contracts are determined. One of the most striking examples is the most recent—the Selective Service Administration with its relatively elaborate administrative process.

2. *Constitutional limitations upon the powers of courts.*—Many of the functions just discussed might, as far as the Constitution is concerned, have been assigned directly to the courts. Congress, for example, might conceivably have empowered the Federal district courts to hear claims for social security benefits under the Social Security Act and, when a claim was approved, to enter a money judgment against the United States. For reasons of expediency or appropriateness Congress did not use this method. In other situations, however, no such choice under the Constitution is open to Congress. Federal courts created under Article III can be authorized only to decide "cases and controversies," to use the constitutional phrase; and from an early day the Supreme Court has regarded this restriction as an important one, to be scrupulously observed. "Cases and controversies," broadly speaking, are matters in which a court can determine with finality the rights of adverse parties by applying the law to the facts as found. Thus the whole field of rule-making (with the exception of rules of judicial procedure) is outside the constitutional competence of the courts, for rules do not determine the rights of specific litigants but, like statutes, are addressed to people generally. Again, the Supreme Court has held that the Federal courts cannot be empowered

to fix rates or prices, although they can review rate orders made by administrative agencies. Nor can they be authorized to issue broadcasting licenses, or to perform many other functions involving similarly wide discretion with respect to future conduct or arrangements. This insistence of the courts upon confining themselves to judicial, as distinguished from executive or legislative, functions has made inevitable the conferring of a wide range of powers, if the powers were to be conferred at all, upon some one of the executive departments or upon an independent agency.

3. *The trend toward preventive legislation.*—If administrative agencies did not exist in the Federal Government, Congress would be limited to a technique of legislation primarily designed to correct evils after they have arisen rather than to prevent them from arising. The criminal law, of course, operates in this after-the-event fashion. Congress declares a given act to be a crime. The mere declaration may act as a deterrent. But if it fails to do so the courts can only punish the wrong-doer; they cannot wipe out or make good the wrong. Traditional noncriminal, private law operates for the most part in the same after-the-event fashion. A statute or the common law gives one individual a right to go into court and sue another. This procedure is likely to be expensive. It is uncertain. At best, in the ordinary action for money damages, it leads only to compensation for the injury, which is seldom as satisfactory as not having been injured at all. To be sure, courts of equity administer a substantial measure of preventive justice by giving injunctions against threatened injuries. But it is necessary to prove the threat, and other limitations confine the scope of this mode of relief. The desire to work out a more effective and more flexible method of preventing unwanted things from happening accounts for the formation of many (although by no means all) Federal administrative agencies.

The rate-making powers of the Interstate Commerce Commission afford an apt illustration. The common law, from time immemorial, recognized a right of action against a common carrier on account of an unreasonable rate. The shipper or the passenger could pay the charge and then sue to recover the unreasonable excess. Preference for a mechanism whereby reasonable rates could be established in advance was a principal factor leading to the Commission's establishment. A more recent example is the Securities and Exchange Commission. Within rather severe limits, the common law recognized a right in a purchaser of securities to recover damages from the seller resulting from false statements made in effecting the sale. The importance of truth in securities led to a demand that honest statements, as well as fuller and more informative statements, be assured so far as possible in advance. If this end were to be accomplished, it could only be done by creating an administrative agency. A similar purpose, effected in a great variety of ways, underlies the formation of many other agencies. Thus, licensing is one of the most significant of all preventive devices. It would be possible to permit anyone to act as the pilot of a ship or a plane, and then to punish those whose incompetence led to accidents or to prohibit them from acting as pilots again. People have preferred, however, to attempt by a licensing method to assure competence in advance; and administrative agencies have had to be created to carry out the

licensing system. Licensing of radio broadcasters has, among other purposes, a comparable object of securing advance assurance of conformity to certain standards of broadcasting, as well as the object of security a ready means of dealing with departures from the standards. Licensing of any activity may be one of the most burdensome forms of regulation, since all who engage in the activity must be licensed in order that the persons who would probably act improperly may be controlled. But it is also one of the most effective, and it is particularly likely to be resorted to where the effort to effectuate policies is made with conviction.

4. *Limitations upon effective legislative action.*—Many of the functions of existing Federal administrative agencies obviously could not, in any view, be performed by Congress. Others, however, could. Thus, State legislatures once fixed rates by statute, although Congress seems never to have done so. Congress once disposed of all money claims against the United States by a private bill procedure; much, although not all, of this work has now been passed on to other agencies. Apart from instances of this character, the full range of rule-making activity of Federal administrative agencies represents work of a type which Congress could do if it had the time and deemed it wise to do it. Independently of the comparative advantages of administrative action, various inherent limitations upon its own functioning militate in these cases against action by Congress itself. The total time available is the most obvious. Time spent on details must be at the sacrifice of time spent on matters of broad public policy. Lack of specialized information is another; lack of a staff or a procedure adapted to acquiring it is a third. The complexity of the problems which have to be determined, even after basic policy has been settled, is the governing consideration. Even if Congress had the time and facilities to work out details, there would be constant danger of harmful rigidity if the result were crystallized in the form of a statute. Thus comes a steady pressure—which may, of course, be yielded to overreadily—to assign such tasks to the controlled discretion of some other agency.

5. *Limitations upon exclusively judicial enforcement.*—If Congress chooses to rely upon the courts instead of assuming the tasks itself, discretion as already pointed out, must not be so broad as to require the exercise of nonjudicial functions. Although this difficulty be avoided, however, other limitations operate. The 94 Federal district and territorial courts are structurally incapable of the same uniformity in the application of law as a single centralized agency. The problem of uniformity, and other problems as well, arise also with respect to the initiative of enforcement which, of course, the judges themselves cannot assume. Action must be brought either in the name of the Government or by private individuals. If brought by the Government, the 94 district and territorial attorneys will vary in their enforcement policy as will the courts in their decisions. If brought by private individuals, there is cast upon these individuals a burden which it is one of the prime purposes of administrative agencies to avoid. Certain agencies, it is essential to recognize, represent an effort, whether wise or unwise, to place upon the Government—rather than upon millions of people of often limited

resources—a large share of the responsibility for making effective policies which the people through their Government have declared.

6. *The advantages of continuity of attention and clearly allocated responsibility.*—In contrast to the limitations of other agencies, just discussed, are certain advantages which administrative agencies, properly organized, may have. The need of bringing to bear upon difficult social and economic questions the attention of those who have time and facilities to become and remain continuously informed about them was recognized very early. In 1787, for example, the General Assembly of the State of Vermont recited that—

Whereas it has been found by experience, that great advantage has been taken, by ferrymen demanding unreasonable prices for their services. And whereas this assembly cannot so well distinguish between the several rivers, and the several parts of said river, pond or lake, on account of distance, swiftness of water, number of travellers, etc. Therefore to prevent such impositions for the future:

Be it enacted by the general assembly of the State of Vermont, That the magistrates, selectmen, and constables, of the several towns where ferries are needed, shall meet before the first day of August annually, at a time and place by them agreed upon, and appoint proper persons and places for ferries; and further regulate the price thereof, according to the profits of such ferries, and price of labour; to be varied from time to time as occasion shall require * * *.¹¹

One hundred years later problems arising from the rapid extension of railroads were pressing and national. Neither the courts nor Congress could exercise adequate control over rates and practices. The task, accordingly, was assigned to an administrative agency, the Interstate Commerce Commission.¹² When in the course of time supervision over carrier operations was extended beyond rate control, the impossibility of direct legislative regulation and the need for an administrative system of control were merely emphasized.

The experience out of which came the Interstate Commerce Commission has been duplicated in other fields. Regulations of marine transportation and aviation presented problems not unlike those involved in regulation of the railroads and led to the Bureau of Marine Inspection and Navigation, the United States Maritime Commission, and the Civil Aeronautics Authority. Control over water power and natural gas resources, after a period of unsatisfactory experiments, was given to the Federal Power Commission. Protection of commerce in agricultural products led to supervision of the instrumentalities of that commerce by the Department of Agriculture administering the Packers and Stockyards Act, the Commodity Exchange Act, and other regulatory statutes. Banks and banking presented complex problems calling for special knowledge and continuing and detailed supervision, not possible for either Congress or the courts, and now performed by the Federal Reserve System, the Federal Deposit Insurance Corpora-

¹¹ Vermont Laws Revised, 1787 [Haswell], pp. 77-78. The statute provided further that any person or persons "demanding any greater sum for ferriage than shall be stated by the authority of aforesaid * * * shall * * * forfeit the sum of fifteen shillings * * *."

¹² "The relationships involved were numerous and complicated, for the general adjustment of which general legislative bodies, dealing with all types of matters and functioning under pressure of political considerations, possessed no special competence and even such legislative adjustments, necessarily of limited scope, as might be deemed sound and just when made, were bound to operate with a harmful rigidity, unresponsive to the constantly changing conditions which surround transportation activity." I. L. Sharfman, *The Interstate Commerce Commission: An Appraisal* (1937), 46 Yale L. J. 915, 949. Note also the statement of Chief Justice Taft that "the utter inability of Congress to give the time and attention indispensable to the exercise of these [legislative] powers in detail" forced it to confer upon the Interstate Commerce Commission the power to exercise them. 257 U. S. xxv, xxvi.

tion, the Federal Home Loan Bank Board, and the Comptroller of the Currency. For radio communication only a limited air-space is available. The science has been from the first a rapidly developing one, demanding technical knowledge and expertness. Here complete legislative regulation was scarcely practicable. So Congress provided the principles of regulation and gave responsibility for administration to the Federal Radio Commission and its successor, the Federal Communications Commission. The financial collapse of 1929 and the years following focused attention upon the investment field. Delicate problems requiring at once an intimate knowledge of financial machinery and elasticity of treatment led Congress to delegate regulatory powers to the Securities and Exchange Commission. So, too, the administrative machinery of this Commission was availed of to perform the complex task of supervising and regulating the structure, finances, and management practices of public utilities.

Each of the agencies just mentioned specializes in the regulation of a single industry or phase of industry—railroad transportation, or shipping, or investment, or banking. But Congress has also employed the administrative process to perform specialized and continuing regulation not of particular industries but of activities cutting across many industries. For example, Congress, believing it necessary to supervise and check competitive practices which tended toward monopoly and restraint of trade, in 1914 created the Federal Trade Commission to prevent unfair methods of competition. In 1935 the National Labor Relations Board was established to prevent unfair labor practices. Both objectives were declared by Congress to embody a national policy. In the case of these two agencies, the factor of technical expertness plays a less important part than in the others; but the advantages of continuous attention and a clearly allocated responsibility are substantially the same. If the initiative for enforcement were to be left to the injured persons immediately concerned, they might often be too weak or timid or discouraged to bring the necessary proceedings, in which case, so Congress thought, the public interest would suffer, since the public interest called for the elimination of the particular practices.

The administration of the Walsh-Healey Act affords a similar example. This statute is enforced primarily by the Department of Labor, through its Division of Public Contracts. The statute provides in part that certain contractors with the Government must pay their employees not less than prescribed wages. If lower wages are in fact paid, a proceeding may be brought before the Division of Public Contracts by agents of the Department to recover for the employees the resulting deficiencies. The problems presented for determination in cases of this type do not require an expert tribunal for their proper solution. On the contrary, the issues involved resemble those which often appear in the courts. But the individual cases involve very small sums, and though the aggregate alleged to be due to all the workers may be substantial, each man's claim will normally be so small and his confidence in the security of his job so tenuous, that litigation will be out of the question for him. Therefore if the Act is to be enforced at all, official means of investigation and specialized procedure for the collection of numerous small claims must be provided.

The enforcement of the disciplinary provisions of the marine laws presents a problem not of acting for weak claimants in the public interest, but of acting against offenders in the wisest and most effective way possible. Meting out punishment for such offenses as intoxication, disorderly conduct, and the like is, of course, a function capable of execution by any magistrate, and technical complexities are absent. Yet discipline on vessels presents a special problem closely related to a whole scheme of regulation, inspection, and safety of the seas and waters. The relatively insignificant issue of whether a seaman was intoxicated is part of a much larger pattern over which there must be special regulation and to which special attention must be paid, and thus one finds the administrative process utilized to determine issues which elsewhere have been reserved for the judiciary.

It is thus apparent that varied types of subject matters, from rate control of railroad carriers to collection of employees' wages and disciplining of seamen, have been entrusted by Congress to administrative agencies at least in part for similar reasons: in order to assure continuous attention to and clearly allocated responsibility for the effectuation of legislative policies.

7. *The need for organization to dispose of volume of business and to provide the necessary records.*—The volume of cases arising under certain laws is very great. The Veterans' Administration, the Railroad Retirement Board, the Social Security Board, and the United States Employees' Compensation Commission, for example, each adjudicates annually thousands of comparatively small claims. The Veterans' Administration alone makes determinations in about 100,000 cases each year; the Social Security Board, it is estimated, will in the year 1940 have disposed of eight or nine times that number. One need not labor the point that the present judicial structure would scarcely be equipped to handle this multitude of cases.¹³

These same agencies illustrate another and related reason for employing the administrative process. This is the need of specialized staffs and machinery to keep and make available the records upon which judgment must be based. Before an agency such as the Social Security Board can disburse annually millions of dollars to hundred of thousands of eligible claimants, a vast clerical machinery must be created. Complex records must be kept, classified, and made available. In the Railroad Retirement Board or the Veterans' Administration it may be necessary to call upon medical experts and occupational specialists. In the registration of securities the Securities and Exchange Commission must be organized to collect and collate huge masses of data available for immediate reference by clerks, accountants, analysts, oil and gas experts, engineers and the like. In part, also, the creation of these agencies with their staffs and accumulation of data is due to recognition by Congress that time is essential in the conduct of many business affairs. In the flotation of securities or the publication of a schedule of rates, it is important that procedures and staffs be available to investigate speedily the propriety of the proposed transaction, at least to the extent of suspending it

¹³ The judicial statistics contained in the Annual Report of the Attorney General for the fiscal year ended June 30, 1939, show that in that year the combined total criminal and civil (other than bankruptcy) cases determined in all Federal district courts came to 73,448.

for further study in formal procedure if serious question of public injury is raised.

C. SOME CHARACTERISTICS OF ADMINISTRATIVE AGENCIES

Certain characteristics of administrative agencies are of such fundamental importance in relation to the problems of their organization and procedure as to require specially emphatic statement.

1. *Size.*—Most administrative agencies are, of necessity, large organizations. For example, the Interstate Commerce Commission has a personnel of more than 2,500; the Securities and Exchange Commission, more than 1,200; the Social Security Board has some 9,000 employees in its Bureau of Old-Age and Survivors Insurance alone; the National Labor Relations Board and the Federal Power Commission each has a staff of more than 800; the Federal Communications Commission, more than 600; the Railroad Retirement Board, more than 2,500; and the Veterans' Administration, more than 36,000, of whom nearly 2,000 are engaged in adjudicating claims of various sorts.

The size of these staffs reflects both the nation-wide jurisdiction of the agencies and the character of the work they are called upon to perform. Each is charged by Congress with the work of continuing supervision of some field of activity throughout all the forty-eight States.

The Interstate Commerce Commission receives, analyzes, and files thousands of rate schedules, inspects thousands of locomotives and safety appliances, receives thousands of applications to be allowed to do, or to be excused from doing various things, receives complaints, conducts investigations. The work of the Social Security Board is even greater. It keeps literally millions of records, and will soon dispose of eight or nine hundred thousand claims a year. The Grain Standards Administration supervises over a million gradings of grain a year. These are perhaps striking illustrations, but they are not unrepresentative of the administrative field.¹⁴ Whether an agency is establishing the records or making the decisions upon which claims will be paid, or regulating an industry, or enforcing standards of conduct which cut across industrial divisions, it is made up of a large number of people performing a variety of tasks which have to be coordinated, supervised, and directed toward fulfilling the functions prescribed by Congress. The personnel may include clerks to receive, analyze, and file reports and other material; accountants to devise and supervise the keeping of accounts by those whom the agency regulates; engineers skilled in radio, or in land, sea, or air transportation; chemists; biologists; economists to interpret and appraise the effect of a given wage rate or other factor upon any business or industry; lawyers and investigators to secure observance of the law.

Out of this solid fact of size, in terms of personnel, flow many of the problems of internal organization and delegation of authority which are discussed in Part D of this chapter. Out of the fact of size, in terms of the number of cases handled, flow the problems dis-

¹⁴ See Appendix F, "The Volume of Business of Administrative Agencies," *infra*, pp. 314-326, for a statistical presentation of the agencies' work load.

cussed in chapter III of providing informal means of settlement for the great bulk of relatively uncontested matters.

2. *Specialization.*—Administrative agencies specialize in particular tasks and they include specialists on their staffs. The staffs may become such either by experience in the specialized work of the agency or by prior technical or professional training. In many cases a principal reason for establishing an agency has been the need to bring to bear upon particular problems technical or professional skills. A public health agency, for example, must be staffed with people who understand diseases, the Federal Communications Commission with technicians who comprehend the engineering and economic aspects of telegraph, telephone, and radio. In other instances recurring experience with the work of the agency, or with a particular phase of its work may develop specialists—such as are found, for instance, in the Veterans' Administration—who have an insight and judgment which a beginner would lack. In either event a central problem of organization is how best to utilize these skills of training and experience. This does not mean that the heads of the agencies should necessarily be specialists. The problem is rather how to bring into play the technical resources of the agency staff so as to reduce the ultimate points of contention, if such there be, to such compass and form that they can be presented upon an understandable record for decision by the heads of the agency and for review by the courts.

Specialization has further consequences in procedure. Because the members of an agency or of its staff—like persons of similar experience in private affairs—approach problems of administration with a considerable background of knowledge and experience and with the equipment for investigation, they can accomplish much of the work of the agency without the necessity of informing themselves by the testimonial process. It is in part for this reason that so many questions, as we point out in chapter III, can be disposed of by informal methods with the consent of the private interests involved. Only when differences do not yield to adjustment or when other considerations, mentioned in chapter IV, make formal proceedings desirable need there be resort to the procedures of formal testimony, more familiar in judicial and legislative processes. Even if there is formal procedure, the characteristics of specialization may, as is discussed in chapter V, have an impact upon procedures for formal adjudication.

The same effects are felt in the procedures antecedent to rule-making. Here again the function of the formal hearing, in many instances, differs from its function in legislative and judicial methods. In the latter it is the instrument for gathering information. In many administrative rule-making situations, as we discuss in chapter VII, the information may be and is obtained by direct investigation and the hearing is most useful as a method of subjecting it to the criticism of private interests affected and of obtaining the views of these interests upon the desirability of various methods of achieving all or some of the objects sought.

3. *Responsibility for results.*—An administrative agency is usually charged by Congress with accomplishing or attempting to accomplish

some end specified in the statute. It may be to see that benefits of some sort are received by persons with whom the agency deals, or that transportation systems or communications systems, or various other business activities are conducted either so as to comply with certain negative requirements or so as to achieve positive results. Taken together, the various Federal administrative agencies have the responsibility for making good to the people of the country a major part of the gains of a hundred and fifty years of democratic government. This means that the agencies cannot take a wholly passive attitude toward the issues which come before them. Out of this fact flow perhaps the most difficult of the problems relating to the administrative process. Administrative agencies constitute a large measure of the motive power of Government; a problem of motive power is a problem also of brakes; but the necessity of both must be faced frankly when either is in question.

4. *Variety of administrative duties.*—No single fact is more striking in a review of existing Federal administrative agencies than the variety of the duties which are entrusted to them to perform. This is true of many single agencies taken alone; it is true, above all, of the agencies taken as a group. This central and inescapable fact makes generalization in description difficult. It makes even more difficult generalization in prescription. For variety in functions means variety in the circumstances and conditions under which the activities of the various agencies impinge upon private individuals. A procedure which would be for the protection of the individual in one situation may be clearly to his injury in another. A set of standards evolved to meet one problem may fail wholly to meet another. One need look no further than a single agency—the Interstate Commerce Commission—to be impressed by the basic necessity of differing procedures for different types of activities, and by the varying procedural patterns which the Commission has evolved to meet this necessity.

The Committee has approached its task with acute awareness of this central difficulty. And as it ventured upon tentative generalizations it has had repeated occasion to be reminded of it. The Committee has throughout, however, regarded the difficulty not as a barrier but as a warning. The recommendations of this report include major proposals for generalized action, at least at the stage of formal adjudicatory hearings. The Committee has confidence that further progress in the direction of uniformity of principle and practice is not only desirable but possible. In considering either the present proposals or suggestions which may grow out of future study, however, awareness of this difficulty remains important, and persistent testing in specific applications is imperative.

D. A CONSEQUENCE OF THE CHARACTERISTICS OF ADMINISTRATIVE AGENCIES—THE NEED FOR DELEGATION

Four of the characteristics of administrative agencies, then, are their size, their specialization, their responsibility for results, and their variety of duties. Each of these characteristics to a greater or less degree, in turn, contributes to, and necessitates, a highly

important characteristic of administrative procedure: delegation. The large staff of an agency, the many duties which the agency is called upon to perform, the necessity of harmonizing its affirmative responsibility for results with its equally important duty of deciding correctly as between the parties in each particular case, and the practical need for the fullest possible utilization of its special skills and expertness—each of these calls for internal organization which involves an allocation of functions among the members and staff of the agency.

For it becomes obvious at once that the major work of the heads of an agency is normally supervision and direction. They cannot themselves be specialists in all phases of the work, but specialists must be immediately available to them. They cannot themselves receive material which must be filed and analyse it. They cannot, and they should not, conduct investigations, determine in every instance whether or not action is required, hear controversies, and at the same time make all the decisions. Administrative procedures must be founded upon the reality that many persons in the agency other than the heads must do the bulk of this work. When agency heads permit themselves to be overwhelmed by detail, they rob themselves of time essential for their most important tasks.

So it will be seen that the very characteristics of administrative agencies necessitate that delegation of function and authority be a predominant feature of their organization and procedure.

1. *Necessity for delegating internal management.*—Delegation must begin with internal management. The Committee has been impressed by the frequent reluctance of high officers, charged with serious policy-making functions, to relinquish control over the most picayune phases of personnel and business management. No reason appears, for example, why the members of one agency must approve, as they do, the travel expense vouchers of its employees, or why the members of another must give, as they do, their personal attention to the assignment of parking spaces in the basement of their building, or why the members of a third must themselves pass upon the selection of every employee whose compensation is to exceed \$2,600 per annum. Intelligent conservation of an agency's resources demands the sloughing off of many of these routine tasks by assignment of the work of internal management to an executive officer. It is plainly feasible for a board or commission to designate one or more of its members as a committee to whom the personnel director will report. The Interstate Commerce Commission has long followed such a plan, with marked success. Eight of the eleven commissioners are relieved entirely of the duties of personnel management. One commissioner has stated that the Commission could not continue to operate if all his colleagues were burdened with every question of employment, promotions, and salary increases of more than 2,500 employees.

2. *Necessity for delegation of authority to dispose of routine matters.*—Not only internal management, but nearly every phase of the typical agency's activity demands delegation of authority. In many agencies there are large numbers of more or less formal applications for extension of time or for waiver of requirements, which involve no decision of principle, but merely ascertainment that the facts are as represented. All of these matters should be entrusted to responsible

executive officers. For example, in agencies which regulate rates, such as the Federal Power Commission, the Federal Communications Commission, and the Civil Aeronautics Board, it is not essential that each of the agency heads should pass upon routine matters connected with the filing of tariffs such as the waiving of notices. This power should be delegated, and the necessary supervision can adequately be performed by one commissioner instead of all. The Interstate Commerce Commission has delegated this particular power to a single commissioner, and he in turn has in large measure entrusted it to a board of employees. The orders have been issued in the name of the commissioner, but in fact the power has been largely exercised by employees under his general direction, the policies have been determined by the commissioner, and only the novel or difficult cases have been referred to him. Apparently none of the other rate-making agencies has experimented with an equally extensive delegation of this power.

3. *Necessity of delegating authority to dispose of matters informally, or to initiate formal proceedings.*—Authority to decide the next step to be taken after investigation of a matter may properly, and should more often, be delegated. Here it must be understood that delegation may be a matter of degree. It is not true that authority must be delegated completely or not at all. In the collection of taxes, after a return has been audited the question may arise whether to accept the taxpayer's position, or to make an adjustment by agreement, or to assert a deficiency involving formal proceedings. The Commissioner of Internal Revenue cannot decide all these questions. Many, indeed most, are decided by responsible employees under adequate supervision. Only important or novel questions go to the Commissioner and few indeed to the Secretary of the Treasury.

But this method is not universally adopted. The Federal Trade Commission, for instance, in a year's time considers some 2,000 separate cases which have been fully investigated by its Chief Examiner's Division or by its Radio and Periodical Division.¹⁵ The question before the Commission is merely what further action shall be taken—shall the matter be dropped? Shall an effort be made to secure an agreement that the conduct will not be continued? Shall a formal complaint be issued? In every instance the matter comes before the Commission after careful review by one of its most important officials; even in those cases in which its several subordinates have concurred in recommending that no further action be taken, personal consideration of one commissioner and some consideration by all is nevertheless accorded.

To conserve the time and energy of the agency heads for their primary tasks,¹⁶ matters such as those just mentioned should be delegated. The Committee believes that agencies which have not done so should vest one or more ranking and responsible agency officers with the power, among other things, to issue complaints or otherwise

¹⁵ See Appendix D, "Institution of Formal Administrative Disciplinary Action for Violation of Statutes or Regulations," *infra*, pp. 286-306, for a description of the investigations which precede issuance of Federal Trade Commission complaints.

¹⁶ Compare the statement of Commissioner Joseph B. Eastman of the Interstate Commerce Commission before a committee of the House of Representatives in 1933: "Sound principles of organization demand that those at the top be able to concentrate their attention upon the larger and more important questions of policy and practice, and that their time be freed, so far as possible, from the consideration of the smaller and less important matters of detail." Hearing on H. R. 7432, before House Committee on Interstate and Foreign Commerce (72d Cong., 2d Sess.) at p. 7.

to initiate action. Thus, the National Labor Relations Board permits each of its Regional Directors to issue complaints alleging unfair labor practices after receiving the consent of the Secretary and under the general supervision of the Board. So, too, the Federal Trade Commission should vest in its Chief Examiner and in its Director of the Radio and Periodical Division power to institute formal action within their respective spheres.

The delegation should, of course, be kept within proper bounds. The Committee recognizes not only that public initiation of action may sometimes be crucial insofar as the affected individual is concerned, but also that the choice of cases in which to proceed may constitute the very essence of policy making and development of the law in the field. But these elements can be recognized, and their importance preserved, without a rigid refusal of the agency heads to relax their hold upon all phases of proceedings. Cases of difficulty or novelty should continue to have the attention of the agency heads. But where the matter falls into an established pattern, and where the agency's policies have become crystallized so that little question arises concerning whether a complaint should or should not be issued, the agency heads should be relieved of the duty of making the decision to proceed or not to proceed in each case.

Supervision and control by the agency heads should be retained by three methods: (1) stating for the guidance of agency officials those policies which have been crystallized, and which the responsible officers need only apply to the particular case at hand; (2) consideration by the agency heads of cases for which no such policies have been crystallized or in which application of the policies is difficult; and (3) requirement that the officers in whom is vested the power to issue, or refuse to issue, a complaint, submit a periodic report (either weekly or daily) to the agency heads. If these three devices are utilized, the Committee believes that the agency heads will be able to guide the important work without devoting unnecessary time and attention to routine matters.

Similar delegation to high officers in the agency is perhaps even more desirable in respect of settlements and other negotiations looking toward the disposition of cases without hearings. As the Committee will discuss more fully in chapter III of this report, the bulk of administrative action is taken informally. Settlements and agreements close out the great majority of cases before hearing. The flexible and expeditious adjustment of controversies between the Government and individual citizens is a major objective of the administrative process. Yet the Committee has noted a tendency on the part of some agencies to hinder such adjustment by withholding from all but the agency heads power effectively to settle and negotiate cases. An individual seeking a definitive statement of an agency's position and exploring the possibilities of amicable adjustment may be frustrated because the subordinates with whom he deals are forced to disclaim responsibility or authority. Delays and red tape result, and settlement is discouraged.

The Committee believes that this situation, again, will be considerably relieved, and the agency heads themselves will be able to turn their energies to more difficult problems, if there is delegation of power to responsible officers to conduct and approve settlements. And, as

in the case of issuance of complaints, effective supervision by the agency heads can be maintained, as many an agency has demonstrated, by requiring that difficult and novel cases be submitted to them, and that, in any event, periodic reports to the agency heads be prepared by the officers.

Closely related to the problem of delegation is that of decentralization. Some agencies have been decentralized to a large extent: The administration of the Longshoremen's and Harbor Workers' Compensation Act by the United States Employees' Compensation Commission, and of the Unemployment Insurance Act by the Railroad Retirement Board, are examples. Decentralization avoids delay and enables the individual citizen to deal with responsible persons in his home locality without the expense of traveling to Washington. The Securities and Exchange Commission has recently made significant experiments in this direction in respect of its registration procedures; so has the Bureau of Internal Revenue. Important factors may militate against complete decentralization: One is the need for uniformity, more important in some agencies than in others; a second is the novelty of an agency's work; a third may be a limited staff. But the Committee is convinced that the convenience of the public may be served and administration improved if those agencies which are in a position to do so will vest in field officers greater powers to deal with the persons whom they regulate. Proper supervision may be retained by careful selection of personnel, by spot checks of field work, by requiring the transmission of files to Washington, and by the preparation of periodic summary reports to the agency heads.

4. *Necessity for Delegation of Authority and Function in Formal Proceedings.*—In very few agencies can the heads of the agency sit, individually or together, to hear the testimony of witnesses in formal proceedings. The press of their many duties is too great. As a result, the practice, common in equity courts, of appointing a special master to hear the evidence and report his findings and conclusions has been widely adopted in administrative procedure.

The need for improving and regularizing this practice and its attendant procedures is great. Chapter IV of this report is devoted to this subject and to the Committee's recommendations. It is mentioned here in order to stress the fact that the problem is merely one of the many which arise from the nature of the tasks which administrative agencies must perform and from the necessities of delegation.

CHAPTER II

ADMINISTRATIVE INFORMATION

An important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure. The staff of the Committee has had to labor industriously for a year or more in order to describe the procedures of a selected group of agencies, without attempting to analyze the substantive principles upon which the agencies act. There are comparatively few works on "administrative law," and even fewer which deal with administrative procedure as such. The publications of the agencies themselves are in a number of instances found to be out of date or of too generalized a character. To all but a few specialists, such a situation leads to a feeling of frustration. Laymen and lawyers alike, accustomed to the traditional processes of legislation and adjudication, are baffled by a lack of published information to which they can turn when confronted with an administrative problem.

Such a state of affairs will at least partially explain a number of types of criticisms of the administrative process. Where necessary information must be secured through oral discussion or inquiry, it is natural that parties should complain of "a government of men." Where public regulation is not adequately expressed in rules, complaints regarding "unrestrained delegation of legislative authority" are aggravated. Where the process of decision is not clearly outlined, charges of "star-chamber proceedings" may be anticipated. Where the basic outlines of a fair hearing are not affirmatively set forth in procedural rules, parties are less likely to feel assured that opportunity for such a hearing is afforded. Much has been done in recent years to alleviate these difficulties. But much more can readily be done by the agencies themselves.

A. RULES, REGULATIONS, AND STATEMENTS

After thorough studies had been undertaken in 1933 at the direction of the President, provision was made, for the first time in the history of the United States, for the publication of administrative regulations in the manner of other laws.¹ As a result the Federal Register now provides for the daily publication of new "rules, regulations, and orders" having "general applicability and legal effect."² The Code of Federal Regulations is a codification of the same documents. While this important step made it possible for the citizens to discover what rules, if any, had been made, it did not provide affirmatively for the making of needed types of rules or for the

¹ See Code of Federal Regulations, v. 1, pp. iv ff.

² 1 Fed. Reg. 2269 *et seq.*

issuance of other forms of information. Rules and regulations are not the only materials of administrative law. There are, in addition, the statutes, which are often general in their substantive provisions and sketchy in their procedural directions; the decisions of each agency, only some of which are accompanied by reasoned opinions and only some of which are published; the agencies' reports to Congress, which contain a variety of useful information but which are not always readily available to the public at large; the interpretative rulings made by the agencies or their general counsel, which frequently are not published; press releases, notices, speeches, and other statements of policy which are easily lost and obviously cannot be distributed to or kept by all who might some day have use for them; and the decisions of the courts upon review, enforcement, or restraint of administrative action, which are few in number and deal for the most part either with purely formal matters or with the details of a particular case. All these types of information should be made available, in orderly and readily accessible form, to the public. To bring such scattered materials together, to know which are superseded, and to fill in missing chapters is a task that only the agency involved can perform.

A primary legislative need, therefore, is a definite recognition, first, of the various kinds or forms of information which ought to be available and, second, of the authority and duty of agencies to issue such information.³ Rules and regulations are of many kinds, each of which should be recognized in any attempt to deal with the problem. Moreover, instead of diverse methods of issuing information, as far as practicable all standard information regarding a given agency should be brought together. Without attempting to exhaust the subject, it is possible to list at least seven forms of vital administrative information:

1. *Agency organization*.—Few Federal agencies issue comprehensive or usable statements of their own internal organization—their principal offices, officers, and agents, their divisions and subdivisions; or their duties, functions, authority, and places of business. The United States Government Manual is not sufficiently detailed to fill this gap. Yet without such information, simply compiled and readily at hand, the individual is met at the threshold by the troublesome problem of discovering whom to see or where to go—a problem sometimes difficult to solve without irksome correspondence or unproductive personal consultations.

2. *Statements of general policy*.—Most agencies develop approaches to particular types of problems, which, as they become established, are generally determinative of decisions. Even when their reflection in the actual determinations of an agency has lifted them to the stature of “principles of decision,” they are rarely published as rules or regulations, though sometimes they are noted in annual reports or speeches or press releases, as well as in the opinions disposing of particular

³ It may not be wholly amiss to add here the thought that no agency can know in advance the identity of every affected interest or every attorney who may at some time be involved in its proceedings. Hence, those who may be interested must themselves bear the major responsibility for securing the information an agency may make available. It is no doubt true even today that accessible documentary material is often not consulted because of failure to seek it from one or another of the agencies. Many law libraries, both those of professional organizations and those connected with educational or public institutions, neglect to index or to maintain current files of administrative materials which may be obtained from the agencies at little or no cost.

controversies. As soon as the "policies" of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form.⁴

3. *Interpretations.*—Most agencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language. They are not binding upon those affected, for, if there is disagreement with the agency's view, the question may be presented for determination by a court. But the agency's interpretations are in any event of considerable importance; customarily they are accepted as determinative by the public at large, and even if they are challenged in judicial proceedings, the courts will be influenced though not concluded by the administrative opinion. An agency's interpretations may take the form of "interpretative rules." More often they are made as a consequence of individual requests for rulings upon particular questions; but as "rulings" they are often scattered and not easily accessible.

4. *Substantive regulations.*—Many statutes contain provisions which become fully operative only after exercise of an agency's rule-making function. Sometimes the enjoyment of a privilege is made conditional upon regulations, as, for example, where Congress permits the importation of an article "upon such rules and regulations as the Secretary of the Treasury may prescribe," or allows utilization of public forests in accord with regulations to be laid down by administrative officers. Sometimes the extent of an affirmative duty is to be fixed by regulations, as, for example, where employers are commanded to pay wages not less than those prescribed in administrative regulations. Sometimes a prohibition is made precise by regulations, as, for example, where the sale of dangerous drugs is forbidden and the determination of what drugs are dangerous is left to administrative rules. In such instances the striking characteristic of the legislation is that it attaches sanctions to compel observance of the regulations, by imposing penalties upon or withholding benefits from those who disregard their terms. Thus these substantive regulations have many of the attributes of statutes themselves and are well described as subordinate legislation.

5. *Practice and procedure.*—Most agencies issue in some form directions as to practice and procedure, but generally these are severely limited to forms of application and the bare requirements of practice. They rarely outline the whole process or indicate alternative procedures. They tend to touch upon the high spots of formality without disclosing the essential patterns of the procedures utilized by a given agency in a given type of case.

6. *Forms.*—A most useful type of information is found in forms for complaints, applications, reports, and the like. Most agencies issue these in connection with their rules of practice. They are helpful to the individual because they simplify his task and make it

⁴ It remains true, however, as was observed in *Chicago, Burlington and Quincy Ry. Co. v. Babcock*, 204 U. S. 585, 598 (1907), that many administrative judgments "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."

unnecessary for him to speculate concerning the desired contents of various official papers.

7. *Instructions.*—Some agencies operate wholly, or for the most part, through examinations, statements, or reports. In such agencies, instructions for such examinations, statements, or reports are the important form of administrative information and are, to all intents and purposes, an essential type of rule-making.

These various sources of administrative information should be recognized. As far as practicable, agencies should be authorized and directed to make and issue, from time to time, such of them as are appropriate to the agency's functions. In compiling information of this sort, the private individual would be materially helped if each agency would take care that its information is constantly improved in form and completeness; kept current as far as possible; promptly published in the Federal Register as well as in pamphlet form; separated as to (a) agency organization, (b) procedure, and (c) substance, interpretation, or policy; and distinguished from statutory provisions with which it may be published.

Omissions in the publication of regulations having statutory effect are no longer worthy of note. Some agencies, such as the Post Office Department, however, have formulated no rules of practice, while the rules of others, by reason of obsolescence or thoughtless adoption of the rules of older agencies, are badly in need of revision to make them conform to actual practice. Where such revision is needed, it should of course be undertaken without delay. The commingling of procedural and substantive regulations is occasionally found, to the detriment of clarity and ease of use. Treasury Regulations under a particular income or estate tax law, for example, typically contain, without separation or demarcation, rules of procedure, substantive provisions supplementing specific sections, and advisory interpretations construing doubtful sections of the Act.⁵ Regulations of the Bureau of Marine Inspection and Navigation on a specific subject include provisions dealing variously with procedure and substance. For example, the proposed ocean and coastwise regulations now awaiting promulgation range from specifications of the ingredients of rivet steel to the requirement that license blanks be filled out by the inspectors in pen and black ink. Other agencies, such as the Veterans' Administration, make the distinction between procedure and substance with only partial success. Improvements in this respect should be made.

Interpretations and policy instructions to the staffs of administrative agencies are now available to the public to a limited extent, especially where interpretative regulations are formally adopted and promulgated. In addition, some agencies have expressed their instructions to their agents in available printed form.⁶ To some ex-

⁵ It must be recognized that some of the existing commingling of procedural, interpretative, and legislative regulations may result from the form of the pertinent statute. The Internal Revenue Code, for example, combines procedure and substance without discrimination, and a set of regulations which proceeds paragraph by paragraph through the Code will necessarily confuse substance and procedure in like manner. But even if the procedural and administrative provisions of the Code are not separately stated, it would seem nonetheless feasible and desirable to draw a set of procedural rules that would be separately stated and separately published.

⁶ Regulations of the Home Owners' Loan Corporation, for example, read as follows under the caption "General policy": "The necessity of treating each case of delinquency as an individual problem is recognized, as is the Corporation's duty to collect indebtedness from borrower, and where clearly established that the default is wilful, steps are to be taken

tent, however, the officers of some of the agencies are controlled in their dealings with outsiders by instructions or memoranda which they are not at liberty to disclose. Rarely, if at all, is there justification for such a practice. Not only does it seem unfair to the individual to compel him to meet unseen regulations, but it is inefficient to encourage representations to an agency which might be stilled if the adoption of a definite policy were known. The Committee is strongly of the opinion that, with possible rare exceptions, whenever a policy has crystallized within an agency sufficiently to be embodied in a memorandum or instruction to the staff, the interests of fairness, clarity, and efficiency suggest that it be put into the form of a definite opinion or instruction and published as such. The extent to which the publication should be separate from that of statutory regulations will vary from agency to agency, but in general it would be wise to distinguish the two. In any event, the publication of the settled policies of each agency which affect outsiders should be complete.⁷

B. OPINIONS AND PRECEDENTS

In the preceding section of this chapter the Committee has recommended the fuller, better organized, and more frequent publication of the guiding principles of administrative behavior. It is recognized, however, that administrative agencies, like the courts, must often develop their jurisprudence in a piecemeal manner, through case-by-case consideration of particularized controversies. This is so partly because the full variety of circumstance can infrequently be perceived in advance. Partly, too, it is necessitated by the circumstances of the agencies' creation. Often an agency has been entrusted with responsible duties in an area in which experience is yet to be won, and where premature rigidifying of policies may prove to be harmful in the extreme. Sometimes, moreover, it is the very justification of an administrative agency's existence that it may exercise discretion in dealing with individual problems which are difficult to fit within the two inflexible boundaries of rules.

Even in these instances, however, there may be no impediment to the agency's stating what it has in fact done in the particular case before it, even though it may be unprepared to state its judgment in a generalized form. As a broad proposition the Committee believes that written opinions are highly desirable attributes of administrative decisions in individual cases; and in fact many of the agencies do now prepare and publish opinions in much the manner of trial and appel-

immediately to protect the Corporation's interest." 24 C. F. R. 402.00a. It is also stated that "It is the policy of the Corporation to endeavor to have its mortgagors regularly remit their payments by mail to the Regional Offices * * *" (24 C. F. R. 402.08); "It is the fixed policy of the Corporation to discourage the personal collection of mortgagors' payments by its own representatives * * *" (24 C. F. R. 402.09).

⁷ A word should be added in commendation of the excellent monthly bulletins or journals which are published by a number of the Federal agencies. Outstanding are the Federal Reserve Bulletin and the Civil Aeronautics Journal. Somewhat narrower in their scope but still extremely useful are the Internal Revenue Bulletin and the monthly supplements to the biennial Postal Guide. Those first mentioned are valuable contributions to the knowledge and development of the subjects with which the Board of Governors of the Federal Reserve System and the Civil Aeronautics Administration deal. In addition, they and the others mentioned furnish a means of imparting new regulations and other information regarding the work of the agency to those affected. Since all of these publications are specialized and relatively inexpensive, they are superior for this purpose to the Federal Register. The establishment of similar publications by other agencies might prove to be feasible if thought were given to their development.

late courts.⁸ The Committee does not recommend imposing upon the agencies the duty of formulating elaborate opinions in every case. The necessity of preparing such opinions in a multitude of simple or petty cases might well be an undue drain on the resources of an agency, leaving insufficient time for more complex and important matters. But insofar as feasible, the Committee recommends that opinion accompany decisions.

For, in the first place, the requirement of an opinion provides considerable assurance that the case will be thought through by the deciding authority. There is a salutary discipline in formulating reasons for a result, a discipline wholly absent where there is freedom to announce a naked conclusion. Error and carelessness may be squeezed out in the opinion-shaping process. Second, the exposure of reasoning to public scrutiny and criticism is healthy. An agency will benefit from having its decisions run a professional and academic gauntlet. Third, the parties to a proceeding will be better satisfied if they are enabled to know the bases of the decision affecting them. Often they may assign the most improbable reasons if told none. Finally, opinions enable the private interests concerned, and the bar that advises them, to obtain additional guidance for their future conduct. Even where strict adherence to precedent is not observed, some light—perhaps as much as the agency itself possesses—will be shed on future action.

C. DECLARATORY RULINGS

In yet another respect there is room for developing predictability in the administrative process, without in the least weakening its ability to adapt itself to new needs or further experience.

In recent years, in the Federal and state courts, the device of the declaratory judgment has been provided to furnish guidance and certainty in many private relationships where previously parties proceeded at their own risk. When real conflicts of interest arise and there is an actual dispute concerning legal rights and duties, it is possible in declaratory judgment proceedings to obtain binding judicial determinations which dispose of legal controversies without the necessity of any party's acting at his peril upon his own view. But the declaratory judgment obtainable through the courts is not the answer to uncertainties which are present in the realm of administrative law.⁹ The time is ripe for introducing into administration itself an instrument similarly devised, to achieve similar results in the administrative field. The perils of unanticipated sanctions and liabilities may be as great in the one area as in the other. They should be reduced or eliminated. A major step in that direction

⁸ The extent to which opinions are written by administrative agencies and the degree to which they have developed authoritative bodies of principles by following their own precedents are set forth in Appendix L, "Form and Content of Intermediate Reports and Final Administrative Decisions," *infra*, pp. 436-465, and Appendix M, "Reliance Upon Precedents by Administrative Agencies," *infra*, pp. 466-474.

⁹ The utility of the judicial declaratory judgment itself in the public law field is limited first of all by the doctrine that administrative remedies must be exhausted and statutory methods of appeal pursued, before resort may be had to the courts by other means for the purpose of testing intended or possible administrative action. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). As to tax controversies, where the need for advance determination of liabilities has been particularly acute, the possibility of using declaratory judgments has been specifically negated by Congress. Act of August 30, 1935, 49 Stat. 1027.

would be the establishment of procedures by which an individual who proposed to pursue a course which might involve him in dispute with an administrative agency, might obtain from that agency, in the latter's discretion, a binding declaration concerning the consequences of his proposed action.¹⁰

At the present time, advisory rulings or opinions are given by a number of agencies, including the Bureau of Customs, the Packers and Stockyards Division of the Department of Agriculture, the Post Office Department, and the Securities and Exchange Commission. Advisory rulings are not an entirely satisfactory device, however, because they invariably carry an explicit or implicit warning that the agency is not bound by the opinion it has rendered. Ordinarily the recipient of the ruling may safely rely upon the agency to adhere to its opinion; but it is not beyond the realm of possibility that a different view will be taken of the question involved when the transaction has been consummated.¹¹ Consequently advisory rulings do not entirely eliminate, though they materially reduce, the element of uncertainty. Greater certainty can be achieved only by attaching to the ruling the same binding effect upon the agency that is attributed to other adjudications.

But without statutory authority an administrative agency is powerless to render a binding declaratory ruling. This disability has been removed in some instances, although the orders which the agencies have been authorized to issue bear different names. Persons desirous of knowing whether the Federal Power Commission deems the construction of a water-power project to be subject to the provisions of the Federal Power Act, for instance, may obtain a formal finding of the Commission upon this issue by filing a declaration of intention to construct a water-power project. If the Commission determines that no permit is needed because the Act does not apply, the declarants may thereafter proceed safely.¹² Failure to seek an advance administrative decision that they are exempt from the statute's requirements would not in itself subject these persons to any sanction. They merely have an option of securing a

¹⁰ On the desirability of administrative declaratory rulings, see E. M. Borchard, *Declaratory Judgments* (1934), at 595; H. Oliphant, *Declaratory Rulings* (1938), 24 A. B. A. J. 7; R. J. Traynor, *Declaratory Rulings* (1928), 16 Tax Mag. 195; Report of a Subcommittee of the House Committee on Ways and Means, *A Proposed Revision of the Revenue Laws*, 75th Cong., 3d Sess. (U. S. G. P. O., 1938), 55; statement of Senator King in support of the amendment to H. R. 8099, 75th Cong., 3d Sess., which contemplated the use of declaratory rulings in customs cases, 83 Cong. Rec. 4626-28 (1938). See, also, this Committee's Monographs No. 5, "Federal Alcohol Administration," Sen. Doc. No. 186 (76th Cong., 3d Sess.), Part 5, at 11-12; No. 13, "Post Office Department," *id.*, Part 12, at 38-40; Monograph No. 27, "Administration of the Customs Laws," pp. 165-167.

¹¹ See this Committee's Monograph No. 13, "Post Office Department," Sen. Doc. No. 186 (76th Cong., 3d Sess.), Part 12, at 39; Monograph No. 27, "Administration of the Customs Laws," p. 166; statement of Senator King in 83 Cong. Rec. 4627 (1938).

One of the major considerations leading to the refusal of the Bureau of Internal Revenue to issue advance rulings on prospective transactions [see Mimeo. 4589, XVI-1 Cum. Bull. 536 (1937)] was the decision of the Board of Tax Appeals in *Matter of Couzens* 311 B. T. A. 1040 (1928) that such rulings were not binding upon the Commissioner who made them or his successors. See S. S. Surrey, *Some Suggested Topics in the Field of Tax Administration* (1940), 25 Wash. U. L. Q. 399, 434. Compare J. M. Maguire and P. Zimet, *Hobson's Choice and Similar Practices in Federal Taxation* (1935), 48 Harv. L. Rev. 1281, 1293-1309. It is interesting to note that since the development of the prospective closing agreement (*infra*, p. 32), the Bureau has liberalized its policy on advance rulings and now issues such rulings with some frequency. See this Committee's Monograph No. 22, "Administration of Internal Revenue Laws," pp. 74-75, fn. 126; R. J. Traynor and S. S. Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies* (1940), 7 Law & Contemp. Prob. 336, 354.

¹² See this Committee's Monograph No. 25, "Federal Power Commission," pp. 13-19. Similar exemption procedures are provided in Section 3 of the Public Utility Holding Company Act, 49 Stat. 838, and in numerous other statutes.

declaration of their status or, in the alternative, of proceeding upon their own view of the law—and at their own risk.¹³

Another example of the administrative declaratory ruling is encountered in the binding prospective closing agreements (that is, agreements with respect to future tax liability) which, since the passage of the Revenue Act of 1938, the Bureau of Internal Revenue has been authorized to negotiate with taxpayers.¹⁴ Until this mechanism was devised, uncertainty concerning the possible tax liabilities created by contemplated business transactions frequently resulted in their being deferred or abandoned.¹⁵ Moreover, if a person did act under a mistaken apprehension of the legal consequences which would flow from this action, the desire to avoid the impact of unanticipated tax claims often impelled him to litigate. These unfortunate results of uncertainty need no longer obtain in the Federal tax field if the prospective closing agreement is used.¹⁶

But the declaratory ruling is not feasible in every circumstance in which doubts may be present. A necessary condition of its ready use is that it be employed only in situations where the critical facts can be explicitly stated, without possibility that subsequent events will alter them. This is necessary to avoid later litigation concerning the applicability of a declaratory ruling which an agency may seek to disregard because, in its opinion, the facts to which it related have changed. The intrusion of variables may distort or destroy the plans concerning which the ruling was intended to give guidance. Hence it is that declaratory rulings may have no place in a complex, shifting problem like that of labor relations, while they may be extremely useful in relation, for example, to advertising practices. Whether a series of advertisements concerning distilled spirits violates a statutory or administrative prohibition can be ascertained by examining the proposed copy for the series. If a declaratory ruling be made that the proposed copy is unobjectionable, later dispute concerning applicability of the ruling is impossible. One can instantly compare the copy submitted for ruling with the copy which was actually published. If their contents are the same, the ruling is applicable; if they are different, it follows that the ruling does not extend to the published advertisement and that the advertiser is therefore unprotected against punitive proceedings if an impropriety is detected. Since this is so, it appears entirely desirable that the Post Office Department, the Federal Trade Com-

¹³ It is this optional character of the declaratory ruling which serves to distinguish it from other advance determinations, such as those made by an agency when a person is required by law to seek permission before taking affirmative action. Here, too, there is a determination of rights and duties in advance of a change in position; but the purpose of a determination in such a case is to further the regulatory purposes of the basic legislation rather than to give opportunity for prior administrative absolution to those who are reluctant to move without it. Under the Public Utility Holding Company Act, for example, it is unlawful for a holding company to proceed with certain types of proposed financial transactions unless the approval of the Securities and Exchange Commission has first been obtained. See this Committee's Monograph No. 26, "Securities and Exchange Commission, pp. 6-11. Indiscriminate extension of this type of mandatory advance decision procedure would impose burdens both upon the persons affected and upon the administrative agencies which might easily outweigh the advantages of certainty.

¹⁴ See this Committee's Monograph No. 22, "Administration of Internal Revenue Laws," pp. 74-80. The prospective closing agreement procedure does not insure the taxpayer against changes in the statutes, nor is provision made for the judicial review of unfavorable rulings. The latter aspect of the procedure is discussed *infra*, p. 33.

¹⁵ See Report of House Subcommittee, *loc. cit. supra*, note 10.

¹⁶ But, contrary to expectations, there has not thus far been a very considerable volume of applications by taxpayers for a binding pronouncement by the Bureau. In few cases has the Bureau refused, after request, to issue a ruling upon which a closing agreement could be predicated.

mission, and the Alcohol Tax Unit of the Bureau of Internal Revenue—all of which exercise authority over advertising matter—be empowered to issue declaratory rulings upon proper application.¹⁷ Similar conclusions may be reached in respect of certain personal status determinations on which much may hinge—as, for example, that an alien desiring to leave this country is entitled to re-enter it within a stated period of time; or that a person is an employee (or employer, as the case may be) within the meaning of the Social Security Act or the Railroad Retirement Act; or that one is not engaged in business subject to the provisions of the Fair Labor Standards Act. In situations of this sort, it is possible to ascertain the facts with the same degree of precision as would be possible if determinations were to be made at a later, and less convenient, time.

There is a possibility, though not a major one, that the opportunity to obtain a declaratory ruling might be exploited by interested persons. Innumerable requests for rulings on slightly altered facts might be made in an effort to reach the outermost edge of legal conduct without stepping over the boundary into actual illegality. If every application for a ruling were to require issuance of a binding declaration, the energies of the administrative agency might be unduly taxed. It should therefore be open to an agency to decline to give its ruling unless an applicant has demonstrated a sound necessity for administrative guidance and has supplied all essential facts.¹⁸ The agency should also be free to decline a ruling when, in the judgment of the agency, the question at issue is of a sort which could most wisely be determined by the presentation and decision of a series of cases.

A final phase of declaratory ruling procedure remains to be considered. It may be anticipated that in most cases in which a ruling has been issued, the applicant will be content to govern himself accordingly. In some situations, however, the applicant might have an honest belief that the administrative ruling was erroneous and would be faced with the uncomfortable choice of either abandoning his plans or proceeding in disregard of the ruling with knowledge that he would be confronted with the imposition of a sanction. Since it is highly unlikely that he would choose the latter course, particularly where the sanction was a severe one such as the revocation of a license, provision should be made for immediate court review of declaratory rulings. The availability of judicial review would make possible the testing of a ruling by an applicant who would otherwise be compelled to desist from action believed by him to be proper.¹⁹

¹⁷ See Title IV of the Committee's proposed bill, which is appended to this report as Exhibit 1.

¹⁸ See Traynor and Surrey, *op. cit. supra*, note 11, at 355; this Committee's Monograph No. 27, "Administration of the Customs Laws," pp. 122, 167. Compare this Committee's Monographs No. 13, "Post Office Department," Sen. Doc. No. 186 (76th Cong., 3d sess.), Part 12 at 39-40; No. 11, "Administration of the Packers and Stockyards Act," *id.*, pt. 11 at 9-10.

¹⁹ As has been noted above, p. 32, the Bureau of Internal Revenue utilizes closing agreements in the tax field. These agreements are not strictly declaratory rulings and the absence of judicial review in respect of closing agreements has not produced unsatisfactory results. Because of their special nature which distinguishes them from declaratory rulings, the Committee's recommendation concerning judicial review of the latter does not extend to closing agreements. See this Committee's Monograph No. 22, "Administration of Internal Revenue Laws," pp. 80-82.

CHAPTER III

INFORMAL METHODS OF ADJUDICATION

1. THE GREAT BULK OF ADMINISTRATIVE DECISIONS ARE MADE INFORMALLY AND BY MUTUAL CONSENT

Every administrative agency is charged with administering or enforcing, in the field which Congress has marked out for it, provisions of law which affect private interests. To do this requires the investigation and decision of great numbers of particular cases. In most of these, resort may be had to formal proceedings with testimony of witnesses, stenographic record, briefs, arguments, and findings of fact or opinion. But despite the fact that formal procedure is generally available, it is of the utmost importance to understand the large part played by informal procedure in the administrative process. In the great majority of cases an investigation and a preliminary decision suffice to settle the matter. Comparatively few cases flower into controversies in which the parties take conflicting positions of such moment to them that resort is necessary to the procedure of the courtroom.

In the field of taxation, for example, the Treasury receives millions of income-, estate-, and gift-tax returns each year—in 1939, 7,600,000. Hundreds of thousands of adjustments are made in them. Yet in 1939 only 4,854 appeals were filed in the Board of Tax Appeals and 900 in the courts. In labor relations one might expect a high percentage of contested cases, yet in the first four years of its existence the National Labor Relations Board closed 12,227 unfair labor practice cases, in only eight percent of which were formal complaints issued and in only four percent of which were formal decisions made. The Interstate Commerce Commission over a period of ten years has arranged settlements in all but five of the 3,500 demurrage complaints filed with it. In the entire Department of Agriculture, which administers over a score of regulatory statutes, the total proceedings under all statutes which have gone to formal hearing have in the three years ended in June 1940, averaged 253 a year, and of these only 37 in the last year progressed to the stage of exceptions to the examiner's report.¹

Examples could be multiplied from nearly every agency in the Federal Government. Enough have been given, however, to make clear that even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process. No study of administrative procedure can be adequate if it fails to recognize this fact and focus attention upon improvement at these stages.

¹ See Appendix F, "The Volume of Business of Administrative Agencies," *infra*, pp. 314-326.

2. WHERE THE DECISION IS BASED UPON AN INSPECTION OR TEST, INFORMAL METHODS PROVIDE THE PRIVATE INTEREST GREATER PROTECTION THAN FORMAL METHODS

In a great many cases the administrative decision rests upon inspections and tests. Oral or documentary evidence plays little or no part. A federally licensed grain inspector takes a sample of grain, and by use of a testing apparatus reaches conclusions concerning the grade of the grain. If the buyer or seller is not satisfied, he may obtain a new test by a supervising inspector of the Department of Agriculture. If still dissatisfied, he may appeal to a Board of Review which makes its own test. All of this must be done speedily since a definite time is set for delivery of the grain and movement of the car, the grain may deteriorate, or market conditions may change. No oral testimony is taken or argument had. The whole procedure takes only a few days. While the gradings are by statute only prima facie evidence in any suit involving the grade of the grain, they have been accepted as final for 23 years and questioned in the courts, so far as can be ascertained, not at all.

Airman certificates issued by the Civil Aeronautics Administrator are essential to engaging as an airman in any civil aircraft. Although the statute provides for hearing upon any petition for reconsideration of a denial of a certificate, practically all denials which have been the subject of hearings have involved one question only—that of physical fitness. Where lack of skill or experience is the ground, it is plain to the applicant that obviating the objection through practice and instruction is the more practicable course. The same is true of applicants for radio operators' licenses and for seamen's and officers' certificates.

No vessel may lawfully sail without certain certificates issued by local inspectors of the Bureau of Marine Inspection and Navigation relating to her seaworthiness. These certificates are issued or denied after physical inspection by the local inspectors. If they are denied, appeal may be taken to a Supervising Inspector who may make his own inspection or act upon the report of the local inspector. Further appeal may be taken to the Director, who rarely attempts to substitute his judgment for that of the men who have actually inspected the ship, but reviews the applicability of the requirements of law sought to be enforced by them. No testimony is taken; parties may appear and argue orally, and they may, though they rarely do, file written arguments. Substantially the same procedure is followed by the Interstate Commerce Commission in its locomotive inspections—which in 1939 exceeded 110,000; by the Federal Communications Commission in inspecting ship radio equipment; and by the Civil Aeronautics Administrator in inspecting aircraft.

A decision of the inspector in the field, under the Perishable Agricultural Commodities Act, concerning the quality and condition of perishables at the time of their delivery to a market must also, for practical reasons, be without formal procedure. The physical evidence cannot be preserved for reinspection, transactions are myriad, and, in general, the contemporaneous judgment of the inspector after

physical inspection must be the most significant aspect of the process of adjudication. Much the same is true of the decision of inspectors at the border that plants, fruits, nursery stock, or vegetables are infected or fall within the scope of a quarantine.

In its issuance or denial of second-class mailing privileges, the Post Office Department affords yet another example of decision after an official's examination. Second-class mailing privileges depend for their issuance and continuance upon statutory requirements that the matter be a "periodical," that it have certain types of binding, that it avoid an excess of advertising in relation to its reading matter, and that it be free from obscenity. Determination of these issues is made without hearing and simply by reference to the literature at hand. This situation differs from the other examples of inspection-adjudication already described in that no technical or scientific questions are involved (except perhaps in obscenity cases), nor is truly expert judgment ordinarily required as it is, for example, in grading of grain or inspection of locomotives. Another condition prerequisite to the grant of second-class mailing privileges is that the periodical be issued from a known office of publication. Determination whether such an office exists is similarly made without hearing. While here the issue cannot be resolved simply by examining the periodical itself, the determination can readily be made simply by physical perception. The local postmaster can look to see whether an office of publication exists with far more convenience than if a hearing on the issue were to be held.

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

The soundest procedure in cases of this type is that which recognizes the reality that the inspection or test is and must be the decisive element. Once that is recognized, the improvement of procedure is

in the direction of protecting the making of the inspection or test itself, and constantly checking the skill and integrity of the inspector who in this situation is, after all, the adjudicator.

Protection, in cases such as these, can be afforded by a right to reexamination or reinspection by another and more experienced inspector, far more than by any right to a formal hearing before an official who must merely listen to testimony. Further, it is essential that the inspectors shall not only be carefully chosen but that their work shall be constantly appraised by their superiors.

The practices of the Grain and Seed Division of the Agricultural Marketing Service of the Department of Agriculture, for example, recognize this. Grain inspectors are licensed, after having passed an examination which establishes their competency to grade grain. Their continued competency is sought to be assured by periodic checks of their work; responsible supervisors examine samples of grain previously graded by licensed inspectors to discover whether errors have been made so frequently by a particular inspector that his license should be revoked. Similar spot-checks of inspectors' work in other agencies should be made. And, as a further protection, the right to obtain an immediate reexamination, now provided in many agencies, should be given wherever feasible.

3. INITIAL INFORMAL DECISION IS AN ESSENTIAL DEVICE IN DISPOSING OF LARGE NUMBERS OF CLAIMS AND LICENSE APPLICATIONS

Under the Railroad Unemployment Insurance Act of 1938, as amended, a railroad employee is entitled to payments for each day of unemployment in excess of varying periods specified in the Act. To accomplish its purpose, the procedure of the Railroad Retirement Board must be swift, simple, and decentralized. In the first six months of the Act's operation the largest amount paid at one time to any claimant was \$15.

A vast number of claims will be presented annually under the Railroad Retirement Act and the Social Security Act. Obviously all but a handful of these will and must be disposed of informally. No system of administration could survive procedure which involved formal hearings in all of these cases. The Veterans' Administration disposes of some 100,000 claims a year, in only 10 percent of which are hearings held before initial decision. Here, while it is important to provide a thorough and impartial formal procedure for hearing those cases in which the claimant and the Government are not able to iron out differences, it is equally if not more important that the procedure for informal decision, which will affect by far the greater number, be swift, simple, and fair.

Such procedures have been evolved by these agencies. The claimant is assisted in the preparation and development of his claim by representatives of the agency accessible to him in the field. Where specialized or expert knowledge is necessary for the decision of cases, these agencies have developed special administrative units to furnish the needed aid. In the Railroad Retirement Board and the Veterans' Administration, for example, medical experts and occupational specialists are on hand to decide questions arising in

the fields in which they are peculiarly proficient. Similarly, the Social Security Board has created subdivisions which deal with cases involving difficult or unusual problems.

Upon the basis of the information gathered by their staffs and submitted informally by the claimants, the agencies—often through field officers—make their initial decisions. In the vast majority of cases these decisions are accepted by the claimants. Only where they are not, are formal proceedings with witnesses and arguments and appeals to reviewing bodies invoked.

Much the same is true of agencies which must pass upon large numbers of applications for licenses or permits where the decision does not depend on tests of skill. The Federal Alcohol Administration in 1 year passed on more than 93,000 applications for label approval or exemption; the Department of Agriculture has registered some 1,700 live poultry dealers; the Securities and Exchange Commission examines annually hundreds of registrations of securities and registers as many more dealers and brokers. Virtually all of these applications are disposed of without formal proceedings.

In cases of this type formal proceedings in the first instance are undesirable from the point of view of the individual and the Government. The number of cases alone makes such formal proceedings impossible without increasing personnel out of all reason. Only after these applications have passed through the sieve of initial decision—which in most cases satisfactorily ends the matter—is it necessary or possible to have formal proceedings.

4. INFORMAL PROCEEDINGS ARE USED TO PREVENT HARDSHIP BY INTERLOCUTORY ORDERS

In many instances administrative agencies have authority, as they must have, to issue orders protecting the public interest pending formal investigation or during an emergency. The purpose may be to ground a plane or pilot pending examination or disciplinary proceedings, or to suspend the license of a ship, master, or seaman, or to suspend a rate schedule pending hearings and final decision, or to require interchange of facilities or to issue emergency service orders if disaster interrupts railway service.

In all these cases the parties affected have full right to formal proceedings before ultimate disposition, but the order dealing with the situation cannot wait for formal proceedings. Nevertheless, it may have serious consequences to the interest affected. In this situation the agencies have resorted to informal proceedings to obviate hardship to the private interest from unnecessary or ill-advised action.

An example of this is the handling of securities' registration statements by the Securities and Exchange Commission. Under the Securities Act of 1933 it is unlawful to issue securities until a registration statement making full disclosure of the facts has been filed with the Securities and Exchange Commission and has become effective. These statements become effective 20 days (or less in the case of acceleration) after filing, unless the Commission institutes proceedings to suspend their effectiveness. The law authorizing these proceedings provides for notice, the making of a formal record, decision, and court review. But securities must be offered within

very narrow limits of time because the vendors cannot run an extended risk of changes in market conditions. Further, the securities must be sold upon prospectuses which command public confidence. For these reasons the mere institution of proceedings which criticize the completeness or accuracy of a statement is, as a practical matter, a serious and probably fatal blow to the proposed offering.

So, to prevent unnecessary hardship, an applicant is informed of what the Commission staff regards as deficiencies in a statement and he is allowed to remedy them by amendment. Informal conferences are held with staff members, individual commissioners, and, on occasion, with the full Commission to discuss the adequacy of the statement or amendments. It is plain that no amount of formal procedure or separation of functions can solve the dilemma presented by these situations. If the Commission is to have any supervision over the completeness, accuracy and clarity of the statement, for the sake of both the public and the issuer the Commission's criticisms must be made before the securities are issued and sold. To accomplish this by formal proceedings is impracticable because of the limitations of time and the nature of the business involved. The most useful procedural devices are those which recognize the seriousness of the decision to institute the proceedings, and which insure that it shall be made by competent and fair administrators who will give the registrant every opportunity which time permits to present his views to the staff and, if necessary, to a commissioner or the Commission.

5. UNNECESSARY RESTRICTION UPON USE OF INFORMAL METHODS

In most cases in which a person applies for some official permission, the agency, if satisfied that the permission is proper, grants it without any formal proceedings. Sometimes the public interest in a full record of the grounds of decision is thought so important by Congress that formal proceedings and a formal record are required by law. For example, the Interstate Commerce Commission and the Federal Communications Commission must hold public hearings before either may approve consolidations of the companies which it regulates.

But there are other cases where formal proceedings are required either by the terms of the statute or by administrative interpretations in which, in the Committee's opinion, something less would fully protect the public interest and make for more expeditious dispatch of business. For instance, the Federal Power Commission, and more recently the Department of Agriculture in its administration of the Packers and Stockyards Act, have refused to approve applications for rate adjustments without a prior formal hearing which they deem to be required by the governing statute, and the Civil Aeronautics Board is required to hold hearings before granting a certificate of convenience and necessity for a new air route. In these and other similar cases, it should be enough for the statute to require the agency to give public notice of the application, but to dispense with a formal hearing if no protest or request to be heard is received and if its own investigation establishes the propriety of granting of

the application.² Until recently, the Securities and Exchange Commission held hearings before approving any applications or declarations under the Public Utility Holding Company Act, even though no reason appeared for disapproval. The rule in this respect was recently amended in order, according to the Commission, "to cut red tape and save much time and expense for the utility companies and the Commission."

6. THE USE OF INFORMAL PROCEDURES IN DISPOSING OF COMPLAINTS BY CONSENT

It often occurs that after an agency has investigated a complaint filed with it, the person or persons complained of and the agency may agree as to the principal evidentiary facts and may also agree that the acts complained of should not be repeated. A frequent obstacle to settlement by consent is the reluctance of persons to make an admission that they acted with an illegal or unethical intent or purpose. It is in this area that consent dispositions are employed, are highly desirable, and can be extended by some improvement in procedures.

(a) *Consent dispositions prior to issuance of formal complaint.*—The Federal Trade Commission during the year ended June 30, 1938, settled 564 cases by stipulations to cease and desist without the issuance of complaints. During the same period it issued 310 formal complaints. A stipulation to cease and desist is an agreement to discontinue specified practices. It differs from a consent decree in that, since no order has been made, violation of the stipulation is not a basis for the imposition of sanctions. Where violation does occur the Commission's only recourse is to institute a formal proceeding for a cease and desist order. Stipulations always consist of three elements: The admission of certain facts; an agreement to cease and desist from designated unfair practices; and a consent that the admissions of fact may be used against the respondent if subsequently the Commission, having reason to believe that the stipulation is being violated, issues its complaint against him.

The National Labor Relations Board has a very similar procedure. If, before a complaint has been issued, the respondent agrees to correct the situation, the agreement is reduced to writing and the charges will be withdrawn or dismissed upon compliance with the agreement.

In each of these cases, though the agencies may announce that an agreement has been made, they do not make public the agreement itself. The object is to obtain compliance with the law, not to insist upon public confession as an alternative to prosecution.

Another agency which has almost identical jurisdiction and powers in another field has made almost no use of consent procedure. The Department of Agriculture in its administration of the Packers and Stockyards Act has power to proceed against unfair methods of competition. In only one instance has it entered into a stipulation to cease and desist.

² The same simplification seems to be desirable where action is initiated by the agency itself. If, after the notice, the person against whom the agency proceeds neither answers nor requests to be heard, it should often be permissible for the agency to enter its order forthwith and without hearing. See "Procedures in Default Cases," Appendix E, *infra*, pp. 307-313.

The Committee believes that consent dispositions of this sort should be encouraged.

(b) *Consent dispositions after issuance of formal complaint.*—The procedure by stipulation to cease and desist, as has been said, does not result in an enforceable order, which in many cases the agency may consider essential and which the respondent may be willing to concede. But the Federal Trade Commission will not enter a consent order unless the respondent files an answer to a formal complaint or signs a stipulation, both of which are matters of public record, admitting some or all of the charges. This is, in part, because the Commission believes that, under the statute, its order must be supported by findings of fact based upon testimony or admissions that the practices have been committed. In part, also, the practice is due to the Commission's belief that this is wise procedure.

However, respondents, though often willing to consent to an order to cease specific practices are also often unwilling to admit the charges either because they import illegal conduct or because of fear that the admission might be used against them in private litigation. For example, in a proceeding by the Federal Trade Commission directed against trade practices alleged to violate the antitrust acts, the respondents may be willing to stop the criticized practices; but they rarely will concede all the facts regarded as necessary to establish a violation of law, especially those relating to the intent with which the acts were done and the effect of them in lessening competition or in fixing or maintaining prices. As a result long and expensive trials may often be necessary to obtain a result which could readily be obtained by consent. From the point of view of both the public and the private interest, it seems highly desirable in cases of this sort to permit consent to the entry of an enforceable order without requiring admissions.

Such is the practice of the National Labor Relations Board. After the complaint has been issued, the respondent, upon admitting only the facts of his business from which the Board may find that he is engaged in interstate commerce, may consent to the entry of an order specifying the practices which he agrees to cease and the affirmative action which he agrees to take. He is not required to admit any facts concerning the practices alleged in the complaint. The Board then makes findings that he is engaged in interstate commerce, that a complaint has been issued, and that the stipulation, which is set forth in full, has been made; the Board thereupon issues the order agreed upon in the stipulation and no further findings concerning the facts or the alleged violations are made. Consent orders of this sort, without findings other than jurisdictional findings, and without admissions, have also been commonly utilized by the Department of Justice in prosecutions under the antitrust laws, for example; and their validity and enforceability have been emphatically upheld in *Swift & Co. v. U. S.*, 276 U. S. 311 (1927). It is hard to see how, in the light of this decision, a respondent who had agreed to a consent order of the Federal Trade Commission could thereafter repudiate it on the mere ground that he had not admitted the facts.

CHAPTER IV

FORMAL ADJUDICATION: PROBLEMS OF ORGANIZATION

A. THE METHOD OF FORMAL ADMINISTRATIVE DECISION

GENERAL STATEMENT OF THE PROBLEM

Most of the controversy over administrative procedure has centered around formal adjudication, though it is the smaller part of administrative adjudication as a whole. It is employed in two principal types of situations. One is when the investigation and the possible resulting action are of such far-reaching importance to so many interests that sound and wise government is thought to require that proceedings be conducted publicly and formally so that the information on which action is to be based may be tested, answered if necessary, and recorded. The other type is where the differences between private interests or between private interests and public officials have not been capable of solution by informal methods but have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy.

Since positions are strongly held, interests clash, and issues are often difficult and technical, the cases have an importance far greater than their number indicates. More than in any other administrative activity, the element of controversy plays a major part, and there must be, therefore, an even greater insistence on impartiality in decision.

Procedure at this stage must be framed to require that the special methods of the administrative process operate in such a way as to give convincing assurance, not that the deciding body is indifferent to the result, because it is usually charged with responsibility for continuous protection and advancement of a particular public interest or policy, but that its decision is not motivated by any desire to deal with the parties or their interest otherwise than in the manner which an objective appraisal of the facts and the furtherance of the public duty imposed upon the agency require.

To accomplish this, it is necessary that the evidence be heard and the facts be reported to the agency head by an official who shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it. The heads of the agency cannot, through press of duties, sit to hear all the cases which must be decided. Their function is to supervise and direct and to hear protests of alleged error. If the initial decision—which may dispose of the case or be the statement of it from which appeal may be taken to the heads—can carry a hallmark of fairness and

capacity, a great part of the criticisms of administrative agencies will have been met.

The methods of hearing and initial decision and the internal procedural structure vary from agency to agency. In general, it has been customary to designate hearing officers before whom evidence may be adduced—whether they be a board of three or more individuals, or, as is more common, a single hearing officer, variously known as a trial examiner, a referee, a presiding officer, a district engineer, a deputy commissioner, or a register. These hearing officers have been selected in various ways. Cases coming before the Board of Tax Appeals—which has no other duties than to hear and decide cases—and the National Mediation Board are heard by single members of the agency itself; cases coming before the National Railroad Adjustment Board are heard by the full bi-partisan membership of one of the four divisions into which the Board is divided by statute. Many other agencies maintain special and separate divisions of trial examiners devoting their time exclusively to the conduct of hearings; still others utilize members of their staffs selected specially for each occasion. In one situation—certain proceedings conducted by the General Land Office of the Department of the Interior—the hearing may be before a clerk or notary public not otherwise connected with the agency.

No less varied is the weight attached by the several agencies to the judgments of those who conduct the hearings. In most of the agencies the person who presides is an adviser with no real power to decide. In a few agencies the hearing officer's or board's decision is conclusive unless appealed by the parties to the head of the agency or unless the agency head itself takes the case up for consideration after initial decision.¹ In one instance initial decision by the hearing officer is final without provision for administrative appeal.² In another case there is no appeal to the agency as of right, and the decision of the hearing officer is final unless discretion is exercised to grant a request for review.³

Even in the common situation where a hearing officer is without real power to decide, his duties and powers vary considerably. He may simply be a monitor at the hearing with power to keep order and supervise the recording of testimony but little or none to make rulings or to play a real part in the final decision of the case. Such is the role of the hearing officer in homestead entry contests and in some Federal Communications Commission proceedings. Or he may have substantial power to rule at the hearing, and he may issue his decision in the form of an intermediate report upon which the agency will heavily rely. Such is his role in some (though by no means all) of the proceedings at the Interstate Commerce Commission. Or he may have limited powers to rule at the hearings; interlocutory appeals may be taken from his rulings to the agency itself; and his inter-

¹ This is the formula adopted by the Railroad Retirement Board, the Veterans' Administration, the administration of the grazing statutes by the Department of the Interior, the Social Security Board, the Board of Tax Appeals, and cases handled by the Bureau of Motor Carriers of the Interstate Commerce Commission.

² Longshoremen's and Harbor Workers' Compensation Act, under which the deputy commissioners of the United States Employees' Compensation Commission hold hearings.

³ Initial decisions upon applications for individual exemptions under the Fair Labor Standards Act are final unless the Administrator of the Wage-Hour Division in his discretion considers the petition for review.

mediate report may be purely advisory, weighing little in the minds of those who finally decide. Such is his role at the Securities and Exchange Commission and the Federal Trade Commission.

Just as there is variation in the part played by the hearing officer in the process of deciding, so the agencies differ in their choice of methods of reaching the ultimate decision. Because the agencies have required the person who heard the evidence to play a more or less subordinate role in deciding, they have had to use other instrumentalities for shaping a decision. Intermediate reports, exceptions thereto, and oral arguments on the exceptions are the mechanical devices which are usually employed; staffs of review attorneys or review examiners and the like have been created as aids. Some agencies, such as the National Labor Relations Board, have established large sections of attorneys isolated from other staff members to analyze the record and prepare decisions in accordance with the Board's directions. Others, such as the Federal Communications Commission, have relied for analysis and assistance upon members of their legal staffs, who collate the recommendations and suggestions of other staff members in the technical divisions. Whatever form of organization may be employed, almost invariably the agency heads rely heavily upon subordinates other than the hearing officer to digest the record and to draft findings and opinions in accordance with the directions of the agency.

Precise evaluation of the comparative merits of the varying methods of the agencies is not now necessary, though some are unquestionably better than others. In general, the Committee has been impressed by the conscientiousness with which some agencies have conducted the necessary experimentation with procedures for formal adjudication. The Committee's detailed study of the several agencies, and the criticisms of procedure which it has received from persons dealing with the agencies, from the bar, and from the agencies themselves, however, have convinced it that there should be general improvement in administrative procedure at this stage. To be sure, it is essential that any prescribed changes be adaptable to the special problems of each agency, but the Committee believes that the adoption of certain general propositions will improve formal procedure, increase public confidence in it, and retain the basic requirement of flexibility.

THE COMMITTEE'S RECOMMENDATIONS

The Committee's recommendations are based upon a recognition and embodiment in law of the administrative practices which in its opinion have been most successful in achieving public confidence and in disposing of the work of the agency. The Committee has not attempted to improvise procedure but to adapt the most successful in actual experience. It has been impressed with the fact that as the conduct of the hearing becomes divorced from responsibility for decision two undesirable consequences ensue. The hearing itself degenerates, and the decision becomes anonymous.

In those agencies where the hearing officer plays, and is known to play, an important part in the disposition of the case, he exercises real authority in keeping the testimony to the relevant and important issues, reducing its volume and sharpening the issues. Where this is not the case, the testimony wanders and the proceeding loses direc-

tion. Evidence is admitted "for what it is worth" or "for the information of" the agency, time is lost and expense increased.

Also, if the hearing officer is not to play an important part in the decision of the case, other persons must. The agency heads cannot read the voluminous records and winnow out the essence of them. Consequently, this task must be delegated to subordinates. Competent as these anonymous reviewers or memorandum writers may be, their entrance makes for loss of confidence. Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who must in the first instance decide or recommend the decision. In many agencies attorneys rarely exercise the privilege of arguing to the hearing officer. They have no opportunity to argue to the record analysts and reviewers who have not heard the evidence but whose summaries may strongly affect the final result.

The Committee is impressed also with the fact that where agencies have recognized the importance of hearing officers in the salaries paid, in the independence of view encouraged and accorded, and in the importance given to their decisions, the positions have attracted and held men whose ability and fairness have been recognized by the bar and the public. Where the opposite has happened, progressive decline has occurred. The agency heads have not had confidence in the ability of the officials, and with that the compensation and lack of responsibility have precluded men of sufficient ability to reverse the trend from accepting the positions.

This is the heart of formal administrative adjudication. It cannot succeed without competent and well-paid men exercising functions of responsibility and interest. This is necessary to protect both the public interest and the private interests which are concerned in the proceedings.

Accordingly, the Committee recommends the following general method, with such exceptions as are later specified, for formal administrative adjudication. These recommendations are contained in a bill drafted by the Committee and printed as Exhibit 1 of this report.

1. HEARING OFFICERS

To each agency (other than those to be noted subsequently) there should be added officials to be known as hearing commissioners to hear cases. These officials should be men of ability and prestige, and should have a tenure and salary which will give assurance of independence of judgment. They should be appointed for stated terms of 7 years, and be removable only upon formal charges of fraud, neglect of duty, incompetence, or other impropriety. Salaries should be substantial—\$7,500 for hearing commissioners and \$8,500 for chief hearing commissioners. In agencies which deal with many small cases,⁴ a salary of \$5,000 a year might be authorized. No agency should be permitted, however, to adopt this lower salary except upon application to the Director of Federal Administrative Procedure (a post the creation of which is urged in a later portion of this report) and upon his certification that the applicant agency's cases are of a type to warrant it.

⁴ The cases coming before the Bureau of Marine Inspection and Navigation (disciplinary), the Civil Aeronautics Board (revocation of airmen's certificates), the Division of Public Contracts (violation cases), and the Immigration and Naturalization Service may be examples.

In any event, a hearing commissioner's salary should be fixed for his entire 7-year term, subject neither to reduction nor to increase during that period.

(a) *Method of appointment.*—The method by which the hearing commissioners and their chiefs should be selected presents a perplexing problem. Suggestion has been made that they be a separate corps, not attached to specific agencies, and that they be appointed, perhaps for life, perhaps for a specified term, by the President, by and with the advice and consent of the Senate. The Committee has given careful and searching consideration to this and similar suggestions and has concluded that they are not desirable.

Several hundreds of hearing commissioners would have to be appointed initially; thereafter each year a substantial number would be appointed or reappointed.

Efficient conduct of the work demands that hearing officers specialize in the work of specific agencies. Some exchange, as we point out, is desirable and will occur. But in the main the work of a hearing commissioner will be with a particular agency. Specialization is one of the fundamentals of the administrative process.

Furthermore, the hearing commissioner is in a very real sense acting for the head of the agency. He is hearing cases because the heads cannot as a practical matter themselves sit. He plays an essential part in the process of hearing and deciding. Those responsible for the work of the agency have a vital interest that this process shall be effectively and fairly performed. The entire usefulness of the agency may be destroyed if the hearing officers are incompetent or if the public loses confidence in their fairness.

So the Committee concludes that the agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing commissioners. But it concludes also that before anyone should undertake these highly responsible duties of a hearing commissioner his judicial qualifications and capacity should be investigated and approved by a body independent of the agency, and whose special concern is the improvement of administrative procedure. Public confidence would be deservedly inspired if full power to approve and appoint or disapprove and refuse to appoint persons nominated by an agency to be hearing commissioners were lodged in the Office of Federal Administrative Procedure, the creation of which is recommended elsewhere in this report⁵—an office composed of a director to be appointed by the President and confirmed by the Senate; an associate justice of the United States Court of Appeals for the District of Columbia designated by the chief justice of that court; and the Director of the Administrative Office of the United States Courts, who is appointed by the Supreme Court of the United States.

Independence of judgment on the part of hearing officers, the Committee believes, will be achieved both by this method of selecting them and by the adoption of the Committee's recommendation that hearing commissioners be given definite tenure of office at a fixed salary. Appointment for a term of 7 years is deemed by the Committee to assure an adequate measure of security for the hearing commissioners without making impossible the displacement of those who fail to measure

⁵ See chapter VIII of this report, *infra*, pp. 123–124.

up to the standards required of them; the period of 7 years here suggested is comparable to that provided in a number of state constitutions as the term of office of judges of the highest courts.

(b) *Provisional and temporary appointments.*—The Committee believes it necessary in order to meet practical needs to provide for (1) provisional appointments; and (2) temporary appointments.

Provisional appointments are suggested in order that an opportunity may be given to test the abilities of possible permanent appointees where desirable. Either the agency or the Office of Federal Administrative Procedure, or both, may believe that although upon a candidate's record he appears qualified, it is desirable to observe him in the actual work as hearing commissioner before concluding that he can successfully discharge his duties. The Committee's recommendation, therefore, provides for provisional appointments, subject to the same requirement of approval by the Office. These appointments should not, in any event, exceed 1 year, and might be less in the discretion of the agency. No provisional appointment should be extended after the expiration of this period; the provisional appointee should either receive a regular appointment or be dropped altogether as a hearing commissioner.

The appointment of temporary hearing commissioners may be necessitated by different considerations. Sudden increases in the number of cases which must be heard at a given time may be of only a temporary character, not justifying the appointment of another hearing commissioner for a 7-year term. Similarly, one or two unusually protracted proceedings may so reduce available hearing personnel that dockets become congested with other cases. To prevent the accumulation of backlogs, and to dispose of them as rapidly as possible when they do occur, the Committee finds it desirable to permit agencies, in such a situation, to appoint temporary hearing commissioners, either by the temporary assignment of hearing commissioners from other agencies or by the temporary appointment of persons who meet with the approval of the Office of Federal Administrative Procedure. These appointments should be for designated cases or for 30 days, subject to extension if the chief hearing commissioner (provided for below) certifies to the continuation of the need.

Furthermore, in some agencies, the volume of cases may be so small that the appointment of a regular hearing commissioner may not be justified. The Federal Reserve System has held less than a dozen formal adjudicatory hearings since 1914; the Federal Deposit Insurance Corporation has held only 22 hearings in three years; the War Department has set rates for a total of only 50 toll bridges, and often not a single rate hearing is held in the course of a year. In agencies whose work load is as light as these, there are insufficient cases to occupy a permanent hearing commissioner devoting his entire time to hearing and deciding. The Committee, accordingly, does not recommend the addition of regular hearing commissioners in such agencies. Instead, it is contemplated that the agencies in which formal adjudication is a more or less inconspicuous and inconsequential adjunct of other activities, will select temporary hearing officers, as outlined above, to conduct and decide cases as they arise.

In any event, all hearing commissioners—be they permanent, provisional, or temporary—should be approved and appointed, after

nomination by the agency concerned, by the Office of Federal Administrative Procedure, and should enjoy the powers and perform the functions which have been outlined in the Committee's recommendations, to the end that the procedures of hearing and decision may be direct, simple, and fair.

(c) *Removal.*—Removal of a hearing commissioner during his term should be for cause only and by a trial board independent of the agency. The removal trial board should be composed of the three members of the Office of Federal Administrative Procedure, but these members may, in their discretion, delegate the conduct of the hearing to the Director of the Office sitting with two other persons designated by the members of the Office. Charges might be presented either by the agency concerned or by the Attorney General of the United States acting upon complaint made by private persons and believed by him to be well founded.⁶

(d) *Exchange of hearing commissioners.*—While, as stated, each hearing commissioner should be attached to a particular agency whose cases he is to hear and decide, it should not be necessary that under all circumstances he devote his entire energies to that agency. Rather, insofar as the several agencies desire and request it, there should be permitted an interchange of hearing commissioners among the agencies. Thus, for example, cases arising under the Commodity Exchange Act probably will not justify the Department of Agriculture's appointment of a full-time hearing commissioner, yet hearing commissioners at the Securities and Exchange Commission should be well qualified to hear Commodity Exchange Act cases. Similarly, the same hearing commissioner might well be able to hear cases arising both under the National Labor Relations Act and violation cases under the Walsh-Healey Act; or the same commissioner may be qualified to hear misconduct cases coming both before the Bureau of Marine Inspection and Navigation and the Civil Aeronautics Board. Interchange of this nature is desirable because it would reduce the use of temporary hearing officers; it would save expense; it would provide some variety for the hearing commissioner; and it would impart fresh points of view to the agencies. The Office of Federal Administrative Procedure, through its Director, should serve as a clearing-house for these exchanges; requests should be made to the Director, and he should, in turn, effect the necessary arrangements. The agencies involved should furnish, pro rata, the hearing commissioner's salary.

(e) *Chief hearing commissioner.*—In agencies employing five or more hearing commissioners, the agency heads should designate one hearing commissioner to serve as chief hearing commissioner, at a somewhat higher salary than that received by his colleagues. The chief hearing commissioner should play an important part in the supervision of the hearing and decision process. He should, of course, assign the hearing commissioners to sit in particular proceedings. Because he will be in a position to gauge the agency's needs

⁶ In addition, of course, termination of a hearing commissioner's service with the agency should be permissible where there is such a diminution in the number of cases to be heard before the agency that his retention is no longer warranted. To assure that removal on this ground is bona fide, the Director of the Office of Federal Administrative Procedure should certify to the necessity of the removal and the hearing commissioner should, during his unexpired term, be placed on an eligible list for reappointment. During such unexpired term, the appointments should be made to the agency only from the eligible list.

with respect to hearing officers, he should be empowered to ask for an exchange or temporary hearing commissioner.

2. FUNCTIONS OF HEARING COMMISSIONERS

Hearing commissioners should be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them. In order to reduce the burdensome length of many records and the needless waste of time and money resulting therefrom, hearing commissioners should be particularly empowered to exclude evidence which is immaterial, irrelevant, unduly repetitious, or not of the "kind on which responsible persons are accustomed to rely in serious affairs";⁷ and they should have power to rule upon the form of any question asked.

Hearing commissioners should also be empowered to preside at prehearing conferences.⁸ Cases in which no evidence is adduced, because the submission is upon an agreed statement of facts, could, in the discretion of the agency, be heard and decided by a hearing commissioner in the first instance.

The hearing commissioners should be a separate unit in each agency's organization. They should have no functions other than those of presiding at hearings or prehearing negotiations and of initially deciding the cases which fall within the agency's jurisdiction.⁹

3. ASSIGNMENT OF DECISIONS TO OTHER HEARING COMMISSIONERS

Situations will arise in which the hearing commissioner who presided at the hearing cannot prepare the findings and decision or cannot do so within a reasonable period. This may arise from death, illness or unforeseen exigencies of business. A hearing commissioner on circuit may find himself involved in a case of unexpected length, or he may have to take over hearings of a colleague who is ill, thus delaying the decision of a case already heard. In such circumstances the chief hearing commissioner should have authority to assign the preparation of findings and decision upon the transcript to another hearing commissioner if, in his opinion, this can be properly done. The hearing commissioner to whom the case is reassigned should be able to order reargument, or even retrial, if that appears necessary. But in any other event than that of prolonged illness, death, or unforeseen exigency, cases should not be reassigned without the consent of the parties.

4. EFFECT OF HEARING COMMISSIONERS' DETERMINATIONS

In the absence of appeal by one of the parties to the proceedings (including the representatives of the agency), the determination of

⁷ *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2nd, 1938), cert. den., 304 U. S. 576, 585 (1938).

⁸ See sec. 2 of ch. V, *infra*, pp. 64-68.

⁹ The adoption of this recommendation will entail an abandonment of procedural methods now in vogue in certain (but not all) types of proceedings before the Federal Communications Commission, the Department of Agriculture, and the Civil Aeronautics Administration.

a hearing commissioner should be final and binding unless, within a reasonable period, to be stated in applicable regulations, the case is called up for review by the head or heads of the agency on his or their own motion. The findings, conclusions, and recommendations of the hearing commissioner should be included in the record upon which any court review is sought.

A major purpose of the Committee's recommendations is to increase, in most agencies, the effect of the hearing officer's work in the decision of the case. The Committee contemplates that his decision will serve as the initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court. Accordingly, an integral part of the Committee's recommendations is that, in the absence of appeal, the decision of the hearing commissioner be final and effective without further action or consideration by the agency. But to preserve uniformity of decision and effective supervision of an agency's work, the Committee recommends not only that the parties, including the agency's trial attorney, be permitted to appeal, but also that the agency heads may, within the period for appeal, take up any decision for review upon their own motion.¹⁰

In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown. And in the event that the agency does find facts contrary to those found by the hearing commissioner, the agency's opinion should articulate with care and particularity the reasons for its departures, not only to disclose the rationale to the courts in case of subsequent review but to assure that the agency will not carelessly disregard the decision of the hearing commissioner.

5. NATURE OF APPEAL

The specific grounds of appeal should be required to be stated, so that the review of a hearing commissioner's decision may be limited accordingly. Because of differences in the subject matters involved in cases before the several agencies, the scope of review should be left for later definition by the agencies; but it should be made plain by statute that where an appeal is based upon allegedly erroneous determinations of fact by the hearing commissioner, the agency may permissibly, but is not required to, confine its examination of the record to the portions cited and may reject that ground of appeal unless those portions disclose that the finding is clearly wrong. In other words, mere allegations of error without convincing support should not impose on the agency heads the duty of reading an entire record.

¹⁰ It must be noted in this context that the term "agency heads" connotes the highest adjudicatory body within one of the administrative establishments, even though the members of that body may not be the agency heads themselves. For example, the Social Security Board, under statutory authorization, has completely divested itself of jurisdiction to consider individual claims for benefits. This jurisdiction it has delegated to an Appeals Council, which has power finally to determine cases arising under the Social Security Act. For purposes of the present discussion it is the Appeals Council rather than the Social Security Board which is the "agency head."

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

6. ELIMINATION OF REVIEW STAFFS AND APPELLATE DUTIES OF AGENCY HEADS

If limited as the Committee recommends, the process of review should rarely involve the heavy burden now assumed by many agencies. If the appeal, the briefs, and the oral argument are prepared with the care and precision upon which the agencies should insist, even factual issues may be determined by means of reference to the papers filed by the parties and to such portions of the record as may have been specifically indicated by them. A successful system of review upon appeal depends upon adequate presentation of all relevant arguments and considerations. The Committee, accordingly, recommends that the agency's trial attorney be required to file a brief, and, where possible, to argue orally in cases where the agency's staff has asserted a position during the trial hearing.

As a consequence, many of the perplexing problems of assistance by subordinate reviewers to the heads of the agency in deciding cases will disappear. Under the methods which the Committee now proposes, there should be little greater need by administrators for review attorneys than would exist among appellate judges. Like judges, however, each agency head may find it useful to have attached to his office one or more law clerks, or even more important officers such as the "examiners" utilized by the Interstate Commerce Commissioners.

But these assistants should be aides and not substitutes. The heads of the agency should do personally what the heads purport to do. We have already recommended that the work of personnel selection and management, the work of investigation, informal adjustment or decision, and the issuance of complaints in the generality of cases be vested in responsible officers. We here recommend similar relief so far as the hearing and initial decision of cases is concerned and have outlined the restricted nature of the review which should be given those decisions. But that review should be given by the officials charged with the responsibility for it, and the review so given should include a personal mastery of at least the portions of the records embraced within the exceptions.

In agencies headed by a board, commission, or authority, further division of labor may be necessary to provide the time for individual attention by the agency heads. The members may find it necessary to sit in divisions, as do the Interstate Commerce Commission and

the Board of Tax Appeals, with the full board reviewing decisions only in cases of exceptional importance or upon petition. It may be necessary to increase boards of three members to five, in order to make this possible.

In single headed departments and agencies, like the Post Office and the Departments of Commerce and Agriculture, the Committee recommends that all pretense of consideration of each case by the agency head be abandoned and that there be created either boards of review, as in immigration procedure, or chief deciding officers who shall exercise the final power of decision. But if the agency head in these departments does review a case, he must assume the burden of personal decision. It is obviously impossible for the Postmaster General to give personal consideration to every case of use of the mails to defraud, for the Secretary of Commerce to pass on the suspension or revocation of seamen's licenses, or for the Secretary of Agriculture to adjudicate all the cases arising under the many statutes administered by his Department. In such instances the cases should be heard and initially decided by the hearing commissioners and be reviewed if necessary by designated officials who are charged with that responsibility and who will perform it personally.

7. POWERS OF AGENCY HEADS TO REVIEW AND DECIDE

Agency heads should have the authority, when reviewing hearing commissioners' determinations, to affirm, reverse, modify (including the power to make the finding which they deem required by the record), or remand for further hearing. It should be open to them to adopt, wholly or partially, the findings, conclusions, decision, or order from which appeal has been taken. They should also have authority upon the certification of the hearing commissioner that novel or complex questions of law exist in the case which call for the immediate decision of the agency,¹¹ or upon petition of the private parties that good cause exists for so doing, to receive the record of a case upon the conclusion of the hearings and proceed directly to its decision, upon requests for findings and arguments by the parties, without findings or decision in the first instance by the hearing commissioner. In such cases they should issue either a proposed decision subject to exceptions or a final administrative decision as may be deemed warranted by the circumstances and fair to the parties.

APPLICABILITY OF RECOMMENDATIONS

The recommendations just summarized and explained are intended by the Committee to be broadly applicable to all agencies which utilize the formal hearing process in adjudication. Some exceptions must, however, be noted.

(a) *Cases heard by Agency heads.*—The purpose of the recommendations is, insofar as possible, to fix the responsibility for initial determinations in able, highly placed officials who have themselves heard the evidence, and to make their determinations a significant

¹¹ Typical of the cases in which there are presented novel questions of law in which the hearing officer does not have the guidance of principles established by the agency in prior cases and in which the judgment of the agency heads is crucial are those now pending before the Securities and Exchange Commission involving simplification and integration of holding company systems.

part of the process of administrative decision. Obviously, then, the recommendations do not apply in agencies where the heads themselves hear and decide cases. Agencies like the United States Tariff Commission and the National Railroad Adjustment Board are therefore altogether excluded, while other agencies which occasionally sit *en banc* are in no wise intended to be precluded from continuing to do so. Nor is anything in the Committee's recommendations intended to affect the hearing of cases by one or more, but less than a majority, of the members of an agency. The procedure of the Board of Tax Appeals, for example, need not be altered. The occasional practice of the Securities and Exchange Commission, Interstate Commerce Commission, and others in this respect is not intended to be changed; except that when a case is heard by one of the agency's heads instead of by one of its hearing commissioners, the same effect should be given to the initial findings and decision as would attach to them if they had been made by a hearing commissioner. Also excluded from application are the deputy commissioners of the United States Employees' Compensation Commission, who, under the Longshoremen's and Harbor Workers' Compensation Act, not only hear industrial accident cases, but finally decide them, subject only to a direct appeal to the courts.

(b) *Cases involving future governance of persons not parties to proceeding.*—The Committee's recommendations are directed to improving the processes by which agencies decide cases. They do not extend to the making of rules and regulations, even where action is required by statute to be preceded by hearings cast into a judicial mold. In many proceedings of this sort as in price-fixing, wage-fixing, and the setting of standards, where controversies can be narrowed to a series of specific issues, the agencies can usefully employ the method of hearing and initial decision here recommended. But the method is not uniformly applicable and to impose it in some instances would probably produce confusion and delay rather than improvement. This may be true because other methods of intermediate report may be regarded as preferable; for instance, the reports of industry committees provided for in the Fair Labor Standards Act. In other instances, many of the important "facts" on which an essentially legislative judgment must rest are conclusions regarding probabilities and consequences, as to which the interests concerned would normally prefer to have the tentative views of the officials who must make the decision rather than of a hearing commissioner who in the nature of things cannot make it. Even in such situations, however, there often are subsidiary questions of fact upon which sharp issue may be joined by conflicting interests. The Committee recommends that the agencies attempt by prehearing conferences to ascertain these issues, formulate them for the hearing, and direct the hearing officer to make his findings upon them to the agency heads. Further discussion of rule-making procedure is contained in chapter VII of this report.

(c) *Cases not marked by hearings.*—The Committee's recommendations pertain only to adjudications based upon formal hearings, and obviously do not apply to the informal proceedings which have been appraised and approved in chapter III of this report. "Spot decisions" such as those involved in grain grading and hull and boiler

inspection therefore remain unaffected. So, too, for example, would the determinations of the War Department respecting harbor works and obstructions, of the United States Maritime Commission respecting subsidies, and of the Veterans' Administration respecting claims for benefits or pensions. While hearings occur in these three situations, they are merely incidental to an *ex parte* investigatory process; decisions rest upon the whole investigation, rather than merely upon that portion of it embraced by the hearing. Initial determinations which rest on written applications and preexisting records, such as those made by the State Department in acting upon passport applications and by the Social Security Board and the Railroad Retirement Board, are similarly untouched by the present recommendations.

B. SEPARATION OF THE ADJUDICATING FUNCTION FROM OTHER ADMINISTRATIVE ACTIVITIES

The recommendations made in the preceding sections of this report looking toward the creation of the office of hearing commissioners to hear and initially to decide cases which go to formal proceedings, together with the recommendations looking toward a greater delegation of administrative functions within the agencies, would insure internal but nevertheless real and actual separation of the adjudicating and the prosecuting or investigating functions. The person who heard and weighed the evidence, who made the initial findings of fact and the initial order in each case, would be entirely different from those persons who had investigated the case and presented it in formal proceedings. He would have had no connection with the initiation or prosecution of the case. His decision would stand unless either the attorney for the agency or the attorney for the private party were able to demonstrate through exceptions, appeal, and argument before the agency heads that his findings or conclusions were in error.

But current discussions of the administrative process raise the question whether separation of function ought not to go further than this. Specifically, it has been urged that possession of the deciding functions of a "judge" is inconsistent with possession of the "prosecutor's" functions of investigation, initiation of action, and advocacy. The proposal is accordingly made that the deciding powers of Federal administrative agencies should be vested in separate tribunals which are independent of the bodies charged with the functions of prosecution and perhaps other functions of administration.

Two points are important to put the problem in a just perspective. The first is that, as the Committee has repeatedly noted, an administrative agency is not one man or a few men but many. It is important, the Committee believes, not to make the mistake of conceiving of an agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both. In an agency's organization there are varied possibilities of internal separation of function to the end that the same individuals who do the judging do not do the "prosecuting." Such internal separation by no means eliminates the problem of combination of functions; but it alters, or if wisely done may alter, its entire set and cast. The second major point is that the functions

of so-called prosecution belonging to administrative agencies are actually of varying types. It is important to distinguish among these types not only because agencies differ in the functions which they possess but because different questions, in relation to the function of judging, arise with respect to different types of functions.

Two characteristic tasks of a prosecutor are those of investigation and advocacy. It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them *ex parte* and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. In addition, an investigator's function may in part be that of a detective, whose purpose is to ferret out and establish a case. Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding. For this same reason, the advocate—the agency's attorney who upheld a definite position adverse to the private parties at the hearing—cannot be permitted to participate after the hearing in the making of the decision. A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide.

These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity. Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. A similar result can be achieved at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them.

A distinctive function, which may be regarded as one of prosecution, is that of making preliminary decisions to issue a complaint or to proceed to formal hearing in cases which later the agency heads will decide. Before a complaint is issued—if an agency has power to initiate proceedings on its own motion or on charges filed by a private person—or before an application raising doubtful questions is set down for formal hearing, a determination must be made that the action is proper. The Committee has heretofore recommended, on grounds of administrative efficiency, that authority to make such preliminary determinations should be delegated as far as possible to appropriate officers. Where this is done, no question can arise that the ultimate deciding officers have been biased through having made, *ex parte*, a preliminary determination in a case which they have later to decide.

Yet such delegation, of course, cannot be complete; novel and difficult questions must from time to time be presented to the heads of the agency. The question must be faced, therefore, whether the making of such a preliminary determination in itself works unfairness in the final decision. Assuming that the agency heads simply pass on the sufficiency of material developed and presented to them by others, the Committee is satisfied that no such unfairness results. What is done is wholly comparable to what a court does in the first stage of a show cause proceeding, or in the issuance of a writ of certiorari. No decision on the merits is made; the court, or the agency, merely concludes that the situation warrants further examination in formal proceedings. The ultimate judgment of the agency heads need be no more influenced by the preliminary authorization to proceed than is the ultimate judgment of a court by the issuance of a temporary restraining order pending a formal hearing for a permanent injunction.

What remains to be discussed is the heart of the problem. Save at the level of the agency heads, an internal separation of function can afford substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommitments of the investigator and the advocate. Even at the level of ultimate decision there can be similar protection, for the sheer volume of work does not permit the agency heads to participate actively in developing one side of any single side but requires that they reserve themselves for the task of deciding questions presented to them by others. Nevertheless, so far as the agency is empowered to initiate action at all, the agency heads do have the responsibility of determining the general policy according to which action is taken. They have at least residual powers to control, supervise, and direct all the activities of the agency, including the various preliminary and deciding phases of the process of disposing of particular cases. The question is whether there are dangers in the possession of these powers such as to make advisable a total separation.

An answer to this question requires first of all a counting of the costs which such a separation would entail. These costs include substantial dangers both to private and to public interests. Most obvious are the disadvantages of sheer multiplication of separate governmental organizations. If the proposal were rigorously carried out, two agencies would grow in each case where one grew before. The result would be, among others, a great variety of relationship in size and importance as between the two members of the various pairs. In some agencies functions of adjudication are of relatively minor significance in relation to the total task of the agency; in others they are a major part of the whole.

Particularly in cases where adjudicatory functions are not a principal part of the agency's work or are closely interrelated with other activities, whatever gains might result from separation would be plainly outweighed by the loss in consistency of action as a whole. Few persons, for example, would advocate that the Bureau of Marine Inspection and Navigation should examine applicants for officers' or seamen's certificates but that a separate board should decide in the first instance whether certificates should issue, or that a separate board, with equal responsibility for determining the questions of policy involved, should retry the questions after denial by the first

agency and issue the certificate if it thought the first agency wrong. Similar confusion would result if the function of issuing broadcasting licenses were divided between two commissions. In greater or less degree these same considerations are applicable wherever the adjudicatory and nonadjudicatory functions of an agency are required to be exercised in harmony with each other and where the knowledge secured in the exercise of the one group of functions is important in the wise exercise of the other. Thus the Interstate Commerce Commission not only decides cases but also prescribes rules and regulations governing carriers and supervises their accounts and the tariffs which they file. The Civil Aeronautics Board, the Securities and Exchange Commission, and other agencies also act through exercise of a number of interrelated powers. These powers must be exercised consistently and, therefore, by the same body, not only to realize the public purposes which the statutes are designed to further but also to avoid confusion of private interests.

There are, however, some agencies such as the Federal Trade Commission and the National Labor Relations Board whose principal duty is the enforcement, by decision of cases, of certain statutory prohibitions. In the case of such agencies, the practical objection which has just been noted to isolating the adjudicatory function and handing it over to some independent body would not exist to the same extent. It would be theoretically possible to assign to one agency the task of investigating charges and filing complaints of statutory violations, and to another agency the task of deciding the controversies thus arising. And it is undoubtedly true that agencies whose only substantial task is that of enforcing the prohibitions of a statute through adjudication, especially in such controversial fields as that of unfair methods of business competition and labor relations, are peculiarly in danger of being charged with bias by those against whom the prohibitions are sought to be enforced.

Further practical objections, however, have to be taken into account in relation to these as well as other agencies. Of prime importance among these objections is the danger of friction and of a break-down of responsibility as between the two complementary agencies. This is a danger to private interests no less than to public ones. To create a special body whose single function is to prosecute will almost inevitably increase litigation and with it harassment to respondents. At present the added responsibility of deciding exercises a restraining influence which limits the activities of the agency as a whole. If only to save itself time and expense an agency will not prosecute cases which it knows are defective on the facts or on the law—which it knows, in short, it will dismiss after hearing. The situation is likely to be different where the function of prosecuting is separated out. First, a body devoted solely to prosecuting often is intent upon "making a record." It has no responsibility for deciding and its express job is simply to prosecute as often and successfully as possible. Second, it must guess what the deciding branch will think. It can explore the periphery; it can try everything; and meanwhile the individual citizen must spend time and money before some curb can be exercised by the deciding branch. And, it should be noted, a separation of functions would seriously militate against what this Committee has already noted as being, numerically and otherwise, the

lifeblood of the administrative process—negotiations and informal settlements. Clearly, amicable disposition of cases is far less likely where negotiations are with officials devoted solely to prosecution and where the prosecuting officials cannot turn to the deciding branch to discover the law and the applicable policies.

These factors are thrown into clear relief if it is recalled that the statutory prohibitions which administrative agencies are commonly called upon to enforce are not and cannot be as clear and precise as a promissory note or bill of sale. They necessarily describe in general terms, and with emphasis upon tendency or effect, those practices which are forbidden. It is and must be left to the administrative agencies to apply these general prohibitions to a great variety of conduct. As this is done, it is expected that the general terms will take on concreteness and that subsidiary principles may be worked out by which certain types of conduct will be known as improper and others as permissible. To do this involves the investigation of many informal complaints and the settlement by agreement of many situations where the practices may have been innocently or inadvertently or not consistently engaged in. To divorce entirely the investigating and enforcing arm from the deciding arm, may well impart additional confusion to this process. Even in the field of taxes, where historically the aim has been at precision, some confusion results from the separation of the collecting officials from the deciding officials. In many claims one person may take one view and another person a different view of the meaning of a statute, with resultant uncertainty and hardship for some taxpayers until the matter has been straightened out in the courts. The danger is even greater with statutes whose content is more vague. It seems most desirable that within the administrative field itself, interpretations should not have to be evolved by a series of litigations in which the enforcing branch endeavors to ascertain the mind of the deciding branch. For this would result, not merely in added difficulty of enforcement, which might be warranted if it were necessary to assure fairness, but in added burdens upon many private interests, who would be unnecessarily harassed by complaints and trials.

Moreover, when one examines the specific criticisms of specific agencies, one is struck by the fact that a mere splitting up of functions would not itself cure the criticisms which appear most common. Insofar as predispositions may exist in the more highly charged fields in which administrative agencies operate, they are mainly the product of many factors of mind and experience, and have comparatively little relation to the administrative machinery. There is no simple way of eliminating them by mere change in the administrative structure. They can only be exorcised by wise and self-controlled men. The problem is inherently one of personnel and the traditions in which it is trained. We believe that the structure and procedure which we have recommended have been demonstrated to be entirely compatible with the development of deciding officers whose impartiality is universally respected.

For, while we thus conclude that complete separation by no means necessarily cures bias, which derives from deeper roots than mere organization, conversely, it is demonstrable that impartiality can be achieved without separation. For instance, throughout the hearings

held by our Committee, both the bar and representatives of the carriers warmly commended the procedures and the fairness of the Interstate Commerce Commission. While the greater part of the formal adjudicatory work of that Commission consists in weighing evidence and arguments presented to it by opposing private interests—carriers, shippers, committees, and the like—still the Commission both initiates proceedings to enforce requirements of law and renders the decision. Yet there is no charge that the Commission is biased or unfair; on the contrary the testimony appears to be unanimous that the Commission acts without favor to or prejudice against any litigant or interest.

The Committee concludes, then, that complete separation of functions would make enforcement more difficult and would not be of compensating benefit to private interests. On the contrary, both those private interests which the statutes are designed to protect and those which are regulated would be likely to suffer. And, finally, we conclude not only that separation will not necessarily cure bias and prejudice but that the requisite impartiality of action can be secured by the means set forth in this and the preceding sections of this report.

CHAPTER V

FORMAL ADJUDICATION: PROBLEMS OF PROCEDURE

We have discussed in the preceding chapter some of the basic problems relating to organization for the purpose of formal administrative adjudication; we have there recommended the adoption of a broad structure which the Committee believes will go far to assure that impartiality of consideration which is necessary to the successful functioning of administrative adjudication and to public confidence in the process. But there remain other problems concerning the hearing procedures themselves. How are hearings begun? What notice should be given? How should the hearings be conducted? These are the questions to which we now turn.

At the outset, it is necessary to state some general principles. As the Committee has noted elsewhere in this report, expertness and expedition are two major justifications for the administrative process. In terms of details, the methods by which administrative proceedings are to be conducted may be influenced considerably by the presence of special skills and special problems in the several agencies. The full utilization of concentrated experience may be frustrated if administrative hearing procedure must be shaped to an inflexible pattern which has been evolved with an eye to the frailties of inexperienced jurors. Just as the procedures in any equity case differ from the procedures in a jury trial, so the details of an administrative hearing may also vary in some respects from those in a jury trial.

In general, the Committee has found that in respect of the agencies adjudicating controversies marked by adversary characteristics, there has, to a considerable extent, been an observance of the orthodox trial techniques in the conduct of hearings. But the administrative agencies have frequently failed to provide a speedy forum, unhampered by burdensome delays. Lengthy hearings and incredibly voluminous records, sometimes running into tens of thousands of pages, have been phenomena not rare in the administrative process.¹ So marked, indeed, has this become that the Securities and Exchange Commission has recently found it desirable in one branch of its work to resort to the Federal courts for the trial of its cases and the invocation of the sanctions provided by statute; utilization of the administrative hearing has been found to be slower and more expensive, and, according to this agency's experience, far less in the way of proof and record are necessary to obtain relief in the courts than before the agency itself. While peculiarities of subject matter and surrounding circumstance limit the significance of this instance, it is nevertheless suggestive of shortcomings in the administrative process.

¹ See "Time Consumed in Reaching Administrative Decisions," Appendix G, *infra*, pp. 327-374 for a survey of the time intervals in the adjudicatory phases of certain agencies' work.

There are certain criteria of fairness in the hearing process which, in the absence of clear evidence of inapplicability in particular circumstances, should regularly be observed. Before adverse action is to be taken by an agency, whether it be denying privileges to an applicant or bounties to a claimant, before a cease-and-desist order is issued or privileges or bounties are permanently withdrawn, before an individual is ordered directly to alter his method of business, or before discipline is imposed upon him, the individual immediately concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them. He must be offered a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned. The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy.

These may properly be termed the fundamentals ordinarily requisite to a fair hearing leading to adverse action against an individual. The Committee has found in its investigation of the administrative process few instances of indifference on the part of the agencies to the basic values which underlie a fair hearing. Perhaps in some measure because of the recent emergence of public and judicial interest in administrative hearings, agencies have in many instances exhibited a healthy self-criticism and considerable alertness to fulfill not only the letter of the judicial pronouncements but the basic implications of fairness in hearing.

With these general observations affording a background, the Committee turns to a discussion of some of the problems arising when informal methods have not disposed of the case, or have not been employed, and formal procedures are utilized to decide the controversy.

1. PROCEDURES LEADING TO A HEARING

Many considerations, both private and public, demand that formal proceedings be instituted with care. Ill-considered action results not only in unnecessary expenditure of public funds and energies, but also in grave consequences to the private individual against whom proceedings are brought.

It is, therefore, imperative that careful investigation and consideration precede the institution of formal proceedings. We have in chapter III noted that hearings should ordinarily be held only when efforts to settle and negotiate have failed. Here we note the importance of holding hearings only after there has been careful assurance that violations have probably occurred. This is an importance which in general the agencies have been alert to recognize. In appendix D of this report we have described the procedures which agencies have adopted in instituting formal administrative disciplinary action for violation of statutes or regulations. We cannot undertake to pass judgment, of course, on whether agencies have *correctly* instituted proceedings. It is possible to conclude, on the other hand, that most agencies have devised adequate procedures to guard against ill-considered institution of proceedings and have,

as a rule, investigated carefully before beginning formal disciplinary action.

A second prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject-matter and issues involved. Notice, in short, must be given; and it must fairly indicate what the respondent is to meet.

Where hearings are held the Committee has found no agency, with the exception of the Post Office in its revocation of second-class mailing privileges,² which has failed to issue some notice of hearing and of the issues to be tried prior to its taking decisive adjudicatory action. Often the statutes which are administered themselves require notice, while the regulations of many agencies, such as the Veterans' Administration and the Securities and Exchange Commission, specify with greater detail what must be included in the notice.

The problem of administrative notice has certain special characteristics. The formal notice of hearing may often not be the decisive document apprising the parties of the issues: Other kinds of notice are ordinarily given at different stages. Both in cases upon applications for licenses and in disciplinary proceedings brought on the agency's own motion, pre-hearing conferences and negotiations may, and usually do, disclose the issues fully. Further, the danger of surprise is considerably diminished by the flexibility of administrative proceedings which makes continuances in the course of hearing fairly frequent. Finally, a post-hearing notice of contentions and issues prior to final decision is commonly afforded by the issuance of an intermediate report or other proposed decision. It is thus rare that full and adequate notice, in some form, does not precede the ultimate administrative disposition of the case.

Yet room remains for considerable improvement in the notice practices of many agencies. While, indeed, pre- and post-hearing notices may be of considerable importance, the crucial notice should be the formal one which precedes the hearings. Too frequently, this notice is inadequate. Particularly in cases begun by applications by private persons who seek approval or a license, or similar action from an agency, which are set down for hearing, often no indication of the issues is given; as a result, the applicant is put to his proof on such broad issues as public interest, convenience, and necessity, although in fact the ground upon which the agency doubts the propriety of a grant may be narrow. Similarly in cases begun by complaint, agencies not infrequently set out their allegations in general form, perhaps in statutory terms, thus failing fully to apprise the respondents and to permit them adequately to prepare their defenses. While these notices may be unassailable on strictly legal grounds, hearings may be considerably shortened and issues narrowed by an emphasis upon more specific and simply stated notices. Particular recommendations on this point are included for several agencies in Chapter IX of this report.

² The Post Office Department is required by statute to afford a hearing before it revokes a second-class mailing privilege. 38 U. S. C., sec. 252. Where the ground of revocation is voluntary abandonment of publication, no notice of any kind is given and the Department proceeds to revocation forthwith. In other cases, the local postmaster is instructed to inform the publisher of the statutory or regulatory grounds on which the contemplated revocation is based, and to permit the publisher to submit any statements he desires. The publisher is not apprised of his right to a hearing. See the Committee's recommendation concerning the practice of the Post Office Department in this respect, chapter IX, *infra*, pp. 151-152.

2. UTILIZATION, AFTER FORMAL ACTION IS BEGUN, OF METHODS TO SIMPLIFY PROCEEDINGS: PREHEARING CONFERENCES AND STIPULATIONS OF FACT

The Committee believes that perhaps the most fruitful possibilities for expediting and simplifying formal administrative proceedings lie in the field of prehearing techniques. In chapter III we have recommended that every effort be made, by conferences and negotiations, amicably to dispose of controversies, by stipulation or other agreement, before there is resort to formal proceedings. But even after notice has been issued and formal decisive action is begun, there is scope for further prehearing methods to dispose of the case, narrow its issues, or simplify the subsequent methods of proof. Two main devices are recommended to accomplish this: prehearing conferences and stipulations.

Both in hearings before administrative bodies and in trials before the courts, it is, of course, wasteful to prove by formal testimony what is not in dispute or can be agreed upon between the parties. But examiners, judges and juries, parties and witnesses have suffered from litigation over points not really contested. Some administrative agencies have tried to narrow the field of testimony to those issues in which there is actual disagreement between the parties, but it has been the courts which have done most to meet the problem.

By collaboration between bench and bar, the Federal and many of the state courts have by pretrial hearings simplified, shortened, and frequently avoided trials.³ Apart from minor variations, the pretrial hearing operates in this way: After the pleadings have been closed, and at a time when the attorneys for the parties have prepared the case for trial, counsel appear before a judge for an informal session. Usually this is shortly before the time of trial when counsel know the real issues and have abandoned some of the earlier allegations or defenses.⁴ The conference is usually, but not necessarily, conducted by a judge who will not preside at the trial.⁵

The judge learns from counsel the nature of the case and the facts really in dispute. He inquires what admissions either party will make, and what matters may be stipulated. He examines the pleadings to see whether they properly reflect the questions in issue, and may order amendments to conform the pleadings to the real issues. He attempts to simplify the proof of significant facts; for instance, where technical questions are involved, he tries by agreement to restrict the number of expert witnesses or to provide for a simpler method than oral examination and cross-examination to ob-

³ Pre-trial hearings were first utilized in the Wayne County (Detroit) Circuit Court in 1929, when the trial docket was about 45 months behind. By 1936, the delay in trying cases had been reduced to 1 year. Cooper, *Pre-Trial Procedure in the Wayne County Circuit Court*, in the *Sixth Annual Report of the Judicial Council of Michigan* (1936) 61, 72.

⁴ See B. J. Laws, *Plan for Pre-Trial Procedure Under New Rules in District of Columbia* (1939) 25 A. B. A. J. 855, 865; 1 Moore's *Federal Practice* (1936) 819.

⁵ See *Pre-Trial Practice Succeeds in One-Judge County* (Essex County, Mass.) (1937) 20 J. Am. Jud. Soc. 246. Some commentators have contended that a judge who has conducted a pretrial session is incompetent to preside at the trial because he is likely to have become "biased" toward the case during his discussions with the counsel. But see *Success of Pre-Trial Hearings Demonstrated* (1938) 21 J. Am. Jud. Soc. 160, 161: "It has occurred to many practitioners that it is absurd to believe that a judge fit to try any case at all is unfit to try one concerning which he has heard some talk by the parties or counsel * * * A judge who has bias and is controlled by it is not more unsafe after presiding at a pretrial hearing."

tain the experts' opinion.⁶ At the conclusion of the conference, the judge prepares a pretrial memorandum which governs the future course of the case.

As a result of this procedure large numbers of cases have been settled. In Michigan in 1937, for example, out of 5,768 cases on the trial docket, 3,198 (55 percent) were disposed of at the pretrial hearings.⁷ Considerable time and expense on the trial have been saved by frequent admissions and stipulations, as well as by the simpler proof of facts.⁸ Similar results from similar procedure are obtainable by administrative agencies. An outstanding example is the administration of the District of Columbia workmen's compensation law by a deputy commissioner of the United States Employees Compensation Commission. There, every contested case of an employee's claim for compensation is set for conference before hearing. The conference is attended by a claim examiner, subordinate to the deputy commissioner, by the insurer's representative, the claimant, and the claimant's counsel if he has one. With complete informality, the examiner seeks to bring the parties to agreement upon the merits, or, at least, upon particular issues. In this way about 1,000 cases are disposed of annually by agreements produced by the conferences, and only about 100 remain for formal hearing. In one respect, however, the conference is not pushed far enough. In those cases which fail of agreement, no attempt is made to simplify the future hearing, so that such cases may still go to trial without previous stipulations as to all or part of the facts, and without agreements as to simplification of the methods of proof.⁹

Prehearing conferences are also used by some of the deputy commissioners of the United States Employees' Compensation Commission in administering the Longshoremen's and Harbor Workers' Compensation Act.¹⁰ Their wider, more regularized use in Federal workmen's compensation administration is clearly advisable.¹¹

The Processing Tax Board of Review, the Board of Tax Appeals, and the Social Security Board have all used prehearing conference to advantage;¹² but the most developed prehearing procedure among the

⁶ See *Report of the Committee on Pre-Trial Procedure* (1938) 63 A. B. A. Rep. 534, 537; A. P. Murrah, *Pre-Trial Procedure—Some Practical Considerations* (1940) 26 A. B. A. J. 592, 594.

⁷ *Eighth Annual Report of the Judicial Council of Michigan* (1938) 11. For a comparable record in a Federal district court see, G. C. Sweeney, *Expert Use of Pre-Trial Docket in Federal Court* (1938) 23 J. Am. Jud. Soc. 11.

⁸ It may also be assumed that the cost of appeal, if one is desired, will be reduced by virtue of the curtailment in the size of the record.

⁹ The conferences are not wholly valueless, however, in compressing subsequent hearings. Prior to the hearing, the deputy commissioner who conducts the hearing ordinarily reads the whole file in the case, including the claim examiner's memorandum report on the conference over which he had presided. Then, at the very outset of the hearing, the deputy commissioner seeks to secure admissions and oral stipulations on all but the basic issues.

¹⁰ In a number of the compensation districts which have a small volume of cases, claim examiners are not employed, and the conferences are held before the deputy commissioner himself.

¹¹ The large area of some of the compensation districts would not militate against the use of pretrial conferences, since the deputy commissioners in sprawling districts engage in "circuit riding," as the volume of business may demand, so that they would be available for the conduct of prehearing conferences at the place of residence of claimants. In the Thirteenth District, which embraces California, the Territory of Hawaii, and some of the Rocky Mountain States, conferences are now regularly held, though they appear not to be absolutely required. In that district, too, the deputy commissioner opens each formal hearing by stating what appear to be the indisputable or uncontroverted facts concerning the accident, notice, average weekly wage and the like, after which he requests the parties to stipulate that these facts are the basis of the claim.

¹² The necessity for pretrial conferences in the Board of Tax Appeals is greatly diminished by the readiness of the Bureau of Internal Revenue to enter into stipulations of fact, so that hearings may be limited to arguments on the law or on the central point of factual dispute. Regular efforts are made by the attorneys of the Bureau to settle or to obtain stipulations in cases pending before the Board.

Federal agencies is that of the Civil Aeronautics Board. There the conference was first utilized in air-mail rate proceedings, and was later extended to applications to operate new routes. At first the major purpose was to reach an agreement before hearing upon the authenticity of documents, the simplification of statistical proof, and the qualification of proposed witnesses as experts on specified matters. The conferences were so successful that their scope has been extended. They may now be convened by an examiner to formulate the issues involved in the hearing, to simplify proof by stipulations, to agree upon the number of witnesses, and to arrange an exchange of exhibits prior to the hearing. Conferences of this character should go far toward speeding hearings in rate and other technical proceedings. In these cases issues of primary fact rarely require proof of a testimonial character where the demeanor of witnesses may be important.¹³ Both the Interstate Commerce Commission and the United States Maritime Commission have had notable success with what is in effect a prehearing conference technique in certain phases of their reparations proceedings. The hearings in these cases are initially upon the issue of whether any reparation whatsoever shall be awarded. If it is decided that some reparation is due, the hearings are not at once resumed. Instead, the parties attempt to agree upon the amount of reparation by the exchange of statements and other informal negotiations. Proof of many isolated transactions at the original hearing is thus eliminated, and generally the negotiations prior to resumption of the hearings suffice to determine the amount of reparation to be awarded. Resolution of this issue depends as a rule on the material to be found in the carrier's and shipper's records.

The Interstate Commerce Commission in valuation proceedings convenes before hearing a conference of engineers, accountants, and appraisers, representing the respective parties, to formulate stipulations covering uncontested facts and issues. These achieved remarkable success in securing agreement as to facts or principles or both; and, where agreements were not obtained, the conferees were able to state the basic issues involved, eliminating collateral problems.¹⁴

The Securities and Exchange Commission has also made extensive use of the prehearing conferences in cases under the Public Utility Holding Company Act. First employed to narrow before hearing the area of disagreement, these conferences between representatives of the utilities and members of the Commission staff normally result in settling many substantial questions of fact before hearing, and frequently have produced complete agreement upon the facts.

¹³ See R. A. Brown, *Public Service Commission Procedure—A Problem and a Suggestion* (1938) 87 U. Pa. L. Rev. 139, 161, where it is suggested that a conference procedure be adopted to define issues, to secure orderly offer of proof, to eliminate useless examination of witnesses, and to obtain in general a more thorough and scientific investigation of fundamental issues.

¹⁴ Some 15 years ago, in its "formal complaint cases," the Commission adopted a "modified procedure," which was less successful. The procedure called for the exchange by the parties, after service of the complaint, of memoranda and exhibits supporting the facts upon which they relied. An examiner then studied the memoranda and served upon the parties a report indicating agreed matters and the precise area of controversy. When the hearing actually commenced, the examiner tried to get the parties to stipulate in accordance with the terms of this report, but very frequently they refused to do so. It is altogether possible, however, that if the parties had been called to a prehearing conference before the examiner for the purpose of analyzing the case in the light of the data filed by them, better results would have been obtained. The incomplete disclosure of the parties' cases in their memoranda—the major cause for the failure to produce stipulations—would be made abundantly clear at a conference where counsel were required to indicate the reasons for refusal to stipulate.

Some limitations upon the development of prehearing conferences in administrative procedure must, however, be noted. They come from differences between the organization and jurisdiction of courts and of administrative bodies, and from attitudes within the agencies.

1. A prerequisite to the success of prehearing conferences is that they be conducted by an agency official of dignity and ability, and that counsel be willing to cooperate.

2. Pretrial conferences are not advisable unless their use will make easier and less expensive the disposition of the dispute. The courts which now offer opportunity for these conferences have a narrow geographical jurisdiction, and neither the judges nor the litigants are put to the expense of additional travel by the scheduling of a pretrial session. The Federal administrative agencies, on the other hand, have as a rule a nation-wide jurisdiction, and many of them are wholly centralized in their operations. Hence, it would be unwise to require pretrial conferences unless the increased travel expense of the litigants would be warranted by the time saved by the conference's limitation of a subsequent formal hearing.

3. Private litigants may, if convenience or advantage warrant, sacrifice unquestionably correct positions for similar concessions by opponents. An administrative agency has no such scope for trading. It has a duty to administer its statute uniformly and according to law and the public interest. This does not mean, of course, that it must litigate every position which there is a possibility of maintaining. But it does preclude agreements which in effect exempt a person from the performance of some obligations imposed by law in exchange for his consent to observe others. In this respect the scope of prehearing conferences is narrower in administrative proceedings than in private litigation.

4. Other difficulties arise from the failure of the agency heads to give adequate authority to the representatives of the agency. In some agencies, the extreme position has apparently been taken that the stipulation of facts by subordinates improperly withdraws the power of decision from the agency heads. This is another instance where the notion that all official action requires personal performance by agency heads makes for administrative inefficiency and for hardship upon those involved in administrative proceedings. In some agencies, also, the responsible heads appear to lack sufficient confidence in their subordinates to permit them to participate in effective prehearing negotiations, and even the simplest stipulations of fact are beyond the attorneys' assigned authority. In such agencies, prehearing conferences are fruitless, since the agency is not represented by counsel whose judgment may bind it.

The various factors mentioned suggest limitations in employing the pretrial hearing in administrative procedure. The Committee believes, however, that none of the difficulties is insurmountable, and that wider and more frequent use of the pretrial hearing in many agencies would be an advance over present administrative procedure.

Even where regularized prehearing conferences are not features of administrative procedure, the agencies should by the use of stipulations avoid unnecessary proof of undisputed facts. At the present time, the methods of obtaining stipulations (when they are employed at all) are often as haphazard as they are in ordinary private litigation

in the absence of pretrial hearings. As has been described in chapter III, some agencies, such as the Federal Trade Commission, permit complete disposition of a case prior to issuance of a complaint by accepting stipulations to cease and desist. But this does not go far enough. Stipulations should be sought after the institution of formal proceedings as well; nor is it important that the stipulations may not cover all the issues. Much time may be saved and litigation of unnecessary issues avoided if some facts are stipulated. Thus the National Labor Relations Board normally succeeds in stipulating the facts bearing on the issue of interstate commerce. By contrast, the Department of Agriculture, perhaps especially in its administration of the Packers and Stockyards Act, makes little effort to eliminate by stipulations burdensome proofs of essentially uncontested matters. The Federal Power Commission, too, uses stipulations so cautiously that for practical purposes they are nonexistent. The Committee believes that to use stipulations in circumstances such as these is most desirable.¹⁵

3. THE GENERAL CONDUCT OF A HEARING

It is obvious, as we have noted, that a litigant coming before an administrative agency should be afforded a proper and fair forum in which he can present his case. The forum must be one which is prepared to receive and consider all that he offers that is relevant to the controversy.

Fulfillment of these requirements is possible not by one, but by several methods; fairness does not require a particular form of hearing procedure. It does require an open and fair atmosphere and a receptive presiding officer. The Committee believes that its recommendations in the preceding chapter for the conduct of hearings by able, independent, and responsible hearing commissioners will do much to assure these fundamentals of a fair hearing.

Hearings should be, and almost invariably are, public. The few exceptions where hearings are private are for the benefit of the individual involved. Hearings conducted by the Social Security Board are private whenever "intimate matters of scandalous nature are involved." Veterans' Administration cases, usually involving medical testimony, are private, unless the veteran waives his right to privacy. Hearings conducted by the Federal Reserve Board to forfeit membership in the Reserve System, and by the Federal Deposit Insurance Corporation to terminate the insured status of a bank, are private, since the mere publicity of a hearing might prove ruinous. So, too, hearings involving misrepresentation under the Grain Standards Act, where the only sanction is to make findings of misrepresentation public; if the hearing itself were to be public, the sanction would be invoked before a finding of guilt.

In all cases except ones such as these, hearings are open to the public. This is as it should be; the practice is an effective guarantee against arbitrary methods in the conduct of hearings. Star chamber methods cannot thrive where hearings are open to the scrutiny of all.

¹⁵ It has been urged upon the Committee by some administrative officers, in defense of their failure to utilize stipulations, that the preparation of stipulations which faithfully reflect the parties' agreements would be extravagantly time consuming. The Committee does not believe that the fears of those officers would be borne out by actual experience. The very substantial use of stipulations in a number of the agencies suggests that no practical obstacle of consequence stands in the path of their successful drafting elsewhere.

Fairness in hearing procedures also requires that the hearing be conducted in an orderly and dignified manner. This does not mean, however, that formality is a prerequisite. In cases such as those coming before the Social Security Board, the Veterans' Administration, and the Railroad Retirement Board, strict formality would hinder the claimants, who often represent themselves and who should be encouraged to tell their own stories as simply and naturally as possible. There, the atmosphere of sympathetic conversation is best conducive to proper administration.

On the other hand, formality is advisable in many contested cases. Yet neither dignity nor formality has always been achieved. On the one hand, administrative officers have sometimes fostered a feeling of disrespect by indecorous and unjudicial habits of conduct and, too, by failing, through timidity or perhaps through lack of power, to deal firmly with disorderly and disrespectful behavior. On the other hand, there has been a tendency of some persons dealing with an agency to refuse to accept an administrative hearing as a regular and serious governmental process. While formality should not be an end in itself, it is often a useful instrument by which to attain that decorum which should attend adjudication of heated controversies and which is necessary to a forum in which parties may most fairly be heard without extraneous distractions.

4. THE PROCESS OF PROOF

(a) *Written evidence.*—The Committee believes that expedition and simplification of formal administrative proceedings can further be achieved by substitution, in appropriate situations, of written evidence for oral evidence. It strongly approves the "shortened procedure" used in certain cases by the Department of Agriculture and the Interstate Commerce Commission. The essence of this procedure is the reduction of the controversy to verified written statements which are exchanged by the parties for purposes of rebuttal; the case is then decided upon the papers thus submitted. The experience of these two agencies indicates that this procedure has been eminently satisfactory and that in some types of cases it results in greater precision than where the facts are presented orally. The Interstate Commerce Commission uses the shortened procedure only if the parties consent, but it is noteworthy that in approximately one-third of all complaint-and-answer cases, numbering some 250 annually, the shortened procedure has been substituted for formal hearings. The Committee sees great promise in the shortened procedure as a method of augmenting accuracy, economy, and convenience. It is commended to all administrative agencies.

In types of litigation where the entire case is not susceptible to the shortened procedure, some of the facts may nevertheless be presented better in writing than orally.¹⁸ Where the matter in dispute is technical or dependent upon records (e. g., the labor cost or volume of production of a plant) it would seem helpful to reduce the material to writing in advance of the hearing, distribute it to the parties and re-

¹⁸ For a description of the practice of the several agencies in respect of written evidence, see Appendix J, *infra*, pp. 404-413.

quire the author to appear at the hearing for clarification or cross-examination if it were desired. Lengthy testimony of a complex character is not easy to comprehend in the hearing room nor can satisfactory cross-examination follow immediately upon its conclusion. A far better understanding of the evidence and a great saving of time and expense would be attained if the method above described were employed. The Committee recommends that all testimony which lends itself to this procedure be so handled; the prehearing conference may well be used to mark out the area for its operation.

(b) *The rules of evidence.*—The absence of a jury and the technical subject-matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the “common law rules” of evidence for jury trials. Such a requirement would be inconsistent with the objectives of dispatch, elasticity, and simplicity which the administrative process is designed to promote. An administrative agency must serve a dual purpose in each case: It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second important factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result.

As a result, it is rarely suggested that the older common law rules of evidence for jury trials should be imposed upon administrative agencies. Congressional sanction has been given to varying degrees of relaxation. The Federal Power Commission and the National Labor Relations Board are expressly freed from application of “the rules of evidence.” The Board of Tax Appeals must observe only the rules of evidence applicable in the courts of the District of Columbia in equity proceedings. Even where the statute is silent, some agencies have prescribed adherence to reasonable requirements. Regulation No. 1, article IV, section 1 (b) of the former Federal Alcohol Administration directed the hearing officer to apply “the rules of evidence applicable in courts of equity in the United States, except that he shall relax such rules whenever in his judgment the ends of justice will be served thereby.” So, too, Rule 1.153 of the Federal Communications Commission provides that “the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings before the Commission: *Provided*, however, that such rules may be relaxed where the ends of justice will be better served by so doing.”

Although administrative agencies may be freed from observance of strict common law rules of evidence for jury trials, it is erroneous to suppose that agencies do not, as a result, observe some “rules of evidence.” Even in the disbursing agencies such as the Veterans’ Administration and the Railroad Retirement Board, where the greatest degree of liberality is necessitated in order to permit the claimant to present his case, the regulations embody extensive rules governing the modes of proving such crucial issues as birth, death, service, and the like.

Abuses in admitting remote hearsay and irrelevant or unreliable evidence there surely have been; but the Committee, within the limits of its resources, has found no general pattern of departure from the

basic principles of evidence among administrative agencies. The ultimate test of admissibility must be whether the proffered evidence is reliable, probative and relevant. The question in each case must be whether the probability of error justifies the burden of stricter methods of proof.

Discretion must be allowed to hearing commissioners just as it is to judges in equity proceedings; the latter are largely governed by principles of common sense and fairness. That strict adherence to standards of relevance and probative value should be observed needs no underscoring. A diffuse record dissipates the energies of the parties and the deciding authorities and distracts attention from the issues. Careless admission of evidence for "what it is worth"—a practice not infrequent among trial examiners—swells the record beyond its necessary limits. Here again, the major difficulties will, the Committee believes, disappear with the utilization of able and independent hearing commissioners as recommended in the preceding chapter.

(c) *Official notice.*—A court requires no proof of obvious, notorious facts; instead it takes "judicial notice" of them. Judicial notice has been described as "primarily a simplifying process" whose "aim is to assume for the purposes of the instant litigation certain elements which experience has shown to be safely assumable."¹⁷ Clearly an administrative agency may take notice of the same kinds of fact which a court notices. But administrative agencies necessarily acquire special knowledges in their sphere of activity. Some, like the Interstate Commerce Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board, are under legislative command to accumulate a great storehouse of data. The deputy commissioners administering workmen's compensation laws and the rating boards passing upon veterans' claims learn about injuries and diseases and their disabling effects; the Wage and Hour Division learns of the need for skill in various kinds of manufacturing operations; the Bureau of Marine Inspection acquires knowledge of the behavior of ships and tides.

All these may become, to the administrators, as obvious and notorious "facts" as facts susceptible of judicial notice are to judges. Should administrative agencies be permitted to utilize their special skills and information in the course of deciding cases coming before them? Or is it necessary that each case be treated as an isolated phenomenon in which their accumulated knowledge must be excluded?¹⁸

In the actual process of decision as distinguished from the process of proof, clearly administrators may call into play their special skills and expertness. The desire for expertness is one of the reasons for the utilization of the administrative process. In evaluating evidence and in reaching his judgment, an administrator can, of course, and must bring his expertness to bear. This much can be put to one side as not falling within the scope of official notice to any greater extent than the judge's use of decided cases is judicial notice. It does not involve a question of evidence or notice of "facts" at all.

¹⁷ John Strahorn, Jr., *The Process of Judicial Notice* (1928), 14 Va. L. Rev. 544.

¹⁸ For a description of the agencies' practices in respect of official notice, see "The Utilization of Material Not Offered as Evidence," appendix I, *infra*, pp. 399-403.

On the other hand, there may be put aside as not permissible or susceptible of official notice facts which may be called "litigation" facts. If information has come to an agency's attention in the course of investigation of the pending case, it should be adduced only by the ordinary process; it should be considered only if it is in the record.

But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become a part of the factual equipment of the administrators, it seems undesirable for the agencies to remain oblivious of their own experience and strip themselves of the very stuff which constitutes their expertness. It appears far more intelligent, if fairness to the parties permits, to utilize the knowledge that comes from prior acquaintance with the problems. Laborious proof of what is obvious and notorious is wasteful; or, in the alternative, decision in disregard of the obvious and notorious in the absence of such laborious proof, is foolish, and contrary to the demands that decisions be as correct as possible.

But a recommendation that the permissible area of official notice be extended to take account of the special nature of the administrative process does not mean that agencies should be free to roam at will through their files, or elsewhere, after the hearing is closed. Indeed, by our definition, only those facts which appear to an administrator to be "obvious and notorious" may be noticed. But, still, a fact which seems obvious and notorious may actually be wrong. Or, as is far more likely to happen in respect of facts of which an administrative agency may take notice, there may be room for reasonable disagreement concerning the significance of the facts which are noticed, and the deductions to be drawn from them. If official notice is taken after hearing of facts, the parties may never be apprised of the real points at issue which must be argued.

The parties, then, are entitled to be apprised of the data upon which the agency is acting. They are entitled not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspective to the facts upon which the agency relies. In addition, upon judicial review, the court must be informed of what facts the agency has utilized in order that the existence of supporting evidence may be ascertained.

So, while it would make for greater expedition and for fuller utilization of administrative skills and knowledge if there were more liberality in respect of official notice, at the same time there can be no extension of this notice unless accompanied by safeguarding mechanics. An agency which intends to consider "nonlitigation" facts not already of record should first spread its intention upon the record to allow attack, explanation, and circumvention. Often, where prehearing conferences are employed, as we have recommended, announcement can be made before the hearing that the agency expects to rely on official material or knowledge without requiring orthodox proof, or the parties may be apprised at the hearing. But it may happen that after the testimony has been closed, an agency may find it desirable to take cognizance of facts which are not of record and which would be helpful in determining issues; this may occur in complex technical cases where the issues do not become crystallized until the later stages of the proceedings, or it may arise when new

but notorious facts intervene after the hearing.¹⁹ That every effort should be made to apprise the parties before the close of the hearing of all evidence or facts intended to be noticed is plain. But when, in what should be rare instances, the need does arise, the agency should not take official notice of facts without apprising the parties of its intention to consider these facts, and without providing them with opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed.

¹⁹ Thus after a lengthy rate-making hearing conducted by the Interstate Commerce Commission had been closed, the wages of railroad employees were, by an award of mediators which attracted wide attention, raised \$100,000,000 annually. The Commission in its decision refused to take notice of this fact, which was not in the record, although the fact was an important one in reaching the proper rate.

CHAPTER VI

JUDICIAL REVIEW OF ADMINISTRATIVE ADJUDICATION*

1. IN GENERAL

In this country, where even legislative action is subject to some judicial veto, there has been little question as to the propriety of judicial review of administrative adjudication. The controversies that have arisen relate rather to the details of the adjustments between courts and administrative agencies. Until relatively recent years, indeed, the availability and extent of judicial review were deemed to be the whole content of administrative law; and the degree of finality to be accorded administrative determinations was described as the "recurrent central issue."¹ Contrary to statements sometimes made, administrative adjudications involving private right are subject to some judicial review in almost all cases.

In many cases, statutes define the role of the judiciary; but to a very considerable degree, judicial review of administrative action is molded by the courts. Theirs is the power of final interpretation of the statutory guides, and theirs the power to provide judge-made remedies when statutes are silent. At times the judicial attitude has been one of opposition to the executive, calling for the subjection of the administrative arm to the rule of law through judicial control. At other times, court and agency have been regarded as cooperating "means adopted to attain the prescribed end" of a statute, with the warning that: "Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."² At some times the courts have been criticized for reviewing too much; at others, for reviewing too little. But both the enlargement and the limitation of the area and scope of judicial review have been in large measure determined by the courts.

Judicial review of administrative action has developed even as the common law itself, gradually, from case to case, in response to the pressures of particular situations, the teachings of experience, the guidance of ideal and general principle, and the influence of legislation—with the courts playing a chief role in the development. As an

*Judicial review of administrative rules and regulations is discussed in Chapter VII.

¹ Dickinson, *Administrative Law and the Fear of Bureaucracy*, 14 A. B. A. J. 513, 515 (1928).

The great expansion of the area of administrative action has led to greater emphasis on the procedure before the administrative bodies, both to promote efficiency and to secure fair determinations which judicial review alone cannot assure.

² *United States v. Morgan*, 307 U. S. 183, 191 (1939).

incident of the administrative process, it shares many of the features of that process. Just as administrative agencies have developed in response to the demands of new subjects and new legislation, so has judicial review responded to the needs of the changing system of administration. Just as there is diversity in administrative agencies, so is there diversity in the courts' review of their action. Just as there is some similarity and imitation in the organization and processes of the administrative tribunals, so is there similarity and imitation in the provisions for judicial review of the orders of these tribunals. Just as procedures appropriate for some agencies are entirely inappropriate for others, so is judicial review also molded by the needs of different situations. Like the agencies, judicial review is a complex of old and new, of historical survivals and purposive innovations.

2. FUNCTIONS OF JUDICIAL REVIEW

In the whole of administrative law the functions that can be performed by judicial review are fairly limited. Its objective, broadly speaking, is to serve as a check on the administrative branch of government—a check against excess of power and abusive exercise of power in derogation of private right. But that relates only to one of two more or less equally important aspects of administration. From the point of view of public policy and public interest, it is important not only that the administrator should not improperly encroach on private right but also that he should effectively discharge his statutory obligations. Excessive favor of private interest may be as prejudicial as excessive encroachment. A Securities and Exchange Commission, for example, which improperly issues a stop order may cause great harm to the interests of the issuer, underwriter, and distributor of the security involved. But it may cause equally great harm to the investing public sought to be protected by the legislation, if, out of excessive regard for the issuer, underwriter, and distributor, it improperly refrains from issuing the order. A Federal Trade Commission may violate the legislative policy and cause harm to private interests by failing to investigate and detect unfair methods of competition as well as by overzealously condemning fair methods.

Yet judicial review is rarely available, theoretically or practically, to compel effective enforcement of the law by the administrators. It is adapted chiefly to curbing excess of power, not toward compelling its exercise. Constitutional limitations may in some cases forbid the use of judicial power to correct underenforcement. But constitutional difficulties aside, the courts cannot, as a practical matter, be effectively used for that purpose without being assimilated into the administrative structure and losing their independent organization. To assure enforcement of the laws by administrative agencies within the bounds of their authority, reliance must be placed on controls other than judicial review—internal controls in the agency, responsibility to the legislature or the executive, careful selection of personnel, pressure from interested parties, and professional or lay criticism of the agency's work.

Even in the sphere in which judicial review can operate, there are several limitations upon the extent to which it can be effectively used. First is the great volume of administrative adjudications. Many of

them, of course, are informal adjudications disposing of claims. But the point is that the courts can only check abuses; they cannot supervise all adjudications in order to insure a correct result in each of them. Then there are financial obstacles: The amounts involved may be too small or the parties too poor to meet the costs of court litigation. With respect to the regulatory agencies there are limits of another sort. In many cases "business transactions cannot wait upon the exigencies of appeal * * *. Time is of the essence."³ Or the business cannot afford to divert to litigation the energies of its executives. In some other cases the harm to be caused by administrative action is done before the stage for judicial review is set and cannot be undone by the review. When the Securities and Exchange Commission issues a stop order or delists a security, later reversal by a court may show the Commission to have been in error, but it cannot recapture the transactions which the Commission's action prevented. Indeed, as the General Counsel of that Commission has pointedly shown, the harm may be caused even before the final action of the Commission: "Whether the Securities and Exchange Commission on final consideration will actually decide to enter a stop order is interesting, but not very important; for only a rare investor would purchase securities from an issuer threatened with the administrative bar. When the Securities and Exchange Commission actually delists a security, the news is important; but the market drops when the order for hearing is announced."⁴

This does not mean, of course, that judicial review is limited in the same way in the case of all agencies. It means rather that judicial review has varying degrees of effectiveness with respect to the several agencies and the several types of administrative powers. And it means that even in the sphere in which judicial review is available important private interests must still be left to the practically unreviewable judgment of the administrative tribunals and reliance be placed on other controls for the fair exercise of that judgment. Obviously, in some cases, as for example, rate regulation, or wage determinations under the Fair Labor Standards or Walsh-Healey Acts, judicial review could be provided which—for good or ill—would leave very little for administrative discretion and would practically substitute judicial for administrative regulation. And in other cases, where review cannot as a practical matter, be so directly effective, its potential availability has definite effects on the procedure and attitude of the administrative body. If his order may be subjected to judicial scrutiny, the administrator will probably take pains to see that his conduct will withstand scrutiny.

What, then, may we expect from judicial review?

First, we expect judicial review to *check*—not to *supplant*—administrative action. Review must not be so extensive as to destroy the values—expertness, specialization, and the like—which, as we have seen, were sought in the establishment of administrative agencies.

Therefore, we may expect judicial review to continue its historic function as a brake on excursion by the administrative body beyond its lawfully delegated authority and on the excessive assumption of

³ Chester Lane, address before the Association of American Law Schools in Handbook of Proceedings in the Thirty-sixth Annual Meeting (1938), 199.

⁴ *Ibid.*

power by the executive. This function has great significance in some cases but little in others, depending partly on the nature of the administrative task and partly on the existence of other controls. In dispensing old-age annuities by the Social Security Board, or unemployment compensation by the Railroad Retirement Board, for example, or in the grading of grain under the Grain Standards Act, the possibilities of such excursion or assumption to the detriment of private right are relatively slight, though other abuses might arise. The dangers may be considerably greater in the regulation of business enterprise. Again, the work of some agencies is subject to check by other executive or legislative bodies; while in the case of other agencies such check is not available.

We may expect judicial review, in the performance of this function of control, to speak the final word on interpretation of law, both constitutional and statutory. This is not to say that the courts must always substitute their own interpretations for those of the administrative agencies. Their review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one.⁵ Reservation of this power satisfies the demand for the rule of law and for greater consistency and uniformity in the body of law. It also is a means of reconciling conflicts, when cooperative effort fails, between separate agencies which are assigned different tasks in the administration of a more or less unified legislative scheme, as, for example, the Railroad Retirement Board and the Bureau of Internal Revenue with reference to pensions for railroad employees.⁶

Judicial review may also be expected to require from the administrative branch fair consideration in its adjudications. As indicated earlier, the problem of fairness in administration cannot be solved by judicial review alone. It has been said, for example, that "if the (Securities and Exchange) Commission were stripped of every vestige of judicial power, the problem of administrative fair play would remain substantially undiminished."⁷ Yet the agencies' formal adjudicatory proceedings are an important part of their activities and, to the public, the most dramatic. A habit of fairness there is desirable for its own sake and also because it may set the tone for the other activities of these tribunals. As pointed out earlier, fair procedure is a standard; it is not a detailed code of conduct for all occasions. The courts have recognized that court procedure is not the only fair procedure and have permitted a good deal of variation among the agencies. In the recent *Morgan* cases,⁸ the Supreme Court dealt only with this issue of fairness. The courts can and do, then, set at least minimum standards of fairness for the process of administrative adjudication. But more adequate protection may require administrative procedure to be institutionalized at a higher level, as recommended in other parts of this report. And to the extent that this is done the importance of judicial review in this respect is lessened.

Finally, judicial review may be expected to check extremes of arbitrariness or incompetence in administrative adjudications. This the

⁵ See below, pp. 90-91 of this chapter.

⁶ See this Committee's Monograph No. 8, "Railroad Retirement Board," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 8, at 46.

⁷ Chester Lane, *op. cit. supra*, note 3.

⁸ *Morgan v. United States*, 298 U. S. 468 (1936), 304 U. S. 1 (1938), 304 U. S. 23 (1938).

courts have generally done, as is discussed below, by requiring the adjudications to be supported by substantial evidence.

But judicial review cannot be expected to insure "correct" decisions by the administrative bodies. The correctness of a decision, is of course, a matter of judgment. There are several reasons why the courts cannot review this administrative judgment beyond the limits outlined in the preceding paragraphs. First again, is the great volume of administrative determinations. The courts cannot review them all. If review is to extend to "correctness," then almost every contested case would present the issue and almost every losing party would entertain a reasonable belief that there is a substantial chance of reversal. Second, if the agency has not exceeded its constitutional or statutory authority, has made a proper interpretation of the law, has conducted a fair proceeding and has not acted capriciously, the features of expertness and specialization on the part of the administrative agency would lend great weight to its inferences and conclusions. Considerations of the same character have led to similar restriction of appellate jurisdiction within the judicial hierarchy. The appellate courts exercise only a very limited review over the determinations of the trial judge or jury. Finally, it may be asked, if judicial review of the correctness of the administrative inference and conclusions is to be permitted, whose judgment of correctness is to prevail, that of the court of original jurisdiction or that of one of the appellate courts to which appeal from the former may be made? If the first may thus supplant the administrative judgment, why should not the second equally supplant the first?

3. EXISTING PROVISIONS FOR REVIEW

a. Constitutional requirements.—Our constitutional doctrine imposes two types of limitations relevant to judicial review. The exact location of these limits is subject to controversy; but for present purposes it is necessary only to indicate their nature and to note that, as in other cases of constitutional interpretation, the ultimate word is the courts'. The constitutional source of these limits is found in the due process clause, the constitutional separation of powers, and the provision of article III, vesting "the judicial power of the United States" in the courts therein provided.

One of these limitations restricts the extent to which the constitutional courts, that is, the Supreme Court and the inferior courts created pursuant to article III, can participate in administration. They exercise only the "judicial power" of the United States and, therefore, may not be required to perform delegated legislative functions. Thus the Supreme Court has held in several cases that these courts may not be required to exercise a delegated legislative or administrative power of review in rate making or licensing cases, and thereby to revise administrative orders and enter such substitute orders as they may deem appropriate.⁹ Again, this "judicial power" may be exercised only in "cases" and "controversies." These words from the text of article III imply the requirements not merely of a

⁹ *Keller v. Potomac Elec. Co.*, 261 U. S. 428 (1923); *Federal Radio Comm. v. General Elec. Co.*, 281 U. S. 464 (1930); *Postum Cereal Co. v. Calif. Fig Nut Co.*, 272 U. S. 693 (1927).

plaintiff and a defendant, but of parties in an adversary position who have "legal standing" to maintain their positions and "justiciable" issues in such form that the judicial power is "capable of acting on them."¹⁰ The issues must be such that the court's decision thereon is final and not subject to revision by executive or administrative officers.¹¹

The other limitation fixes the area in which the courts may not be excluded from judicial review. "The judicial power of the United States" is vested in the courts created under article III and may not be vested elsewhere. Other bodies validly engage in work of adjudication when (a), like the territorial courts or the Court of Claims, they do not exercise "the judicial power of the United States" but merely aid in the performance of a task exclusively within Congressional competence,¹² or (b) their adjudications are subject to review by the constitutional courts.¹³ The Supreme Court has never had occasion to hold that the Congress has improperly delegated judicial power to an administrative tribunal.¹⁴ But it has held that the extent of the courts' review of administrative adjudication is affected by this doctrine. The nature of these effects is discussed below.

Between these constitutional limits of maximum and minimum judicial participation, there is a considerable area for legislative discretion in granting or withholding the right of judicial review. And the Congress has exercised this discretion in a variety of situations on the basis of its appreciation of their particular needs. For example, it has provided for review of contract claims against the Government; it has expressly withheld review by any "official or court of the United States" of "decisions rendered by the Administrator of Veterans' Affairs under the provisions of" Title I of the Act of March 20, 1933, authorizing the payment of pensions to veterans; but it has granted a trial de novo for determinations of the same agency in War Risk Insurance cases.

The congressional and judicial practice has ordinarily been to provide judicial review for administrative adjudications whether required by the Constitution or not. The Committee believes this practice to be wise. Review should be denied only when there are compelling reasons of policy for this course. The functions of judicial review sketched above have a general utility. When the review is limited to the performance of those functions, no serious inconvenience or interference with administrative action results. The objections to judicial review have been generally not to its availability but to its scope. But the scope of judicial review is a separate matter and it is treated separately below.

The existing provisions for judicial review are, then, of two kinds: (a) those contained in statutes and (b) those developed by the courts in the absence of legislation.

b. Nonstatutory review.—Even independently of constitutional demands, the courts have developed means for controlling executive and administrative officers in their relation to private right. While the Government enjoys sovereign immunity from suit, its officers do not

¹⁰ *Keller v. Potomac Elec. Co.*, *supra*, note 9.

¹¹ *Hayburn's Case*, 2 Dall. 409 (1792); *Gordon v. United States*, 2 Wall. 561 and 117 U. S. 697 (1865).

¹² *American Ins. Co. v. Canter*, 1 Pet. 511 (1928); *Katz, Federal Legislative Courts* (1930) 43 Harv. L. Rev. 894.

¹³ *Crowell v. Benson*, 285 U. S. 22 (1932).

¹⁴ *Cf. Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 156 Pac. 591 (1916).

share in that immunity. They are answerable, as private individuals, for wrongs committed even in the course of their official work, just as a private agent is answerable for a wrong committed by him on behalf or at the command of his principal. To be sure the officer may justify his conduct by referring to the law under which he is acting. But that raises precisely the issue whether the law does indeed authorize his conduct under the circumstances—the typical issue for judicial determination.

Thus the basic judicial remedy for the protection of the individual against illegal official action is a private action for damages against the official in which the court determines, in the usual common-law manner and with the aid of a jury, whether or not the officer was legally authorized to do what he did in the particular case. The plaintiff cannot sue to redress merely any unauthorized action by an officer. To maintain the suit the plaintiff must allege conduct by the officer which, if not justified by his official authority, is a private wrong to the plaintiff, entitling the latter to recover damages.

While the private action for damages is the basic remedy, it is generally inadequate and the equity injunction has become in the United States the common remedy. It rests on the same theory, namely, the answerability of a Government officer as a private individual for conduct injurious to another, and depends upon the assumption that unless enjoined the officer will commit acts which will entitle the plaintiff to maintain an action for damages.

Other remedies have been devised by the courts for various situations: habeas corpus, certiorari, mandamus, prohibition. But in the Federal courts, the injunction is the remedy normally used and it accomplishes what in the several states is sometimes done only by the other remedies.

Since June 1934, the Federal courts have been empowered to grant declaratory judgments in "cases of actual controversy." While this proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields.¹⁵ The declaratory judgment is a general remedy not confined to any particular type of controversy and having no special provision for administrative law. Its utility for judicial review is, therefore, largely in the control of the courts.

These remedies, it should be repeated, are not limited to the cases in which the Constitution is deemed to require judicial review. On the contrary, even in cases in which Congress is competent to exclude judicial participation, these remedies are available upon determination (1) that Congress has not forbidden judicial review, (2) that review would not improperly interfere with administration, and (3) that the issues presented are within the "judicial power" to decide.

The nonstatutory remedies thus occupy a wide field in Federal administrative law. They are available for the review of major and long-established activities of Government for which no remedy is provided by statute;¹⁶ and they are available also where the remedy

¹⁵ Borchard, *Declaratory Judgments* (1934).

¹⁶ *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902) (postal fraud order); *Ng Fung Ho v. White*, 259 U. S. 276 (1922) (alien deportation); *U. S. ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316 (1903) (determination by the Land Office of the extent of a land grant). See this Committee's Monograph No. 13, "Post Office Department," Sen. Doc. No. 186 (76th Cong., 3d sess.), Part 12, at 7, 38; Monograph No. 15, "War Department," at 4; Monograph No. 20, "Department of the Interior" at 43.

provided by statute is not an adequate substitute or does not include the particular situation involved.¹⁷

c. Statutory review.—Statutes creating administrative tribunals generally provide methods by which their determinations may be judicially reviewed. In this way, a number of methods have been established: First is the case in which the administrative order is not self-operative and suit for enforcement must be brought by the agency. For example, prior to 1906, no sanction was provided for securing obedience to orders of the Interstate Commerce Commission other than a suit by the Commission to compel obedience.¹⁸ The same was true of the Federal Trade Commission Act until 1938¹⁹ and is true today of the National Labor Relations Act. The statutes differ as to the weight to be attached to the administrative findings, the courts in which enforcement is to be sought and the process by which judicial aid is to be invoked. These matters will be discussed below. The point here is that by this method, administrative orders become effectively binding only when judicially enforced and a prerequisite condition of judicial enforcement is the court's determination that the order was properly made within the scope of the agency's legal authority.

In some instances, the statute provides for administrative determinations which are to have the effect of prima facie evidence of the truth in cases, private or governmental, involving the matters determined. Of this character are reparation orders²⁰ of the Interstate Commerce Commission, and its valuations under the Valuation Act of 1919. Determinations of grades under the Grain Standards Act and reviewable awards of the National Railroad Adjustment Board are other examples. In these situations, too, ultimate adjudication of the issues may be for the courts, with the administrative determination merely shifting the burden of proof and calling for rebuttal.

For some cases, statutes enact, with or without some change, a nonstatutory method of review. For example, the Hepburn Act in 1906 conferred jurisdiction on the Federal district courts to "enjoin, set aside, or annul" orders of the Interstate Commerce Commission. It prescribed the procedure already adopted by the Expediting Act of 1903 for enforcing such orders—a three-judge court with direct appeal only to the Supreme Court, and the requirement that both courts give the case precedence over others. This jurisdiction was continued by the Urgent Deficiencies Act of 1913.²¹ It is the procedure prescribed for orders of, among others, the Interstate Com-

¹⁷ Thus a determination by the Interstate Commerce Commission that an electric railway was a carrier subject to the Railway Labor Act was held to be not reviewable by the statutory method prescribed for orders of that Commission, but reviewable in an equity suit brought by the railway to enjoin the United States Attorney from prosecuting the railway for violation of the Labor Act. *Shields v. Idaho Central Ry.*, 305 U. S. 177 (1938). Likewise, a determination of the Bituminous Coal Commission held to be not subject to review by the Court of Appeals of the District of Columbia in the statutory method was held to be reviewable by a bill in equity in the District Court. *Utah Fuel Co. v. Bituminous Coal Commission*, 306 U. S. 56 (1939). Cf. *A. F. of L. v. N. L. R. B.*, 308 U. S. 401 (1940).

¹⁸ See McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission*, 102-115 (1933).

¹⁹ The change was made by the act of March 21, 1938, c. 49, 52 Stat. 111.

²⁰ It has been suggested that in such cases the guarantee of jury trial prevents greater weight being given to the administrative order. To the extent that a shipper is given an election to sue in a court rather than apply to the commission, this suggestion is not tenable.

²¹ Oct. 22, 1913, c. 32, 38 Stat. 208, 220, 28 U. S. C., sec. 47.

merce Commission, the Secretary of Agriculture under the Packers and Stockyards Act, and the Federal Communications Commission in its regulation of telephone and telegraph.²²

A method of review which has found considerable favor in recent legislation is that first enacted in the Federal Trade Commission Act in 1914, that is, review in a Circuit Court of Appeals with discretionary appellate jurisdiction in the Supreme Court. This method has been enacted both for cases in which the administrative order is self-operative as those under the Federal Trade Commission Act since 1938, and cases in which the order carries no sanction until it is approved by the court, such as in the case of orders of the National Labor Relations Board now. Review in the Circuit Courts of Appeals is the method provided by statute for orders of a number of agencies.²³

4. EXISTING STANDARDS OF REVIEW

The statement of judicial remedies available for review of administrative adjudications still leaves for consideration the standards applicable to the use of the remedies. First, what adjudications are reviewable and at whose instance, that is, what is the area of review? Secondly, what is the scope of the review, the extent to which any particular matter will be scrutinized?

a. Area of review.—Legislation has played little part in defining the area of reviewable administrative action. Such limits as there are to that area have been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme. As stated earlier, with respect to a number of the agencies, the statutes say nothing of judicial review and the issue of reviewability is necessarily left to the courts. Other statutes do provide for judicial review, but content themselves with the generality that the "orders" or the "final orders" of the agency shall be reviewable; and that only raises the questions whether a particular action is an order and whether the order is a final one. Some statutes specify that the review may be had at the suit of an "aggrieved party", or an "aggrieved person" or any person "adversely affected" by the order. Certain statutes specify with particularity what is to be reviewed; others follow a particular specification with an omnibus provision. Thus the Federal Communications Act provides for review of orders of the Commission granting or denying licenses with respect to broadcasting; it then permits review of other "orders" without further description and prescribes that all the remedies stated

²² The Railroad Retirement Act provides for review in rather unique language: "An employee or other person aggrieved" may apply to a United States District Court in any district in which the Board has established an office "(1) to compel the Board to set aside an action or decision of the Board claimed to be in violation of a legal right of the applicant, or (2) to take action or to make a decision necessary for the enforcement of a legal right of the applicant." But this jurisdiction "shall not be exclusive of any jurisdiction otherwise possessed by such courts" at law or in equity to aid in the enforcement of rights or obligations under the act.

²³ In addition to the Trade Commission and Labor Acts, typical of the statutes providing for judicial review in the first instance by the appropriate Circuit Court of Appeals are the Securities Act, the Securities and Exchange Act, the Holding Company Act, and the Civil Aeronautics Act. The Federal Communications Act provides for initial judicial review of broadcast orders only in the United States Court of Appeals for the District of Columbia.

are given in "addition" to, and not to the "exclusion" of, such other remedies at law or in equity as may be appropriate.

With respect to these agencies which have very narrow functions there is comparatively little doubt concerning the area of review. Thus the possibilities are relatively few in the case of the United States Employees' Compensation Commission, or the Fair Labor Standards Act, the Grain Standards Act, or even in the case of the Federal Alcohol Administration Act. But in the case of agencies like the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Power Commission, the Department of Agriculture, or the Post Office, the possibilities are many. Each of these agencies makes a variety of determinations and issues a variety of orders or notifications otherwise denominated. No one has ever suggested that all of the acts of such agencies should be subject to judicial review. The problem of differentiating between the reviewable and the nonreviewable acts calls for the best judicial talents.

In the cases which have come before them the courts have made specific determinations as to whether the particular administrative activity may or may not be judicially reviewed. In this way doubts are removed from part of the field and the light of analogy is cast on the remainder. But beyond that the courts have ventured to enunciate only general standards which guide but do not compel, and which leave considerable room for judgment and wise choice.

First of these general standards is that only a person with "legal standing" can attack an administrative act. The standing may be conferred by statute; but it frequently is not so conferred in specific terms. The question is then whether the person has otherwise a private right not to have the administrative body act in the allegedly unlawful manner. The issue is similar to that raised in a suit contesting the constitutionality of a statute. It is, of course, to some extent question begging. But it can be given greater particularity only in a specific context. For example, the Supreme Court has held that a railroad may, and a shipper may not, contest some orders of the Interstate Commerce Commission.²⁴ Whether a particular person shall have the right to contest administrative action, as whether he shall have the right to contest legislative action, is a question of law and policy dependent upon a number of variable factors. Consideration, though not conclusive, has been given, for example, to the nature and extent of the person's interest, and the character of the administrative act, whether it commands conduct by the person, permits conduct by his rival, withholds a service or benefit which the Government is free to withhold, and so forth.

In some cases the aggrieved person may have a constitutional right to a judicial determination of the issues he tenders.²⁵ But neither the courts nor the Congress have restricted judicial review to persons who allege violation of constitutional right. Except in special cases, when special considerations require a contrary holding, judicial review within the usual limits is appropriate whether the applicant seeks protection of a constitutional right or of a statutory or common-law right, privilege, or bounty.

²⁴ *Alexander Sprunt & Sons v. United States*, 281 U. S. 249 (1930).

²⁵ *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936); *Crowell v. Benson*, 285 U. S. 22 (1932).

Proposals to define the class of persons who can attack acts of administrative agencies in general are either futile or dangerous: Futile because they can hardly go beyond the present generality of persons "aggrieved" or "adversely affected" or otherwise having "legal standing"; dangerous if they go beyond it, unless the redefinition is based on detailed consideration of the specific judicial determinations made in the particular situation. For otherwise arrangements resulting from a painstaking choice of policy by Congress and by the judiciary, which allows for wise adaptability to specific situations as they are presented, might be blindly destroyed without knowledge as to whether the actual changes effected are desirable or regrettable. Experience shows that even with respect to specific agencies, both the Congress and the courts have hesitated to define exhaustively the class of persons entitled to judicial review. Occasionally pains are taken out of an abundance of caution to assure review for a particular group or to assure that review will not be denied solely for a particular reason, as, for example, that the person seeking review was not a party to the administrative proceeding. But even there wide discretion is still left to the courts. And the courts have reached similar results without such legislation. Thus, the Supreme Court has held, even in the absence of provisions similar to those in the Federal Communications Act, (a) that a person aggrieved by an order of the Interstate Commerce Commission in some cases may have judicial review though he was not a party before the Commission, and (b) that a party before the Commission is not necessarily entitled to judicial review.²⁶

A second standard is that judicial review is generally not available for preliminary and procedural orders of administrative agencies. The requirement of finality of administrative action and exhaustion of administrative remedies as a prerequisite of judicial review has been formulated by the courts in the absence of legislation. Legislation which limits judicial review to "final" orders merely enacts the self-imposed policy of the courts. In the judicial hierarchy, too, appeals are generally restricted to final judgments. Conservation of judicial energy and convenience of litigants are deemed to require that appeal be postponed until opportunities for correction of error by the lower court are foreclosed by entry of final judgment; and here, too, the litigant is generally required to exhaust his remedies in the lower court. With respect to judicial review of administrative determinations the same considerations are applicable. And there is the added factor that court and agency are not parts of the same hierarchy. Maintenance of amicable relations between them and avoidance of disrupting conflict requires generally that the administrative agency be permitted to finish its job before the court steps in. But it is not always easy to determine what is a final order, just as it is also not always easy to determine what is a final judgment. The requirement is flexible enough to permit its adaptation by the courts to special situations.²⁷

Third, until the 1938 term of the Supreme Court there was a judicial doctrine that "negative orders" of administrative agencies were not subject to judicial review. The Court never gave precise

²⁶ *Chicago Junction Case*, 264 U. S. 258, 268-269 (1924); *Alexander Sprunt & Sons v. United States*, 281 U. S. 249 (1930).

²⁷ Compare the *Utah Fuel* case, *supra*, note 17.

descriptions which would insure the recognition of such an order. A "negative order" was presumably one by which the administrative agency denied the relief claimed by the applicant. But the doctrine was not held applicable to all such orders. The criterion of disabling negativeness was therefore a matter of much dispute and the character of the order in specific cases was subject to controversy even after judicial decision of the issue. No legislation created this class of nonreviewable orders; and, except in the case of a few agencies, no legislation destroyed it. But the Supreme Court in 1938 reconsidered its precedents and expressly denied further vitality to "negativeness" as a criterion of nonreviewability.²⁸ The court created and the Court destroyed—in a striking example of judicial response to need and experience.

Though "negativeness" as a criterion of reviewability has been abandoned, the problem of whether the administrator's refusal to take action is reviewable still remains. Its solution now depends upon other standards. In some instances review may be unavailing because the determination of whether or not action should be taken in the circumstances may have been committed to the exclusive judgment of the administrator as to the public interest and convenience. But if the denial is based on an erroneous interpretation of law, judicial review is available to remove at least that barrier.²⁹

Finally, there is the category of cases in which judicial review is denied because it is thought that the cases deal with matters which are more fittingly lodged in the exclusive discretion of the administrative branch, subject to controls other than judicial review. This category, too, is the product chiefly of judicial self-limitation. It relates, of course, to matters which do not involve private right, matters with which, by constitutional doctrine, Congress is free to deal as it sees fit. The most recent example is the *Lukens* case,³⁰ holding that a person seeking Government contracts cannot have judicial review of wage determinations under the Walsh-Healey Act, which controls the award of Government contracts. The Walsh-Healey Act does not in terms either grant or deny judicial review of these determinations. There was no constitutional obstacle to review of the issues presented in the case. But the Court determined that denial of review was more appropriate and was probably implied by the legislative silence, because the Government is free to contract with whom it pleases and had been so free before the Act and because the Court concluded that an opportunity for judicial review would unduly interfere with the execution of Government contracts.

The very nature of this category of cases indicates the impracticability of a more precise definition applicable to all agencies. By hypothesis the cases are such that Congress may grant or deny judicial review as it deems fit. If Congress has not expressed its will, the Court must determine what is appropriate with such aid as it may find in legislative history and government policy. Sometimes it has granted a limited review, as in veterans' and Post Office cases;³¹

²⁸ *Rochester Telephone Co. v. United States*, 307 U. S. 125 (1939).

²⁹ Cf. *United States v. Humboldt Steamship Co.*, 224 U. S. 474 (1912).

³⁰ *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940).

³¹ Although generally there is no statutory provision for review of orders relating to the postal service, a statute of 1916 provided that an order directing a publication to be carried by freight may be reviewed by the United States Court of Appeals for the District of Columbia, 39 Stat. 424, 39 U. S. C., sec. 576.

sometimes it has denied review as in the *Lukens* case. The basis of the decisions must lie in considerations of policy. And these differ from case to case.

b. Scope of review.—Like the area of judicial review, the extent to which administrative action within that area will be subjected to judicial scrutiny is also largely determined by court decisions. The courts developed standards as to the scope of judicial review when legislation did not provide them. To a large extent, subsequent legislation dealing with the matter has either enacted the judicially formulated standards or has been so interpreted by the courts that no difference resulted.

In matters involving constitutional right, the Supreme Court has held that the Constitution—the due process clause, perhaps aided by article III—requires the Federal courts to exercise an independent judgment as to the issues of law and fact, though “this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to administrative findings upon hearing and evidence.”³² This construction of the Constitution was adopted by a divided Court.

The Supreme Court has also held that article III, aided perhaps by the due process clause, guarantees opportunity for a trial de novo of facts “where the determinations of fact are fundamental or ‘jurisdictional,’ in the sense that their existence is a condition precedent to the operation of the statutory scheme,” and “in cases brought to enforce constitutional rights.” On these issues judicial review is not restricted to the administrative record and the litigant may offer to the court evidence not presented to or considered by the agency.³³ This construction, too, was adopted by a divided Court.

Beyond the cases to which these decisions are applicable, judicial review may be restricted to the record before the agency;³⁴ and the extent of the courts’ scrutiny may be narrowed. To state the matter very broadly judicial review is generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are said to be matters of administrative judgment to be determined exclusively by the agency. But the narrow inquiry into the agency’s authority to act as it did covers a wide field. The question whether Congress had the constitutional authority to authorize the administrative action is, of course, always in the background. Short of the constitutional issues are the questions of interpretation of the statutes conferring the authority. The questions of statutory interpretation cover both the substance of the agency’s power and the procedure by which the power is exercised.

Thus the Supreme Court has held that what is an “unfair method of competition” under the Federal Trade Commission Act is ultimately a question for the courts.³⁵ Again, whether an employer is

³² *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936); cf. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920). Some lawyers see a withdrawal from it in the recent case of *Railroad Commission v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940).

³³ *Crowell v. Benson*, 285 U. S. 22 (1932).

³⁴ A number of statutes providing for review by the circuit courts of appeals empower the courts in proper cases, prior to review, to remand the cases to the agency for the taking and consideration of additional evidence offered by the litigant.

³⁵ *Federal Trade Commission v. Gratz*, 253 U. S. 421 (1929); cf. *Federal Trade Commission v. R. F. Keppel & Bro. Inc.*, 291 U. S. 304 (1934).

engaged in a business so related to interstate commerce that he is subject to the National Labor Relations Act is a question for the courts, as are also the questions, for example, whether an employer's refusal to put his agreement in writing can be an unfair labor practice under the Act and whether the National Labor Relations Board may order the hiring of a person whom the prospective employer has refused to hire because of his union affiliation. Whether the factors upon which the administrative decision was based are such as the agency is permitted to consider and whether the factors which it rejected are such as it is permitted to reject, and what weight is required to be attached to various factors are all questions which the courts can review as questions of law.

On the procedural side are all the requirements of fairness derived from the Constitution and statute—requirements which, if not met, may, as in the *Morgan* cases,³⁶ invalidate administrative action without inquiry into the merits of the results reached by the administrative body. Are notice and hearing prerequisite to the validity of the administrative action? If so, what kind of notice and what kind of hearing? Before whom may the hearing be held and by whom must the administrative determination be made? Was the aggrieved party given proper opportunity to present relevant evidence and to contest evidence used by the agency? Is the administrative decision required to be based only on evidence of record and, if so, did the agency take into consideration evidence not made part of the record? Is the agency required to formulate findings as a basis for its action and, if so, did it properly make the required findings? These are questions which the court may ask on review and the answers to which may determine the validity of the administrative action.

In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, it is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence. The question whether the administrative finding of fact rests on substantial evidence, it is said, is really a question of law, for a finding not so supported is arbitrary, capricious and obviously unauthorized.

In numerous decisions courts have held that the specific issues involved were questions of fact or questions of law. But definite criteria for ascertaining confidently which is which prior to court decision have not yet developed. A scholar has concluded that:

In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions based upon a difference of subject matter * * * The knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right.³⁷

This may be the reason why there is so much division of opinion, even among judges, as to the category in which particular issues belong. It has been suggested that the distinction, even though difficult and not entirely real, may nevertheless "satisfy the demands

³⁶ *Morgan v. United States*, 298 U. S. 468 (1936); 304 U. S. 1 (1938), 304 U. S. 23 (1938).

³⁷ Dickinson, *Administrative Justice and the Supremacy of Law* 55 (1927).

for a creative philosophy that seeks a basis upon which to allot law-making by adjudication as between courts and administrative."³⁸

The statutes conferring power on administrative agencies vary in their provisions as to the scope of judicial review. Thus nothing is said about the scope of review in suits "to enjoin, set aside, annul, or suspend" orders of the Interstate Commerce Commission under the Urgent Deficiencies Act of 1913³⁹ or suits "for the enforcement * * * of any order of the Interstate Commerce Commission other than for the payment of money."⁴⁰ The Communications Act of 1934 provides, with reference to orders of the Commission granting or denying construction permits, station licenses, and renewals or modifications thereof—

that the review by the court [the United States Court of Appeals for the District of Columbia] shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious.⁴¹

With respect to other orders of the Commission, the procedure of the Urgent Deficiencies Act of 1913 is made applicable without any provision as to the scope of review.⁴² The Federal Trade Commission Act provides that the "findings of the Commission as to the facts, if supported by evidence, shall be conclusive."⁴³ In the Securities Exchange Act the provision is that conclusiveness shall attach to the findings of the Commission as to the facts, if they are "supported by substantial evidence."⁴⁴ Such is the provision also in the case of the Federal Alcohol Administration,⁴⁵ the Federal Power Commission⁴⁶ and the administration of the Fair Labor Standards Act⁴⁷ and the Bituminous Coal Act.⁴⁸ In the case of the National Labor Relations Act, the adjective "substantial" is omitted and the Board's findings of fact are made conclusive "if supported by evidence."⁴⁹

These differences in language seem to involve no difference in meaning. Thus the Supreme Court held that the omission of the word "substantial" in the Labor Act was not significant and that the "statute in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive' * * * means supported by substantial evidence * * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵⁰ Similar conclusiveness is attached to findings of the Interstate Commerce Commission; and scholars are of the opinion that its findings have, at one time at least, fared better in the courts than those of the Federal Trade Commission, even though the statutes makes no specific provision for conclusiveness of the former and do for the latter.⁵¹

³⁸ Landis, *Administrative Policies and the Courts* (1938) 47 Yale L. J. 519, 532.

³⁹ 38 Stat. 220 (1913), 28 U. S. C. sec. 47 (1934).

⁴⁰ 36 Stat. 555 (1910), 38 Stat. 219 (1913), 49 U. S. C. sec. 16 (12) (1934).

⁴¹ 48 Stat. 1094, 47 U. S. C. sec. 402e (1934).

⁴² 50 Stat. 197 (1937), 47 U. S. C. sec. 402 (Supp. 1939).

⁴³ 52 Stat. 113 (1938), 15 U. S. C. sec. 45c (Supp. 1939).

⁴⁴ 48 Stat. 901, 15 U. S. C. sec. 78y (1934).

⁴⁵ 49 Stat. 978 (1935), 27 U. S. C. sec. 204h (Supp. 1939).

⁴⁶ 49 Stat. 860 (1935), 16 U. S. C. sec. 8251 (Supp. 1939).

⁴⁷ 52 Stat. 1065 (1938), 29 U. S. C. sec. 210 (Supp. 1939).

⁴⁸ 50 Stat. 85 (1937), 15 U. S. C. sec. 836b (Supp. 1939).

⁴⁹ 49 Stat. 453 (1935), 29 U. S. C. sec. 160e (Supp. 1939).

⁵⁰ *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229 (1938).

⁵¹ McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* (1933).

There are some variations in statutory language which seem to make a substantial difference. Thus in reparation cases the Interstate Commerce Act provides that the findings of the Commission shall be only "prima facie evidence" of the matters determined by them.⁵² In suits for recovery of underpayments of wages under the Walsh-Healey Act, the statute makes the findings of the Secretary of Labor conclusive "if supported by the preponderance of the evidence."⁵³ The Commodity Exchange Act requires the orders of the Commission refusing or revoking designations of contract markets to be supported "by the weight of the evidence"; that Act also expressly specifies as other grounds for judicial reversal that the order "was issued without due notice and a reasonable opportunity having been afforded * * * for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of said commission * * *,"⁵⁴ grounds upon which, it is to be noted, courts will in any event reverse administrative decisions even if the statute is silent. While the broadened judicial review prescribed in reparation cases is rooted in constitutional reasons, the explanations for some of these other variations are doubtless hidden in the legislative histories of the several statutes. Whether the variations usually make any real difference in the judges' actual treatment of the administrative orders, and how much difference, can only be guessed. No cases useful in this respect have been decided under the Walsh-Healey or Commodity Exchange Acts.

Both the judicial and the statutory standards as to the scope of judicial review leave with the courts considerable opportunity for choice and self-restraint in applying the standards to specific cases. The standards are not objective. They relate in large measure to matters of opinion and require the exercise of judgment where differences of opinion are common and frequently reasonable. It is no matter of surprise, therefore, that judges of the same court or of separate courts differ as to whether in a given case the administrative action was supported by substantial evidence and was within the permissible scope of administrative judgment, or was arbitrary and capricious, without substantial support and, hence, without the scope of authority. What one judge regards as a question of fact another thinks is a question of law.

Even on questions of law judgment seems not to be compelled. The question of statutory interpretation might be approached by the court *de novo* and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support.⁵⁵ Certain standards of interpretation guide in that direction. Thus, where the statute is reasonably susceptible of more than one

⁵² 49 U. S. C. sec. 16 (2). The same is true in suits to enforce money awards of the National Railway Adjustment Board. 48 Stat. 1192, sec. 3 (p) (1934), 45 U. S. C. sec. 153 (p) (Supp. 1939).

⁵³ 49 Stat. 2038 (1936), 41 U. S. C. sec. 39 (Supp. 1939).

⁵⁴ 42 Stat. 1002 (1922), 7 U. S. C. sec. 9 (Supp. 1939).

⁵⁵ See, e. g., *S. E. C. v. Associated Gas & Electric Co.*, 99 F. (2d) 795, 798 (C. C. A. 2d, 1938): "Moreover, we are dealing with a new act the administration of which is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the act should control unless plainly erroneous. In no other way can the objects of the act be attained without constant and disconcerting friction."

interpretation, the court may accept that of the administrative body. Again, the administrative interpretation is to be given weight—not merely as the opinion of some men or even of a lower tribunal, but as the opinion of the body especially familiar with the problems dealt with by the statute and burdened with the duty of enforcing it. This may be particularly significant when the legislation deals with complex matters calling for expert knowledge and judgment.

Under existing standards, then, the courts may narrow their review to satisfy the demands for administrative discretion, and they may broaden it close to the point of substituting their judgment for that of the administrative agency. In exercising their powers of review, the courts have been influenced, it is commonly thought, by a variety of inarticulate factors: The character of the administrative agency, the nature of the problems with which it deals, the nature and consequences of the administrative action, the confidence which the agency has won, the degree to which the review would interfere with the agency's functions or burden the courts, the nature of the proceedings before the administrative agency, and similar factors.

Suggestions for legislative change in the scope of judicial review have related chiefly to administrative findings of fact. It has been suggested that the scope of review of these findings be enlarged to include inquiry as to whether the findings are supported by the weight of the evidence. Assuming that such a change may be desirable with respect to special administrative determinations,⁵⁶ there is serious objection to its adoption for general application.

In the first place there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between "substantial evidence" and "weight of evidence" is not easily drawn—particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leaves some lingering doubts unanswered. "Substantial evidence" may well be equivalent to the "weight of evidence" when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided.

In the second place the wisdom of a general change to review of the "weight of evidence" is questionable. If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or spe-

⁵⁶ See, for example, S. 3943, 76th Cong., 3d sess., 1940, which sought to enlarge the scope of review of all orders of the Secretary of the Interior involving the disposition of public lands. The reason given for the bill was the peculiar situation which had arisen in these cases. (86 Cong. Rec. 8804, May 8, 1940.) The Senate committee to which the bill was referred conferred with the Secretary of the Interior, who suggested certain changes and endorsed the bill as so revised. The committee reported favorably (S. Rep. 2171) and the Senate passed the bill. (86 Cong. Rec. 19351, Sept. 30, 1940.) The bill provides for full review of the law and the facts, not in all courts but only in the United States Court of Appeals for the District of Columbia; and not in all public land cases but only the cases of orders "relating to the validity or existence of any placer mining claim . . . initiated prior to the enactment of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437) and involving the proprietary rights or other direct and actual interests of the United States adverse to those of the party aggrieved." All agreed that the peculiar circumstances in these cases made the fuller review desirable and this enlarged review was limited to these circumstances.

cialists in the field involved. It would divide the responsibility for administrative adjudications.

Another recent suggestion is that administrative findings of fact shall be set aside on review by the courts if the findings are "clearly (or plainly) erroneous" or are not supported by "credible evidence." The phrase "clearly (or plainly) erroneous" is not a term of art and there is no agreement as to its meaning. It is a phrase used in common language to express a judgment which derives significance only from concrete context. Whether it would cause any departure from existing practice in judicial review and what or how much departure it would cause no one knows. The same is true of the phrase "credible evidence." In what way, if any, does it differ from the existing standard of "substantial evidence," which the Supreme Court said means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"?⁵⁷ Does "credibility" imply more or less than "substantiality"? It has been commonly held, for example, that a "mere scintilla" of evidence does not satisfy the requirement of substantiality, and that a finding based solely on hearsay must be set aside. Yet both the scintilla and the hearsay may be "credible."

Dissatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies. "The need for review of questions of fact is less if the machinery for the determination of facts inspires confidence; it is greater if it does not."⁵⁸ Quite apart from the objections to the suggested changes stated above, the Committee believes that the machinery which it has recommended in this report for administrative adjudications will inspire confidence and will obviate the reasons for change in the scope of judicial review.

What has been said about the sufficiency of the existing provisions for judicial review applies only, of course, so long as the courts continue to discharge conscientiously the functions of review stated above. These require that, under whatever formula, the court should review the proceeding sufficiently to be satisfied that the administrative determination is not arbitrary and is within permissible bounds of administrative discretion. Between the limits of maximum and minimum review derived from the Constitution, the Congress has power to regulate the extent of the courts' participation. When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change.

5. COURTS OF REVIEW

In the absence of statutory prescription to the contrary, review of administrative adjudications begins in the courts of original jurisdiction with opportunities for appellate review in the appellate courts.

⁵⁷ Note 50. *supra*.

⁵⁸ Laird Bell, *Let Me Find the Facts* (1940) 26 A. B. A. Journal 552, 553.

This is true whether the review is sought by a bill to enjoin enforcement of the administrative order or by an action for damages against the officer involved, or by a suit for declaratory judgment, or in a case between private parties in which the order is relied upon, or by any other of the common-law remedies. Some statutes specify review by this method, for example, the Longshoremen's and Harbor Workers' Act.⁵⁹ But other statutes provide one or another of two different methods: (1) review by a three-judge district court convened for the purpose; or (2) review in a circuit court of appeals. For customs and patent cases there are the so-called legislative courts: The Customs Courts and the Court of Customs and Patent Appeals.

The device of a three-judge district court for judicial review was first adopted for Interstate Commerce Commission orders by the Urgent Deficiencies Act in 1913, and has since been extended to other matters. Review in the circuit courts of appeals as the courts of original jurisdiction was first provided by the Federal Trade Commission Act in 1914 and has since been prescribed for a number of other agencies. From judgments of the three-judge district courts an appeal may be taken only to the Supreme Court, and the appeal is available as of right. The Supreme Court also has appellate jurisdiction over the cases in the circuit courts of appeals, but this jurisdiction is discretionary and is invoked by petition for certiorari.

Generally review is not confined to the court of a single area and jurisdiction is given to courts of the type named in several places which are related to the matter involved. For example, suits to enjoin orders of the Interstate Commerce Commission may be brought "in the judicial district wherein is the residence of the party * * * upon whose petition the order was made"; if the order is not made upon petition of a party or does not relate to transportation, the venue is the district "where the matter complained of" before the Commission arises; and if the order does not relate either to transportation or a matter so complained of, the venue is the district in which one of the plaintiffs has either its principal office or its principal operating office.⁶⁰ Review of orders of the National Labor Relations Board may be sought in the courts of appeals of the circuits in which the unfair labor practice occurred or in which the respondent before the Board resides or transacts business. Occasionally, the Congress has given exclusive jurisdiction to a single court, as, for example, the Court of Appeals for the District of Columbia for review of orders of the Federal Communications Commission granting or denying construction permits or station licenses.⁶¹

Assuming that habit or unthinking imitation is responsible for the choices made in some of the statutes, the choices made in others were

⁵⁹ "(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order. * * *

"(c) If any employer or his officers or agents fails to comply with a compensation award that has become final, any beneficiary of such award, or the deputy commissioner making the order, may apply for the enforcement of the order. * * * If the Court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise * * *"
44 Stat. 1436 (1927), 33 U. S. C. sec. 921 (1927).

⁶⁰ 38 Stat. 219 (1913), 28 U. S. C. sec. 43 (1934).

⁶¹ See also note 31, *supra*.

purposive and were made after considerable deliberation and appraisal of probable consequences. For example, the provisions as to venue in the Federal Communications Act have a long legislative history and much thought was apparently given to the question of how far, if at all, jurisdiction shall be confined to the Court of Appeals of the District of Columbia or conferred upon all the courts of appeals or shared by the district courts.⁶² The arguments advanced for dispersion of jurisdiction generally center on the convenience of the private parties involved. This is a more important factor in some cases, as, for example, the award of annuities by the Social Security Board in small amounts to impecunious aged people, than in others, as, for example, the Interstate Commerce Commission's relations with the railroads which have representatives and an association in Washington. The arguments for confining jurisdiction to a single court stress the desirability of specialization and the avoidance of conflict of decisions. These factors, too, are, of course, of different importance in the different administrative adjudications.

The diversity with respect to the forum for review is generally not troublesome. Differences do not create confusion when they are clear differences; and on the whole they are. But two areas of difficulty do exist:

(a) Some difficulty has been encountered in determining whether a single- or a three-judge court is the proper forum for suits to enjoin some orders.

(b) In some cases in which jurisdiction to review is lodged in the circuit courts of appeals only, some administrative determinations are said to be nonreviewable by the statutory method but reviewable by an ordinary suit for an injunction.

The holdings in these cases are not necessarily procedural technicalities serving no useful function. To some extent they may be based on consideration of policy such as, for example, the necessity of securing additional evidence—particularly, perhaps, with respect to the effect of the order on the complaining party—or the inconvenience of convoking a three-judge court, or the undesirability of creating occasion for obligatory, direct appeal to the Supreme Court instead of the circuit court of appeals with discretionary review in the Supreme Court. The instances in which these difficulties are encountered are not many. It is probable that they are justified by policy considerations and, when not so justified, can be overcome by the courts without the aid of legislation. If that is not so, it seems desirable to enact a statute providing that if a wrong method of review is sought in a court which has jurisdiction to review the order by the proper method, the court shall, subject to such conditions as may be appropriate, grant review as if the proper method were chosen; and if only another court has jurisdiction, the case shall not be dismissed but shall be transferred to the other court.⁶³

⁶² See H. R. Hearings on H. R. 5589, 69th Cong., 1st sess. (1926) 30, 41; H. R. Rep. 404, 69th Cong., 1st sess. (1926) 20; H. R. Rep. 464, 69th Cong., 1st sess. (1926) 18; S. Hearings on S. 1 and S. 1754, 69th Cong., 1st sess. (1926) 114; H. R. Rep. 1886, 69th Cong., 2d sess. (1927) 18; S. Doc. 200, 69th Cong., 2d sess. (1927) 18; S. Hearings on H. R. 7716, 72d Cong., 1st sess. (1932) 18, 22, 49 et seq.; S. Hearing on S. 2910, 73d Cong., 2d sess. (1934) 43, 64, 68, 73; H. R. Hearings on H. R. 8301, 73d Cong., 2d sess. (1934) 80, 107; S. Rep. 781, 73d Cong., 2d sess. (1934).

⁶³ See section 311 of the Committee's proposed bill, printed below as Exhibit 1 of this report.

This provision would eliminate the risks in choice of remedy and would supply the advantages sought from a uniform procedure.

There may be some question as to the desirability of continuing the three-judge district court method of review. At present this method is accompanied by the direct appeal as of right to the Supreme Court. But the two matters are not inextricably related. Original jurisdiction might be given to the circuit courts of appeals with the same obligatory appellate jurisdiction in the Supreme Court. The Committee believes this matter to be one of convenience in judicial administration and beyond the scope of its inquiry.

CHAPTER VII

PROCEDURE IN ADMINISTRATIVE RULE-MAKING

I. THE DEVELOPMENT OF ADMINISTRATIVE RULE-MAKING

A. EARLY HISTORY

The promulgation of general regulations by the executive, acting under statutory authority, has been a normal feature of Federal administration ever since the Government was established. The first Congress provided that traders with the Indians should be licensed and bonded to observe "such rules, regulations, and restrictions" as might apply, including "such rules and regulations as the President shall prescribe."¹ In 1796 the President was given authority to establish regulations for estimating the duty upon goods, the cost of which was stated by the importers in depreciated foreign currencies.² In 1809 conclusive effect as against shippers and shipowners was given to instructions and regulations of the President authorizing the collectors of customs to refuse permission for loading cargoes, to detain vessels, and to seize goods in the enforcement of the embargo acts.³ The Internal Revenue Administrative Act of 1813 directed the Secretary of the Treasury to "establish regulations suitable and necessary for carrying this act into effect; which regulations shall be binding upon each assessor in the performance of duties enjoined by or under this act,"⁴ and broad rule-making powers to secure the proper appraisal of imported goods were conferred upon the Secretary, under the direction of the President, by the Customs Amendment Act of 1828.⁵

By succeeding statutes the rates of foreign postage,⁶ permission to change the names of vessels,⁷ provision against fire hazards on passenger and freight vessels,⁸ the felling of timber on public lands,⁹ and the packing of oleomargarine,¹⁰ one after another became subject to regulations prescribed by officers of the Government. Even broader authority was given by three acts to prevent the importation of cattle except from countries to be designated,¹¹ to suppress cattle disease,¹² and to prevent the spread of specified contagious diseases of man,¹³ in

¹ 1 Stat. 137 (1790).

² 1 Stat. 673.

³ 2 Stat. 509.

⁴ 3 Stat. 26.

⁵ 4 Stat. 274.

⁶ 9 Stat. 589 (1851).

⁷ 11 Stat. 1 (1856).

⁸ 16 Stat. 441-2 (1871).

⁹ 20 Stat. 88 (1878).

¹⁰ 24 Stat. 210 (1886).

¹¹ 14 Stat. 3 (1866).

¹² 23 Stat. 31 (1884).

¹³ 26 Stat. 31 (1890).

each of which the appropriate official was given power "to make all necessary orders and regulations to carry this law into effect"¹⁴ or to adopt "such rules and regulations as he may deem necessary"¹⁵ or "as in his judgment may be necessary"¹⁶ to accomplish the statutory purpose.

B. MODERN DEVELOPMENT

Broadly speaking, the causes of the growth of administrative rule making are twofold: The increasing use by Congress of "skeleton legislation," to be amplified by executive regulations;¹⁷ and the expansion of the field of Federal control—indeed, of governmental intervention generally—in which the new legislation, like the old, contains its quota of delegations of rule-making power.

Relatively few of the administrative agencies studied by the Committee lack power to prescribe regulations for the control of activities which are subject to their authority,¹⁸ and even these are empowered to prescribe procedural rules which necessarily must be obeyed by persons coming before them.¹⁹ The power to promulgate substantive regulations having the force and effect of law covers a wide range of private activity. Without attempting an exhaustive catalog, we may note, for example, that the Board of Governors of the Federal Reserve System is empowered to regulate, among other things, margin requirements in securities transactions, reserve requirements for banks, and the maximum rates of interest on deposits. National banks and state banks which are members of the Reserve System may buy investment securities for their own account only under such restrictions and

¹⁴ *Loc. cit. supra*, note 11, at 4.

¹⁵ *Loc. cit. supra*, note 12, at 32.

¹⁶ *Loc. cit. supra*, note 13.

¹⁷ Ilbert, *Methods of Legislation* (1912), 146; Carr, *Delegated Legislation* (1921), passim; Report, Committee on Ministers' Powers (1932) 5, 15-16, 22-23, 51-52. Carr's enumeration of the reasons, which has been widely copied, may be summarized as follows: (1) the requirement of greater flexibility in the details of a law than the legislature can supply, in order to meet changing conditions; (2) the need for freeing the legislature from concern with details in the initial consideration of a law because of the pressure of time upon it and the desirability of careful consideration of the fundamental problems involved; (3) the desirability of expert determination of numerous matters involved in modern legislative schemes such as those affecting housing, health, social security, and public services of many sorts; and (4) the necessity of administrative authority to deal with emergencies, for which the legislature often cannot be summoned and with which its processes are too slow to deal, even when it is in session.

¹⁸ The National Labor Relations Board's power to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter" [49 Stat. 452, 29 U. S. C. sec. 156] has been assumed to extend only to matters of procedure, and the Board does not in fact attempt to define unfair labor practices by regulation. On the same theory, the Federal Trade Commission has power to lay down binding regulations only with respect to quantity discounts in the pricing of goods in a limited class of industries under the Robinson-Patman Act—a power which it has not yet exercised. 49 Stat. 1526 (1936), 15 U. S. C. sec. 13. Such agencies as the Social Security Board, and the United States Employees' Compensation Commission which are charged with carrying out fairly definite statutes by adjudicating particular cases, are not given power to elaborate the law they apply by adopting general regulations.

¹⁹ Broad power to control procedure in matters coming before them is given to the Executive Departments by R. S. sec. 161, which, codifying statutes dating back to 1789, reads as follows: "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." Like the National Labor Relations Board, the other agencies mentioned in footnote 18 have power to issue rules and regulations of a procedural nature. See, e. g., the Federal Trade Commission Act (Commission authorized "to make rules and regulations for the purpose of carrying out the provisions of this Act," 38 Stat. 722); the Social Security Act (Board authorized to issue such rules and regulations "as may be necessary to the efficient administration of the function" with which it is charged by the Act, 49 Stat. 647, 42 U. S. C. sec. 1302); the Longshoremen's and Harbor Workers' Compensation Act [Employees' Compensation Commission authorized "to make such rules and regulations * * * as may be necessary in the administration of this Act," 33 Stat. 939 (1927), 44 U. S. C. sec. 442 (1934)]. Similar provisions may also be found in most of the statutes granting substantive rule-making powers.

definitions as the Comptroller of the Currency may by regulation provide. The Securities and Exchange Commission has extensive power to prescribe regulations governing security markets and trading and the operations of public-utility holding companies.

The Fair Labor Standards Act permits the Administrator of the Wage and Hour Division, on recommendation of appropriate industry committees, to issue orders which prescribe wages that vary from the statutory minima and to define the scope of certain exemptions from the Act. The Secretary of Labor is empowered by the Walsh-Healey Act to determine prevailing minimum wages which shall thereafter be paid by contractors in the performance of Government supply contracts. The United States Maritime Commission is authorized to set minimum wage and manning scales, as well as minimum working conditions, for all vessels receiving operating differential subsidies.

The Federal Security Administrator under the Food, Drug, and Cosmetic Act, is empowered to issue regulations fixing legally binding standards of identity, quality, and fill of container for a wide and important range of products and to prescribe labelling requirements and requirements as to content for specific classes of products. The Grain Standards Act authorizes the Secretary of Agriculture to set standards of quality and condition for grain which must be used whenever grain is sold by grade in interstate or foreign commerce. Similar acts govern other agricultural commodities.

The Bureau of Marine Inspection and Navigation of the Department of Commerce, for the purpose of promoting safety at sea, issues voluminous regulations governing the construction and operation of vessels. The Civil Aeronautics Administration has similar powers in regard to transportation by air, and the Interstate Commerce Commission with respect to transportation by land. The Federal Alcohol Administration Act authorizes the Administration (now the Alcohol Tax Unit of the Bureau of Internal Revenue) to issue regulations governing certain trade practices in the industry. The Bituminous Coal Division of the Department of the Interior is empowered to set minimum prices and marketing rules and regulations for soft coal, as well as maximum prices if the need should arise. Other bureaus of the Department have broad rule-making powers over the Alaskan fisheries industry and such matters as the taking of migratory birds and Alaskan game. The Federal Communications Commission has wide authority to issue rules and regulations governing telegraph and telephone carriers, commercial and amateur radio broadcasting and communication, and wireless installations aboard ships and motor lifeboats.

In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so. Some of these, such as many of the rulings of the Treasury Department under the tax laws, take the form of opinions upon specific statements of fact and should hardly be called regulations; but they often operate as effective precedents. Others, such as the rulings of the Board of Governors of the Federal Reserve System, refer to hypothetical facts and become in effect somewhat generalized opinions of what is lawful and

what is unlawful. Some agencies which issue interpretations couched in general terms rather than rulings upon particular facts are careful to distinguish them from regulations that have the force of law;²⁰ other agencies simply promulgate their interpretations as regulations which are indistinguishable in form from those that have statutory force.²¹

Administrative rule-making, in any event, includes the formulation of both legally binding regulations and interpretative regulations. The former receive statutory force upon going into effect.²² The latter do not receive statutory force and their validity is subject to challenge in any court proceeding in which their application may be in question. The statutes themselves and not the regulations remain in theory the sole criterion of what the law authorizes or compels and what it forbids. An interpretative regulation even of long standing will be rejected if it is deemed to be in conflict with a clear and unambiguous statute.²³

This distinction between statutory regulations and interpretative regulations is, however, blurred by the fact that the courts pay great deference to the interpretative regulations of administrative agencies, especially where these have been followed for a long time. In upholding certain regulations issued by the Commissioner of Internal Revenue, the Supreme Court has stated that "it is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."²⁴ Although the courts at times avoid the effect of this doctrine by refusing to apply administrative interpretations which they consider inadmissible,²⁵ the doctrine has sufficient weight to give much finality to the interpretative regulations of administrative agencies. Consequently the procedures by which these regulations are prescribed become important to private interests and will be considered in this report.

C. EXCEPTIONAL TYPES OF RULE-MAKING

From the earliest times Congress has conferred upon the President powers which differ importantly from those which have just been described. Instead of being simply one means of continuous, integrated regulation, such as most of the regulatory bureaus and commissions undertake, they involve isolated or temporary authority to deal with emergency situations and often the determination of high matters of State.²⁶ The President, for example, may be authorized to impose an embargo in the event of foreign war, or to impose a retaliatory tariff upon finding that a foreign nation has discriminated against American products. Or, in the converse situation, the Presi-

²⁰ For example, the Administrator of the Wage and Hour Division of the Department of Labor, who has power to issue binding regulations only under certain specific provisions of the Fair Labor Standards Act, has found it necessary to issue "interpretations" under other provisions as well. He has been careful not only to give these their distinguishing designation but also to state that they express only his carefully considered opinion, with which others are at liberty to differ.

²¹ Thus the Treasury Regulations include both types of regulations without distinction. ²² The judicial review of statutory regulations is, generally speaking, of limited availability and scope. It will be discussed later in this chapter.

²³ *Koshland v. Helvering*, 298 U. S. 441 (1936); Alvord, *Treasury Regulations and the Wilshire Oil Case* (1940), 40 Col. L. Rev. 252, 261-2.

²⁴ *Brewster v. Gage*, 280 U. S. 327, 336 (1930); *Fawcus Machine Co. v. United States*, 282 U. S. 375 (1931); Alvord, *op. cit.*, *supra*, note 23 at 262.

²⁵ See note 23, *supra*. ²⁶ See *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935) at 421-425, citing earlier cases.

dent may prescribe regulations to deal with an emergency which Congress has found to exist. Powers of this sort were conferred in the legislation of the Civil and World Wars²⁷ and more recently for dealing with the economic crisis.²⁸ Here again the very emergency character of the situations makes inapplicable the procedures evolved for dealing with the normal regulations promulgated by administrative agencies in the performance of their duties.

Occasionally a power, at first given for only exceptional situations, may be authorized for more frequent routine use. The power already mentioned to vary the law as to imports and import duties, once given only to the President to combat foreign discrimination or involvement in foreign wars, is now authorized for the more routine purpose of excluding goods because of unfair competition and of altering rates of duty to compensate for differences in the cost of production of domestic and foreign goods. But when this change from exceptional to regularized use occurred, a change in procedure occurred also. The United States Tariff Commission was established and its procedures subjected to the more ordinary rule-making procedures which fall within the scope of this Committee's study. The exceptional powers which we have mentioned were not entrusted to specialized administrative agencies, nor was it contemplated that in exercising them the President would maintain a continuing supervision with the aid of a technical staff. Such powers remain extraordinary and will not be further considered here.

II. SIGNIFICANT ASPECTS OF RULE-MAKING PROCEDURE

A. THE CHARACTER OF RULE-MAKING PROCEDURE

It has been suggested that the process of administrative rule making is essentially the same as that of legislation and that the procedure which is incident to it may therefore be patterned after that of legislatures. This conclusion, however, does not follow. A legislature is supposed to be as far as possible a cross section of the community, and its members in theory bring with them a large part of the knowledge and opinion out of which after open discussion the laws are to be framed. When all due allowance is made for the increasingly important role taken by committees in the legislative process, it remains true that legislative procedure has not been shaped primarily for the purpose of securing anew and from outside sources data and expressions of view that will determine the formulation of a statute.

An administrative agency, on the other hand, is not ordinarily a representative body. Its function is not to ascertain and register its will. The sovereign will has already been broadly expressed. Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. It investigates and makes

²⁷ J. Hart, *Ordinance Making Powers of the President of the United States* (1925), 92-96, 98-107 contains a summary of the powers conferred during the Civil and World War periods.

²⁸ Some of the important rule-making powers conferred in the emergency of 1933 are enumerated in Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 *Harv. L. Rev.* at 259-260.

discretionary choices within its field of specialization. The reason for its existence is that it is expected to bring to its task greater familiarity with the subject than legislators, dealing with many subjects, can have. But its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect.

These differences are and should be reflected in its procedures, which should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses. They should also be adapted to eliciting, far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action. Administrative rule-making proceedings consequently cannot wisely be patterned unthinkingly after legislative analogies.

There are four stages in the rule-making procedures of the Federal administrative agencies. There are (1) the investigation, or study, of the problems to be dealt with; (2) the formulation of tentative ideas regarding the regulations to be issued; (3) the testing of these ideas; and (4) the final formulation of the regulations. These will be dealt with in the discussion which follows, but the historical development of rule-making procedure and the specific procedural devices employed, which form the basis of the discussion, cut across these elements. The latter must be kept in mind as the history and incidents of rule-making procedure are considered.

B. EARLY ABSENCE OF REGULARIZED PROCEDURE

For over a century the Federal statutes conferring rule-making authority were entirely lacking in any definition of the procedure to be followed in the preparation of regulations. No requirement of notice and hearing or of consultation with outside interests was imposed. In a few instances Congress required that regulations have the approval of a superior officer before going into effect.²⁹ In a few other instances Congress required that the regulations should be laid before it at the time of their issuance—not, apparently, for approval, but merely to permit the legislature to be informed of the administrative action.³⁰

It is hardly to be supposed that in the early days of Federal administration the scattered private interests affected by administrative regulations were regularly consulted in the course of the rule-making process. Importers, Indian traders, pensioners, taxpayers, and the rest may occasionally have written to the authorities to convey their points of view or may have made representations through members

²⁹ The Secretary of the Treasury might, with the approval of the President, make regulations to insure the just appraisal of imports (4 Stat. 274 (1828)); the Secretary of War was directed to grant certain pensions under such rules and regulations as he might prescribe, with the approval of the President (9 Stat. 250 (1848)); the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, was empowered to establish rules and regulations necessary to protect the revenue arising from the taxation of liquor (12 Stat. 449 (1862)).

³⁰ A statute establishing the Naval Hospital "authorized and required" the Secretary of the Navy "to prepare the necessary rules and regulations for the government of the institution, and report the same to the next session of Congress" (2 Stat. 650 (1800)). A later enactment provided that the purchase of supplies for the Navy be made under Executive regulations and required that the rules adopted for this purpose be laid before Congress (5 Stat. 536 (1842)).

of Congress. There is no available record to indicate whether scheduled meetings or hearings ever took place, but it does not seem likely. Administrative knowledge, good sense, and responsibility to Congress probably were the only usual safeguards to affected interests.

C. CONSULTATION AND CONFERENCES

As economic and other groups in the community became organized and vocal, and as legislation affecting them came more and more into existence, administrators, in contact with those upon whom their authority bore, turned to them for information and their points of view. Participation by these groups in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings.

Early in the present century a number of agencies appear to have adopted regularized consultation in connection with their rule-making processes. A 1902 appropriation act³¹ brought experts outside the Government into the task of rule-making³² by appropriating funds "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various states and of the courts of justice."

Ever since its establishment in 1913, the Federal Reserve System has regularly consulted with members of the banking world. Other agencies, among them the Securities and Exchange Commission, the United States Maritime Commission, the Civil Aeronautics Authority, the Federal Communications Commission, the Bureau of Marine Inspection and Navigation, the Bituminous Coal Division, the Grain and Seed Division of the Department of Agriculture, the Bureau of Customs, the Children's Bureau, and the Bureau of Biological Survey, have also conferred, in making rules, with the interests affected by them.

The practice of consulting with private interests leads easily to the establishment of temporary or permanent advisory committees drawn from an industry. During the early years of the present century the Forest Service consulted with committees of stockmen, the Bureau of Biological Survey with committees of conservationists, and the Secretary of Agriculture with committees of cotton growers in setting cotton standards under the Cotton Futures Act. In 1908 the Transportation of Explosives Act authorized the Interstate Commerce Commission to utilize the services of the American Railway Association in formulating its regulations.³³

The Revenue Act of 1918³⁴ provided for a temporary Advisory

³¹ 32 Stat. 286, 296.

³² Previously, by the Safety Appliance Act of 1893, 27 Stat. 531, the American Railway Association was authorized to "designate to the Interstate Commerce Commission" the standard height of drawbars on railroad cars.

³³ Act of May 30, 1908, c. 234, 35 Stat. 555, 18 U. S. C. sec. 383 (1934).

³⁴ Act of February 24, 1919, c. 18, 40 Stat. 1057, sec. 1301 (a) (65th Cong., 3d sess.).

Tax Board in the drafting of regulations. The Alaska Game Law of 1925³⁵ set up an advisory group to be consulted in the making of regulations. The Fair Labor Standards Act,³⁶ requires that wage orders of the Administrator, varying the statutory minimum-wage rates in particular industries, shall originate with committees of employer, employee, and public representatives.

The practice of holding conferences of interested parties in connection with rule-making introduces an element of give-and-take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered. As a procedure for permitting private interests to participate in the rule-making process it is as definite and may be as adequate as a formal hearing. If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented conferences have evident advantages over hearings in the development of knowledge and understanding.

Notable instances of the regular use of conferences, to the exclusion wholly or partially of hearings, appear in the procedures of the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission, and the Federal Communications Commission. The practice of the Board of Governors of the Federal Reserve System is especially noteworthy because of the Board's virtually complete reliance upon conferences rather than hearings as a means of enabling affected parties to participate in the rule-making process. Over a period of time the Federal Reserve System has developed a procedure of consultation and conference within the Board's organization and with the public, directly and through the American Bankers' Association and the 12 Federal Reserve banks. Outside views come from replies to letters which the Board sends out, and orally at conferences. Usually statements are put in writing and a stenographic report of conferences is made. Frequently, the interchange of data and views is facilitated by mimeographing and circulating them, both within and without the staff. The procedure is flexible, thorough, adapted to bringing the knowledge of an expert agency to bear upon its rule-making problems, and fair. No complaint seems to have been made of it. Because of its successful bringing together of agency knowledge and outside contributions, there seems to be no reason for extending to the Board of Governors the policy of holding rule-making hearings which is suggested below for other agencies with functions that seem logically indistinguishable. Tradition, historical development, and able personnel have introduced procedural variety into administration which it would be futile and unwise to attempt to eliminate.

The Securities and Exchange Commission, also dealing with close-knit economic groups, has used consultation and conferences in rule-making and has rarely failed to submit its proposals to those regulated before promulgating rules.

The Federal Communications Commission deals with more scattered interests but has found it possible, nevertheless, to dispose of a large portion of its rule-making problems by consultation with the industry which it regulates. The Bureau of Motor Carriers of the Interstate

³⁵ Act of January 13, 1925, c. 75, 43 Stat. 739 (68th Cong., 2d sess.), 48 U. S. C. sec. 205 (1935).

³⁶ Act of June 25, 1928, c. 676, 52 Stat. 1061, 29 U. S. C. sec. 205 (Supp. 1939).

Commerce Commission has done the same. The Bureau of Marine Inspection and Navigation has formed committees of consultants, drawn from the industries affected, which have met continuously with the Bureau's officers and participated in the drafting of particular sets of regulations governing the construction of vessels. The Committee recommends the wider use of these methods of obtaining the knowledge, views, and criticism of outside interests in the process of rule making. They can be particularly useful in the work of the Bureau of Internal Revenue, the Comptroller of the Currency, and the Post Office Department. Consultation cannot be prescribed by legislation. Frequently it is not necessary, as in instances where the content of regulations, such as many traffic regulations on land, water, or in the air, is a matter of indifference so long as a definite plan is provided. The occasions when consultation and conferences should be employed can scarcely be specified in advance; their use must be left to administrative devising, in the light of a conscious policy of encouraging the participation of those regulated in the process of making the regulations.

D. HEARINGS

Hearings differ from consultation and conferences in that they are publicly announced in advance and any interested party is permitted to attend and testify. Their use in rule making is a product of the present century.

A succession of statutes conferring rule-making authority upon the Interstate Commerce Commission has provided that certain regulations should issue only "after hearing" or "after full hearing." Such provisions were contained in the Safety Appliance Act as amended in 1903³⁷ and as supplemented in 1910³⁸ and in the Boiler Inspection Act of 1911.³⁹ In 1917 the Commission was empowered, "after hearing," to establish rules, regulations, and practices with respect to car service.⁴⁰

Hearings have become usual in other fields where safety in transportation is regulated. The Bureau of Marine Inspection and Navigation, although not required by statute to do so, held hearings in 1936 upon regulations for the construction of oil tankers and announced in 1939 that it proposed to do so in the future upon "all regulations of extensive scope and character." An Act of 1936, dealing with oil tankers, required hearings in connection with future regulations upon that subject.⁴¹ The Civil Aeronautics Authority held hearings upon proposed regulations for the structure and equipment of aircraft. The Bureau of Motor Carriers of the Interstate Commerce Commission has held hearings upon safety and other regulations.

The Secretary of Agriculture has held hearings without statutory requirement in establishing purely advisory standards for wheat,⁴²

³⁷ Act of March 2, 1903, c. 976, 32 Stat. 943, 45 U. S. C. sec. 9 (1935).

³⁸ Act of April 14, 1910, c. 160, 36 Stat. 298, 45 U. S. C. sec. 12 (1935).

³⁹ Act of February 17, 1911, c. 103, 36 Stat. 914.

⁴⁰ Act of May 29, 1917, c. 23, 40 Stat. 101, 49 U. S. C. sec. 1 (14) (1934).

⁴¹ 49 Stat. 1890, 46 U. S. C. sec. 319 a (3).

⁴² Grain Standards Act of August 11, 1916, c. 313, pt. B, 39 Stat. 482, 7 U. S. C. sec. 71 (1935).

cotton,⁴³ and other products,⁴⁴ and for canned goods under the 1930 amendment⁴⁵ to the Food and Drug Act. In 1938 Congress adopted a legislative requirement of formal hearings in connection with several varieties of regulation of products under the Food, Drug, and Cosmetic Act.⁴⁶ Before that the Plant Quarantine Act of 1912,⁴⁷ the Importation of Adulterated Seeds Act, as amended in 1926,⁴⁸ and the Federal Seed Act of 1939⁴⁹ contained the hearing requirement in connection with rule-making. The latter act is unique in extending the requirement to virtually all types of regulations, including procedural regulations.

Since the variation of tariff rates has become an administrative matter, the requirement of hearings in advance of recommendations to the President that rates be altered has been included in the statutes.⁵⁰ Hearings are also required to be held under the Trade Agreements Act before concluding an agreement to alter rates of duty.

Several recent statutes governing trade practices in general terms, to be amplified by administrative regulations, call for hearings as part of the process of formulating the regulations. Included in this list are the Federal Alcohol Administration Act of 1935,⁵¹ which significantly omits the hearing requirement for other types of regulations, such as regulations to define the nonindustrial uses of alcohol and those regulating the sale of distilled spirits in bulk; the Commodity Exchange Act of 1936 with respect to altering the minimum period of notice of delivery of grain under contract;⁵² and the Robinson-Patman Act of the same year with respect to price differentials on quantity sales in industries having a small number of large purchasers.⁵³

The regulation of wage rates has generally been attended by hearings, either through administrative choice or by reason of statutory requirements. Thus wage determinations under the Walsh-Healey Act, applying to work on products supplied to the United States, have regularly been made after hearing, although the statute does not so require. Wage-fixing by the United States Maritime Commission and by the Secretary of Agriculture under the Sugar Act of 1937 must be accompanied, respectively, by "appropriate hearings"⁵⁴ and by "investigation and due notice and opportunity for public hearings."⁵⁵ The Fair Labor Standards Act of 1938 not only requires the participation of industry committees in the formulation of industry wage orders, as previously noted, but also requires the Administrator to hold hearings upon the committees' proposals and to base his action approving them upon evidence adduced at the hearings.⁵⁶

Governmental price fixing has also been accompanied by the statutory hearing requirement. Rate fixing for public utilities has

⁴³ Cotton Futures Act, Act of August 11, 1916, c. 313, pt. A, 39 Stat. 476; Cotton Standards Act, Act of March 4, 1923, c. 288, 42 Stat. 1517, 7 U. S. C. sec. 51 (1935).

⁴⁴ United States Warehouse Act, Act of August 11, 1916, c. 313, pt. 6, 39 Stat. 486, 7 U. S. C. sec. 257 (1935).

⁴⁵ 46 Stat. 1019.

⁴⁶ 52 Stat. 1055, 21 U. S. C. sec. 371.

⁴⁷ Act of August 20, 1912, c. 308, 37 Stat. 316-318, 7 U. S. C. secs. 159-161 (1935).

⁴⁸ Act of April 26, 1926, c. 186, 44 Stat. 325, 7 U. S. C. sec. 115 (1935).

⁴⁹ Act of August 9, 1939, c. 615, 53 Stat. 1275, 7 U. S. C. sec. 1551 (Supp. 1939).

⁵⁰ Tariff Act of September 21, 1922, c. 356, 42 Stat. 941; Tariff Act of June 17, 1939, c. 497, 46 Stat. 701, 19 U. S. C. sec. 1336 (a) (1935).

⁵¹ Act of August 29, 1935, c. 814, 49 Stat. 981, 27 U. S. C. sec. 205 (f) (Supp. 1939).

⁵² Act of June 15, 1936, c. 545, 49 Stat. 1498, 7 U. S. C. sec. 7 (a) (4) (Supp. 1939).

⁵³ Act of June 19, 1936, c. 592, 49 Stat. 1526, 15 U. S. C. sec. 13 (a) (Supp. 1939).

⁵⁴ Act of June 29, 1936, c. 858, 49 Stat. 1972, 46 U. S. C. sec. 1131 (a) (Supp. 1939).

⁵⁵ Act of Sept. 1, 1937, c. 898, 50 Stat. 909, 7 U. S. C. sec. 1131 (b) (Supp. 1939).

⁵⁶ Act of June 25, 1938, c. 676, 52 Stat. 1064, 29 U. S. C. sec. 208 (d) (Supp. 1939).

been attended by a high degree of procedural formality; and the same kind of procedure has been employed under the Packers and Stockyards Act as respects both stockyard companies and "market agencies," or commission merchants. In these instances, however, the number of enterprises having their rates fixed in a single proceeding is quite limited, with the consequence that rate fixing has come to be thought of as adjudication rather than as rule making. The fixing of mine-mouth prices for virtually all of the bituminous coal sold in the United States, on the other hand, involves a large number of enterprises. Nevertheless, despite the fact that the statutory procedural requirement is not entirely clear,⁵⁷ the Bituminous Coal Division has employed an elaborate hearing procedure in arriving at its recent country-wide price order.

Agreements and orders under the Agricultural Marketing Agreements Act of 1937,⁵⁸ embracing varied controls over marketing practices and prices, may be placed in effect only "after due notice and opportunity for hearing." No distinction is drawn between agreements, which are voluntary with handlers, and orders, which may be imposed upon them if approved by two-thirds of the producers by number or volume of the commodity in question. The imposition of import quotas pursuant to the agricultural program must also be preceded by hearings in the course of investigations conducted by the Tariff Commission.⁵⁹ Although the Agricultural Adjustment Act of 1935 provided for notice and opportunity to be heard in advance of a program of benefit payments for commodities,⁶⁰ the Act of 1938⁶¹ omits this particular procedural requirement.

The promulgation of a number of other regulations of substantial economic importance to business has, by the several agencies' own choice, been preceded by hearings in recent years, despite the absence of statutory requirements to this effect. This was the case with the original Packers and Stockyards regulations in 1921, the Alaska fisheries regulations in 1939, the accounting regulations of the Federal Power Commission for hydroelectric and natural-gas companies, and some of the more important broadcasting and other regulations of the Federal Communications Commission. The Wage and Hour Division has held hearings upon a number of its regulations other than industry wage orders, as has the Children's Bureau upon its regulations under the same act.

So it will be seen that hearings are now generally held in connection with the fixing of prices and wages, the prescription of rules for the construction of vessels and other instruments of transportation, the regulation of the ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both

⁵⁷ The Act [50 Stat. 72 (1937), 15 U. S. C., sec. 829 (a) (Supp. 1939)] provides that no order subject to judicial review and "no rule or regulation which has the force and effect of law" shall be made except after notice and an opportunity for hearing. Whether a price order is subject to judicial review has not been finally determined.

⁵⁸ 50 Stat. 246, as amended. 50 Stat. 563, 7 U. S. C., sec. 608 b-f.

⁵⁹ 50 Stat. 246 (1937), 7 U. S. C., sec. 624.

⁶⁰ 49 Stat. 752, 7 U. S. C., sec. 608 (5).

⁶¹ 52 Stat. 31, 7 U. S. C., sec. 1281 *et seq.*

by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making.

The Committee believes that the practice of holding public hearings in the formulation of rules of the character mentioned above should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making. The difficulty of defining necessary exemptions from any general prescription argues strongly, however, against the wisdom or feasibility of a statutory requirement that hearings invariably precede promulgation of a regulation. Advance notice and hearings in rule making inescapably involve expense and a measure of delay—not always warranted in connection with regulations of minor, noncontroversial character, or regulations which announce interpretations, or regulations whose rapid creation is necessary to avert dangers or prevent unscrupulous conduct. Neither statutory classification of subject matters nor characterization of types of rules could assure that hearings would be held in every instance where profitable, or that they would not be compelled in some situations where they were useless or even positively dangerous. Here, as elsewhere in the administrative process, ultimate reliance must be upon administrative good faith—good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated. The same comment applies to the subject of notice of rule-making hearings. Hearings are likely to be diffuse and of little real value either to the participating parties or to the agency, unless their subject matter is indicated in advance. Hence, sound practice dictates that ordinarily notices of hearing be accompanied by tentative drafts of the regulations being considered or by a precise statement of the subjects which it is expected may ultimately be touched. But so much may not be feasible in every instance, either because of the bulk of the regulations or because the agency feels that assumption of a position by it should be postponed until further proceedings have been completed and fuller information is at hand. While in principle, therefore, each agency should be obliged to announce with the greatest possible definiteness the matters to be discussed in rule-making proceedings, a statutory specification concerning notice would almost necessarily prevent justifiable, though unforeseen, departures from the desirable standard.

E. ADVERSARY HEARINGS

Hearings in rule making are usually either investigatory or designed to permit persons who may not have been reached in a previous process of consultation and conference to come forward with evidence or opinion. The purpose is not to try a case, but to enlighten the administrative agency and to protect private interests against uninformed or unwise action.

Rule-making proceedings do occur, however, in which an adversary element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. Low-cost producers as against high-cost producers with respect to maximum prices or minimum wages; workers as against employers with respect to wages or working conditions; buyers as against sellers with respect to the regulation of agricultural marketing; the makers of machinery which will be barred by proposed safety regulations

as against others whose product will be lawful; these are recurring divisions of interested parties which from time to time confront an administrative agency engaged in rule making. Frequently the number of parties constituting a single interest is small and existing members are known. In any event, whether their number is great or small, they may often gain or lose with relative finality in the rule-making proceeding itself. The content of the regulations when issued may be definite and the consequences of noncompliance severe, such as the loss of the right to do business. Under these circumstances it may be desirable to let affected parties treat the rule-making proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be publicly disclosed to opposing interests which may answer, explain, or rebut. For this purpose the procedure of consultation and conference and of nonadversary hearings may be inadequate. Where this is the case, hearings, in which information is introduced as evidence subject to refutation and often to cross-examination, have come to be employed.

Hearings of this type may be held by administrative choice, as in the case of some proceedings of the Federal Communications Commission, or because of statutory requirements, as in the case of the Food and Drug Administration and the Wage and Hour Division. Recent statutes containing these requirements go far in prescribing procedures previously encountered only in connection with adjudication. They require findings of fact to support the administrative regulations and either require in terms that these findings be based exclusively upon evidence in the record of the hearing⁶² or authorize the courts, in statutory review proceedings, to set aside the regulations because an essential finding lacks substantial evidence in the record to support it.⁶³ The agencies subject to these requirements are thus compelled to bring forth the entire bases of their rule-making determinations at oral hearings and to record in writing the stages by which they arrive at their conclusions.

The application of the procedures of a judicial trial to administrative rule making is limited, however, by the distinctive characteristics of rule-making proceedings. The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed and accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination, and of stating the findings and conclusions fully. The problem is evident, for example, in the case of a set of regulations which in thousands of paragraphs lays down rules for ship construction⁶⁴ or one which governs as discretionary a

⁶² Food, Drug, and Cosmetic Act, 52 Stat. 1055 (1938), 21 U. S. C., sec. 371 (e); Agricultural Marketing Agreements Act, 50 Stat. 24 (1937), 7 U. S. C., sec. 608 (c) (Supp. 1938).

⁶³ Bituminous Coal Act, 50 Stat. 73 (1937), 15 U. S. C., sec. 829; Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U. S. C., secs. 208, 210 (a).

⁶⁴ 46 C. F. R. 39, *et seq.* (1939).

matter as the nature of the disclosures to be made in a registration statement for new issues of securities.⁶⁵

No general statement of the types of rule making in which adversary hearings should be used seems possible. Provision for their use must necessarily be left to specific regulatory laws and to administrative rules of practice. It is too early to attempt to pass final judgment upon the wisdom of the provisions for adversary hearings contained in the Bituminous Coal Act, the Fair Labor Standards Act, and the Food, Drug, and Cosmetic Act just cited. The earliest of these dates only from 1937. Not only are the results of so brief an experience difficult to measure, but improvements in administrative detail are probable.

Thus far the resulting procedure has been cumbersome and expensive. The record and exhibits lying back of the recent bituminous-coal price order totaled over 50,000 pages; the trial examiner's report embraced approximately 2,800 pages in addition to exhibits, and the Director's report consisted of 545 single-spaced legal-size pages, exclusive of indices, annexes, and price appendices. Wage-order records under the Fair Labor Standards Act run from 600 to 10,000 pages each. The hearing process under the Food, Drug, and Cosmetic Act has required from 5 to 11 months for completion. The bituminous-coal price order was issued more than two years after the present phase of the procedure leading to it was begun.

Even if the expense and delay of these adversary rule-making processes cannot be wholly eliminated, they may, insofar as they do not constitute a break-down of governmental regulation,⁶⁶ purchase advantages which justify them. The ultimate judgment of whether they do or not should determine whether they are to be continued. The possible advantages are primarily those, including greater satisfaction to the parties, which result from the check to which the evidence and arguments may be subjected by counter evidence, cross-examination, and argument. They include also the discipline to which the reasoning of an administrative agency is subjected when it must make findings based upon identified evidence and predicate its conclusions, in turn, upon these findings. This discipline should be self-imposed in any event within an agency's organization if not publicly; but it is not always true that it is.⁶⁷

These possible advantages of adversary procedure in situations involving controversial economic interests may account for the voluntary adoption of this type of procedure by a number of agencies. There are indications, on the other hand, that in some instances the use of such procedure may spring from conscious or unconscious adoption of trial methods in rule making by agencies which also have cases to hear and decide⁶⁸ or from a supposed necessity imposed

⁶⁵ 17 C. F. R., sec. 230, 400, *et seq.* (1939).

⁶⁶ The administration of the Fair Labor Standards Act, the Agricultural Marketing Agreements Act, and the Food, Drug, and Cosmetic Act is going forward vigorously within the limitations imposed by the cost and delay of the necessary procedure. The restrictions imposed by the Bituminous Coal Act have more nearly induced paralysis. If the Act should be extended, the restrictions will probably be less serious in the future than they have been in the past.

⁶⁷ See Fuchs, *The Formulation and Review of Regulations Under the Food, Drug, and Cosmetic Act* (1939), 6 L. & Contemp. Probs. 43, at 58-62, for an illustration of reasoning lying back of regulations which might have been improved by procedural requirements.

⁶⁸ In the Interstate Commerce Commission the formulation of safety regulations has been accomplished to a large extent in proceedings instituted by labor unions, in which the carriers have been respondents. It has been natural and proper, in consequence, for

by Supreme Court decisions or public sentiment relating to the administrative process.⁶⁹ Except insofar as binding procedural requirements actually exist with respect to rule making, the adoption of adversary methods should be governed wholly by realistic considerations.

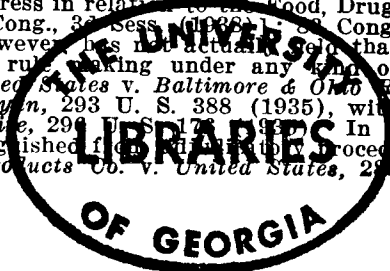
F. INVESTIGATIONS

Much that occurs at a hearing or conference is conditioned by the investigation of the problem which may have preceded it, or of which the hearing may be a part. Where conferences and hearings are not held, the initial investigation is of all-embracing importance in the rule-making process. Where conferences and hearings are held after the investigatory stage has passed, they may or may not add to the information of the agency. Hence the initial investigation is of primary significance in most instances of rule making. The methods by which it may be conducted are of great importance to affected private interests.

The investigation may be conducted within the agency by bringing to bear upon the problem the experience of its staff, and the accumulated information in its records. Or information may be sought by summoning witnesses and obtaining documents for examination in a public proceeding. Often both methods are followed. The Interstate Commerce Commission has preceded a number of its regulations and broad rate orders by special investigations and investigatory hearings. The Federal Power Commission has issued rules not involving actual regulation of business on the basis of information developed by its staff from its records, but conducted an extensive investigation of accounting systems, consulted interested groups, and held hearings upon its proposed accounting regulations for electric and natural gas utilities. The Federal Alcohol Administration (now the Alcohol Tax Unit), the Federal Communications Commission, and the Securities and Exchange Commission all engage in elaborate studies of problems that are to be covered in regulations. At least two of the investigations of the latter agency have covered periods of several years. The Tariff Commission conducts one of the most elaborate fact-gathering systems in the Government, involving both continuous accumulation of data and investigation and report upon

the procedure to follow the same pattern as that in other proceedings before the Commission. The Supreme Court has imposed the requirements of adequate findings upon the Commission in proceedings of this sort. *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454 (1935). But the Commission has followed adversary methods strictly whenever rule-making hearings have been held without apparent regard to their utility. Other instances of the apparent assumption that adversary rule-making methods imply extreme procedural safeguards have been noted in the Federal Communications Commission and in the administration of the child-labor provisions of the Fair Labor Standards Act.

⁶⁹ Agencies which by statute are required to give full hearings seem usually to feel that they are required to follow judicial methods. See this Committee's Monograph No. 12, "Administration of the Fair Labor Standards Act," 80-85; Sellers and Grundstein, *Administrative Procedure and Practice in the Department of Agriculture Under the Federal Food, Drug, and Cosmetic Act of 1938*, 210 et seq. There is support in the legislative records for the view that such was the intention of Congress in relation to the Food, Drug, and Cosmetic Act. H. R. Rep. No. 2139, p. 10 [75th Cong., 3d Sess. (1938)]. See Cong. Rec., 11830 (June 13, 1938). The Supreme Court, however, has not actually held that particular procedural requirements are mandatory in rule-making under any part of statute, except for the single matter of findings. *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), with which compare *Pacific States Box & Basket Co. v. White*, 296 U. S. 172 (1935). In leading cases, rule-making proceedings have been distinguished from judicial proceedings for procedural purposes. *Norwegian Nitrogen Products Co. v. United States*, 298 U. S. 294 (1933).



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special problems, with resort to field work at home and abroad where necessary.

The investigation is usually set in motion by the agency itself. Only rarely is it initiated by a private party, as is the case, for example, with some of the safety regulations of the Interstate Commerce Commission that are sought by labor unions. In the course of the investigation, study of available data, inspections, consultations, requests for information from private parties, and organized field studies are the means typically employed. To a considerable extent, data procured under statutory powers to require reports or to inspect premises and records are made use of in the investigations. In relatively few instances, but nevertheless in some, hearings are employed as the initial means of gathering information. In these various ways an agency prepares itself either to issue regulations without further formality or to proceed to the scheduled conferences or hearings from which its regulations will issue.

The continuous use of consultation and conference by the Board of Governors of the Federal Reserve System has already been described. This interchange of information and opinion between the Board and the world of banking and finance is part of a program of study and observation which keeps the Board in constant touch with the matters that are subject to its authority. Research is a major part of the Board's work and its staff is made up in large part of specialists who are qualified to gather and interpret the necessary data. The product is a body of knowledge regarding business and credit, set forth in indexes, graphs, and reports, which, as published in the Federal Reserve Bulletin, constitutes a leading source of information in the United States regarding economic conditions. It forms the base upon which many of the Board's regulations rest.

When it comes to the preparation of a specific regulation, the process ordinarily begins with special analyses and studies by sections of the staff. If necessary, questionnaires may be circulated and field trips may be undertaken by staff members. Regulation T, regulating margins under the Securities Exchange Act, which presented a somewhat novel problem to the Reserve Board, was preceded by the circulation of 200,000 questionnaires by the stock exchanges to their members at the request of the Board, to obtain information on the actual condition of margin accounts. Several of the Board's aides also traveled about the country interviewing persons who might be affected. The analyses and studies which are prepared by sections of the staff are circulated among other parts of the Board's organization for comment. Consultations, both within and outside the Board, take place thereafter until the final product issues.

A less refined, more decentralized process is employed by the Comptroller of the Currency in regulating the investments which banks may hold. The backbone of the Comptroller's staff is the traveling bank examiners and the district chief examiners, whose knowledge and views constitute a leading basis for determining the content of the regulations. A file of letters from bankers is, however, maintained in Washington. When new regulations are to be formulated the material bearing upon them, including to some extent the views of bankers, as ascertained by the examiners, is assembled, and, after con-

sultation within the agency and with other banking control agencies, the regulations issue.

Still more in contrast to the centralized methods of investigation of the Federal Reserve System are those of the Bureau of Marine Inspection and Navigation. The rule-making authority here is a Board of Supervising Inspectors, composed of members whose normal duties are to conduct and administer the inspection of vessels and the disciplining of seamen in the ports of the United States. They bring to their rule-making task at annual and special meetings the knowledge born of their field experience and previous training. The headquarters of the Bureau are not equipped to carry on continuous research in the problems of safety with which the regulations deal. The early origin of the Bureau, before continuous research was a usual government function, is thus reflected in a form of basic organization which is adapted to a "practical," rather than a scientific, handling of its problems. In recent years, however, as experience has shown the need of elaborate revisions and amplifications of many of the Bureau's regulations, drafts of regulations have been prepared by the headquarters staff through the use of a procedure which includes consultation with experts in marine engineering, the study of records of marine casualty investigations, meetings of the supervising inspectors, submission of proposed regulations to the industry, and hearings.

At times an administrative agency relies upon the hearing as the only means of investigation. Such was the case, for example, in connection with the Maritime Commission's establishment of minimum wage scales for ships operated under subsidies administered by the Commission. Following hearings which were held at ten principal ports, and after a report by its Division of Maritime Personnel, the Commission issued its wage scales.

The extent to which administrative agencies rely upon accumulated information or special investigations in rule-making depends in large part upon the amount of time they have had to familiarize themselves with their problems. The Interstate Commerce Commission has been able in some important instances affecting motor carriers to formulate and issue regulations without special investigation or proceedings of any kind. The Bureau of Biological Survey employs such complete and continuous methods of keeping in contact with the problems of wildlife conservation and with the opinions and judgment of sportsmen, state conservation officials, and others interested, that its regulations issue in the normal course of its work and on the basis of its current and accumulated knowledge, with no additional investigation or formality except the submission of its tentative conclusions to the annual convention of the International Association of State Game, Fish, and Conservation Commissioners. On the other hand the newer wage-fixing agencies are obliged to start virtually from scratch in defining and ascertaining the circumstances of the industries with which they deal.

Some agencies employ a special investigating body devoting itself wholly to rule-making. The Public Contracts Board in the Division of Public Contracts of the Department of Labor holds hearings and makes recommendations for wage determinations under the Walsh-Healey

Act. Under the Fair Labor Standards Act the industry committees both receive information about the industry concerned and express the views of their members. The Food and Drug Administration employs a Food Standards Committee, which collects information on products for which standards are to be proposed and formulates the proposed standards. The Bureau of Explosives of the American Railway Association in effect performs similar functions for the Interstate Commerce Commission.

The reduction of all these varied methods of investigation to a uniform system would manifestly be undesirable and impossible. Methods must continue to be adapted to the problems to be studied, to the characteristics of the agencies employing them, and to the state of existing administrative knowledge of the matters to be dealt with. The volume of reporting to Federal agencies now exacted of business enterprises requires, however, the admonition that returns and reports should be held within the limits of what is actually necessary. Power may be constitutionally conferred upon administrative agencies to procure information needed by them to carry on their assigned duties.⁷⁰ It should not be withheld; but it should be exercised with restraint and with knowledge that the burden imposed is a mounting one.

G. DEFERRED EFFECTIVENESS OF REGULATIONS

Even a cumulation of all of the procedural safeguards that can be brought together in a rule-making proceeding may be insufficient to bring to the attention of the administrative agency some significant point of which account should be taken. After the present oil-tanker regulations of the Bureau of Marine Inspection and Navigation had been originally published, following a duly-announced public hearing upon a draft of the regulations, it appeared that provision had not been made to deal with certain small oil tankers, constructed partly of wood, that had been in operation in Southern bays and inlets. The Bureau's proceedings had not come to the attention of the operators of these tankers. Situations such as this are certain to arise and some procedure should be provided to correct error or oversight in regulations before, rather than after, they become effective. This can be done by deferring their effectiveness until a specified period after their announcement. A provision of this sort will, moreover, insure notice of the regulations to interested parties, so far as that can be done by formal means, and will provide a procedural safeguard especially useful and desirable in cases where public hearings have not been held. A period will be provided in which all persons interested may bring matters to the attention of agency and which will give an opportunity for changes to be made if they are warranted.

A number of statutes now in force provide for the deferred effectiveness of regulations promulgated under them. The Transportation of Explosives Act, the Grain Standards Act, and the Naval Stores Act contain provisions for the effectiveness of regulations 90

⁷⁰ *Electric Bond and Share Co. v. Securities and Exchange Commission*, 303 U. S. 419 (1938).

days after their publication. Regulations of the Federal Power Commission and those under the Federal Seed Act take effect in 30 days. Varying periods of deferred effectiveness for regulations have been specified from time to time by various administrative agencies including the Board of Governors of the Federal Reserve System, the Federal Communications Commission, the Federal Alcohol Administration, and the Children's Bureau under the Fair Labor Standards Act. Similar action on the part of the Bureau of Motor Carriers of the Interstate Commerce Commission with respect to the regulation requiring the filing of contracts by contract carriers led to objections and successive postponements.

A statute providing for the deferred effectiveness of all Federal administrative regulations which have statutory effect is recommended for the purpose of providing a general safeguard to interested private parties. Such a statute should contain a provision that in the discretion of the administrative agency, to meet situations calling for more prompt action, the period of delay might be shortened or dispensed with. An exception of this character seems necessary to prevent undue delay and hazards to effective administrative action in emergency situations and in situations where the advance announcement of a regulation might lead to intensive and harmful efforts to avoid it during the period of deferment.

The effective date of all regulations should, of course, be calculated from the time of their publication in the Federal Register.

III. JUDICIAL REVIEW OF REGULATIONS

Until recently, judicial review of administrative regulations could be had only collaterally, in actions brought to enforce them, in injunction suits to prevent their enforcement, in declaratory judgment proceedings, in habeas corpus actions to obtain release from arrests for violation, or in private actions in which the results turned upon the effect of regulations. In such an action, the issue may be either the validity of a regulation as a whole or the legality of applying it to the person who is challenging it,⁷¹ in the same way that an attack upon a statute may involve either the constitutionality of the measure as a whole or the constitutionality of applying it to a particular party.

Where the legality of applying a regulation to a particular objector is in question, the issue is comparatively narrow. The relevant evidence relates to the business or transactions or affairs of an individual or corporation; the pertinent legal question is the applicability of the statute under which the regulation was promulgated to the facts thus revealed. The decision will be the kind courts are accustomed to render in regard to many matters that come before them.

Where the validity of the entire regulation is in question in one of the types of actions above enumerated, the central issue is one of law, involving the relation of the regulation to the governing statute or occasionally to the Constitution. Evidence will be necessary to the solution of the issue only insofar as the facts bearing upon the legality of the regulation are not within the knowledge of the court—

⁷¹ *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940).

just as, in constitutional cases, the facts which surround the constitutionality of a statute require presentation in evidence or briefs to the extent that they may not be known to the court. Conceivably, a legal argument may be all that is necessary to aid in determining the validity of a regulation, as of a statute.

Occasionally, as is also the case when the constitutionality of a statute is in issue, a careful presentation of facts that are not of common knowledge may be necessary to illuminate the relation between a challenged regulation and the legal authorization for it. The relation between safety of operation and a regulation requiring power reverse gears on locomotives is obscure until it is revealed that a reverse gear serves not only to back the locomotive but also to check it when the train is going forward⁷² and that it acts in certain ways under certain conditions. Similarly, the relation between a required statement on the label of a food and the statutory evil of misbranding becomes clear only when it is learned what consumers in fact understand from a label which omits the statement.⁷³ Judicial review of the validity of administrative regulations in the types of actions noted above may consequently involve examination into the facts bearing upon the regulations, in order to develop the connection, or lack of it, between them and the statutory authorization.

In some instances in which administrative regulations have been challenged, the administrative agencies have undertaken to defend by bringing before the courts a large part of the information upon which they have acted. When the Secretary of Agriculture's definition of "sausage" under power given him by the Meat Inspection Act was challenged, persons in the meat industry, and experts in the subject, were brought in to testify to trade practice and opinion, such as they had previously revealed to the Department.⁷⁴

In none of these instances of judicial review, however, has it been the task of the court to retrace the entire investigation and reasoning by which an administrative regulation was arrived at. A judgment upon the rational relation of the regulation to the statute has been all that has been sought⁷⁵ and instances of the failure of the judiciary to give due weight to the administrative judgment underlying a regulation are not numerous.⁷⁶

Some of the recent statutes conferring rule-making power, however, as has been stated earlier in this chapter, provide for a much more detailed judicial review of certain administrative regulations than that just described. They require that the regulations in question be based

⁷² *Johnson v. Atlantic Coast Line R. Co.*, 222 I. C. C. 542, 554-556 (1937).

⁷³ The Food and Drug Administration has sought testimony from consumers in regard to their reactions to proposed labelling requirements. Fuchs, *The Formulation and Review of Regulations under the Food, Drug, and Cosmetic Act* (1939), 6 Law and Contemporary Problems 43, 59.

⁷⁴ *Houston v. St. Louis Independent Packing Co.*, Records and Briefs, 249 U. S. 279 (1919).

⁷⁵ "The agency, board, or department * * * is called upon to exercise a judgment or discretion which, unless it appears to be purely arbitrary, is not the subject of judicial review. Such rules and regulations must be reasonably appropriate and calculated to carry out the legislative purpose, and must be entirely within the power conferred upon such agency." *Wallace v. Feehan*, 206 Ind. 522, 533, 190 N. E. 438 (1934).

⁷⁶ "Where the regulation is within the scope of the authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 186 (1935). "It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review." *United States v. George S. Bush & Co.*, 310 U. S. 371 (1940).

upon findings of fact; that these, in turn, be based upon evidence made of record at a hearing; and that a reviewing court set aside a regulation not only for failure of the findings to support it, but also for failure of a finding to be based upon substantial evidence in the record. Review by the courts is had in statutory proceedings which may be instituted within a prescribed time by parties aggrieved by regulations and which result in a certification of the administrative record to the court. A judgment adverse to a regulation results in setting it aside.

In these review proceedings a court is required not merely to pass upon the presence of a rational relationship between a regulation and the governing statute, but to judge the fundamental soundness of the details of the administrative reasoning process. The regulation does not speak for itself, with a limited amount of evidence or argument to aid in judging it; the entire administrative record must be examined.

The full significance of this novel type of judicial review becomes apparent only when the characteristics of the problems to be resolved in regulations are considered. A leading characteristic is the discretion required for their solution. In an ordinary trial the question is whether the facts bring the case within a rule or principle of law or not. The issues can be framed as issues of fact, and findings based upon evidence can be made. The issues are always of limited scope, relating to the particular circumstances or transactions, and the evidence bearing upon them can be incorporated into a record.

The situation is different in rule making or other discretionary determinations which involve, in effect, the formulation of new policies. For example, whether railroad, air lines, or steamship companies shall be required to install expensive safety devices; what shall be the nature of the elaborate accounting systems prescribed for communications companies or other utilities; what shall be the standards of identity and quality for foods; what shall be the definition of improper practices by trust officers of national banks—these and a thousand other determinations which must be made in administrative regulations involve important choices of policy. Such choices must be made in the light of facts; but the chief issues are not factual. They relate either to the proper balancing of objectives—safety of transportation as against minimizing the expenditures of transportation companies; conformity to the idea of consumers as against freedom for manufacturers to follow practices of their own choosing; and the like—or to a choice of methods to achieve given objectives, such as the best way to produce an adequate record of the financial affairs of certain corporations or the most workable procedure for judging the fitness of applicants for certain types of licenses.

It is true that the discretion thus exercised in administrative rule making operates within statutory limits and is not unfettered. Nevertheless, within these limits the important questions always are what is desirable or what is workable in order to carry out the directions contained in the statute. It is possible, though difficult, in a proceeding involving discretion to specify questions of fact upon which information is needed; to gather record evidence bearing upon them, to make findings with regard to them; and then to arrive at final conclusions in the light of these findings as well as of the relevant considerations of policy. This is the method of proceeding which is imposed by some of the recent statutes that call for the more

searching type of judicial review. The possible advantages and disadvantages of requiring this administrative procedure have already been discussed.

In considering now whether judicial review of a detailed kind is desirable, attention should be paid to the nature and complexity of the questions of fact involved. To take a comparatively simple example, suppose the problem to be that of prescribing regulations specifying the maximum amount of a particular type of poisonous spray residue to be permitted upon raw apples shipped in interstate commerce. The following questions would seem to have a bearing upon the final result: (*a*) the quantity of the particular poison, consumed within, say, a year, that will have a definitely harmful effect upon ordinary individuals; (*b*) the proportion of individuals that would be similarly affected by smaller quantities, and what quantities; (*c*) the quantity of unpeeled apples, and hence of poison upon apples, consumed by individuals in, say, a year; (*d*) the quantity of the same poison consumed by the same individuals upon other products in the same time; (*e*) the physical practicability and (*f*) the cost of reducing the amount of spray residue to various quantities and of eliminating it entirely before the apples are shipped; (*g*) the probable distribution between consumers and growers of the added cost incident to the removal of spray residue, in the light of (*h*) the effect of higher prices upon consumption and (*i*) the countereffect of knowledge by consumers that apples carry poison.⁷⁷

The evidence relating to these questions would have to be sought in a variety of quarters. Questions (*a*) and (*b*) are medical, and information regarding them would have to be derived from observation and experiment. Questions (*c*) and (*d*) relate to the habits of people and would have to be obtained by direct inquiry or from statistics regarding the distribution of apples or both. Question (*e*) presents a question of chemistry, the answer to which depends upon experiment. Question (*f*) presents a relatively simple economic problem, resolvable in terms of the prices, wages, and the like, that would have to be paid for the labor, equipment, and supplies required in the process of removing the residue. Testimony and statistics regarding these could readily be obtained. Questions (*g*), (*h*), and (*i*) involve a complex economic problem which is probably beyond definite solution by means of available knowledge. Suggestive studies might, however, be made, and opinion evidence might be obtained.

If evidence upon all of these questions were duly incorporated into a record and findings were made with respect to each point, the question of whether it would be useful to have a court review the evidence and the findings would depend upon the ability of the court to supply a corrective to possible gross error. Under the statutes, a finding is to be disregarded by the court only if there

⁷⁷ These questions could be broken up into more minute ones, and additional relevant questions (*e. g.*, the possibility of training consumers to remove the poison before eating unpeeled apples) may be thought of. Those enumerated might, however, serve as a reasonably adequate basis for an investigation into whether a regulation should be promulgated and, if so, what it should contain. The analysis of the problem into these questions would not necessarily have to be made in advance. The factors involved might emerge in the course of the investigation or in the attempt to state the findings. If the problem were then found to have been incompletely explored, a supplementary investigation might be made.

is no substantial evidence to support it. One crucial point is whether the courts would be willing to regard as substantial the opinion evidence and the possibly somewhat speculative and partial data upon which some of the findings would necessarily rest—especially the economic findings and findings relating, for example, to consumer preferences or reactions to food products and their labels. Those courts mindful of the reasons for entrusting such determinations to administrative agencies of course would regard such evidence as possessing weight. Some experience with judicial review, however, points the other way.

The courts, in any event, in judging such evidence would not be making use of their expertness at weighing judicially admissible evidence and trying the facts in judicial actions; for the facts here involved differ very greatly from those which courts ordinarily try. Like the ultimate conclusions embodied in regulations, they are general, not limited to particular situations. Not what Consumer *A* thinks or thought on a particular occasion, but what consumers generally think; not the hazard involved in running a locomotive in a particular manner over a given stretch of track, but the likelihood of accidents from running locomotives possessed of equipment of a given type everywhere; not whether *A* or *B* was poisoned by lead or arsenic on apples, but whether people generally are likely to be poisoned by a certain amount of spray residue on apples—these are the kind of factual issues that must be resolved by findings in rule making.

Undoubtedly the appraisal of evidence bearing upon such questions and the formulation of findings upon the evidence lie peculiarly within administrative competence. It seems unlikely that advantage will be gained from exposing this process to the scrutiny of judges untrained in the subject matter of regulations. It should be enough that the administrative authorities are required, in case their regulations are called in question before a court, to demonstrate that they come rationally within the statutory authorization. For these reasons the operation of existing statutes which provide for the detailed type of judicial review upon administrative records should be carefully watched before other similar measures are enacted. The Committee does not recommend the general application or extension of this type of court review of regulations.

It is argued in support of statutory court review of the record and findings upon which administrative regulations are based that if judicial review of the factual conclusions lying behind regulations is to be had at all, it must be had in statutory proceedings to question the regulations, involving an examination of the administrative record. Insofar as this contention assumes the desirability of judicial review of the whole record underlying an administrative regulation, the answer has already been suggested: If an administrative agency is best qualified to weigh the facts and opinions that culminate in regulations, its conclusions should be final and it is no anomaly that they are. Insofar as the contention is based on the unavailability of judicial review except in a special statutory proceeding of the kind in question, the answer is that the legality of applying a regulation to a particular party may still be questioned, and the relevant facts shown, in the usual types of judicial proceedings, whether brought by or

against the party. If a party has no standing whatever, in certain circumstances, to challenge the administrative action, the reason is that under the governing substantive law the action taken is not an infringement of any legal interest of that party.

IV. CONGRESSIONAL REVIEW OF REGULATIONS AND REQUESTS FOR CHANGE

The laying of regulations before Congress has not been unknown in American practice. The Reorganization Act contained a requirement to this effect, relating to Presidential reorganization orders, accompanied by a provision for deferred effectiveness which gave Congress time to nullify any order that it did not wish to have become operative.⁷⁸ A similar practice with respect to the more usual types of administrative regulations has been employed in England. It met with the approval of the Committee on Ministers' Powers, which made suggestions for the regularization of its details.⁷⁹ The suggestion that a requirement of this sort be applied in this country to regulations which have the force of law has from time to time been made.

The Committee does not recommend a general requirement that regulations be laid before Congress before going into effect. Legislative review of administrative regulations, in this particular, has not been effective where tried. The whole membership of Congress could not be expected to examine the considerable volume of material that would be before them. Even a joint committee entrusted with the task could not supply an informed check upon the diverse and technical regulations it would be charged with watching. The reporting of individual rules to Congress as they are promulgated would add little or nothing to the opportunity for congressional action, if it is desired, that would be afforded by the publication of regulations in the Federal Register when supplemented by deferred effectiveness, which is recommended above. Experience, both in England and in this country, indicates that lack of desire, rather than lack of opportunity, has accounted for the absence of legislative interference with administrative regulations.

Congress and the public are, however, entitled to know of the rule-making activities of administrative agencies. The progress of the law which these agencies are developing should be recorded and submitted for information and criticism in such a way as to give an over-all view of what is being done, rather than mere information of isolated instances. Not only new regulations adopted but unaccepted proposals for change in existing regulations or for additions to them, emanating from outside the agencies, are of importance. It has been charged that in the present large aggregate of Federal regulations are some that cannot be justified. The Committee does not and cannot pass judgment upon this charge. But a means of throwing light upon existing regulations and upon requests for changes or additions is desirable.

To secure attention for requests for changes in regulations and to provide a report of rule-making activity to Congress, the Committee

⁷⁸ 53 Stat. 562 (1939), 5 U. S. C. secs. 133 c-d.

⁷⁹ Report, Cmd 4060 (1936), 67-69.

recommends that each agency be required by statute to make an annual report of its rule making during the preceding year, embracing both the regulations adopted and a summary of the proposals, emanating from outside the agency, that were not acted upon or were rejected. Administrative agencies exercise a delegated power, for the wise use of which they are responsible to the legislature and the people as a whole and also, in a very real sense, to those upon whom their activity directly bears and those members of the legislature who take a special interest in their work. Aside from any question of possible abuse, those interested should know and understand the reasons for administrative determinations, negative as well as affirmative, rule making as well as adjudicatory.

In the decision of cases, findings and reasoned opinions afford the needed information; in rule making an annual survey and report would do the same. Each agency should undertake to give one, charging a ranking staff member or a member of the board or commission with definite responsibility for it. In this way, if the legislature should conclude that it wished to undo anything the agency had done or to compel changes in its regulations, it could act on the basis of full information.

CHAPTER VIII

OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE

The Committee has been impressed in the course of its inquiries not only by the need for dissimilarities in administrative procedures, to which allusion has been made in this report, but also by the possibilities for greater uniformity in many subordinate particulars. The Committee has also been much impressed by the absence in many agencies of information or interest concerning the procedures in other parts of the Federal administrative establishment.

These circumstances, especially when joined with others about to be mentioned, strongly suggest the desirability of establishing within the Federal Government a permanent organization to devote attention to the agencies' common procedural problems. True, the vigor of procedural reform and the alteration of existing practices depend perhaps not so much on forces outside the agencies as on the agencies' own sensitivity to the need for self-criticism and improvement; nevertheless, improvements may well be stimulated by an organization especially qualified to perceive existing defects and suggest correctives.

To this end the Committee recommends that there be established by law an Office of Federal Administrative Procedure somewhat comparable in dignity and responsibility to the Administrative Office of the United States Courts. The Office should have at its head a board composed of (1) a Justice of the United States Court of Appeals for the District of Columbia, to be designated by the Chief Justice of that Court; (2) the Director of the Administrative Office of the United States Courts; and (3) the Director of Federal Administrative Procedure, to be appointed by the President of the United States, with the advice and consent of the Senate, for a term of seven years. The Director of Federal Administrative Procedure should be empowered to prepare a list of the administrative bodies which determine the rights, duties, immunities, or privileges of private persons. Each such agency may thereupon designate one of its responsible officers to serve as adviser to the Director. In addition, the Director should be able to call upon committees composed of representatives of the agencies as well as representatives of the public, to assist and advise him in the conduct of his inquiries and other functions.

In general, it should be the major function of the Director to examine critically the procedures and practices of the agencies which may bear strengthening or standardizing, to receive suggestions and criticisms from all sources, and to collect and collate information concerning administrative practice and procedure. As the Committee has discussed in chapter II of this report, not the least of the difficulties which have confronted the orderly development and un-

derstanding of administrative procedure is the absence of detailed information and study. Recurring problems have been treated by each agency without regularized reference to other agencies; separate bodies of law have grown up and some degree of confusion has resulted. On the one hand, this has resulted in considerable loss of time and energy to each agency, which has been forced to build up its procedures and gather its own law as best it might. On the other hand, the absence of information has proved irritating to the members of the bar and the public dealing with the agencies. Knowledge and regularization of procedures should go far toward creating that confidence in the administrative process which is necessary for its successful functioning.

In addition to these general duties of investigation and collection of data, the Committee recommends, as discussed in chapter IV of this report, that there be vested in the Office of Administrative Procedure important duties with respect to the selection and removal of hearing commissioners. Finally, the Committee suggests certain problems in addition to those dealt with in this report, to which attention of the Director, with advice of such committees and representatives as he might select, could usefully be turned:

1. ADMISSION TO AND CONTROL OVER PRACTICE BEFORE THE AGENCIES

Especially among lawyers' organizations there has been manifest a sentiment in recent years that only members of the bar should be admitted to practice before administrative agencies. The Committee doubts that a sweeping interdiction of nonlawyer practitioners would be wise, nor does it believe that corporations or other organizations should in all cases be forbidden to appear through and be represented by their officers.¹ At the same time, it appears to the Committee that members of the bar are subjected to an unjustifiable annoyance in connection with their admission to practice before the agencies.² Recognizing that some variations may be needed to fit particular situations, the Committee nevertheless feels that too little has been done by the agencies themselves in reexamining their present requirements and in considering cooperative, centralized machinery to lighten the load of the agencies and of those who practice before them.

2. SUBPENAS

The practices of the several agencies in respect of the issuance of subpoenas upon request of private parties and upon request of the

¹For example, the work of nonlawyer employees of service organizations (American Legion, American Red Cross, etc.) in representing claimants before the Veterans' Administration has been much commended. See this Committee's Monograph No. 2, "Veterans' Administration," Sen. Doc. No. 186 (76th Cong., 3d sess.) pt. 2 at 38-39. In proceedings under the Walsh-Healey Act corporate respondents have often been represented by their own officers, and the Division of Public Contracts has not felt that its proceedings were damaged by that fact. See this Committee's Monograph No. 1, "Division of Public Contracts, Department of Labor," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 1 at 11, footnote 11.

agencies' own employees, show wide differences.³ Some of them are readily understandable in the light of the special uses to which subpoenas may be put by those to whom they have been made available. Other differences are no doubt largely accidental and reflect nothing more profound than the haphazard growth of administrative processes. The Committee doubts the justifiability of a requirement that applications be made in a way that is burdensome to respondents nor does the Committee perceive justification for issuing subpoenas for the use of an agency's officers without first requiring a showing that they are needed and will be properly used. To the extent that they will not be governed by the proposals already made by this Committee in connection with adjudicatory proceedings, these are all matters which can readily be regularized by the agencies themselves and which should be evaluated by the Director of Federal Administrative Procedure with a view to conforming and strengthening present practices.

3. DEPOSITIONS

The formalities involved in the taking of depositions vary somewhat in different agencies, though the common provision is that they may be taken in accordance with the law of the state in which the particular case is pending. No one of the procedures employed by the several agencies in this particular has seemed to the Committee to be unfair or unwieldy. It may be, however, that in this respect a higher degree of uniformity than now exists is attainable and would be desirable. That possibility is commended to the study of the Director of Federal Administrative Procedure, along with the possibility that specific provision should be made for the taking of depositions where it is now lacking.

4. FORM OF BRIEFS AND PLEADINGS

A variety of requirements now marks the agencies' choices concerning the desirable form and style of briefs, applications, and pleadings. While the contents of these papers must necessarily remain unstandardized, there appears on the surface to be no reason why printing specifications, size and quality of paper, and like matters should not be uniform by agreement among the agencies.⁴ The needs of legibility are not likely to be affected by circumstances peculiar to any one of the administrative bodies.

5. ANSWERS

The officers of agency after agency have expressed to the Committee the opinion that the answer is not a useful pleading in admin-

³ An excellent compilation of requirements in respect of admission and disbarment appears in a report of the District of Columbia Bar Association's Committee on Administrative Practice, *Admission to and Control over Practice before Federal Administrative Agencies* (1938). See, also, J. S. Waterman, *Federal Administrative Bars: Admission and Disbarment* (1936), 3 U. Chi. L. Rev. 261.

³ For a detailed description of the procedure for issuance of subpoenas, see appendix K, *infra*, pp. 414-435.

⁴ That these matters may be of moment is illustrated by this Committee's Monograph No. 3, "Federal Communications Commission," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 3 at 67: "A trade association of paper manufacturers recently requested the Commission to reconsider one of its rules of practice and procedure which required applications and pleadings to be made on paper of stated dimensions. Upon a showing that the additional cost involved in conforming to the Commission's regulation would far outweigh any benefit the agency might derive from using that particular size of paper, the Commission amended its regulation."

istrative procedure. Answers which contain only general denials do no more than give advice that a contest may be expected. They do not serve to narrow the issues of that contest. Consideration should be given by the Director of Federal Administrative Procedure to the present provisions of statutes and regulations concerning answers, with a view to determining whether they should be drastically altered, perhaps by substituting for the answer a mere notice of desire to be heard. Failure to file such a notice within a stated period might constitute a default obviating the necessity of scheduling unwanted hearings.⁵

6. AVAILABILITY OF RECORDS

The sheer costliness of securing a stenographic transcript of a record compiled in an administrative proceeding is shocking. A careful survey should be made in order to determine whether cooperation among the agencies might not secure a lowering in the expense. While in many agencies the cost of transcripts is less than for corresponding records of most court proceedings, there is no uniformity in this respect, and the charges are in almost every instance more than is seemly when cheapness is one of the asserted virtues of the administrative process. It is possible that a grouping of the reporting services for which the agencies now contract might lower costs. In any event, continued inattention to this detail of the conduct of proceedings is not justifiable.

7. REPORTS AND RECORDS

The Committee has noted in chapter VII of this report that it is often necessary for agencies, in preparing regulations and in the course of other duties, to require individual citizens and corporations to make extensive reports. These may be in the form of periodic reports of answers to questionnaires or the like. The information so gathered is usually necessary for informed regulation and, indeed, may be the very means whereby an agency acquires expertness. Yet returns and reports to administrative agencies should be held within the limits of what is actually necessary. It is unquestionable that one of the factors proving most irritating as well as expensive to the public is the duty of collecting and submitting extensive information. Sometimes there is considerable duplication among the agencies. The Committee accordingly recommends that the Director of Administrative Procedure continue the study of this problem already initiated by the Division of Statistical Standards, Bureau of the Budget, with a view toward limiting requests for information and toward harmonizing the activities of the agencies so as to avoid harassment of individuals. Consideration might well be given to the creation of a central bureau for the collection of necessary data.

⁵ See appendix E, "Proceedings in Default Cases," *infra*, pp. 307-313.

CHAPTER IX

RECOMMENDATIONS CONCERNING INDIVIDUAL AGENCIES

In this chapter the Committee presents recommendations bearing upon the problems of a number of individual agencies. The particularized suggestions here made do not purport to catalog completely the alterations in administrative procedure which might profitably be undertaken. This cautionary note must be most emphatically stated. The conclusions and recommendations contained in the Committee's report are, of course, applicable to the agencies mentioned below. The Committee, moreover, has not felt it desirable to advance distinctly formulated recommendations with reference to every single agency which has been under its examination. Recognition that problems exist has not in every instance been accompanied by an assured opinion concerning the most certain means of dissipating them. This factor has similarly deterred the Committee from determinative recommendations concerning each one of the procedural difficulties which may have arisen in the agencies to which the following remarks are addressed. As to these, the Committee calls renewed attention to the several monographs which have been prepared by its staff and published by its direction. In them may be found description of problems which, though not referred to by the Committee in its present suggestions, are nevertheless deserving of the earnest consideration of the several agencies and of those who are interested in their sound development.

DEPARTMENT OF LABOR, DIVISION OF PUBLIC CONTRACTS

In general, the Committee's recommendations in part D of chapter I, relating to delegation; chapter II, relating to administrative information; chapter III, relating to informal prehearing procedures; chapter IV, relating to hearing commissioners; and chapter V, relating to procedures in formal adjudication are applicable to violation cases determined by this agency, while the recommendations in chapter VII, relating to rule-making, are applicable to wage determinations.

*Formulation of complaints.*¹—Complaints charging noncompliance with contractual stipulations required by the Walsh-Healey Act are extremely general in form. Failure of the complaints to state precisely the acts or omissions of the respondent which allegedly constitute violations of the act, produces answers which are equally

¹ See this Committee's Monograph No. 1, "Division of Public Contracts, Department of Labor," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 1 at 7, 8-10.

vague. Consequently, the pleadings fail as a rule to formulate the issues which are to be embraced by the hearings. The Committee believes that the Division's complaints should be more specific. It accordingly recommends that each complaint should state at the outset the case the Division expects to be able to prove, upon the basis of its then available information, subject to additions or excisions by later amendment. In cases involving wage delinquencies the Committee thinks it unnecessary that the name of each individual employee be listed, where it is possible to set forth that the underpayment of wages occurred in respect of work done at specifically named times by specifically indicated shifts or groups or occupational classifications of workers.

*Protection of witnesses and informants.*²—One of the asserted reasons for the Division's failure to issue more specific complaints is the fear that doing so may expose employees to reprisals by employers. By failing to name individual employees as the ones to whom sums are owed by their employer, the Division believes that it is able to shield them from discrimination, because when they are subsequently called as witnesses they appear under the compulsion of subpoenas. Since the Division is convinced that more carefully formulated complaints may in fact expose employees to their employer's hostility because of their having given information in aid of the statute's enforcement, protection should be afforded them by statute. Protection ought not be sought through inadequately stated complaints. Instead, the Walsh-Healey Act should be amended to provide that in each contract subject to its terms there be inserted a stipulation that no employee will be discharged or otherwise discriminated against because he has filed charges or given testimony under the statute.

*Scope of appeal to Secretary.*³—A decision of the Administrator of the Division is operative as the final order of the Department of Labor in the absence of an appeal to the Secretary. The present regulations fail to provide that an objection not pressed before the Administrator must be disregarded if advanced for the first time on appeal to the Secretary. The Committee recommends that the rules of practice be amended to incorporate this limitation. Orderly consideration of the cases and sifting out of contentions so that the ultimate appellate authority need not be unduly burdened, require that the parties carefully formulate their cases at the time of appeal to the Administrator.

VETERANS' ADMINISTRATION

In general, the Committee's recommendations and discussion concerning administrative information in chapter II; informal adjudication in chapter III; hearing procedures in chapter V; and rule-making in chapter VII, are applicable to the Veterans' Administration.

*Oral argument before rating board in the nature of appeal.*⁴—After the decision has been issued by the rating board (the body of

² *Id.*, at 9.

³ *Id.*, at 21.

⁴ See this Committee's Monograph No. 2, "Veterans' Administration," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 2, at 24-26.

original jurisdiction), the claimant may automatically obtain a rehearing before that board. Although the rehearing was originally intended to serve in lieu of a hearing on appeal before the Board of Veterans' Appeals, the claimant is still free to obtain a hearing before the latter in the event that the rating board refuses to reverse itself on the basis of the rehearing.

Because of the unnecessary duplication and consumption of time involved in the present practice, it is recommended that a rule be adopted providing that argument or hearing in appealed cases may be had before the rating board only if the applicant waives his right to a hearing before the Board of Veterans' Appeals, and that, in the absence of such a waiver, argument before the rating board be permitted only under restricted standards where the rating board deems reopening or reconsideration is necessary.

*Form of opinions accompanying decisions.*⁵—Rating board decisions are ordinarily in code, unintelligible to the outsider. The requirement embodied in the rules and regulations that in the event of conflicting evidence or the rejection of the claimant's contention, the reasons for the board's resolution or action must be set forth in a formal opinion, is not generally observed in practice. Decisions of the Board of Veterans' Appeals are accompanied by written "opinions." The opinions, however, simply recite the evidence and abruptly set out the conclusion. Reasoning is ordinarily absent.

In all rating board decisions where there are conflicting considerations or evidence, closer adherence to the present regulation requiring the filing of reasoned opinions is recommended. Similarly, it is recommended that greater care be exerted by the Board of Veterans' Appeals to prepare opinions which exhibit the reasons underlying the decisions.⁶

*Reconsiderations; reopenings.*⁷—The regulations forbid reopening and reversal in the absence of "clear and unmistakable error" or new and material evidence; it is not required that the new evidence could not have reasonably been adduced in the first instance. The practice is lenient, and the mere making of new contentions or renewal of old ones ordinarily suffices to impel a reexamination of the case. The result is that claims which are denied are constantly pressed and little real finality attaches to the decision. The nature of the work of the Veterans' Administration as a benefactor agency justifies considerable leniency in respect of reconsiderations; difficulties deriving from the nature of the litigants, in addition, make it impossible to invoke strict requirements that all relevant evidence be adduced initially at the risk of subsequent exclusion. But constant reconsiderations deprive the decisions of dignity and subject the Administration to constant harassment in the form of renewed pleas by the claimant, accompanied by frivolous additions of evidence or by efforts to apply outside pressures. Hence, the Committee, while recognizing the undesirability of prescribing rigid rules, recommends that the Administration discourage renewal of claims by evincing reluctance to reverse in the absence of compelling

⁵ *Id.* at 26-27; 36, note 57; see also appendix L of this report, "Form and Content of Intermediate Reports and Final Administrative Decisions," *infra*, p. 456.

⁶ See pt. B of ch. II of this report, *supra*.

⁷ See Monograph No. 2, *op. cit. supra*, note 4, at 28-31; and appendix C of that Monograph, pp. 64-67.

new evidence and by making strong efforts to persuade the claimants to focus their full efforts upon establishing their case at the outset.

*Power of Board of Veterans' Appeals to reverse for clear error in unappealed questions; remand on presentation of new evidence to Board.*⁸—Upon appeal to the Board of Veterans' Appeals the latter has jurisdiction to act only upon questions appealed. It cannot reverse upon clear but unappealed error. Instead, it must refer the matter to the Director of the Veterans' Claim Service. Similarly, if in the course of hearing an appeal to the Board, new evidence is presented to it, if such evidence is deemed to be of such significance as to make reversal probable, the Board may not reverse forthwith, but must remand to the rating board.

No reason appears for reference of clear cases to other branches of the Administration, especially in light of the fact that the Board of Veterans' Appeals has many of the characteristics of a body of original jurisdiction. It is therefore recommended, in respect of clear but unappealed error, that the Board, after giving such notice and opportunity for argument as may in the circumstances be appropriate, be permitted to reverse. For similar reasons, and because it is desirable that the same body to whom the evidence is presented be permitted to act upon it, it is recommended that the Board, when new evidence is presented to it, be permitted to decide the case forthwith upon the basis of the entire record. In order to assure, however, that claimants make every effort to present the full case to the rating board, it is recommended that if there appears to have been no good reason for the claimant's failure to have adduced such new evidence before the rating board, the Board of Veterans' Appeals then remand unless real hardship results.

*Procedure in certain forfeiture cases.*⁹—Payment of benefits under the veterans' laws may be terminated or forfeited because of misrepresentation or other misconduct, but notice and opportunity for hearing are first required. The rules and regulations provide that the accused shall be confronted, in the notice, with the allegations, but not with the evidence against him. In addition, in cases where a widow is accused of open, notorious, adulterous cohabitation, the informants against her are not disclosed, nor is much of the information, which is regarded as "confidential." The Veterans' Administration has adopted this policy of nondisclosure partly to protect its sources of information, and partly because it is felt that the harmony of the community may be disrupted if a widow were informed of the identity of her accusers. The Committee does not, however, believe that these are impelling reasons. Termination of benefits is a serious sanction; an accusation of adultery is even more grave. Rebuttal of charges of this nature is extremely difficult where the accused knows neither the evidence against her nor the identity of her accusers. The interests of the accused in cases of this type seem paramount. The Committee recommends, accordingly, that in all cases involving forfeiture of benefits, full notice be given, and that in adultery cases, the policy of nondisclosure of information and identity of informants be abandoned.

⁸ *Id.*, at 32 and 34.

⁹ *Id.*, at 12 and 23.

FEDERAL COMMUNICATIONS COMMISSION

The Committee's general recommendations in Part D of chapter I in respect of delegation; in chapter II, in respect of administrative information; in chapter III, in respect of informal procedures, pre-hearing conferences and negotiations; in chapters IV and V, in respect of organization and procedures for formal adjudication; in chapter VI, in respect of venue for judicial review; and in chapter VII in respect of rule making, are applicable to the Federal Communications Commission.

*Intervention.*¹⁰—Under its old rules of practice, the Commission permitted any party to intervene in a hearing on a license application if his petition disclosed "a substantial interest in the subject matter." This qualification was so broad and vague that petitions were almost never denied. As a result, there occurred extended cross-examination of witnesses by each intervener, even though the latter often presented no affirmative evidence upon the issues. The resulting general tendency to protract hearings without substantial compensating contribution to enlightenment on the issues recently led the Commission to amend its rules in respect of intervention to require that a petition to intervene must set forth not only the interest of the petitioner in the proceeding, but also "the facts on which the petitioner bases his claim that his intervention will be in the public interest." Subsequently, petitions were denied where they were based upon the fact that the proposed intervener desired only to show at the hearing the manner in which his private interests might be affected by a grant of the application. If the petition fails to address itself to any consideration of public interest or to facts which might constitute valid grounds for denial of the application, it will be denied. Even where a petition is denied, persons are permitted to file communications relating to the merits of any pending application and, by rule, no person may be precluded from giving any relevant material and competent testimony, even though he may not be accorded the status of an intervener.

It has been contended that the Commission's new rule concerning intervention is unduly harsh and tends to deprive existing competing licensees and others of an opportunity to protect their interests. This issue, the Committee finds, is closely interrelated with substantive legal problems upon which it is unwilling to pass. The United States Supreme Court, in *Federal Communications Commission v. Sanders Brothers Radio Station*,¹¹ has indicated that the effect of the grant of an application upon private interests of persons other than the applicant is not in and of itself a factor which the Commission must, or possibly may, consider. Competitors, whether or not as such, are indicated by the same decision to have certain rights and interests in the proceedings, at least to the extent of being entitled to petition for judicial review of the grant. It would not be appropriate to determine here the precise legal interest existing licensees may have in hearings upon applications. If, indeed, competitors have a legal interest in being protected from competition or the like, their petitions

¹⁰ See this Committee's Monograph No. 3, "Federal Communications Commission," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 3 at 16-21.

¹¹ 309 U. S. 470, 642 (1940).

for intervention must, of course, be granted. If, on the other hand, they have no such interest, and their rights are no different from other members of the public, so that in effect they are no more than representatives of the public interest and vindicators of the public rights, the Commission's new and more stringent regulations concerning intervention are fully justified.

*Place of hearings.*¹²—Hearings upon applications for broadcast licenses are almost invariably held in Washington, D. C.; the same is true of hearings looking toward the suspension of commercial radio operators' licenses. This fact handicaps both the Commission and the individual involved: In the case of broadcast licenses, often purely local issues are involved and the most efficacious manner in which to proceed would be to hold the hearing in or near the city in which the applicant proposes to build or operate his station. The burden upon the individual involved in coming to Washington and bringing his witnesses is especially heavy in the case of commercial radio operators; the latter are so unlikely to be able to undertake this journey that their right to a hearing may in large part be illusory. Yet budget limitations virtually necessitate the Commission's present practice. The Committee recommends, accordingly, that every effort be made by the Commission to secure sufficient appropriations to hold hearings in the field.

*Petitions for rehearing.*¹³—Section 405 of the Communications Act authorizes the filing of applications for rehearing within 20 days after the effective date of an order granting or refusing an application for a license. The United States Court of Appeals for the District of Columbia has interpreted this provision as requiring that a person who had not previously been a party to the Commission proceedings must file a petition for rehearing as a condition precedent to appealing to the court. This interpretation is fully consonant with the desirable practice of insisting that objections to administrative action should not be raised for the first time on appeal, but should instead be presented initially for administrative consideration. Fearful, however, that their own appeals might be dismissed, many persons who had participated in the proceedings before the Commission—and to whom the Court of Appeals' ruling may therefore be inapplicable—have automatically filed petitions for rehearing by the Commission. Petitions for rehearing of this type have raised no new problems for the Commission's consideration and consequently have been disposed of without much difficulty, though they have added a further burden of expense and delay. In order to avoid the necessity for the filing and disposition of these futile petitions, the Committee recommends that the Commission declare publicly that, since in its opinion the decision of the Court does not require anything more than the exhaustion of administrative remedies by an appellant, parties to hearings before the Commission need not petition for a rehearing prior to taking an appeal. The assurance of the Commission that the failure of such persons to petition for a rehearing will not be urged as a defense to an appeal, should suffice to terminate the present wasteful and pointless practice.

¹² See Monograph No. 3, *op. cit. supra*, note 10, at 21, 51.

¹³ *Id.*, at 36-37.

*Press releases in cases involving revocation of broadcast licenses.*¹⁴—The service of notice of hearing or a show-cause order in broadcast-license cases is followed by the publication of a carefully prepared press release stating the reason for the Commission's action. Publicity is, by itself, one of the most effective sanctions available to the Commission. But the use of the sanction at present contains elements of unfairness, since the notice of hearing, when served by mail, may not even reach the licensee until after the newspapers have published the Commission's allegations. The Committee recommends, accordingly, that except where protection of the public interest impels immediate public warning, the Commission withhold the press release at least until the licensee has had an adequate opportunity to examine the notice of hearing and either (1) prepares a brief answer for simultaneous release, or (2) determines whether he should discontinue the program in issue as a prelude to requesting the Commission's immediate and informal termination of the proceedings.

*Certificates of compliance with the Safety Convention.*¹⁵—Although the inspections of ships which have applied for certificates of compliance with the Safety Convention are made by Commission employees, and the decision of the Commission on the application is final, the actual issuance of the certificate is by the Bureau of Marine Inspection and Navigation of the Department of Commerce. Since the function of the Bureau is entirely ministerial, and the Commission has statutory authority to issue certificates, the Committee recommends the elimination of this unnecessary step by the repeal of the Executive order which now vests sole power to issue certificates in the Bureau.

*Interlocutory suspension of operators' licenses and their revocation.*¹⁶—The Commission has no power under the statute either to suspend a radio operator's license pending the outcome of disciplinary proceedings or to revoke a license. Since the Commission may desire, in cases of flagrant violations the recurrence of which might endanger the safety of persons or property, to suspend a license pending the completion of formal proceedings, the Committee recommends that the Communications Act be amended so as to vest this power in the Commission. The authority to revoke licenses, a sanction which may be appropriate in some instances, should also be conferred upon the Commission by statutory amendment.

FEDERAL ALCOHOL ADMINISTRATION*

The Committee's general recommendations in Part D of chapter I, relating to delegation; chapter II, relating to administrative information; chapter III, relating to the utilization of informal procedures;

¹⁴ *Id.*, at 42.

¹⁵ *Id.*, at 46-47.

¹⁶ *Id.*, at 50-51.

*Subsequent to the investigation by the Committee's staff of the procedures of the Federal Alcohol Administration, this agency was absorbed by the Alcohol Tax Unit of the Bureau of Internal Revenue pursuant to the President's Reorganization Plan No. III effective June 30, 1940, and the pursuant Order No. 30 of the Secretary of the Treasury. At the present time, substantial changes, directed in large part toward decentralization of administration, are being made in the organization of that part of the Alcohol Tax Unit charged with the enforcement of the provisions of the Federal Alcohol Administration Act. While some further changes in procedure will unquestionably be necessary before the present reorganization is completed, the following recommendations, which are based upon the Committee's observations of the procedures of the defunct Administration, will probably be equally applicable to the new administrative machinery.

chapter IV, relating to hearing commissioners; chapter V, relating to procedures in formal adjudication; and chapter VII, relating to rule making, are applicable to the administration of the Federal Alcohol Act. Special attention is called to the Committee's recommendations in chapter II, relative to the utilization of declaratory rulings in connection with the advance approval of advertising; and its recommendations in the same chapter, relative to the preparation of findings and opinions.

*Procedure prior to denial of applications for certifications of label approval.*¹⁷—No method is now prescribed by which applicants for certificates of label approval may, if the labels submitted are found to be defective, present their arguments to the agency on the question of compliance of the labels with the regulations. It is, nevertheless, customary to permit a dissatisfied applicant to confer informally with responsible officials if that privilege is requested. The Committee recommends that provision be made for a hearing on applications which have been denied after investigation. This provision would not only advise applicants that they may have an opportunity to be heard, but also the record made at such a hearing could, in the event of an adverse decision, serve as the basis for court review.

*Specificity of pleadings.*¹⁸—Notices of contemplated denial are sometimes couched in extremely general terms, such as a mere paraphrase of one or more of the statutory grounds for denial; a similar generality has been observed in a number of orders instituting suspension proceedings. Since it is desirable that parties be given as precise notice of the issues as is possible, the Committee recommends that these pleadings contain more specific statements of the facts upon which is based the conclusion that an applicant for a permit should be denied, or a permittee should be suspended, as the case may be. A collateral benefit which may be derived from improved procedure in this respect is the diminution, if not the elimination, of the frequent requests now received for bills of particulars.

*Unwritten procedures.*¹⁹—While procedures have been developed whereby persons may obtain bills of particulars, subpoenas, and orders for the taking of depositions, the rules of practice are silent on these matters. In the interest of persons who are unfamiliar with these unwritten procedures, the Committee recommends that appropriate provisions governing them be incorporated in the rules of practice.

*Press releases.*²⁰—It has been the practice to publicize orders instituting proceedings of a disciplinary character against permittees. Publicity has been obtained through press releases, distributed widely among newspapers and trade journals, as well as among members of the industry. While the press releases appear to have been accurate statements and have stated that the suspected permittees have not yet been proved to have violated the act, they have nevertheless been very damaging to those involved in the proceedings. So marked has the fear of disastrous publicity become that many permittees have settled cases by sacrificing bona fide defenses, in order to avoid the issuance of a press release. In some instances, the Committee has reluctantly

¹⁷ See this Committee's Monograph No. 5, "Federal Alcohol Administration," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 5, at 3, footnote 17.

¹⁸ *Id.*, at 6-7, 16.

¹⁹ *Id.*, at 7, 21-22.

²⁰ *Id.*, at 16-17.

concluded, the former Federal Alcohol Administration appears to have relied upon threatened adverse publicity as an extra-legal sanction to secure observance of its commands, even when the validity of its dictates was not free from doubt.

Such abuse of the power to publicize proceedings must be unqualifiedly condemned.

The Committee notes its belief that there is rarely any strong justification for prior publicity in the cases which here arise. The sanctions provided by the statute, particularly the power to suspend the permit, should, if utilized, provide sufficient discouragement to the potential lawbreaker. Only rarely is it necessary to take rapid action in order to safeguard the public health or to prevent gross deception of consumers. It is accordingly recommended that the indiscriminate use of the press release be discontinued.

*Default hearings.*²¹—Hearings are now held in suspension, amendment, and revocation cases in which the respondent has failed to answer or to request a hearing. Since the statute requires that a permittee be given only an opportunity to be heard, and since no information is adduced at the hearing which is not already in the files and has already been examined by responsible officials, the Committee recommends that default hearings be discontinued and, in lieu thereof, that a final order, after due notice to the respondent, be entered immediately upon default.

*Records of rule-making hearings.*²²—Communications received from interested parties prior to the hearing are incorporated in the record as exhibits at the close of the hearing. To the extent that the purpose of incorporating these data in the record is to afford interested parties an opportunity to present rebutting evidence, that purpose would be achieved more satisfactorily by submitting the materials at the opening, rather than at the close, of the hearing; the Committee recommends, therefore, that these materials be made available to interested parties before or at the opening of the hearing.

FEDERAL TRADE COMMISSION

The Committee's general recommendations in part D of chapter I relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to the utilization of informal procedures; in chapter IV, relating to hearing commissioners; in chapter V, relating to procedures in formal adjudication; and in chapter VII, relating to rule-making, are applicable to the Federal Trade Commission. In respect of this agency, special attention is drawn to the committee's recommendations concerning delegation of power to initiate action (pt. D of ch. I), the use of stipulations and consent orders (sec. 6 of ch. III), and the preparation of reasoned opinions (pt. B of ch. II), and the issuance of declaratory rulings (pt. C of ch. II).

*Publicity of complaints.*²³—After its investigation and upon the issuance of its complaint, the Commission's complaint is mimeographed and is made available to all persons requesting copies; in

²¹ *Id.*, at 17-19; see also appendix E, "Procedures in Default Cases," *infra*, pp. 308-309.

²² See Monograph No. 5, *op. cit. supra*, note 17, at 30.

²³ See this Committee's Monograph No. 6, "Federal Trade Commission," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 6 at 14.

addition, the Commission has issued a press release consisting of a résumé of the allegations of the complaint. Recently, the Commission has inaugurated the practice of giving similar publicity to the answers which respondents have filed. The Committee does not find it feasible or desirable altogether to suppress publication of the fact of issuance of complaints leading to public hearings; on the contrary, reasons of public protection may often affirmatively demand notification that, after careful investigation, the Commission has reason to believe that violations of the law are occurring. Further, the Committee does not believe that it is ordinarily practical simply to make the complaints available without more. The Committee, however, perceives that there may be potential harm to the respondent. In cases in which the public health, safety, or other interest does not impel immediate announcement of the issuance of a complaint, the Committee recommends that the Commission permit a reasonable period to the respondent to prepare a reply, that publication of the complaint be withheld until such reply has been submitted or the period has expired, and that thereafter the Commission simultaneously release a résumé of the complaint and of respondent's reply.

*Issuance of subpoenas.*²⁴—Even during the course of the hearing, respondents are required to submit applications for subpoenas to the Commission itself, rather than to the hearing officer. The Commission's own trial attorneys, on the other hand, are supplied with subpoenas ad testificandum in blank, to be used as the occasion arises. The Committee is unable to find good cause for requiring the Commission to devote its attention to the issuance of subpoenas in the course of the hearing; on the contrary, the Committee finds that the present procedure is cumbersome in that it vests the power of determining this issue in the hands of officials unfamiliar with the course of the hearing and, further, it places a burden upon respondents which is not shared by the Commission's counsel. The Committee therefore recommends that the hearing officer be supplied with subpoenas signed by the Commission in blank, and that he be empowered to issue such subpoenas in the course of the hearing either to the respondent or to the Commission's trial attorney upon the hearing officer's being satisfied that good cause appears for the use of compulsory process.

*The form and content of the decision.*²⁵—At present, the Commission's findings of fact are formalistically phrased in the language of the complaint; they are largely concerned with the conclusions rather than the facts. A narrative statement of facts is absent, as is any reference to or discussion of the conflicting contentions of the parties. The decisions further commonly omit discussion of the principles of law under which the respondent's conduct is held to be legal or illegal, as the case may be. Under the present form of the Commission's decisions, it is frequently impossible to appreciate what business methods are involved; in addition the decisions are of indifferent value as precedents or guides for businessmen and attorneys both within and without the Commission. The Committee accordingly recommends that every effort be made to improve the form of the

²⁴ *Id.*, at 18; see also appendix K, "Procedure for Issuance of Subpoenas," *infra*, pp. 418-419.

²⁵ See Monograph No. 6, *op. cit. supra*, note 23, at 29-30; see also appendix L, "Form and Content of Intermediate Reports and Final Administrative Decisions," *infra*, pp. 442-444.

- Commission's decisions, whether sustaining or dismissing the complaint, and that such decisions include a discussion of the facts and contentions of the parties and the reasons underlying the ultimate judgment.

DEPARTMENT OF AGRICULTURE, ADMINISTRATION OF THE GRAIN STANDARDS ACT AND OF THE PACKERS AND STOCKYARDS ACT

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to the utilization of informal procedure; in chapter IV, relating to hearing commissioners; in chapter V, relating to procedures in formal adjudication; and in chapter VII, relating to rule-making procedures are applicable to the administration of the Grain Standards Act and the Packers and Stockyards Act. Special attention is called to the recommendations in part D of chapter I relative to delegating power to initiate action and dispose of routine questions; in section 2 of chapter V relative to the use of stipulations; in section 5 of chapter III relative to disposing of applications for rate adjustments under the Packers and Stockyards Act without requiring the holding of hearings; and section 6 of part A of chapter IV in respect of the Secretary's delegation of the power to make final administrative decisions to a chief adjudicating officer or reviewing board of responsible officials.

Oral arguments.—Hearings looking toward the suspension or revocation of grain inspectors' licenses are held before trial examiners in the field. At the conclusion of the hearing, the examiner prepares a report which is considered by the General Field Headquarters in Chicago, and thereafter by a number of officials in Washington. At no stage is the respondent afforded an opportunity to argue orally before either the examiner or any other person who participates in the decision, although he is permitted to file "arguments in writing" in the form of briefs. Respondents in any event are not ordinarily so situated, financially or otherwise, that they can file briefs or come to Washington to present oral argument.²⁶ Much the same considerations apply in small reparations cases under the Packers and Stockyards Act, where, although opportunity for oral argument before the Secretary in Washington is afforded, the opportunity is more theoretical than real because of the disproportionate expense of a trip to Washington.²⁷ The Committee recommends, therefore, that oral argument be permitted before the hearing officer at the close of the hearing and that this argument be embodied in the record for later consideration by Department officials.

*Informal procedures in live poultry licensing.*²⁸—Under the Packers and Stockyards Act, live poultry dealers in designated cities or areas must be licensed by the Department of Agriculture; applications for licenses may be denied only after issuance of a show-cause order and opportunity for hearing. Except where there are doubts

²⁶ See this Committee's Monograph No. 7, "Administration of the Grain Standards Act, Department of Agriculture," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 7 at 13-14.

²⁷ See this Committee's Monograph No. 11, "Administration of the Packers and Stockyards Act, Department of Agriculture," *id.*, pt. 11 at 20.

²⁸ *Id.*, at 11-12.

concerning the financial statement furnished by the applicant, the Department proceeds to issuance of notice and hearing whenever some reason appears in the application for withholding the granting of the license. No effort is first made to confer informally with the applicant in an effort to correct the apparent deficiencies. Even where the question concerns the adequacy of the financial statement, no informal procedures were utilized until 1939, and orders to show cause were issued forthwith.

The Committee finds that this is a fertile field for useful resort to informal preliminary procedures. Many applicants for poultry dealer licenses have difficulty in grasping the requirements for proper applications. It is likely that a competent investigator with an alert sense of fairness and an ability to explain to the applicant the information which is needed could accomplish much by clearing up existing doubts and thus disposing of the necessity of going on to hearing. That this is true seems to be demonstrated by the recent and successful utilization of informal procedures in financial qualification cases, in which the Department now sends an accountant to the office of the applicant to assist him in the preparation of his financial statement, thus obviating the need in many cases for the issuance of show-cause orders. The Committee recommends, therefore, that in these application cases, show-cause orders be issued and hearings be scheduled only after efforts have first been made, where practicable, to dispose of the difficulties by informal methods.²⁹

*Issuance of regulations prescribing bonds.*³⁰—In any case involving financial qualifications of an applicant for a live poultry dealer license, or for registration of market agencies and dealers, and before or after the issuance of the show-cause order, or even after the final order denying the license has been issued, the proceedings may be terminated favorably to the applicant if, as the regulations provide, he posts a satisfactory bond. The regulations fail, however, to indicate the prescribed conditions of the bond, or the method of determining its amount, or the qualifications of the obligee. That formulation of these requirements is not impossible is evidenced by the fact that the Solicitor has prepared a form for bonds in these cases, and the Department has, as a matter of practice, imposed definite and specific requirements concerning the amount of the bond (*e. g.*, one-quarter the amount of the applicant's gross weekly live poultry purchases, in addition to any existing deficit in assets shown by the applicant's balance sheets). A public formulation of the Department's requirements in these respects might very possibly eliminate the necessity of later time-consuming explanations and even might lead to the offering of satisfactory bonds at the outset, instead of after official steps have been taken to reject the application. The Committee recommends that the Department include in the form of the application itself an announcement that a bond, satisfying these stated requirements, may be furnished by the applicant.

*Suspension of rate orders.*³¹—Section 306 (e) of the Packers and Stockyards Act authorizes the Secretary summarily to suspend for 30 days filed rates which appear to be improper, and to extend the

²⁹ See ch. III of this report, *supra*, pp. 41-42.

³⁰ See Monograph No. 11, *op. cit. supra*, note 27, at 12-14.

³¹ *Id.*, at 22.

suspension for 30 additional days. This total of 60 days is, however, the limit of the permissible suspension period, which, because of length and complexity of rate-making proceedings, proves often to be wholly inadequate. Rates can rarely be prescribed within that time and, indeed, it is uncommon for formal hearings even to commence within the period. This circumstance suggests that if the process of rate regulation is to be an effective one, further tentative controls are needed. The Committee accordingly suggests that legislative consideration be given either (1) to permitting the period of suspension to be extended until final order in the rate proceedings, or at least until they have progressed sufficiently to show that suspension should be lifted; or (2) the authorization of a temporary rate order procedure, similar to that already functioning in the public-utility rate field. While the latter possibility is not so summary as suspension of a proposed schedule, it is at least more expeditious than the procedures now available to the Department. In any event, neither of the alternatives here suggested would involve a question of confiscation since if it were found ultimately that, during the interim period, rates had been maintained at too low a level, the final order could be so drawn as to permit recoupment from future rates fixed accordingly.

RAILROAD RETIREMENT BOARD

In general, the Committee's recommendations in chapter II, relating to administrative information; chapter III, relating to informal adjudication; chapter V, relating to hearing procedures; and chapter VII, relating to rule making, are applicable to the Railroad Retirement Board.

*Content of field investigator's report.*³²—In cases where there is a sharp conflict or considerable doubt, a field investigation is ordered. This investigation ordinarily includes interview of some, but not all, persons involved. The investigator may, and often does, include in his report his conclusions in respect of the basic fact in controversy. Since the field investigator is ordinarily not in possession of all the facts or contentions bearing on the issues, and since the function of adjudication is in any event vested in a special group in Washington, it is recommended that conclusions be omitted from field investigation reports. This recommended omission does not, however, extend to the investigator's conclusions based on personal observation, as, for example, the credibility of the person interviewed or the apparent age of the person observed.

*Separation of fact finding and rating in disability cases.*³³—In cases involving a claim of total and permanent disability for regular employment for hire, the claimant is ordinarily directed to subject himself to physical examination by Veterans' Administration physicians or others not attached to the Railroad Retirement Board. The examining physician's report is strictly confined to a statement of the primary medical facts and omits recommendations or conclusions. This report is then submitted to the Disability Rating Board, before whom no provision is made for the claimant's personal appear-

³² See this Committee's Monograph No. 8, "Railroad Retirement Board," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 8, at 12.

³³ *Id.*, at 13-14.

ance. The Rating Board, upon the basis of the examining physician's report, then determines the issue of disability for hire. If the claim is disallowed by the Board, the claimant is then entitled to personal appearance before it; if new light is thrown on the issue, the Board will not, however, proceed to a rating but will order a new examination by another physician.

The separation of the function of fact finding from that of reaching conclusions seems in this instance to be artificial and wasteful of the valuable information to be gained from first-hand information and observation. For the present, however, since the examining physicians are not employees of the Board and are not yet trained in its standards of disability, it may not be feasible to permit them to note their conclusions in all cases. It is, however, believed possible to draw a distinction between "medical" conclusions (i. e., conclusions concerning probable medical consequences—for example, whether a certain eye injury is likely to result in loss of sight and permanent impairment) and "economic" conclusions (i. e., whether an injury or illness entails unemployability). It is recommended that "medical" conclusions, as well as statements concerning the claimant's general appearance and condition, based upon the physician's personal observation, be permitted. It is further recommended that attention continue to be directed toward training physicians, and when such a corps is developed, that they be permitted to note their "economic" conclusions as well. It is further recommended that when claimants appear before the Disability Rating Board, the latter's members, two of whom are physicians, be permitted to reach a decision forthwith and without remand if, within the limits of their facilities, they are able to do so.³⁴

*Decision of the Appeals Council—Unanimity.*³⁵—Section 260.02 (g) of the Board's regulations provides that decisions of the Appeals Council "shall be taken by unanimous vote" of the five members. This provision has been interpreted to require a unanimous decision. The decision may be either (1) on the merits; or (2) to certify the entire record to the Railroad Retirement Board as an automatic appeal. The question concerning the effect of lack of unanimity on both of these courses has not yet arisen.

Since it is not apparent that a split decision is valueless, and since an effort to obtain unanimity may consume an unnecessary amount of time when the council has already demonstrated difficulty in remaining abreast of its case load, it is recommended that at least after the basic questions of policy have been established, the requirement of unanimity be abandoned. Since no provision for appeal by an officer of the Board has been made, however, it is recommended that the Board, in its discretion, be permitted to take up any case for its own consideration on its own motion, and that automatic appeals be permitted to be certified to the Board by any two members of the appeals council.

*Opportunity for hearing in overpayment and waiver cases.*³⁶—Section 9 of the Railroad Retirement Act provides that in the event

³⁴ A major reason for the present practice of the Disability Rating Board's remanding, even after appearance of the claimant before them, is that the facilities necessary for examination of the claimant and for making a medical conclusion are not available to the Board.

³⁵ Monograph No. 8, *op. cit. supra*, note 32, at 25-26.

³⁶ *Id.*, at 42-43.

that a claimant has been erroneously paid, the Board shall recover such overpayment unless the payee is in the judgment of the Board "without fault" and "such recovery would be against equity and good conscience." The factors upon which recovery or waiver depends are, therefore, (1) whether the payee knew or had reason to know of the overpayment; and (2) the extent to which he is dependent upon the current payment of benefits for the necessities of life and whether he has, by reason of the erroneous payment, changed his position so as to make recovery a severe hardship upon him.

Upon the Board's discovery of the overpayment, the payee is notified and requested either to make prompt restitution or to "set forth in detail the reasons, if any, why full payment * * * should not or cannot be made." If further information is deemed necessary following the payee's reply, it is usually developed by correspondence, rarely by field investigation or by interview of the payee. No provision is made for a personal appearance or hearing.

Since the question of waiver is likely to depend on questions of facts and intangible elements difficult of precise ascertainment, since the factors involved would seem to be best determined by a vis-à-vis method, since the present procedure places upon the payee a burden of proof which he may be ill-equipped to meet by correspondence, it is recommended that if the payee's claim of hardship is prima facie valid, and unless the sum is entirely trivial, either (1) field investigation, including an interview of the payee, be invoked; or (2) opportunity be afforded the payee to appear personally and informally before field employees constituted to receive him, and that such employees be permitted to make reports and recommendations to Washington prior to central adjudication of the case.

FEDERAL CONTROL OF BANKING—FEDERAL RESERVE SYSTEM, COMPTROLLER OF THE CURRENCY, AND FEDERAL DEPOSIT INSURANCE CORPORATION

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to informal procedures; and in chapter VII, relating to rule-making procedures, are applicable to Federal control of banking. The recommendations in chapter IV in respect of hearing commissioners and in chapter V in respect of procedures for formal adjudication are also applicable to forfeiture and removal proceedings brought before the Board of Governors of the Federal Reserve System, and to Federal Deposit Insurance Corporation proceedings to terminate the insured status of banks. Since neither of these agencies is likely to have many formal hearings annually, attention is drawn to the recommendations in chapter IV relative to the use of temporary hearing commissioners and of hearing commissioners borrowed from other agencies dealing with like subject matter.

*Procedure in respect of issuance of rulings.*³⁷—The Board, the Federal Deposit Insurance Corporation, and the Bureau of the Comptroller of the Currency issue a series of "rulings" or interpretative opinions,

³⁷ See this Committee's Monographs No. 9, "Federal Reserve System," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 9 at 21-23; No. 14, "Federal Control of Banking," *id.*, pt. 13 at 38-39.

many of which partake of the characteristics of regulations, are policy making, and for practical purposes are binding upon banks or others whom they concern. Prior to issuance, there is commonly no consultation with outside persons, nor does either the Federal Deposit Insurance Corporation or the Bureau of the Comptroller publish or make available to the public these rulings.

Since the rulings may have considerable effect upon the rights or duties of groups of individuals other than those who initiated the inquiry, it is recommended that those of general application be submitted to persons outside the staff for comment. To insure against protracted and valueless controversy, it is suggested that such submission be limited to well-recognized organizations of banking institutions. Further, since the precedent value of the rulings may make them of considerable public interest and may contribute to the development of modern banking laws as well as to certainty among those affected, the Committee recommends that the Federal Deposit Insurance Corporation and the Bureau of the Comptroller of the Currency periodically collect and publish the opinions of general interest.

*Action upon applications: The opportunity for rebuttal.*⁸⁸—The three banking agencies have extensive licensing powers: The Federal Reserve Board's approval is a condition precedent to establishment of state branch banks, admission of state banks to membership, granting trust powers to national banks, authorizing foreign banking businesses, and granting voting permits to holding-company affiliates. It also acts upon applications by member banks for a change in classification which would entitle them to carry lower reserves. Similarly, applications must be made to the Bureau of the Comptroller of the Currency for national-bank charters and to the Federal Deposit Insurance Corporation for admission to insurance. None of the agencies holds hearings on these applications, even where denial is contemplated; instead, final action is based upon ex parte investigations, examinations, and interviews. Nor in the case of each of these agencies is there a regularized method of informing the applicant specifically of the evidence against him. The Federal Deposit Insurance Corporation, however, upon request of an applicant whose application has been denied, furnishes him with a detailed statement of its objections; the Bureau of the Comptroller of the Currency affords the applicant an opportunity for reconsideration but does not regularly state the specific grounds for adverse action; the Federal Reserve may confer with the applicant but does not inform him specifically of the adverse evidence or the identity of those furnishing unfavorable information.

As a safeguard against improper action and in order to afford applicants opportunity to meet adverse evidence, the Committee recommends (1) that the identity of all informants be recorded in the files; and (2) that, prior to the taking of adverse action, the applicant be precisely and specifically informed of the adverse evidence and that he be afforded a reasonable time to present rebutting evidence and arguments. The Committee recognizes, however, that a major safeguard is careful and conscientious investigation, that in

⁸⁸ See this Committee's Monographs No. 9, *op. cit. supra*, note 37, at 32-38; No. 14, *id.*, at 10-13, 15, and 42-44.

determining whether individuals are suited to engage in the banking business, or whether the community needs a bank, or whether a bank should be insured and similar questions, a congeries of imponderables is involved, calling for almost intuitive special judgments so that hearings are not ordinarily useful, and that the banking business is a delicate one so that the advantages and importance of ready and frank information may outweigh the dangers of accepting confidential information. Accordingly, and in the absence of any substantial evidence that there has been an abuse of power, the Committee is not prepared to recommend that either hearings be held prior to denial or that in all cases the identity of the author of the adverse evidence be disclosed to the applicant.

*Federal Deposit Insurance Corporation default proceedings.*³⁹—Although subsection (i) (1) of the act expressly provides in respect of hearings looking toward the termination of the insured status of a bank that “Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank,” the Federal Deposit Insurance Corporation proceeds to a hearing and adduces evidence despite the respondent’s failure to appear or indicate a desire for a hearing. The Committee recommends that the respondent be notified that its failure to appear or request a hearing will result in the termination of its insured status without more, and that in the event of nonappearance and in the absence of the respondent’s taking steps to defend itself, a default judgment be entered forthwith terminating its insured status without further proceedings.

BUREAU OF MARINE INSPECTION AND NAVIGATION (DEPARTMENT OF COMMERCE)

In general, the Committee’s recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to informal methods of adjudication; in chapter IV, relating to hearing commissioners; in chapter V, relating to procedures for formal adjudication; and in chapter VII, relating to rule-making procedures are applicable to the Bureau of Marine Inspection and Navigation. Special attention is drawn to the Committee’s recommendation in section 6, part A of chapter IV, that in agencies such as the Department of Commerce, review of hearing commissioners’ decisions be vested in a deciding officer or board appointed by the Secretary, and that the Secretary delegate his powers to adjudicate to such an officer or board.

*Investigation proceedings.*⁴⁰—A primary purpose of the marine casualty investigation boards is to investigate past casualties in order to discover means of promoting safety at sea and to develop regulations which may prevent recurrence of the particular type of casualty. But no clear line of demarcation has been drawn between investigations and hearings looking toward disciplinary action. When in the course of an investigation it appears that individual derelictions have occurred and may have been the cause of the casualty, the investiga-

³⁹ See appendix E, “Procedures in Default Cases.” *infra*, p. 309.

⁴⁰ See this Committee’s Monograph No. 10, “Department of Commerce, Bureau of Marine Inspection and Navigation,” Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 10 at 8-10.

tion proceeding is terminated as such and is transformed into a nominally new proceeding for the purpose of trying the persons believed to be guilty.

Because of this close relationship between the investigation and the decisive hearing, the investigation has been modelled upon formal adversary proceedings. Any "party in interest," including any person whose conduct is under investigation, is entitled to appear, call witnesses, examine, and cross-examine; the boards present their own case, and cross-examine witnesses called by the parties. Upon the conclusion of investigation, findings are made and are based wholly upon the record.

Since the investigations are preventive in nature, and are intended either to prescribe future conduct by rules to guard against recurrence or to determine whether a hearing looking toward decisive action should be held, the Committee is of the opinion that a more purely investigative technique should be utilized. A clear line should be drawn between investigations and disciplinary proceedings; in the former, interviews and ex parte investigations may properly supplement the hearings. The Committee further believes it desirable that, in investigations, there be no parties as such, and that control of the proceedings by outside persons be confined to suggesting to the boards persons to be called as witnesses and questions which may be asked.

*Ex parte evidence.*⁴¹—In disciplinary cases now heard by boards of three inspectors of the Bureau, looking toward the suspension of certificates, considerable use of affidavits and similar written evidence has been made. Such affidavits may often deal with factual issues which go to the heart of the controversy. In addition, the boards have been furnished with materials gathered in the course of investigations but these materials are not included in the record of the hearing. The Committee believes that in disciplinary proceedings of this nature, where facts are often in dispute, the use of affidavits and other ex parte evidence should be severely restricted. Affidavits and other written material should be admitted only upon a showing of practical unavailability of the authors. If possible, depositions or interrogatories are preferable and should be limited to situations where, for example, the event in question occurred in a foreign port and was investigated by an American consul in the course of his official duties. Finally, the persons who adjudicate the case should refrain from examining material and affidavits gathered in the course of investigation unless they appear as evidence formally adduced at the decisive hearing.

*Unwritten procedures.*⁴²—Although some regulations have been issued governing the salient points, there is by no means a definitive and complete statement of the procedure of the Bureau of Marine Inspection and Navigation. The Bureau's hearings are necessarily decentralized; as a result considerable procedural variations are apparent from area to area, and from board to board. In addition, the hearings are often confused, since the boards have no authoritative guides or sources of ready reference concerning the Bureau's principles. In order to insure some measure of uniformity and to assist

⁴¹ *Id.*, at 12, 14; see also appendix J, "The Utilization of Evidence not Subject to Cross-examination," *infra*, p. 404.

⁴² See Monograph No. 10, *op. cit. supra*, note 40 at 12.

both the hearing officers and those who appear before them, the Committee recommends that a complete manual of practice be prepared and issued by the Bureau.

*Delay in reaching decisions in disciplinary cases.*⁴³—At present, the boards which hear disciplinary cases have no power to issue decisions; instead the record is transmitted to Washington, where it is extensively reviewed. Even after the Bureau has reached its decision, the case may again be appealed to the Secretary, in whose office it is apparently considered by six individuals. As a result, in the most picayune cases—even in those where the defendant pleads guilty—the time lapse between initiation of the proceedings and the final decision may be well over a half year. The primary object of the legislation administered by the Bureau is safety at sea; if that object is to be achieved, charges of incompetency of officers and seamen must be decided with despatch. In this respect, the Bureau has not succeeded although no obstacles in the nature of the subject matter justify the delay.

The Committee believes that much of the delay will be obviated by the adoption of its proposals, embodied in Chapter IV of this report and in the bill which accompanies it, to vest in hearing commissioners the power initially to decide, their decisions to be final in the absence of appeal to the Director of the Bureau and, even if an appeal be taken, with no absolute requirement that the Director review the decision *de novo* on the facts. The Committee recommends further (1) that in the ordinary case involving intoxication, disorderliness, and the like, the hearing commissioner be encouraged to announce his decision orally and immediately at the conclusion of the hearing; and (2) that since under the Committee's present proposal, an aggrieved person will already be entitled to an appeal from a responsible hearing commissioner to the Director of the Bureau, the statute be amended to preclude the right of further appeal from the Director to the Secretary of Commerce. The Secretary of Commerce should, of course, retain general powers of supervision over the activities of the Bureau.

*The problems of sanctions.*⁴⁴—The only sanction provided by statute for punishing offenses of officers and seamen is the suspension or revocation of licenses and certificates. The Committee, however, has doubt concerning the invariable suitability of this sanction. Undoubtedly suspension or revocation is proper in cases involving incompetency: The primary purpose of these statutes was to weed out incompetents and those unfit to serve upon the waters; the objective of promoting safety at sea requires that if a seaman or officer be found incompetent, he be deprived of his certificate until such time as he fulfills the specified requirements. But many relatively petty offenses—use of offensive language, intoxication off duty, and the like—may have only a remote bearing upon competency and safety; nevertheless, a short suspension may result in the offender's being unable to sail on his scheduled voyage, thus probably depriving him of his livelihood for a considerable length of time. Under these circumstances, the Committee recommends that the statute be amended to permit, as an alternative to revocation or suspension of

⁴³ *Id.*, at 19–20.

⁴⁴ *Id.*, at 20–24.

certificates, the imposition of fines, subject to judicial review de novo in the same manner as is recommended below in respect of remission, mitigation, and collection of fines.

A second problem relating to the sanctions available to the Bureau involves the time relationship. At present, the decision to suspend and determination of the period of suspension are made by the Director in Washington. Because the Director does not know the schedule of the convicted offender, the sanction must be imposed blindly. If, for example, he suspends the certificate for ten days, and the defendant's ship is in port for 11 days, the sanction is almost meaningless; on the other hand, if the vessel happens to be in port only nine days, a ten-day suspension may be unexpectedly heavy, since the defendant will miss the entire voyage. The Committee believes that this problem emphasizes the desirability both of providing for alternative sanctions and of permitting the initial decision to be made in the field forthwith by the hearing commissioner.

Finally, even after it is determined to suspend or revoke a certificate, the sanction may be meaningless because of the difficulty of locating the seaman involved; his certificate cannot be "lifted" until he is found. The long delay between hearing and final decision accentuates this problem, since the seaman has probably long since moved on. Again, this problem is likely to be solved by permitting the hearing commissioner to issue his decision immediately after the hearing. In the event that the defendant desires to appeal from the decision to the Director of the Bureau, it is recommended that, upon his filing his intention to appeal, the defendant be supplied, in the place of the surrendered one, with a temporary certificate distinguishable on its face and becoming automatically void after a specified period during which the appeal could be determined. The defendant-appellant would then be required to return for a new certificate within a reasonable time and, if the appeal is denied, he could easily be located or else he would be without a certificate altogether.

*Procedure for remission, mitigation, and collection of fines.*⁴⁵—For violations of various provisions of the navigation laws and regulations, the statutes provide in many situations for the imposition of fines, penalties, and forfeitures. The Secretary of Commerce is empowered to remit or mitigate any fine, penalty, or forfeiture. When investigation discloses a prima facie case of violation, the maximum fine is assessed by the Bureau as a matter of course. At the same time, a form is supplied to the alleged offender to permit him to apply for remission or mitigation. In only about ten percent of the cases does the alleged violator deny the offense and in almost all he applies for, and receives, substantial remission or mitigation. Yet, even after the compromise sum is determined, problems of collection remain: If the collector is unsuccessful, he must either drop the matter or turn it over to the United States Attorney for the purpose of instituting an action in the Federal district court.

As a result, a multitude of suits for petty amounts have accumulated. Approximately 1,500 navigation cases are now in the hands of the United States Attorney for the eastern District of New York; recently

⁴⁵ *Id.*, at 27-29.

the Collector of Customs sent him 631 such cases simultaneously. Virtually a complete breakdown in the system has resulted.

The Committee believes that the Federal district attorneys and courts should not be encumbered with these petty cases and ought not be utilized as collection agencies for the Bureau. Accordingly, the Committee recommends that enforcement of penalties be treated administratively in the first instance. The power to impose fines, penalties, and forfeitures should be transferred to the Bureau, to be initially exercised, after hearing, by hearing commissioners. The fines, penalties, and forfeitures should be assessed as they are at present; upon failure to collect, however, hearing should be held before hearing commissioners to determine *de novo* whether offenses have been committed and to fix the amount of the penalties. Appeals to or review by the Director of the Bureau should be retained as recommended in chapter IV of this report. In order to resolve any doubts concerning the constitutionality of the procedure, it is recommended that the aggrieved person be permitted review *de novo* by a Federal district court on appeal from the Bureau's final decision. Even with so amply extended a scope of review, the Committee believes that the stresses of the present system would be relieved, for only exceptional cases would go to court; if a method of administrative enforcement were established, the cases which did reach the court would be instituted by the alleged violator in seeking relief from assertedly erroneous administrative action, instead of by the Bureau in an effort to collect innumerable petty fines in essentially routine cases.

*Rule-making.*⁴⁶—The Bureau issues rules of great volume and complexity, treating comprehensively the problems of safety, navigation, and construction. By statute the bulk of this rule-making power is vested neither in the Director of the Bureau nor in the Secretary of Commerce, but rather in the Board of Supervising Inspectors. This Board is composed of the seven supervising inspectors who direct the activities of the Bureau's seven districts and supervise the work of the local inspectors. The Board is required by statute to meet at least once annually.

The main thought and action of the supervising inspectors are devoted to their work in the field, and of necessity they are able to give only incidental attention to the huge tasks of promulgating and modernizing regulations. The supervising inspectors are men qualified to inspect ships and to direct the activities of local inspectors, but they have no special skill in the drafting of comprehensive regulations. Their work in the field peculiarly fits them to determine whether or not proposed regulations will be workable, but others may be in a better position to keep abreast of technical developments. Consequently, there has recently been a shift in emphasis in the process of rule-making. The task of initial preparation has been assumed by the Bureau and its technical staff. The Committee believes that these circumstances should receive statutory recognition; it is recommended, therefore, that the rule-making power be transferred by statute to the Director of the Bureau. In order, however, to preserve the practical knowledge of the supervising inspectors, the Committee recommends that they be constituted an advisory

⁴⁶ *Id.*, at 30-32.

body, to be summoned when new regulations are proposed for the purpose of examining and analyzing the proposals and making recommendations to the Bureau concerning them.

*Collection of tonnage taxes.*⁴⁷—The tonnage-tax laws are administered by the Bureau through the collectors of customs. If the collector's decision and assessment are unfavorable to the taxpayers, the latter may protest and the Assistant Director and Director of the Bureau review the decision. Where the collector decides favorably to the taxpayer, and assesses no tax at all, no machinery has been provided for independent inquiry by other officials into the question whether or not the favorable interpretation is erroneous. As a result, there appear to be wide variations in the degree of strictness of collectors and, in addition, it is possible that taxes due and payable under acts of Congress are neither collected nor even sought to be collected. To remedy these defects, the Committee recommends that the Bureau enable itself to supervise the collection of tonnage taxes by requiring collectors to make reports of their decisions favorable to the taxpayer. Such reports should be transmitted to and reviewed by the Bureau to assure uniformity and to assure that taxes due under the laws are collected, until Congress sees fit to repeal or modify the existing statutory provisions.

ADMINISTRATION OF THE FAIR LABOR STANDARDS ACT

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; and in chapter III relating to informal methods of adjudication are applicable to the Wage and Hour Division's treatment of applications for exemptions, while the recommendations in chapter VII relating to rule-making procedures are applicable to the Division's issuance of wage order and other rules, and to the rule-making activities of the Children's Bureau. Particular attention is called to the recommendations in section 4 (a) of chapter V relating to the utilization of written evidence; these recommendations, although made in respect of adjudication, are applicable to wage-order proceedings.

*Prehearing conferences in wage-order proceedings.*⁴⁸—The Wage and Hour Division has in the past had some difficulty in resolving the issue of the definition of the industry for which a minimum wage was to be recommended prior to the hearing upon the industry committee's recommendation. It is apparent that full use of conferences and consultations with representatives of the industry has not been made. In addition, it has been common for the Division, through its own staff and other Federal bodies, to gather data without reference to other groups; the result has been that various groups have made duplicating surveys which have resulted in considerable confusion, misunderstanding, and unnecessary disagreement and loss of time at the hearing. Finally, no effort is made in advance to block out the issues; witnesses often appear without knowledge of or preparation for presentation of such evidence as may be useful.

⁴⁷ *Id.*, at 35-36.

⁴⁸ See this Committee's Monograph No. 12, "Administration of the Fair Labor Standards Act," at 23-24, 28-29, 46-48.

The Committee believes that the Wage and Hour Division has not yet fully explored the possibilities of prehearing techniques as a device to clarify, simplify, and expedite the process of proof. The Committee accordingly recommends the utilization of representative panels which may not only assist in arriving at a definition of the industry to be considered, but which may also cooperate in the collection of the necessary wage data. Since the industry committee hearings as well as the filing of notices of intention to appear readily identify the persons interested, the Committee believes it feasible and desirable for the Division to indicate to these persons the fields in which evidence may be useful and the type of evidence which might fruitfully be prepared. The large number of parties, the expense of duplicate appearances and similar factors, however, make it improbable that regular pretrial conferences can successfully be utilized in most cases.⁴⁹

*Issuance of subpoenas.*⁵⁰—All requests for subpoenas are directed to the Administrator, and not to the officer presiding at the wage-order hearing. The subpoenas are issued by the Administrator only, after consideration by the review unit and the Administrator. The presiding officer is given no power to issue subpoenas, nor is he called upon to determine whether they should be issued. Since the presiding officer is best qualified through his knowledge of the progress of the hearings to pass upon the issue, the Committee recommends that he be supplied with subpoenas, signed in blank by the Administrator, which the presiding officer should be empowered to issue in accordance with rules and instructions prescribed by the Administrator.

*The post-hearing procedure.*⁵¹—Upon the conclusion of the hearing, the record is assigned for analysis to the review attorney and review economist who attended the hearing, but took no active part in it. These subordinates prepare digests for the Administrator, who thereafter consults with them, and with other members of the staff who have not participated in the hearing. Even though the Division's counsel and economist who took part in the hearing no longer serve as proponents of the proposed wage order, they are excluded from any participation in the post-hearing process. Similarly Division employees who testified are considered disqualified. Although formerly the presiding officer played no part in the consideration of the case, more recently he has been considered eligible for consultation. As a result of the Wage and Hour Division's observance of a theory of separation, those staff members who have made the most thorough study of the problems at hand and have gained the greatest familiarity with them have been sterilized; evaluation of the record and ultimate judgment is vested in the hands of persons who must attack the problem *de novo*. The Committee does not believe that this choice is impelled either by law or by other demands for fair play. The attorneys and economists who gather the necessary material and participate in the hearing are not now advocates of the proposed order; their task is simply to accumulate and submit all relevant material. In any event, where the agency is engaged in rule-making of this nature, the arguments based upon a combination of the roles

⁴⁹ See the discussion of prehearing conferences and stipulations of fact in sec. 2 of ch. V of this report, *supra*, pp. 64-68.

⁵⁰ See Monograph No. 12, *op. cit. supra*, note 48 at 70-71, footnote 62; see also "Procedure for issuance of Subpoenas," Appendix K, *infra*, pp. 422-423.

⁵¹ See Monograph No. 12, *op. cit. supra*, note 48 at 90-98.

of advocate and adjudicator are inapposite. The fact that the subordinates whom the Administrator may consult may have had some thoughts on the question at hand, and may have been engaged in procuring information, far from being a disqualification, should be recognized as conducing to just and informed results since it allows a more intelligent selection, at least so long as none of the subordinates was engaged in activities in any way resembling prosecution of a cause.

*Hearings preceding the issuance of regulations by the Children's Bureau.*⁵²—Prior to its issuance of regulations governing the employment of minors aged 14 to 16, or those in occupations deemed to be hazardous, the Children's Bureau, pursuant to its procedural regulations, invariably holds one hearing and sometimes two. The hearings are, however, preceded by intensive and complete investigation, as well as by conferences and interviews with possibly interested persons. In the four hearings thus far held, no factual evidence was presented and in two of the hearings, only one witness appeared at each.

The Bureau's thorough utilization of the investigatory and conference methods, combined with its expert knowledge and the fact that its issues are ordinarily narrow and the opinions of the persons affected easily tapped, makes it unnecessary for the Bureau to obligate itself to hold hearings in all cases. The Committee accordingly recommends that the Bureau continue its special investigations and conferences; issue its proposed regulation based thereon; distribute its report and proposal, accompanied by an announcement that comments and suggestions would be welcome; permit further conferences on the report and proposal; and thereafter hold hearings, but only if the responses indicate (1) that there have been factual gaps in the report; or (2) that there are important disagreements either upon the facts contained in the report or upon the desirability of the proposal.

POST OFFICE DEPARTMENT

In general, the Committee's recommendations in part D of chapter I relating to delegation; in chapter II relating to administrative information; in chapter III relating to informal methods of adjudication; in chapter IV relating to hearing commissioners; in chapter V relating to procedures in formal adjudication; and in chapter VII relating to rule-making procedures are applicable to the Post Office Department. Particular attention is called to the applicability of the following: (1) The recommendation in chapter IV (sec. 6 of pt. A) that where powers of adjudication are vested in heads of executive departments, the heads delegate the power finally to decide, possibly subject to discretionary review on appeal, to a responsible chief deciding officer or board; (2) the recommendation in chapter IV relating to hearing commissioners and their powers, applicable to fraud order proceedings and (where statutory hearings are held) to proceedings to revoke second-class mailing privileges; (3) the recommendation in part B of chapter IV that under no circumstances should the prosecuting attorney or the attorney who personally and directly participated in the framing and issuance of the complaint subsequently participate in the decision; and (4) the recommendation in part C

⁵² *Id.*, at 181-185.

of chapter II that declaratory rulings be utilized in advertising and similar matters.

*Notice prior to revocation of second-class mailing privilege on the ground of voluntary abandonment.*⁵³—One of the grounds for revocation of a second-class mailing privilege is “voluntary abandonment”—failure to publish over a reasonable length of time. Proceedings leading to such revocation are begun when the postmaster at the office of publication notifies the Department of suspension of publication. Without more, and without notice to the publisher, the second-class mailing privilege is revoked. Only when he offers his publication for mailing and second-class rates are refused him, will the publisher become aware of the revocation.

The Committee recognizes that abandonment of publication is easily ascertainable and ordinarily indisputable and that the local postmaster takes no action until he is reasonably certain of abandonment. Nevertheless, error is possible and its consequences to the publication are grave, since the periodical is ordinarily a perishable product which must be mailed on schedule. Accordingly, as a safeguard against error, the Committee recommends that the local postmaster be required to inform the publisher of his intention to notify the Department of the voluntary abandonment, and that the publisher be privileged within a stated period to submit to Washington any objections, information, or arguments he may deem relevant.

*Notification of a second-class permittee's right to a hearing prior to revocation.*⁵⁴—The statute (38 U. S. C., sec. 232) provides that second-class mailing privileges “shall not be suspended or annulled until a hearing shall have been granted to the parties interested.”

In fact, the publisher is simply sent a citation letter setting out the ground for revocation and permitting him until a certain date “to submit any statement he desires as to why the second-class mailing privilege should not be revoked.” The earlier practice of notifying the permittee of his right to appear and to have a formal hearing was abandoned because the Department believed that publishers often made needless trips to Washington in cases where the issues could have been disposed of by correspondence. While it is true that in many instances a publisher may not wish a hearing, the Committee believes that the choice should be his, and, accordingly, recommends that he be notified of his statutory right to a hearing.

*Hearings prior to denial or revocation of applications for permits.*⁵⁵—Although, as noted above, the statute provides for hearings prior to revocation of a second-class permit, in fact hearings are almost never held,⁵⁶ but rather correspondence, conferences, and, occasionally, investigations are utilized. Issues which arise are (1) whether the publication is a “periodical,” or is numbered consecutively, or satisfies the physical requirements for second-class matter; (2) whether the periodical has been published at least four times a year, has an established office, and has a legitimate list of subscribers;

⁵³ See this Committee's Monograph No. 13, “Post Office Department,” Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 12, at 6-7.

⁵⁴ *Id.*, at 8-9.

⁵⁵ *Id.*, at 10-15.

⁵⁶ The Committee does not here undertake to decide whether the statutory requirement of a hearing has been satisfied by the present procedure, but it observes that the practice is a long-established one and thus far unquestioned by the courts. *Cf. Lewis Pub. Co. v. Wyman*, 152 Fed. 787, 793 (E. D. Mo., 1907).

and (3) whether the publication has included obscenity or other un-mailable materials, including "radical" matters.

Group (1) issues are resolvable by reference to a single item of evidence—the periodical; the only matters upon which the publisher may profitably be heard are the ultimate conclusions. The Committee, therefore, recommends only that opportunity for oral argument (or conferences) and written briefs be afforded in respect of this group.

Group (2) issues involve questions of fact which may not be determined without reference to outside sources. Issues of credibility may also be involved where the legitimacy of the list of subscribers is contested. Yet the factual questions are tangible and objective; formal hearings before hearing officers would be cumbersome and expensive. Accordingly, the Committee recommends that where a disagreement of fact between the local postmaster and publisher arises, there be a complete investigation by a post-office inspector, who should obtain affidavits and should interview all persons available. All adverse evidence so uncovered should be disclosed to the publisher who, in turn, should be given opportunity to submit his own statements and affidavits. The right of the publisher to be heard by, to argue before, and to confer with, the deciding officials in Washington should be retained and announced.

Group (3) cases resemble group (1) in that determination of obscenity, radicalism, or the like can be made upon the basis of an examination of the *res* itself. Yet, obscenity is largely a question of judgment which often may require a broad sociological expertness. The Committee recommends, therefore, that the Department consult outside experts, scholars in the field of art, the sciences, and literature, as the case may be, in order to obtain their opinions prior to ultimate determination. Oral argument should also be preserved and employed on this issue.

*Injunctions pendente lite in fraud cases.*⁵⁷—Although many of the schemes against which the Department proceeds involve frauds which may be quickly consummated and in which immediate protection of the public is imperative, the Department has no power to impound the respondent's mail. As a result, the fraud order may come too late; in addition, the need for speed has resulted in a procedure which occasionally evidences the sacrifice of fairness for expedition. The Committee, therefore, recommends the enactment of legislation empowering the Postmaster General to apply to a United States district court either (1) for an injunction to halt the allegedly fraudulent enterprise; or (2) for an order authorizing impounding the respondent's incoming mail, pending the issuance of a complaint and final determination. As a safeguard against dilatory prosecution of the administrative proceeding, it is recommended that the statute provide for a limited life, of reasonable length, for the interlocutory order or injunction.

*Place of hearings and depositions.*⁵⁸—The fraud order section has only one hearing officer, who hears approximately 100 cases annually. All hearings are held in Washington, D. C. In addition, the Department has made no provision for a deposition procedure.

⁵⁷ See Monograph No. 13, *op. cit. supra*, note 53 at 22–23.

⁵⁸ *Id.*, at 23 and 30.

The unavailability of depositions, when coupled with the holding of all hearings in Washington, D. C., imposes a heavy burden upon respondents whose places of business or whose witnesses are not close at hand. The Committee, therefore, recommends that the burden upon the respondent be alleviated by a statutory amendment, if necessary, allowing the use of depositions; in addition, it is recommended that if the staff of hearing officers is increased, consideration should be given to the holding of field hearings.

*Default proceedings.*⁵⁹—Hearings are held in fraud order cases even though the respondent has failed to answer, appear, or request a hearing. The statute requires neither a hearing nor an opportunity for hearing prior to the issuance of an order. Since no information is adduced at the hearing which is not already in the files and has already been examined by responsible officials, the Committee recommends that default hearings be discontinued, and, in lieu thereof, that a final order be entered immediately upon default; in order that such procedure will not take the respondent unawares, it is recommended that the notice of hearing which accompanies the complaint, should advise the respondent (1) that he has a right to a hearing on a certain date; (2) that the hearing will be held if, ten days before the date set, he (a) requests a hearing and appears on the date set, or (b) requests a hearing, states that he will not appear, but submits an answer and supporting material which raise substantial issues of fact; and (3) that if he does not request a hearing or submit such answer and material, a fraud order will issue on the date set and without a hearing.

*Unwritten procedures, rules of practice.*⁶⁰—Although more or less standardized methods have been established for the conduct of fraud order hearings, no procedures have been reduced to writing and no rules of practice have been issued. The absence of written rules creates confusion; moreover, it may lead respondents and their attorneys to suspect arbitrary application of rules and may thus destroy confidence in the integrity of the Department's proceedings. The Committee accordingly recommends that the Department issue rules of practice setting forth with all possible specificity its requirements in respect of notice, answer, rules of evidence, affidavits, exceptions, oral arguments, briefs, and the like.

*Availability of transcripts of the record.*⁶¹—In fraud order cases, the Department does not utilize a reporting service. The hearing is recorded by its own stenographers. The transcribed record is not available to the respondent, either by purchase or otherwise, so that if the respondent wishes a record, he must so determine in advance and must bring in his own court stenographer. If the respondent does this, the Department dispenses with its own stenographer and requires the respondent to furnish it with a copy of the latter's record.

The Committee believes that the Department's practice in respect of records imposes hardships upon the respondent. Effective disposition of cases as well as fairness to the respondent requires the practical availability of the record. The Committee accordingly recommends that the Department either furnish the respondent with

⁵⁹ *Id.*, at 24-26; see also appendix E, "Procedures in Default Cases," *infra*, pp. 311-312.

⁶⁰ See Monograph No. 13, *op. cit. supra*, note 53 at 26, footnote 90.

⁶¹ *Id.*, at 27-28.

a copy of the record transcribed by its own stenographer free or at cost,⁶² or obtain a contracting service.

*Subpenas.*⁶³—The postal statutes make no provision for the issuance of subpoenas by the Department in the course of fraud-order hearings. While this does not seriously hinder the Department in the presentation of its case because of the availability and willingness of its witnesses (postal inspectors and Government experts), the respondent may face serious difficulties in obtaining the presence of witnesses who must usually travel far and are often unwilling to testify “against the Government.” Since it is desirable to remove all unnecessary obstacles to the respondent’s proper and full presentation of his case, it is recommended that legislation be passed to empower the Department to issue subpoenas in fraud-order cases.

*Notice and hearing in foreign fraud orders.*⁶⁴—Fraud orders are issued against foreign respondents without issuance of complaint or notice; upon the receipt of informal and private complaints, and possibly after some investigation, the order is issued forthwith and the respondent learns of the order only when his mail from the United States is suspended. This severance of communication, of course, makes extremely difficult his taking any further action.

The dangers of proceeding upon unverified complaints need no underscoring. The Committee recommends that this practice be abandoned; that the Department proceed only after investigation; that the respondent be notified of the charges against him; and that he be permitted, if he wishes, to answer or appear or submit verified material or argument. Where the fraud order is based upon advertisement of obscene products, however, special reasons justify the present practice of summary issuance of a fraud order, since if the products are in fact obscene, the offer to deliver such products is fraudulent since they cannot pass through the customs, while on the other hand, the advertisement is similarly fraudulent if the products are not in fact obscene.

*The Post Office Department and the Federal Trade Commission.*⁶⁵—There exists a considerable concurrence of jurisdiction between the Post Office Department, in the exercise of its fraud order powers, and the Federal Trade Commission. In respect of all respondents in interstate commerce who use the mails in furtherance of their enterprise, the jurisdiction of the two agencies is identical. Even more striking is their identity of power since the addition of section 12 (a) of the Federal Trade Commission Act, which makes it unlawful to disseminate any false advertisement by United States mails for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of foods, drugs, devices, or cosmetics. The only distinction between the two agencies lies in the sanctions available to them: The Commission strikes down only the fraudulent representations and other deceptive features of an enterprise through the issuance of a

⁶² The Veterans' Administration and the Federal Alcohol Administration produce extra copies and furnish them gratis to the claimant or respondent as the case may be. The Interstate Commerce Commission also furnishes free copies of the transcript to the complainant and respondent in many of its proceedings. The Grazing Service of the Department of the Interior, furnishes records at the cost of five cents a folio. The Veterans' Administration also charges for the cost of the record if request for a copy has not been made in sufficient time to run off a carbon.

⁶³ See Monograph No. 13, *op. cit. supra*, note 53 at 30.

⁶⁴ *Id.*, at 36-37.

⁶⁵ *Id.*, at 37-38.

cease and desist order; the Post Office Department, on the other hand, has the power to destroy the entire business insofar as it is dependent upon the receipt of any mail (whether or not the mail is connected with the fraud).

Some efforts have been made in the direction of establishing a working arrangement between the Commission and the Department whereby their activities could be integrated: An official of the Post Office Department has, however, asserted to this Committee that "little success has been achieved" toward this end. In at least one case, a respondent was proceeded against successively by the Commission and the Department for the same activities.

The Committee recommends that, as a matter of economy of effort, and to prevent harassment of respondents, integration of the activities of the two agencies be achieved. The Committee recommends that further conferences between officials of the two agencies be held to map out a general program whereby the Commission will take jurisdiction over respondents whose business is in the main legitimate but some of whose representations are fraudulent, while the Department will prosecute cases involving respondents whose business is inherently fraudulent and the use of the mails is an integral part of the business. In addition, there should continue to be a regular interchange of information between the two agencies on particular cases to prevent action by both against the same respondent for the same activities. Finally, the Committee can perceive no substantial difference in the types of questions arising from the subject matter coming before the two agencies, and is of the opinion that separate staffs are unnecessary. Except for the Department's ability to achieve greater expedition than the Commission, no reason is apparent for the continuance of the fraud-order section of the Department side by side with the Commission. Especially in view of the general undesirability of attaching adjudicatory functions to a large establishment whose chief officials are absorbed in other activities, and in which the adjudication is likely to become loosely handled and regarded as incidental, the Committee recommends that legislative consideration be given to the transfer of the Department's jurisdiction over fraud to the Federal Trade Commission. Such transfer may include a transfer to the Commission of the sanction of cutting the respondent off from his incoming mail where the use of the mails is an integral part of the enterprise and such a sanction seems otherwise appropriate.

WAR DEPARTMENT

In general, the Committee's recommendations in part D of chapter I relating to delegation; in chapter II relating to administrative information; in chapter III relating to informal methods of adjudication; and in chapter VII relating to rule-making procedures are applicable to the War Department.

*Use of ex parte material and opportunity for rebuttal.*⁶⁶—The Department conducts hearings on applications for the issuance of licenses and permits authorizing the erection of bridges, wharves, docks, and other obstructions in navigable waterways. These hearings are informal and, in fact, do not constitute the primary source

⁶⁶ See this Committee's Monograph No. 15, "War Department," pp. 19-21.

of the information upon which decision rests. Before the hearings the district engineer investigates the application and the facts of the case and views the site of the proposed construction; the results of his investigation are not however presented at the hearing for scrutiny, testing, or rebuttal by interested parties. Ordinarily no hardship is imposed upon the applicant by this practice, since in the course of preliminary conferences the engineer will have exhibited his information and opinions. But other parties, perhaps opposing the application, have no opportunity of knowing the findings and conclusions of the engineer.

The Committee recognizes that, historically, actions by the Department on matters such as these are taken informally, and that decision rests upon technical perceptions and judgments. It is therefore unwilling to prescribe that the procedure be completely formalized. Nevertheless, there is a measure of unfairness in holding hearings at which interested parties may never be faced with the material which is likely ultimately to be the moving factor in the decision. The Committee recommends, therefore, that the district engineer prepare a report embodying the results of his investigation and that such report be made available prior to the hearing so that interested parties may have an opportunity to attack and rebut it.

*Rate-making procedure.*⁶⁷—The Secretary of War is empowered to fix the rates charged by toll bridges. He never begins action to do so on his own motion, but awaits charges from others that rates are unreasonable. If the complaints seem to be well founded, hearings are held thereon after public notice, but the Department does not actively participate in the presentation of evidence; instead, it permits the burden of showing that the rates are unreasonable to rest upon the complainant. Although all witnesses at the hearing are subject to cross-examination, the Department's engineers conduct an *ex parte* investigation in order to ascertain the probable investment in the bridge when it was built and the extent of its subsequent depreciation, as well as to estimate the return upon the investment which is being obtained by the existing charges. As in the case of such investigations conducted in respect of applications for licenses or permits, the results of the investigation are not presented testimonially or otherwise incorporated in the record of the rate hearing. Further, at no time is the bridge owner or any other party informed of the issues with precision: The notice simply states that a hearing will be held; no intermediate or proposed decision is issued.

The Committee believes that the Department's rate-making procedure is deficient in two major respects: (1) in its failure to apprise the parties of the issues and evidence; and (2) in its failure sufficiently to protect the public for whose benefits the rates are being regulated. In respect of the first deficiency, the Committee recommends that the notice of hearing be framed with particularity and that either before the hearing in such notice, or after hearing in an intermediate report, interested persons be informed of the proposed rates. In addition, the evidence and information gathered by the district engineer should be made available to the parties before hearing, that they may have an opportunity to check and rebut them and, if necessary, to call the engineer for cross-examination.

⁶⁷ *Id.*, at 31-40.

In respect of the second deficiency, it is to be noted that one of the reasons why the fixing of charges has been undertaken by the Government is the inability of the ordinary consumer to establish unaided the impropriety of the rates being exacted from him by a public utility. The Department's unreadiness to assume the responsibility of initiation of action, or even of investigation and proof of relevant facts, serves to deter the institution of proceedings which might lead to the control of toll rates. This difficulty may inhere in the organization of the War Department, whose major functions are unrelated to this sphere of regulation and which, especially at the present time, must direct its energies in other directions. Nevertheless, the Committee recommends that at the very least, the district engineer be made available to assist a complainant in the development of his case if the complaint seems well-founded, and that the engineer assume an active role in the hearing. If it is entirely impracticable for the War Department to participate to this extent in rate-making proceedings, the Committee suggests that legislative or Presidential consideration be given to transfer of the rate-making functions to some other Federal rate-making agency.

*Findings and decision.*⁶⁸—The Department issues its adjudicatory orders unaccompanied by decisions. In denying licenses and permits, no specific findings are made upon which action is predicated; similarly, in fixing rates for toll bridges, the Secretary signs an order prescribing tariffs, but makes no formal findings of fact or conclusions of law. As a result, there is no indication of the bases upon which the Department's actions rest, nor is there to be found elsewhere an articulation of its policies. The absence of reasoned opinions may be especially hampering in rate-making cases, since persons concerned immediately by these decisions, as well as those who may wish a guide for future conduct, are unaware of the methods of computation or standards applicable. As a safeguard against arbitrary action and as a guide to persons affected by the Department's activities, the Committee recommends that those orders which are adjudicatory of rate making in nature and which follow hearings be accompanied by findings and opinions.

SOCIAL SECURITY BOARD

In general, the Committee's recommendations in chapter III relating to informal adjudication are applicable to the initial decisions rendered by the Social Security Board's staff; and the recommendations in chapter IV relating to hearing commissioners are applicable to and largely declaratory of the existing hearing proceedings before referees. The discussion in chapter II relating to administrative information is also in general applicable to the Board's activities.

*Withdrawal of funds from States.*⁶⁹—Under the Social Security Act, Federal grants-in-aid are made to States which operate approved programs involving various types of social legislation. In order that a State may receive Federal funds it must submit to the Board for its approval all initial plans for these programs and all changes which are made from time to time. In the event that any plan is changed in such a way as to violate Federal requirements or in the event that any

⁶⁸ See "Opinions and Precedents," pt. B of ch. II of this report, *supra*, pp. 29-30.

⁶⁹ See this Committee's Monograph No. 16, "Social Security Board," at 59-74.

plan is so administered as to fall short of the standards specified in the Act, the Board has power, "after reasonable notice and opportunity for hearing," to discontinue the making of certifications to the Treasury for disbursements of Federal funds to the State.

Ordinarily difficulties of a controversial character do not arise with respect to the formulation and modification of plans; the disputes relate, rather, to questions whether or not the administration of the plans meets established requirements. Before undertaking formal proceedings looking toward discontinuance of a Federal grant the Board seeks earnestly to cause deficiencies to be remedied through negotiation with the State officials. If these negotiations fail, notice of hearing is given in the form of a letter to the State agency signed by the chairman of the Board. This notice sets out the salient points which constitute the reasons for calling the hearing, but it is couched in exceedingly broad terms.

Because the nature of the charges against a State has been disclosed by the long negotiations which precede the notice, its generality of wording probably involves no element of surprise. Yet the Committee believes that the Board would ordinarily find it desirable, when giving the notice of hearing, to supply to the State officials copies of such documentary evidence as may have been collected at that time. This course would obviate the present necessity of reading orally at the hearing the lengthy investigators' reports, which constitute the bulk of the Board's evidence. The function of the hearing itself might then well consist principally of the State's explanation and rebuttal of the charges made in the reports, except to the extent that the Board might find it necessary to bring the reports down to date.

NATIONAL LABOR RELATIONS BOARD

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to the utilization of informal methods, settlements, and stipulations; in chapter IV, relating to hearing commissioners and the process of decision; and in chapter V, relating to the procedures for formal adjudication, are applicable to the National Labor Relations Board. Particular attention is called to (1) the recommendations in part D of chapter I that the power to initiate action by issuance of complaints be delegated to Regional Directors or other responsible officers, so as to achieve a large degree of internal separation, and (2) the recommendations in part A of chapter IV that hearing commissioners replace trial examiners, that their decisions be final in the absence of exceptions or review *sua sponte*, and that where exceptions are to findings of fact, the Board be reluctant to disturb such findings in the absence of clear error. The adoption of recommendations in chapter IV should make reliance on review attorneys unnecessary; the issues should be sufficiently narrowed and the hearing commissioner's decision a sufficiently able and important document that the members of the Board can themselves play a far more important part in the mastery of the case on appeal to them.

*Specification of grounds for refusal to issue complaints.*⁷⁰—Upon the investigation of charges of unfair labor practices, formal proceedings

⁷⁰ See this Committee's Monograph No. 18, "National Relations Board," at 12-14.

frequently are not instituted because either the facts disclosed or considerations of policy or budget do not justify the issuance of a complaint. In these cases, it is the practice of the Board's Regional Directors by letter to advise the person filing the charges that such charges have been dismissed and that he may seek Board review of that action. The dismissal letter does not inform the complainant of the grounds for the Regional Director's refusal to issue the complaint, although that information may be secured by inquiring informally of the Regional Director.

For the benefit of persons who might desire to appeal to the Board, and who are unfamiliar with the informal method of ascertaining the basis for the Regional Director's action, the Committee recommends that the dismissal letter should state briefly the nature of the deficiency in the case and advise the complainant that a more detailed explanation will be furnished upon request by the officials in the field.

*More specific complaints.*⁷¹—While the respondent is generally aware, by virtue of the conferences held during the investigation of charges, of the ultimate issues to be tried, there have been numerous instances in which complaints have been drafted in general terms and have included unspecified and catch-all allegations. As a result, requests for bills of particulars and motions to amend during the hearing have had to be granted. The Committee recommends that the complaints be drawn with care and be as specific as possible. To this end the Board should rescind the instruction given to the field staff by the Litigation Division of the General Counsel's Office, to the effect that each complaint should contain the overgeneralized allegation that the employer committed certain violations of the act "by the above and other acts."

*Trial of uncontested issues.*⁷²—Despite the provision of its rules and regulations that failure to deny is to be regarded as an admission, and indeed, even though an allegation of the complaint is admitted, whether expressly or impliedly by the failure of the respondent to controvert it in his answer, it is the practice of the Board to adduce evidence on each issue of fact not covered by a stipulation. The Board's position is largely influenced by the language of section 10 (c) of the act, authorizing the entry of a cease and desist order "if upon all the testimony taken the Board shall be of opinion" that unfair labor practices have occurred. The Committee does not believe that the quoted language would be held to preclude the Board's reliance upon a respondent's answer. It recommends, accordingly, that the Board follow the provisions of its rules and regulations and thus dispense with proof of uncontested issues.

*Issuance of subpoenas.*⁷³—The Board furnishes to the trial examiner and to the Regional Director subpoenas signed in blank, application must be made to the former for issuance of subpoenas during the course of the hearing, while the latter will issue them prior to the hearing. The Board's trial attorney customarily obtains his subpoenas before the hearing begins, but the degree of supervision exercised over him in their use varies from region to region; it is not always required that he justify, as other parties must, the issuance of a subpoena at this stage. The Committee recommends that the practice, which has

⁷¹ *Id.* at 25-26, note 52.

⁷² *Id.*, at 27-28.

⁷³ *Id.*, at 44-45; see also appendix K, "Procedure for Issuance of Subpoenas," *infra*, pp. 423-424.

persisted in some regions, of furnishing the Board's trial attorneys with a supply of blank subpoenas, so that they are not required to apply to the trial examiner even during the hearing, be abandoned. The Committee perceives no reason why the requirement that all parties must justify the issuance of a subpoena should be relaxed in favor of the Board's attorney and recommends, accordingly, that Regional Directors impose uniform standards for all parties.

*Participation by Board's attorneys in post-hearing process.*⁷⁴—Because of budgetary limitations and lack of time, the Board's attorneys are unable either to present argument to or file briefs with the hearing officer or the Board. Their participation in the case ends with the close of the hearing. Since it is the opinion of the Committee that the recordation orally or in writing of the attorneys' views upon the cases which they have prepared for hearing and have tried would be of great value to deciding officials, it is recommended that, as soon as sufficient funds are available for the adoption of the system, the Board's attorneys be instructed to argue orally in support of their positions, and, where necessary, to file exceptions to the hearing officer's findings and decision.

DEPARTMENT OF THE INTERIOR

In general, the Committee's recommendations in part D of chapter I relating to delegation; in chapter II relating to administrative information; in chapter III relating to informal methods of adjudication (especially in reference to initial decisions on applications for grazing permits and to other initial decisions by the General Land Office); in chapter IV relating to hearing commissioners and opinions; in chapter V relating to procedures in formal adjudication; and in chapter VII relating to rule-making procedures, are applicable to some or all of the activities of the Department of the Interior. The recommendations in chapter IV relating to hearing commissioners would replace the present system of hearings in homestead entry contests now conducted by registers or their appointees. Particular attention is also called to the recommendation in chapter IV (sec. 6 of pt. A) that where the head of an executive department has power to make final administrative adjudications, this power be delegated to a chief deciding officer or reviewing board, subject, perhaps, to discretionary review by the Secretary on appeal.

A. GRAZING SERVICE

*Criminal Proceedings.*⁷⁵—When a violation of the Taylor Grazing Act has been discovered, criminal proceedings may not be instituted until the matter has been considered in turn by the regional grazier, the Division of Investigations of the Department, the Solicitor's office of the Department, and the Department of Justice. These successive reviews have never resulted in rejection of all the regional grazier's recommendations. Since these reviews necessarily delay the institution of proceedings in a situation where rapid action is essential for effective enforcement of the law, the Committee recommends

⁷⁴ See Monograph No. 18, *op. cit. supra*, note 70 at 53-58.

⁷⁵ See this Committee's monograph, "Department of the Interior," Monograph No. 20, pp. 9-10, footnote 16.

that authority be given to the regional graziers to call directly upon the appropriate United States attorney, who would then be required, except in cases where substantial doubt existed as to the propriety of proceeding, to bring criminal proceedings.

*Sanctions.*⁷⁶—No legislation specifically authorizes the Secretary of the Interior to accept offers of settlement in satisfaction of the civil liability of persons violating the Taylor Grazing Act, nor does the Act expressly permit the Secretary to discipline offenders by removing and impounding their livestock, or by reducing or revoking grazing permits, or by refusing to renew such permits. Nevertheless, all these sanctions are considered by the Department to be available to it. While these powers may very possibly be impliedly within the broad range of the Secretary's authority under the act, the Committee recommends the enactment of legislation which would remove any doubts which may now or hereafter exist in this respect.

*Filing of Applications.*⁷⁷—Although applicants for grazing permits are advised to file their applications by a named date, it is, nevertheless, the practice of the Grazing Service to consider any application received prior to the opening of the grazing season but after the date set. Since difficult and complex problems may be presented because of the unavailability of a particular application at the time that the remaining adjudications for a given grazing district are made, the Committee recommends that the Service refuse to accept applications tardily filed in the absence of impelling considerations to the contrary.

FORM AND CONTENT OF DECISION

(a) *Regional grazer's decisions.*⁷⁸—Although the rules of practice require the regional grazer, in the event his decision is unfavorable to the applicant, to include "a recital of the specific reasons therefor," satisfactory compliance with this mandate is sometimes lacking. In approximately 25 percent of the cases, the notice of decision gives no indication whatever of its underlying basis and frequently, where "reasons" are set forth, they consist of unamplified references to the pertinent sections of the Federal Range Code.

The Committee recommends that a clear statement of the grounds of the decision be given in order not only to furnish applicants with the information required to determine whether an appeal should be taken, but also to sharpen the issues and facilitate the final disposition of cases which are appealed.

(b) *Hearing officers' decisions.*⁷⁹—The hearing officer's decision, from which an appeal lies to the Secretary, does not generally differentiate between findings of fact and conclusions, nor are the grounds for the decision stated clearly and succinctly. Since the adjudication of grazing cases frequently involves the exercise of extremely delicate judgments, the Committee recommends that the hearing officer's decision be prepared with greater care and precision. One of the reasons, however, for the poor quality of the decisions lies in the confusing nature of some of the provisions of the Federal Range Code, which,

⁷⁶ *Id.*, at 9-11.

⁷⁷ *Id.*, at 14.

⁷⁸ *Id.*, at 24-25; see also appendix L, "The Form and Content of Intermediate Reports and Final Administrative Decisions," *infra*, pp. 461-462.

⁷⁹ See Monograph No. 20, *op. cit. supra*, note 75, at 38.

therefore, the Committee recommends should continue to be re-examined and revised with a view toward greater simplicity and clarity.

*Uncertainty of grants.*⁸⁰—In many situations, the privileges granted to a permittee may be altered in part as the result of an appeal successfully prosecuted by another applicant. While it is said that livestock operators are aware of the defeasible nature of their privileges, neither the Federal Range Code, the regional grazer's decision, nor the permit refers expressly to this condition. Since it is possible that hardship may result because of the silence of the Service on this matter, the Committee recommends that a provision be added to the Federal Range Code reflecting the defeasible character of grants of grazing privileges, and that the regional grazer's decision and all permits contain similar provisions.

*Exchange of briefs.*⁸¹—While opportunity is given to all parties to submit briefs to the Secretary in the event that an appeal is taken from the examiner's decision, no provision is made for the service of the appellant's brief on the respondent or other parties prior to the time when the latter's brief is due. The Committee accordingly recommends that the rules of practice be amended to permit respondents and other parties to submit their briefs within a reasonable period after receipt of the appellant's briefs.

B. GENERAL LAND OFFICE

*Reports of Geological Survey.*⁸²—When an application for an oil and gas lease is denied on the basis of the advice of the Geological Survey that the lands involved are within the known geologic structure of a producing oil and gas field, or are not on a single geologic structure, or are incapable of producing oil and gas, the applicant is permitted to appeal to the Secretary from the decision of the Commissioner of the General Land Office. On the appeal, the applicant may submit affidavits, and present written and oral arguments in support of his contentions, but no hearing is held on the disputed issues of fact, nor is the report of the Geological Survey made available to the applicant. While the present method of submission of affidavits and argument furnishes a satisfactory procedure for the resolution of the technical issues involved in these cases, the appellant could direct his energies more readily to the precise points of difference between him and the Office if a detailed report of the Geological Survey were furnished. The Committee recommends accordingly that a report of the Survey containing a discussion of the technical issues be served on all persons who may desire to prosecute an appeal.

*Investigations of petitions for classification.*⁸³—The adjudication of some petitions for the classification of lands is dependent in large part upon the information available as to the financial condition of the applicant, his standard of living, family relationships, and personal qualifications and character. At the present time, this information consists entirely of the statements contained in the petitioner's papers and the general knowledge of the Land Classification Divi-

⁸⁰ *Id.*, at 38, note 36.

⁸¹ *Id.*, at 39-40.

⁸² *Id.*, at 64-65.

⁸³ *Id.*, at 81-82.

sion concerning economic and social conditions in particular areas. Field investigations are rarely conducted in these cases because of the unavailability of adequate appropriations. Nor are hearings held prior to the grant or denial of petitions; not only is the General Land Office unable to afford the expense of conducting hearings, but homestead applicants are in any event seldom likely to be financially able to support their petitions by means of a hearing process. Since a thorough investigation of the type generally made by the Division of Investigations would furnish a reliable method for obtaining the data needed to adjudicate these cases properly, the Committee recommends that the General Land Office conduct such investigations and that the necessary funds for that purpose be appropriated by Congress.

*Exchange of briefs.*⁸⁴—In homestead entry contests, briefs may be filed at any time prior to the consideration of the appeal by the General Land Office. Briefs are exchanged as a matter of practice in private contests, but the appellant is not required to serve his brief at a time which would permit the respondent to answer the appellant's contentions in his brief. The Committee recommends that, in order to obtain the parties' most considered views, the rules of practice be amended so as to allow respondents a reasonable period in which to file reply briefs.

*Use of Extra-Record Material.*⁸⁵—All initial decisions are reviewed upon appeal by attorneys and other officials in the General Land Office. Although a hearing precedes such initial decision, and although all evidence there has been transcribed or recorded, the review on appeal is not confined to material in the record transmitted to the reviewers. Instead, there is available to them the report of the Division of Investigations; it is upon the basis of this report of investigation that Government contests are instituted. Although the precise extent to which these ex parte reports, which are not made a part of the record at the hearing, are utilized in the process of decision varies from individual to individual, it is nevertheless clear that at least some officials rely, in arriving at findings of fact, upon either the data or the opinions set forth in the reports, and that others, while reading the reports, may be influenced, if only imperceptibly, by the statements of the investigations in the reports. Since it is the purpose of the hearing to serve as a vehicle for the collation of all information pertinent to the case, and since it is ordinarily essential to a full opportunity to present a case to permit parties to know the evidence which may be considered and to rebut or qualify it; and since neither administrative convenience nor public interest seems to justify the reliance upon ex parte material, it is recommended that the Department discontinue its practice of referring, as an aid to its adjudication, to the results of the investigations of its staff.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

In general, the Committee's recommendations in chapter II relating to administrative information; in chapter III relating to informal

⁸⁴ *Id.*, at 108.

⁸⁵ *Id.*, at 111-114.

methods of adjudication; and in chapter V relating to procedures in formal adjudication, are applicable to the United States Employees' Compensation Commission. Since the deputy commissioners who hear the case commonly make the final administrative decision, subject only to review in the courts, the recommendations in Part A of chapter IV relating to hearing commissioners are not applicable. Particular attention is called to the Committee's recommendations in section 2 of chapter V relating to prehearing conferences as a means not only of settling disputes altogether but of narrowing the area of controversy and simplifying proof at the hearing.

*Supervision of uncontested cases.*⁸⁶—A major proportion of the injuries reported to the deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act and the District of Columbia Workmen's Compensation Act results in no adjudication or contest of any kind. Many of these cases are those in which injuries are reported but no compensation appears to be due on the face of the reports filed; a second group consists of cases in which compensation does appear to be due but is paid voluntarily and without protest from the injured employee. In the latter type of case, the employee is invited by the agency to communicate with it in regard to underpayments in the case; in both types the Commission may attempt to check further by correspondence. There is, however, no field investigation to determine the extent of the injury or the circumstances in which it was sustained.

The Committee recognizes that the problem of the uncontested case is a major one in the field of compensation administration. A fundamental objective of the agency is the affirmative realization of a program on behalf of injured workers: Insofar as possible it is designed to aid the injured workman in receiving what is legally due him. By contrast with his employer or the employer's insurance carrier, the employee is often unaware of his rights, and unfamiliar with the procedures for fully realizing them. Further, at least nominally, there exists a danger that the employee, fearful of offending his employer, may be hesitant in insisting upon the rights the law gives him. But students of compensation administration are of the opinion that the Commission's present practice of writing to employees in these cases, inviting conference, protest, or request for advice if there is any doubt in the employee's mind, is a reasonably adequate safeguard. Alternatives to the present basic procedure, moreover, are not readily available. To require a field investigation, conference or hearings in the case of every reported injury would be burdensome, time consuming, and expensive, probably tending to delay the prompt disposition of contested cases. Further, it is unlikely that the existing difficulties would be alleviated by requiring the parties in each case to execute a formal agreement concerning the extent and satisfaction of liability for compensation payments; this would be a troublesome formality in which inheres no assurance of protection against the present dangers. The Committee recommends, however, that in the larger and busier districts the Commission appoint a field investigator to make occasional spot checks and to interview employees in such uncontested cases as are indicated by the files to warrant that action.

⁸⁶ See this Committee's Monograph No. 21, "United States Employees' Compensation Commission," at pp. 18-20.

*Answers.*⁸⁷—The Commission's rules and regulations require the employer or carrier to file answer; for this purpose, a form is supplied which sets out the eight basic issues which may be involved, and which requires the employer or carrier to cross out one of the two words "admitted-denied" after each. In addition, space is provided for any answer not covered by these points. The answer, however, is not required to be verified, nor is there any sanction provided by the regulations for failure to answer. As a result, in at least one district, answers are not filed, although full hearing is held. Further, it is the occasional practice to file an answer which formally denies all of the basic issues, although the employer or carrier in actuality concedes some of them and does not intend to litigate them.

Although perhaps no great harm occurs by virtue of these practices in view of the prehearing conferences and the liberal provision for adjournment in the event that new issues are raised, the Committee believes that if answers are to serve any utility in these cases, the practice in respect of them should be tightened. A requirement that answers be verified might tend to discourage the practice of indiscriminate denial, and accordingly, it is recommended that the rules embody this requirement. Further, to avoid the preparation for a litigation of uncontested issues, to prevent any possibility of prejudice to the claimants, and to focus the issues as formally as possible, the Committee recommends that the Commission amend its rules to provide that failure to file a verified answer or failure to deny particular allegations within a reasonable time shall be deemed an admission of allegations not answered or denied.

*The decision.*⁸⁸—The Commission's regulations provide that each compensation order shall include findings of fact, but expressly call for the exclusion of "recitals of evidence, statements of opinion, and citations to authorities." As a consequence, none of the orders contains any matter in the nature of an opinion or an explanation of the process of reasoning by which the result was reached. The deputies have been advised by the Commission, however, that they may, if they choose, file with their order a separate memorandum in the nature of a legal opinion; but it is estimated that this has been done in less than a dozen cases in recent years. No matter how difficult or complex the legal issues may be, therefore, the parties are ordinarily given no clue to the reasoning underlying the decision. And, in the absence of a statement of the conclusions of law, the order may be without utility as a guide to the conduct of carriers or claimants in future cases.

The Committee recognizes that in busy districts the task of preparing opinions in every case would be unduly burdensome; it recognizes further that in a substantial number of cases the problems are problems of fact and that any opinion would be little more than a recital of the evidence. Accordingly, it is not recommended that all orders be accompanied by opinions, although findings of fact should always be made. Nevertheless, the Committee believes that there are cases of sufficient complexity or importance to warrant the preparation of

⁸⁷ *Id.*, at 47-48.

⁸⁸ *Id.*, at 69-71; see also appendix L, "The Form and Content of Intermediate Reports and Final Administrative Decisions," *infra*, pp. 454-455.

opinions. It is, therefore, recommended that the regulations be amended to permit the deputy commissioner to accompany his order with an opinion and, further, that the Commission urge the deputy commissioners to do so wherever feasible and useful.

*Administration of the United States Employees' Compensation Act and related statutes.*⁸⁹—In addition to the Longshoremen's and Harbor Workers' Compensation Act and the District of Columbia Workmen's Compensation Act, both of which relate to employees of private employers, the Commission administers the United States Employees' Compensation Act of 1916 and other statutes relating to employees of the Federal Government. In sharp contrast to the procedure under the first two acts, centralization is a major characteristic of the administration of the United States Employees' Compensation Act. Further, under the latter there are no hearings; rather final adjudications are based primarily upon correspondence, affidavits, and forms filed by mail with the Claims Division in Washington. Occasionally one of the Commission's seven investigators makes an *ex parte* field investigation; there are no conferences or hearings.

The Committee perceives in the present procedures of this Act some measure of inefficiency as well as unfairness both to the Government against whom the claim is made and to the Federal employees who lodge the claim. The problems involved in these cases are often peculiarly questions of fact—whether the employee was injured in the course of his duty, his condition as a result of the injury, and the like. A person who saw the claimant and heard him and others who describe the circumstances would seem far better fitted to reach a decision than one who merely reviews correspondence, reports, and affidavits. The Government, which here is disbursing its own moneys and is the employer, does not in every case have adequate opportunity to check the claims and contentions of its employees; the employees, in turn, have scant opportunity to know and rebut the evidence against them and to be heard on their own behalf by officials who decide the case. Still another defect inheres in the present procedures in that there has been devised no formalized method for reviewing protests by dissatisfied claimants. As a result, the Commission is often harassed to review its determinations already made; often, through pressures and other causes, the same persons who made the initial decision are forced to reconsider and reexamine the case a number of times.

The Committee believes that administration will be improved by decentralizing it and coordinating it with the administration of the Longshoremen's and Harbor Workers' Compensation Act and the District of Columbia Workmen's Compensation Act.⁹⁰ Accordingly, the Committee recommends that claims filed by Federal employees in general be handled in the same manner as claims filed by private employees. All claims should be filed in the office of the deputy commissioner who has jurisdiction over the area in which the injury occurred; the deputy commissioner may, if he deems it appropriate, refer the matter to Washington. Initial decision should be made by a claim examiner on the basis of records in the file. But in the event

⁸⁹ See Monograph No. 21, *op. cit. supra* note 86, at 109–113.

⁹⁰ It is to be noted that the Federal establishment, especially in those of its branches in which injuries occur, is itself widely decentralized.

of any doubts of the examiner, or any questions raised by the employee or his superior officer, conferences should be held in the same manner as under the other acts administered by the Commission. If the conference does not dispose of the case, the dissatisfied employee should be entitled to a hearing before the deputy commissioner or an officer designated by him, or before appropriate officers in Washington.

In some respects, the procedure must differ in the case of Federal employees, since these will not be biparty proceedings between employer and employee. The Commission occupies a dual role of disburser and agency of the employer; but there is no employer, as in other workmen's compensation proceedings, to complete the record with evidence adverse to the employee. Consequently, the deputy commissioner need not confine himself, in reaching the determination, to consideration of material adduced at the hearing: He should also be free to consult all matters in the file, as is now done by the Veterans' Administration where a similar problem obtains. The employee should, however, be advised, prior to the hearing if possible, of all such file material. As a further assurance against *ex parte* procedure occasioned by the absence of a contending employer, the Committee recommends as frequent investigation of these claims as the Commission's budget permits.

In appropriate cases, provision may be made for appeals from the initial decision of the deputy commissioner or other officer to the Commission itself; in any event the same general supervision of private employees' cases now exercised by the Commission ought to be continued in respect of Federal employees. In order to permit this drastic modification in the administration of the Federal employee's compensation statutes, the Committee recommends that the acts be amended so as (1) to omit the provision in section 32 of the 1916 act that the Commission "shall decide all questions under this act" and to provide that decision may be by deputy commissioners; (2) to eliminate the requirement in section 36 that the Commission shall make a determination in every claim filed under the act; and (3) to provide that applications for administrative reconsideration be filed only within a specified period after the denial, in whole or in part, of the claim or the last payment of compensation, or if new facts not previously available are disclosed.

BUREAU OF INTERNAL REVENUE

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to informal methods of adjudication; in chapter V, relating to procedures in formal adjudication; and in chapter VII, relating to rule-making procedures, are applicable to the administration of internal-revenue laws. The recommendations in chapter IV relating to hearing commissioners are not applicable to the Board of Tax Appeals, since its members themselves hear and decide the cases; the hearing commissioner recommendations are, however, applicable to alcohol tax, licensing, labeling, basic permit, and trade-practice matters.

*Refund claims.*⁹¹—A taxpayer who has in the first instance mistakenly overpaid his taxes may file a refund claim with the Bureau and, if it be denied, may bring suit for refund in one of the United States district courts or the Court of Claims. Often the filing of the refund claim is the first intimation to the Bureau of Internal Revenue that error has possibly occurred. In this circumstance, the Bureau very properly undertakes an investigation of the merits of the claim and accords to it its earnest consideration.

Frequently, however, a refund claim pertains to an income, estate, or gift-tax deficiency assessed and paid after conferences have failed to reconcile differences between the Bureau and the taxpayer. Or the refund claim may pertain to an assessment of a miscellaneous tax which has been protested before collection by a so-called claim in abatement or otherwise. In these types of cases the factual background and applicable considerations will have been thoroughly explored at an antecedent stage, before the refund claim was filed. The Bureau nevertheless reconsiders, more or less fully, the issues previously presented.

The Committee recommends that if a protest against an assessment has been lodged and considered prior to payment of the tax, the taxpayer be required by regulation to indicate in his refund claim whether the grounds and facts stated vary from those urged in the protest and, if so, how. To the extent that they have been decided by the Bureau's previous determination, they should not be reconsidered. Inasmuch as a refund claim is filed in these circumstances primarily to satisfy a formal prerequisite of standing to sue the Government, the Bureau should avoid delays and duplications of effort by summarily denying a claim where no events or decisions bearing upon the merits have intervened since the taxpayer's prepayment protest.

*Income-tax audit and conference procedure in Collectors' offices.*⁹²—Individual income-tax returns showing a gross income of \$5,000 or less are audited in collectors' offices, while larger individual returns and corporate income-tax returns are audited in the offices of internal-revenue agents in charge.

Whenever an agent in charge proposes to recommend assessment of a deficiency or denial of a refund or determination of an overassessment, he sends the taxpayer a "30-day letter" giving notice of the proposed action and offering opportunity for protest and conference if the taxpayer is dissatisfied. Collectors, on the other hand, send 30-day letters only when deficiencies are proposed; in the case of an overassessment or denial of a refund claim, no notice is given in advance of the collector's final decision, and no opportunity for protest exists other than the opportunity to protest to Washington against a complete or partial denial of a refund claim.⁹³ The Committee recommends that the procedure of the collectors' office be aligned with that of the agents in cases of these types. Small taxpayers should, like others, receive 30-day letters advising them of contemplated decisions

⁹¹ See this Committee's Monograph No. 22, "Administration of Internal Revenue Laws," at 29, note 60; 134-135, note 199.

⁹² *Id.*, at 35-37.

⁹³ Because no other provision for conference has been made, the collectors' offices as a matter of informal practice arrange a conference between a deputy collector and the taxpayer when the refund claim is filed, but before any formal action has been proposed by the collector.

and should have the privilege of protest and conference in the field. Small taxpayers who do protest an action by the collector should also be advised that they may, if they desire, have a further administrative appeal prior to the taking of definitive action by the Bureau of Internal Revenue.

At the present time, a small taxpayer who is dissatisfied with a collector's decision concerning the assessment of a deficiency may appeal to the revenue agent in charge for his district and then, if still dissatisfied, to the technical staff division office. Since a larger taxpayer is entitled to only one administrative reconsideration—that is, he passes from the agent's office to the staff division office—there appears to be no sound reason for granting to the small taxpayer an opportunity for two successive reconsiderations. But, since the amount involved in the small income tax cases rarely warrants a petition for review by the Board of Tax Appeals, the small taxpayer should be accorded every consideration in the Bureau itself. It is accordingly recommended that appeal lie from collectors' decisions directly to technical staff division offices. The number of these appeals is not great; the burden on the staff offices is not likely to be considerable.

*Extensions of time for payment.*⁹⁴—At present a taxpayer's application for an extension of time in which to satisfy a tax liability must be filed with the collector of internal revenue and must be passed upon by the Washington office of the Bureau. It therefore follows an entirely separate channel of decision from that which has been created for determining the correct amount of a proposed deficiency. The consequent difficulties in the way of achieving concurrent settlement of the amount of deficiency and extension of time in which to pay it have almost certainly led many taxpayers to contest deficiencies which they privately acknowledged to be correct. The Committee therefore recommends that the Commissioner of Internal Revenue give to staff division heads, with the concurrence of division counsel, the power now possessed by the Commissioner to grant extensions of time to pay deficiencies in income, gift, and estate taxes, and that these officers be authorized to determine also, after consultation with the collector, the amount of security, if any, to be required of the taxpayer in connection with each extension.

*Offers in compromise.*⁹⁵—Although the acceptance of an offer in compromise constitutes a legal method of settling any disputed tax liability, the device has come to be used almost exclusively in cases where the taxpayer's ability to pay is a decisive factor in the settlement.

The consideration of offers in compromise is an extended one, commencing in the office of the collector or agent in charge, passing next to the head and the division counsel in the staff division office, then progressing successively through the Washington office of the technical staff, the Commissioner's office, the chief counsel's committee, and the office of the general counsel of the Treasury, before being finally submitted to the Secretary, Under Secretary, or an

⁹⁴ See Monograph No. 22, *op. cit. supra*, note 91 at 56-58.

⁹⁵ *Id.*, at 62-68.

Assistant Secretary of the Treasury for the formal approval required by statute.⁹⁶

Just as divorcement of the machinery for securing extension of time from the machinery for determining the amount of a deficiency has unnecessarily prolonged many tax disputes, so also the difficulty of obtaining approval of an offer in compromise has needlessly retarded the conclusion of fair settlements in many cases where there was inability to pay the full amount of a deficiency. The Committee therefore recommends that staff division heads, with the concurrence of division counsel, be authorized to accept offers in compromise of deficiencies asserted in amounts not exceeding a stated maximum of, say \$20,000. There is a strong sentiment within the Bureau that the danger of collusion is greater when the only criterion of correctness is the taxpayer's ability to pay than when the criterion is the amount of the actual liability. Respect for this sentiment prompts the suggested limitation upon the power of field officials.

At present a statutory provision requires that all offers in compromise be approved by the Secretary, Under Secretary, or an Assistant Secretary of the Treasury. The Committee's recommendation contemplates an amendment looking toward the relaxation of this requirement.

*Determination of overassessment.*⁹⁷—At present staff division officers may finally dispose of deficiency disputes, regardless of the amount involved. But a staff division determination concerning an overassessment of more than \$20,000 is subject to the approval of the review division in the chief counsel's office in Washington. While the chief counsel's office asserts that its local counsel are now insufficiently familiar with refund claim procedure to be entrusted with the largest overassessment cases, they will acquire experience in the disposition of the cases already within their jurisdiction. The fact that this responsibility is withheld sometimes proves an embarrassing factor in those cases which involve the same or related tax questions for two different tax years, one of which shows a deficiency, the other an overassessment; nominally, at least, authority for final disposition of a dispute with the taxpayer concerning the same point of law or fact may in these cases rest in two distinct branches of the Bureau. Accordingly, the Committee recommends that as rapidly as the Treasury believes that the experience of its field staff warrants the enlargement of responsibility, staff division heads be authorized to approve finally, with the concurrence of division counsel, overassessments up to \$75,000. Since, however, the Bureau believes that somewhat closer supervision should be maintained in large overassessment cases, the Committee recommends that the delegation to staff division heads be only partial in that no approval by staff division heads of overassessments between \$20,000 and \$75,000 should be permitted to become final for, say, 30 days. In this period, the staff division head may be required to submit a report of the case to the review division of the chief counsel's office, and veto power will be retained in Washington. Additional

⁹⁶ A special class of offers in compromise involving actual or potential litigation (principally bankruptcy cases) follows a slightly different path, being considered by the chief counsel's office in Washington instead of the staff division office; otherwise, this type of offer is submitted to approximately the same rigorous and repeated examinations.

⁹⁷ See Monograph No. 22, *op. cit. supra*, note 91 at 61-62.

legislation would not be required to effectuate this recommendation. Overassessments involving refunds or credits of \$75,000 or more would, of course, continue to be submitted to the Joint Committee on Internal Revenue Taxation, under existing statutory requirement.

*Interdivision transfers.*⁹⁸—Occasionally the same question must be settled with respect to the taxes of a number of persons located within the jurisdictions of different staff divisions—as, for example, in cases involving several beneficiaries of the same trust, or partners of a single partnership, or transferees from the same transferor. At present it is the common (but not unvarying) practice of the staff division offices to await the decision of that one of their number regarded as having basic jurisdiction. After that initial decision has been made, the other offices listen to the arguments of the similarly situated taxpayers within their respective jurisdictions but decide in accordance with the first decision. The Committee recommends that consideration of related cases be centralized in some one of the several staff division offices involved, and that there be promptly transferred to that office the disputes of all similarly affected taxpayers. If this recommendation be adopted, an affected taxpayer, if unable to proceed to conference in the division of central consideration, could at least transmit written argument to that office. The present recommendation that transfers of cases be regularly made calls for no more than a suggestion to the staff divisions as to the practice to be followed; the transfers are permissible under existing procedural instructions.

*Conferences in Washington.*⁹⁹—Several classes of issues in tax cases are, in effect, decided in the Washington office of the Bureau, though without opportunity for the affected taxpayer to secure a conference in or submit arguments to that office. The most common examples of these issues are those coming within the jurisdiction of the engineering and valuation division of the income-tax unit and those involving legal rulings made or approved by the chief counsel's office.

In theory, a staff division office is at liberty to depart from an engineering report approved in Washington, a determination made there concerning securities or their value, or a legal opinion prepared there. In practice, of course, departures are extremely rare. Decisions in these cases are for all practical purposes actually made in Washington, though in form they may be decisions of field officers. The Committee therefore recommends that in instances where rulings or decisions are referred to the Washington office for formulation or approval taxpayers whose cases are then involved should be so advised and should be privileged to present their views orally or in writing to the officers who are to consider the conclusions to be reached.

*Additional assessments of miscellaneous taxes.*¹⁰⁰—The present procedure for an assessment of an additional miscellaneous excise tax is not a regularized one. The taxpayer may or may not be advised that an assessment is contemplated. Sometimes the taxpayer's receipt of a report by the collector or the "flying squad" which made the basic examination puts him on notice. Often, however, the first definite intimation that a deficiency has been determined comes in the form of a notice and demand for payment within ten days. Such a demand

⁹⁸ *Id.*, at 91 *et seq.*

⁹⁹ *Id.*, at 86-90.

¹⁰⁰ *Id.*, at 130-133.

may subject a taxpayer to a very considerable financial embarrassment; and while the taxpayer may file a claim in abatement, the collector may refuse to stay collection pending consideration of the claim unless the taxpayer posts an adequate bond (a condition which may itself prove as difficult of fulfillment as would immediate payment of the tax). The Committee recommends that the Bureau, by its own regulations, develop the practice of notifying taxpayers of proposed deficiencies in miscellaneous excise taxes and that opportunity be afforded to be heard in opposition to an additional assessment, assessment being withheld in the meantime unless there is reason to believe that collection of the revenue might be jeopardized.

*Government's litigation policy in tax matters.*¹⁰¹—The Bureau has been criticized for its alleged policy of taking opposite positions with reference to the same question, as well as for its asserted repudiation in court of its own previous rulings and for its refusal to accept as determinative court decisions which it has not sought to have reviewed and reversed by a higher judicial authority. Much of this sort of criticism, the Committee believes, unjustly overlooks the realities of the Bureau's litigation problem. It would not be wise to increase the volume of narrow litigation by requiring the Bureau to appeal from every single Board of Tax Appeals decision which it was unprepared to accept as binding precedent. Nor could the Bureau appropriately be compelled to acknowledge as governing its future course the first adverse decision of a circuit court of appeals, while taxpayers remained free to contest in other circuits the soundness of an opinion which was adverse to them. Nevertheless, the Committee believes that needless prolongation of litigation occasioned by inconsistencies of position can to some extent be avoided. In the Committee's opinion, much could be accomplished by a joint committee of the Bureau and the Department of Justice, charged with the duty of studying the effect of each Board of Tax Appeals and court decision and charting accordingly, on as long range a basis as possible, the Government's litigation program. A determined effort should be made to expedite the consideration of key cases by the board and the district courts. Where feasible, simultaneous consideration by several circuit courts of appeals should be sought, with early review by the Supreme Court if conflict ensued. Even in the absence of conflicting circuit court decisions the Supreme Court might well be petitioned more frequently to issue its writ of certiorari, so that questions of public importance might be finally determined without undue protraction of lower court litigation.

CIVIL AERONAUTICS ADMINISTRATION*

In general, the Committee's recommendations in part D of chapter I relating to delegation; in chapter II relating to administrative information; in chapter III relating to informal methods of adjudication; in chapter IV relating to hearing commissioners and the process of decision; in chapter V relating to hearing procedures; and in chap-

¹⁰¹ *Id.*, at 153, note 223.

*Subsequent to the investigation by the Committee's staff of the procedures of the Civil Aeronautics Authority, this agency was reorganized pursuant to the President's Reorganization Plans Nos. III and IV. The text of these plans is set forth in appendix B of this Committee's Monograph No. 19, "The Civil Aeronautics Authority." The recommendations included herein are based primarily upon the procedures of the Authority, but are applicable to the procedures of the Civil Aeronautics Administration.

ter VII relating to rule-making procedures, are applicable either to the Civil Aeronautics Administrator, or the Civil Aeronautics Board, or both. In respect of the Board's procedures, particular attention is called (1) to the recommendations in part D of chapter I that there be delegation to decide routine matters, especially those relating to making tariff changes on less than statutory notice, and (2) to the recommendations in section 5 of chapter III that the statutory requirement of hearings prior to the issuance of certificates of public convenience and necessity and foreign air carrier permits be amended so as to make it possible to dispense with hearings where the Board finds the application satisfactory and no protest is heard.

*Prehearing techniques and other informal means of adjudication.*¹⁰²—Prior to hearings upon applications for certificates of public convenience and necessity as well as those concerning rates, the Board has made considerable and successful use of prehearing conferences designed largely to reach an agreement concerning the kind of evidence to be produced. More recently, a rule has been adopted which has extended the use of such conferences to achieve, if possible, the formulation of the issues to be considered at the hearing.

In the air mail and other rate proceedings before the Board the basic evidence is statistical, contained in the records of the parties and the Board; the vast bulk of it can be reduced to documentary or exhibit form. If conflict exists at all, it ordinarily does not concern the basic data but rather the inferences and deductions to be drawn from these data. The Committee, accordingly, recommends that the Board develop, expand, and emphasize its prehearing techniques in these cases. Such techniques should include (a) an opportunity to agree upon matters to be presented in written form, and for an exchange of such written evidence; (b) an adjournment for a sufficient time to permit analysis of the written evidence; and (c) a second conference or exchange of correspondence to consider further written evidence rebutting and supplementing that already presented and to consider staff and other analyses of the material already accumulated. If thereafter any areas of disagreement remain, a hearing limited to their further exploration should be held; it may be devoted in the main to cross-examination of particular affiants and of persons who prepared the analyses of the written evidence.¹⁰³

*Posthearing analyses.*¹⁰⁴—In air-mail and other rate proceedings before the Board, the accounts and analysis division examines the record and prepares statistical and accounting analyses upon the basis of the record. These analyses are not introduced into the record, nor have they been prepared in time for use by the hearing officer; rather they are used only in the process of ultimate decision.

The Committee recognizes the possibility that in some situations, technical post-hearing analyses may not be items of evidence but simply constitute memoranda containing opinions and judgments concerning recorded evidence, much like memoranda of law prepared by law clerks for judges. But the special nature of air-mail rate

¹⁰² See this Committee's Monograph No. 19, "The Civil Aeronautics Authority," at 33-37; 67-68; 74-75; 88-91.

¹⁰³ See this Committee's discussion of prehearing conferences in sec. 2 of ch. V of this report, *supra*, pp. 64-68; see also the discussion concerning the use of written evidence in sec. 4 (a) of ch. V, *supra*, pp. 69-70.

¹⁰⁴ See Monograph No. 19, *op. cit. supra*, note 102, at 71-72.

proceedings makes the present practice of the Board undesirable. As pointed out in the preceding recommendation, the area of disagreement in these cases is defined not by the evidence, which is largely statistical, but by the deductions to be made from the evidence. Further, decision concerning the proper air-mail rate to be paid is not an "adjudication" in the ordinary sense, since it contains many of the elements of negotiation for a subsidy.

Thus the result of the present practice is that the crucial work is done *after* the parties have been heard; the heart of the problem is not reached until after the hearing and oral argument, when the analyses are made. These analyses involve the making of the critical deductions, and accounting is not, for rate-making purposes, such an exact science that the inferences drawn are inescapable. But the air carriers are not faced with these analyses until the final decision and, throughout the hearing, have no indication of what the position of the Board's staff may be. As a result, they are afforded no opportunity to argue concerning the deductions which the staff might draw from the evidence.

To remedy this situation, the Committee recommends that these analyses, insofar as possible, be available to the parties and to the hearing officer, in the form of briefs or otherwise, prior to his decision. The Committee has already recommended that prehearing techniques be utilized to prepare and exchange the basic evidence, and, further, to permit the Board's subordinates to analyse this evidence and distribute these analyses among the interested parties before the hearing. Insofar as further staff analyses of the evidence adduced at the hearing are necessary in these cases, it is important that they be made available to the hearing officer and the parties so that parties will know the staff's position and opportunity will be given to contest the deductions and conclusions. In this manner, both the initial and final decision can be made in the light of argument upon all the positions which the parties and the staff may put forward as warranted upon the record.

*Collection of civil penalties.*¹⁰⁵—Violation of some of the provisions of the Act or of the Board's rules and regulations subject the violator, under section 901 (a), to civil penalties in the form of a fine. Such violations usually are similar in kind to motor vehicle traffic offenses (e. g., flying without an airman certificate, carrying passengers for hire without an appropriate certificate, and the like). The Administrator may compromise such fines, but if the alleged violator declines to make a compromise offer in an amount which the Administrator deems satisfactory, the case is transmitted to the Department of Justice for the initiation of proceedings in the Federal district courts for the collection of a civil penalty. The problem of utilizing the Federal courts as collection agencies in these cases has not yet become acute. Yet if, as may be expected, the volume of air traffic increases, the number of violations will also increase. The burden upon the Federal courts may then become so heavy that the collection system may break down.¹⁰⁶ To alleviate the undesirable clogging of judicial dockets, the Committee recommends that the Admin-

¹⁰⁵ *Id.*, at 108-109.

¹⁰⁶ Compare this Committee's Monograph No. 10, "Department of Commerce, Bureau of Marine Inspection and Navigation," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 10, at 27-29.

istration be empowered by statute to impose fines after notice and opportunity for hearing. In order to meet possible constitutional objections, provisions should be made for review de novo of the Board's decisions upon appeal to the Federal district courts.

Division of responsibilities between an Administrator and a Board under the Reorganization Plans.—(a) *In respect of the powers of safety regulation.*¹⁰⁷—The powers of safety regulation formerly exercised by the Authority are now divided between the five-member Board and the Administrator of Civil Aeronautics. Reorganization Plan III has been interpreted to vest the Administrator with the power to reprimand one who violates the safety laws and regulations, to compromise a civil penalty, or to deny an application for a license or for renewal of a license, while the power to suspend or revoke the violator's certificate is vested in the Board. The Administrator may initiate and prosecute proceedings before the Board to revoke a license, or, even if he does not, the Board may on its own motion bring revocation proceedings.

The division of power and responsibility to impose sanctions may have considerable consequences: In a particular case, the Administrator may feel that revocation or suspension is in order, while the Board may feel that such action is undesirable; or the Administrator may compromise and collect a civil penalty and the Board may also suspend or revoke the violator's certificate; or where the Board has revoked a certificate, the Administrator may immediately issue to the violator a new certificate. This latter possibility, together with the Administrator's power to deny an application for renewal would, in effect, enable him completely to deprive the Board of its jurisdiction to suspend or revoke. Even if no conflict in policies arise, there will be inevitable duplications in hearings, investigations, and considerations. In addition, the Board, now primarily responsible only for economic cases, may not be in a position to harmonize its efforts with the Administrator's efforts in safety cases. Thus, for example, the Administrator may detect violations which he believes endanger human lives and merit immediate proceedings looking toward revocation. The Board, now chiefly absorbed in other matters, may be somewhat divorced from the situation and may take some time before considering the case; meanwhile, important questions of safety are at stake and the power of summary suspension may have been exhausted. For these reasons, the Committee recommends that consideration be given to amending the reorganization plans by vesting in a single authority the entire range of sanctions applicable to violations of the safety rules as well as complete jurisdiction over the issuance, renewal, suspension, and revocation of certificates.

(b) *In respect of issuance and enforcement of safety rules.*¹⁰⁸—Under Reorganization Plan III, the power to make rules and regulations concerning safety is vested in the Board, but the Administrator is responsible for their enforcement. The Committee finds that, in general, it is desirable for the rule-making power to be exercised by the body which, through day to day administrative experience, acquires an intimate knowledge of the subject of regu-

¹⁰⁷ See Monograph No. 19, *op. cit. supra*, note 102, appendix B, at 9-10.

¹⁰⁸ *Id.*, appendix B, at 11-12.

lation:¹⁰⁹ If the Board is to acquire such knowledge, it must maintain its own technical staff which, in effect, may be faced with the necessity of duplicating the work of the Administrator's staff. The alternative appears to be the acceptance of the Administrator's recommendation in respect of safety rules. The Committee recommends, therefore, that consideration be given to amending the reorganization plans to vest in a single body the responsibility for the issuance and enforcement of rules.

BITUMINOUS COAL DIVISION (DEPARTMENT OF THE INTERIOR)

In general, in respect of the price-fixing and other rule-making proceedings of the Bituminous Coal Division, the Committee's recommendations in chapter VII are applicable. Because the general price-fixing phase of the Division's activities has been completed, however, no specific recommendations relating to that phase have been made here. In respect of the Division's licensing and adjudicatory activities, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II relating to administrative information; in chapter III, relating to informal methods of adjudication; in chapter IV, relating to hearing commissioners and the process of decision; and in chapter V, relating to hearing procedures, are applicable.

*Preliminary procedure governing 4-II (d) applications.*¹¹⁰—Section 4-II (d) of the Bituminous Coal Act permits various classes of persons affected by the general prices promulgated by the Division to file complaints against (inter alia) specific items in the final price schedules as they apply to the complainants. In addition, the act provides that pending final disposition of such petition the Division may make such preliminary or temporary order as may be appropriate. Several procedural steps are provided for the disposition of these petitions: (1) by rules and regulations, any person seeking temporary relief pending final disposition may request an informal conference which may be attended by interested persons; (2) the petitioner is further entitled by the Division's rules to a hearing as of right on his prayer for temporary relief; (3) any person, whether or not he could have filed an original petition or intervened in the preliminary conference or hearing, may move to reopen an order granting temporary relief and, if he requests a hearing, the rules provide that this must be granted; and (4) a hearing is required by the act prior to the granting of permanent relief.

While in practice the Division intends to consolidate several of these stages and combine them into the final hearing, and has done so, the Committee is of the opinion that the machinery indicated by its rules and regulations for the disposition of 4-II (d) petitions is overelaborate, and may tend seriously to delay relief and consume the energies of the Division. Particularly is this so when it is recalled that the basis of the petition is that hardship and inequity are involved. It may be expected that a substantial number of such petitions will be filed simultaneously. Accordingly, the Committee recommends

¹⁰⁹ Compare pt. B of ch. IV, *supra*, pp. 57-60.

¹¹⁰ See this Committee's Monograph No. 23, "Bituminous Coal Division," at 85-88.

amendment and clarification of its rules and regulations to permit the consolidation of these stages to the fullest practicable extent; and the Committee further recommends (1) that the decision whether to hold an informal conference and a preliminary hearing be left to the Division as a matter of discretion in each case; (2) that under ordinary circumstances the Division refrain from holding both a conference and a preliminary hearing after such conference; (3) that the Division reserve to itself discretion in appropriate cases to grant or deny temporary relief without a hearing or conference; (4) that it similarly reserve to itself discretion to deny without hearing petitions requesting reconsideration of the decision on temporary relief; and (5) that petitions to obtain reconsideration of the decision on temporary relief be permitted to be filed only if such decision was not preceded either by a conference or a hearing and if the person seeking reconsideration had no notice of the original petition for temporary relief and can show either surprise or new facts. It should be noted that despite these several recommended restrictions the whole issue may be litigated de novo in the hearing on the petition for permanent relief, so that before the matters are finally disposed of all interested persons will in any event have a full opportunity to present their evidence and contentions.

*Effective date of final order in 4-II (d) cases.*¹¹¹—In granting relief in a petition filed under section 4-II (d), the Division is not bound by the prayer in the petition, but may grant whatever relief it may deem appropriate. Thus, at least nominally, the purpose of the elaborate provisions for giving notice of the filing of such petitions may be defeated. A competing coal producer notified of the petition may be lulled into a belief that the relief requested will not, if granted, affect him. But the actual relief granted may be of a different nature from that requested; for example, although the petition might request that petitioner's prices be raised, theoretically the Division may decide that the proper relief is to lower the prices of others to bring them into line with petitioner's. While all competitors could protect themselves by appearing at all hearings which might possibly lead to an order affecting them, this would be likely to impose a heavy burden upon them and would tend toward undue confusion at and prolongation of the hearing. Accordingly the Committee recommends that where the relief granted is different in kind from that sought, the effective date of the new price order be postponed for a sufficient period to notify persons who may be affected and to permit them to file objections and request a further hearing.

*Notice in hearings on applications for exemptions.*¹¹²—Section 4-A of the act provides for the filing of applications for exemptions by producers who contend that their coal does not move in or affect interstate commerce or is exempt from the act for other reasons. Although the Division may grant such applications without hearing, denial must be preceded by notice and hearing. If the Division does determine that denial is probably justified, no notice of the agency's contemplated position is given; instead the notice simply states that the matter has been set for hearing on a specified date. Although the vice of this lack is probably lessened by the fact that the application has been the

¹¹¹ *Id.*, at 92-93.

¹¹² *Id.*, at 103, note 118.

subject of conference between the Division and the applicant, the Committee nevertheless recommends that the notice include with as much specificity as possible the grounds upon which the Division contemplates denial. Such a notice would serve to focus the issues at the hearing, dispense with unnecessary evidence on matters not contested, and advise the applicant of the issues which he should meet.

INTERSTATE COMMERCE COMMISSION

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to informal methods of adjudication; in chapter IV, relating to hearing commissioners; in chapter V, relating to procedures in formal adjudication; and in chapter VII, relating to rule-making procedures, are applicable to the Interstate Commerce Commission. Particular attention is called to the recommendations in chapter V relating to the utilization of prehearing conferences, stipulations, and written evidence.

*Answers and defaults.*¹¹³—The Commission's rules of practice provide that answers to formal complaints "must" be filed; any defendant who fails to file an answer "will be deemed in default and issue as to such defendant will be thereby joined." In actual practice answers seldom serve to clarify the issues. Ordinarily they are mere general denials; some of the carriers have developed printed forms of "answer," used indiscriminately in all cases and sometimes even denying that they are common carriers or corporations. Since the filing of answers seems to serve no useful purpose except where the defendant has special facts to plead, it is recommended that the Commission amend its rules of practice to provide that answers need not be made unless the defendant so elects. Alternatively, the Commission might give meaning to the term "default," and might enforce strictly the further provision of its rules that answers must be "so drawn as to advise * * * of the nature of the defense." Because of the public interest involved, however, the Commission has been reluctant to impose any sanction or to permit the entry of an order as, of course, in case of default for want of answer.

*Findings of fact.*¹¹⁴—The dissatisfaction of practitioners before the Commission with respect to the Commission's failure to make specific findings of fact seems to the Committee to be in large measure justifiable. Many of the Commission's proposed and final reports recite the nature of the evidence and the contentions on each side, but do not specifically indicate the precise findings made on the disputed propositions. In some cases the making of specific findings is no doubt rendered extremely difficult by the nature of the subject matter. Nevertheless, the Committee believes that substantial improvement in the content of both proposed reports and final reports can and should be achieved by a greater effort on the Commission's part to clarify its findings of fact. At the same time, the Committee believes that some of the responsibility for the Commission's failure in this regard rests upon omission of

¹¹³ See this Committee's Monograph No. 24, "Interstate Commerce Commission," at 24-25. See also appendix E, "Procedures in Default Cases," *infra*, pp. 307-313.

¹¹⁴ See Monograph No. 24, *op. cit. supra*, note 113, at 65-68. See also appendix L, "Form and Content of Intermediate Reports and Final Administrative Decisions," *infra*, pp. 447-449.

counsel to observe the Commission's Rule XIV (a), providing that each brief "should include requests for such specific findings as the party thinks the Commission should make."

*Official notice.*¹¹⁵—The Committee believes that the Commission has limited unduly its own power to take official notice of facts well known or readily available to it. As a consequence of its doubts concerning its power to act upon the basis of general facts within its knowledge though not formally proved, the Commission has been compelled to countenance unnecessarily protracted hearings and has even occasionally decided cases without reference to actual knowledge which might have altered the results.

In addition to matters known to the Commission by reason of its specialized experience is the body of information contained in the Commission's official records, though possibly not introduced in evidence in the particular case under consideration. The Committee believes that the Commission or its hearing officer may properly take official notice of such information when clearly relevant, if in the course of the hearing, or thereafter, there is notice of what is proposed to be done and if opportunity is given to every party to explain or rebut the information of which official notice is to be taken. The device, used by the Commission in a few cases, of securing consents or stipulations that information in the Commission's official records may be used, is not wholly satisfactory, first, because the parties' affirmative consent is necessary and, second, because consent or stipulation permits the Commission to use file material without giving to adversely affected parties the opportunity (which the Committee believes they should have) to rebut or explain.

*Informal complaints.*¹¹⁶—When informal complaints against carriers' rates, charges, or practices are received by the Commission, its Bureau of Informal Cases seeks by correspondence with the carriers to bring about satisfaction of the complaint without formal hearing. The work of this Bureau has been highly effective in achieving economies of time and money. It might be even more so if the Bureau did not rely solely upon correspondence in bringing the parties to agreement; on occasion the Bureau might perhaps profitably undertake the mediation of cases through oral conferences. Moreover, in the Commission's present machinery for informal settlement of cases, no effort is made to encourage the consideration of cases on the informal docket when the complainant has in the first instance filed a formal complaint concerning a rate matter. Numerous rate problems are of narrow scope; in comparable situations other agencies have found informal methods successful, and indeed, the Commission's own Bureau of Service has demonstrated the possibilities: During the past ten years the Director of that Bureau has brought the parties to an accord on the facts in all but five cases out of some 3,500 growing out of demurrage disputes involving application of tariffs when consignees have allegedly retained cars an undue length of time.¹¹⁷ In a demurrage case an effort to secure agreement by informal methods is made whether the case has been initiated by a formal or by an informal complaint. It is recommended that a similar effort be made in appro-

¹¹⁵ See Monograph No. 24, *op. cit. supra*, note 113, at 81-90.

¹¹⁶ *Id.*, at 90-98.

¹¹⁷ *Id.*, at 139-141.

priate rate cases. Determination whether informal negotiations may be profitable ought not to depend upon the fortuities of pleading; nor should the choice made by a complainant who may not be aware of the possible savings on the informal docket irrevocably commit all parties and the Commission itself to the expense and time required for formal proceeding.

FEDERAL POWER COMMISSION

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to informal methods of adjudication; in chapter IV, relating to hearing commissioners; in chapter V, relating to procedures in formal adjudication; and in chapter VII, relating to rule-making procedures, are applicable to the Federal Power Commission. Particular attention is called to the following: (1) the Committee's recommendations in part D of chapter I that power to dispose of routine matters and to initiate action be delegated to responsible officials; (2) the recommendations in section 2 of chapter V, relating to the utilization of prehearing conferences and stipulations; and (3) the recommendation in section 5 of chapter III that hearings be omitted in cases begun by application where no adverse action is contemplated and no protest has been received. The adoption of the hearing commissioner method of adjudication will result, of course, in the issuance, in most cases, of initial decisions, although at present intermediate or proposed reports are not served upon the parties.

*Particularity of notice.*¹¹⁸—A large part of the Commission's business is devoted to the consideration of applications filed with it for licenses or other forms of authorization or approval. It receives applications for licenses for hydroelectric power projects, for certificates of public convenience and necessity, for approval of interlocking directorates and the like. Normally these applications are first carefully scrutinized by the Commission's staff; except in the case of applications for certificates of public convenience and necessity for gas-pipe lines, where hearings are mandatory, the Commission's general practice is to hold hearings only where some reason appears to deny the application; if no reason for denial is apparent, the application is granted without a hearing. Nevertheless, where hearing is ordered, the notice does not limit the issues by specifying the portion of the application which is questioned or by setting out the particular grounds upon which denial is contemplated. Instead, at the hearing, the burden is placed upon the applicant of adducing proof on every fact upon which the action of the Commission may depend.

Since the points upon which the Commission must be satisfied are numerous and often vague under requirements of public interest, convenience, and necessity, the consequences of the Commission's failure to specify the issues may be unfortunate. Where for example, a hearing on an application for a license of a power project is held, the applicant might be required to prove, among other things,

¹¹⁸ See this Committee's Monograph No. 25, "Federal Power Commission," p. 25-26; 68-69; 73.

that the project which he proposes will not cause or aggravate floods, although the Commission's engineers may have already been satisfied that the project is unobjectionable in that respect. Hearings are thus unduly extended and the energies and time of the applicant, as well as the Commission, may be expended upon matters not in dispute. To remedy this situation, the Committee recommends that in these cases the Commission include in its notices the specific grounds which led it to contemplate denial rather than grant without a hearing. The hearing should be limited to these issues, but the Commission should not be precluded from amending the notice to enlarge the issues if new reasons for denial should appear in the course of the hearing; nor should it be precluded from later reopening the hearing on issues not originally included in the notice of hearing. In this way, the application may be disposed of by denial through a hearing on a single issue and the necessity is obviated both of hearing evidence on issues not in dispute or on issues which are unnecessary for denial.

*Determination of cost and fair value.*¹¹⁹—In order to establish a base for any subsequent rate-making or recapture proceedings, section 4 (b) of the Power Act requires the Commission to determine the actual legitimate original cost and the net investment in a licensed project. Section 23 (a), however, provides that in the case of the issuance of a license for the extension, improvement, or alteration of a project already constructed under other valid authority, the Commission shall determine the "fair value" of the project. In some cases, the claims of fair value, predicated upon estimates of cost of reproduction new, less accrued depreciation plus amounts for intangibles, may far exceed actual legitimate original cost; how far the Commission will let such factors enter into a determination of fair value has not been decided. Since determination of fair value is significant in both rate making and the establishment of the recapture price, considerable controversy may arise over the question of the basis of valuation to be utilized by the Commission. The question may arise at any stage of the proceedings and may permeate all; unless the parties adopt the expensive and burdensome course of producing evidence on both theories of valuation, a long hearing may be conducted on the wrong theory and thus may ultimately be rendered useless. One method for avoiding these difficulties is for the Commission to determine in advance of hearing under which section the license issued, so that controversies, if there were to be any, would develop at the outset. But this method is satisfactory only if the Commission were to regard itself as bound by this preliminary determination, and this it has refused to do. Nevertheless, the Committee believes that the desirability of settling the issue of the basis of valuation before the other questions are explored at a hearing is great enough to warrant experimentation with means to accomplish this. It recommends, therefore, that the hearings be separated into a preliminary and final phase, the former to be devoted to the issue of the basis of the valuation, the latter to evidence concerning the facts upon which valuation on such basis can be made. Little delay need be anticipated by the adoption of this

¹¹⁹ *Id.*, at pp. 37-38; footnote 48.

method, for the issue of basis of valuation is largely one of law and the evidentiary facts will be infrequently controverted. In addition, once the basis of valuation is determined, the remaining phases of the proceedings can progress with the area narrowed and with assurance that the evidence is focused upon the proper fields.

*Opinions.*¹²⁰—Although the Commission deals with many complex issues relating to the public interest, convenience, and necessity—issues to which it is important to give content and clarity—its decisions are seldom supported by argumentative opinions. Since its creation in 1930, the Commission has, in fact, written only 51 opinions. Consequently, both the staff and the persons outside the agency who are regulated by it receive little guidance; inefficiency in staff work and uncertainty in general may result. While, indeed, long opinions are doubtless unnecessary in all cases, the Committee believes that orders should be accompanied by findings, and that the omission of opinions articulating the bases of the decision should be the exception rather than the rule. It recommends, therefore, that the Commission make every effort to prepare opinions to supplement its decisions and that these opinions be collected, indexed, and made generally available.

SECURITIES AND EXCHANGE COMMISSION

In general, the Committee's recommendations in part D of chapter I, relating to delegation; in chapter II, relating to administrative information; in chapter III, relating to informal methods of adjudication; in chapter IV, relating to hearing commissioners and the process of decision; in chapter V, relating to procedures in formal adjudication; and in chapter VII, relating to rule-making procedures, are applicable to the Securities and Exchange Commission. Special attention is called to the Committee's recommendations in part D of chapter I, dealing with delegation of power to dispose of routine matters and to initiate action, and also dealing with the desirability of decentralization. The major changes in the Commission's present hearing and post-hearing procedures which will result from the substitution of the hearing commissioner method for the present trial examining system should also be noted.

*Hearings upon unopposed declarations and applications.*¹²¹—Until recently, the Commission held hearings upon all applications and declarations filed under the Public Utility Holding Company Act, although the Commission's staff took no adverse position and no interested persons objected to the granting of approval or other action sought by the applicant or declarant. By virtue of amendment to its rules and regulations (Holding Company Act Release No. 2161, July 10, 1940), this practice was abandoned; hearings are now held upon Holding Company Act applications and declarations only if a contest develops. Nevertheless, hearings are still held upon all applications filed under Sections 12 (d) and 12 (f) of the Securities Exchange Act for the withdrawal of securities from listing or for

¹²⁰ *Id.*, at 89. See also appendix L of the Report, "Form and Content of Intermediate Reports and Final Administrative Decisions," *infra*, p. 458.

¹²¹ See this Committee's Monograph No. 26, "Securities and Exchange Commission," at 69-81.

the extension or termination of unlisted trading privileges. The Committee approves of the recent change in practice in respect of matters arising under the Holding Company Act, since it dispenses with a substantial number of unnecessary hearings.¹²² The Committee recommends that similar procedures be extended to applications under sections 12 (d) and 12 (f) of the Securities Exchange Act.

*Default proceedings.*¹²³—Hearings are held in actions to revoke registrations and other disciplinary proceedings instituted by the Commission even though the respondent has failed to appear or request a hearing. Since no information is adduced at the hearing which is not already known to or in the files of the Commission, and has already been examined for sufficiency by the Commission prior to the institution of decisive action, the Committee recommends that default hearings be discontinued, and, in lieu thereof, that a final order be entered immediately upon default. The Committee recommends that the Commission's intention in this respect be brought home to the respondent by including in the notice an announcement that opportunity for hearing is to be afforded in respect of the allegations at a stated time and place; that such hearing will be held only if timely request is made for it; and that an order may issue against the respondent without hearing in the absence of a request therefor and in the absence of his filing his intention to appear.

ADMINISTRATION OF THE CUSTOMS LAWS

In respect of unfair import practice cases conducted by the Tariff Commission, the Committee's recommendations in chapter III, relating to informal methods of adjudication; and in part B of chapter II, relating to opinions, are in general applicable. The recommended hearing commissioner system is not applicable since the Commission members themselves hear and decide the case. In respect of cost investigations and other rule making of the Commission, the recommendations in chapter VII are in general applicable. In respect of the activities of the Customs Bureau, the Committee's recommendations in chapter III relating to informal methods of adjudication, and in chapter VII, relating to rule making, are applicable. Special attention is called to the Committee's recommendations in part C, chapter II, relating to declaratory rulings.

A. UNITED STATES TARIFF COMMISSION

*Jurisdiction over unfair import practice cases.*¹²⁴—Under the Tariff Act of 1930 the Tariff Commission is directed to report to the President the existence of unfair practices in the importation of merchandise into the United States which tend "to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States." If the Presi-

¹²² See pt. 5 of ch. III, "Informal Adjudication," *supra*, pp. 40-41.

¹²³ See Monograph No. 26, *op. cit. supra*, note 121, at 151-155; see also appendix E, "Procedures in Default Cases," *infra*, p. 312.

¹²⁴ See this Committee's Monograph No. 27, "Administration of the Customs Laws," at 14-15, 55-57.

dent concurs in the Commission's finding that unfair practices exist, he may direct that the articles involved, imported by any person violating the act, shall be excluded from entry.

The cases arising under this portion of the statute are few. The jurisdiction which the Commission exercises over them is largely unrelated to its other functions. As the Commission has itself stated, "neither it nor its staff is especially fitted" to deal with unfair import practice cases. The Committee for these reasons recommends that section 337 of the Tariff Act be amended so as to transfer jurisdiction over unfair import practices from the Tariff Commission to the Federal Trade Commission, except where those practices involve issues of patent infringement; in the latter type of case jurisdiction should be vested in the Federal district courts now dealing with patent questions.

*Confidential data.*¹²⁵—Under the statute, the Commission is required to treat as confidential all information relating to "trade secrets or processes." The Commission has, however, employed a much broader standard of confidentiality, and has received in confidence in unfair import practice cases many data which were not encompassed by even a liberal definition of "trade secrets or processes." This broadened concept of confidentiality has not only produced considerable confusion and extended argument at hearings, but also has made it impossible for opposing parties to submit rebutting evidence. While the Commission seeks by its investigations to confirm the accuracy of all evidence offered in confidence, and thus accords a measure of protection to the parties, the Committee recommends that the Commission alter its practice so as to allow the nondisclosure only of data encompassed within a more literal definition of "trade secrets and processes."

B. BUREAU OF CUSTOMS

*Form of entries.*¹²⁶—At the present time, entries are not accepted unless they are accompanied by the duties estimated to be payable by the collector of customs. As a result, many entries contain no indication whatever concerning the classification of the Tariff Act which the importer believes to be applicable to his merchandise. The liquidation of entries is therefore generally accomplished without any awareness on the part of the collector's staff that a controversy is likely to ensue. In order to provide a method whereby a more thorough and pointed consideration of entries may be had in the customhouse, the Committee recommends that the form of entry be amended so as to enable the importer to include a statement with respect to his contentions on the question of classification.

*Administrative consideration of importers' contention.*¹²⁷—In a number of situations, customs officials have reason to believe that the importer is likely to disagree with their classification of merchandise. For the most part, it is possible to obtain a statement from the importer concerning his views, as well as any information which he may have relating to the question of classification. The Committee recommends that these methods be employed wherever customs officials believe that an entry is likely to ripen into a controversy and,

¹²⁵ *Id.*, at 66-67; compare 43-45.

¹²⁶ *Id.*, at 92-94.

¹²⁷ *Id.*, at 109-110, 127-128.

if importers refuse voluntarily to respond to questions asked of them, that compulsory examinations, as authorized by section 509 of the Tariff Act, should be utilized.

*Sufficiency and amendment of protests.*¹²⁸—Most protests are received in such form that it is difficult, if not impossible, for the collector and the Assistant Attorney General in charge of Customs to ascertain the subject matter of the protest and the bases therefor. The Committee recommends, therefore, that the statute be amended so as (1) to require all protests to identify clearly the merchandise involved by furnishing the marks and numbers corresponding to the invoice designations; (2) to require all protests to set forth the reasons which establish the incorrectness of the collector's decision; and (3) to prohibit the amendment of protests in a fashion which completely alters the nature of the importer's objections. Intelligent administrative consideration of protests and pointed preparation for their trial before the Customs Court are now made extremely difficult not only by their initial vagueness but by the importer's privilege to amend his protest so as completely to alter the fundamental nature of his objections. The suggested amendment would permit the importer to present additional reasons in support of his claim, but it would prevent him from changing his contention from, for example, an objection to the classification of the merchandise to one directed to the propriety of the rate of currency conversion utilized.

NATIONAL RAILROAD ADJUSTMENT BOARD

In general, the functions of the National Railroad Adjustment Board are, in a sense, unique among the Federal administrative agencies discussed in this report. Whether the Board is engaged in "adjudication" or in "adjustment" or arbitration is a controverted question, because of its special characteristics, and also because its "hearings" are in the first instance before members of the Board sitting in divisions, much of the discussion in the report does not apply to this agency. It may be noted, however, that the recommendations in Chapter II, relating to administrative information and the preparation of opinions, apply to the Board.

*Composition of the Board.*¹²⁹—Some procedural difficulties of the National Railroad Adjustment Board stem from the fact that its members are essentially representatives of the litigants before it, rather than impartial arbiters of the controversies presented for decision. The creation of a disinterested tribunal to replace the present organization might, therefore, resolve certain existing procedural problems. It is clear, however, that the bipartisan character of the Board—half of whose members represent carriers and half of whom represent employee organizations—is a reflection of historical developments and that, with all of its imperfections, it may make for a more workable adjudicatory mechanism than could a plan constructed abstractly. Since the activities of this Board bear so intimate a relationship to the whole subject of employer-employee relationships in the transportation industry, the Committee is not pre-

¹²⁸ *Id.*, at 145-149.

¹²⁹ See this Committee's Monograph No. 17, "Railway Labor," pp. 2-4.

pared to recommend that the Board be replaced by a new, nonpartisan tribunal until such time as the advantages of that type of organization are acknowledged by all parties concerned. The opinion may nevertheless be expressed that a nonpartisan agency, if it could be brought into being by agreement among the various interests affected, would prove to be an instrumentality superior to the one now maintained by the carriers and the employee organizations. The recommendations which follow are, however, limited to suggested changes within the existing framework of the National Railroad Adjustment Board.

*Limitation upon time for filing claims.*¹³⁰—Under present statutory provisions there is no limitation upon the time within which claims must be asserted by employees who maintain that their contractual rights have been violated by a carrier. The absence of a limitation has resulted, in exceptional instances, in the filing of claims for acts allegedly committed as much as fifteen years previously. It is within the power of the Board itself to establish time limitations which would protect against the assertion of stale claims. In the absence of appropriate action by the Board, it is recommended that the Railway Labor Act be amended to require that claims, in order to be cognizable by the Board, be filed within a period not later than one year following the act or acts against which complaint is made.

*Submissions.*¹³¹—Disputes may be referred to the Board by "either party," but in almost every instance have been submitted by employee organizations. Some cases are submitted upon agreed statements of fact, with a clear understanding of the specific issues in controversy. In the great bulk of cases, however, the employee organization and the carrier simultaneously file *ex parte* submissions, without any preliminary pleading or agreement indicating the nature of the dispute which is to be laid before the Board. The carriers maintain that the simultaneous filing of submissions is disadvantageous to them, since their submission, while expected to be somewhat in the nature of an answer, must be prepared and filed before there is any opportunity to examine the complaint; that is, the submission of the employee organization. To this argument the response has been made that no element of surprise in fact exists, because every case submitted to the Board has previously been "negotiated on the property" and is therefore well understood by the affected carrier. Moreover, it is said, to require the employee organization to make its submission first would be to give the carriers an untoward strategical advantage.

There are elements of inconsistency in the two arguments offered against permitting study of the complaint in advance of preparing the answer. If the defendant carrier is, as suggested, already fully informed in fact concerning the contents of the complainant's submission, no tactical advantage would accrue to the carrier if the submission were actually seen.

If, on the contrary, the carrier may be surprised by the unseen submission, it seems clear to the Committee that the consequences of nondisclosure are undesirable. Not only may there be an element

¹³⁰ *Id.*, at 15.

¹³¹ *Id.*, at 25-27.

of unfairness in the procedure, but, in addition, it is defective in that it fails to assure sharpening of the controverted issues and the possibility of narrowing their scope. In this aspect of procedure the Committee believes that the traditional method of the courts and other administrative tribunals, is fully adapted to the needs of the Board. It, therefore, recommends that the claimant be required first to make his submission, with opportunity thereafter to the defendant to make a responsive submission. This recommendation may be effectuated either by the Board's own action or by appropriate legislation.

*Conduct of hearings.—(a) Presentation of arguments.*¹³²—The preparation of stenographic transcripts of oral arguments before the different Divisions should be authorized if the funds of the Board permit. Since more than half the cases now heard by the Board are eventually submitted to referees for ultimate decision, the availability of a transcript of the argument before the Board would be an asset at a later stage of the cases.

*(b) The process of proof.*¹³³—The existing hearing method of the Board presupposes that facts will not be found on the basis of direct testimony. Indeed, the Board has no power to subpoena witnesses and has developed no machinery whereby they might be had. Some attorneys representing carriers have expressed dissatisfaction over the absence of conventional processes for exploring disputed issues of fact. On the other hand, a number of well-informed executive officials of the carriers have indicated ready acceptance of the existing methods.

In any event, it is generally agreed that fully ninety-five percent of the cases involve no pivotal issues of fact which cannot be easily resolved without the formal taking of evidence. Because of uncertainty concerning the extent to which, if at all, the present system has proved to be defective in practice, and because of fear that the more traditional methods of proof would in this instance produce disagreement and disorder, the Committee makes no recommendation for fundamental revision of the hearing technique now in use by the Board.

*Proceedings before referees.*¹³⁴—When a case has been deadlocked by the evenly divided votes of the members of one of its Divisions, it is then placed before a referee, appointed for the particular case to break the deadlock. Two of the Divisions permit interested parties to file briefs with and address oral arguments to the referee. Another Division permits only oral arguments. The remaining Division, having the largest case volume of any, permits neither arguments nor briefs. Instead, its members themselves act as the parties' representatives for presentation of written and oral arguments. In those Divisions in which the privilege of appearance before the referees has been granted, experience has shown little utilization of the opportunity to offer argument. Yet, the absence of the privilege where it has been withheld has occasioned strenuous criticism of the Board. Because granting the privilege of advancing arguments orally or in the form

¹³² *Id.*, at 27-29.

¹³³ *Id.*, at 30-32.

¹³⁴ *Id.*, at 32-35.

of briefs would apparently create satisfaction among some interested groups without causing substantial difficulty or inconvenience, the Committee recommends that that privilege should be accorded by each of the Board's Divisions.

*Docket congestion in Division I.*¹³⁵—The most serious immediate problem confronting the Board is the congestion of the docket in Division I. That Division decides some 80 percent of all the cases coming to the Board. It inherited a large accumulation of cases at the outset; it is now more than three years behind its docket in the decision of cases; and it is continuing to lose ground. The Railway Labor Act authorizes use of a device to reduce docket congestion. It is there provided that a Division may "empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division; *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided." The Committee recommends that most cases now coming before Division I should be heard and considered by panels consisting of an equal number of labor members and carrier members (one or more of each) instead of by the Division's full membership of ten. Because the members representing the carriers and the employees, respectively, almost invariably vote *en bloc*, it may reasonably be supposed that the recommendations of the two-member panel would normally be adopted by the Division. In the infrequent cases which involve inter-union disputes and in the cases which concern rivalries among diverse interests on either the carrier or the labor side, panels of four or six members might be designated, or, since they would constitute a relatively inconsiderable burden, such cases might be decided in the first instance by the entire Division.

Other questions.—The Board has deadlocked upon the question whether employees in person, as distinguished from labor organizations, should be permitted to bring their claims before the Board. The effect of this deadlock has been that no such claims are set down for hearing.

The employees concerned are not, however, left without any remedy, for the courts have held that they may assert contract claims against carriers directly in court.

The Board has also deadlocked upon the question of giving notice of hearings to employees who may be affected by orders of the Board. The result has been that notice is given only to the immediate parties. Here again affected employees are not left without any remedy, for the courts have held that they may enjoin the carrying out of the Board's orders.

Whether in these two situations the statute, which is not wholly clear upon either point, should be amended, is a question upon which the Committee has arrived at no final determination. The question is more than one of procedure. It involves considerations of labor policy and of the nature and philosophy of collective agreements which appear to the Committee to be beyond the practicable scope of its inquiry.

¹³⁵ *Id.*, at 36-44.

UNITED STATES MARITIME COMMISSION

Two circumstances make it unnecessary for the Committee to make specific recommendations in respect of the United States Maritime Commission. The first is that, subsequent to the study of the Commission's procedures by the Committee's staff, many of the powers to regulate water carriers were, by statute, transferred to the Interstate Commerce Commission. Presumably the Interstate Commerce Commission will follow substantially the same procedures in the regulation of water carriers as it has followed in regulation of carriers by rail, motortrucks, and pipe lines. Reference is made to the Committee's suggestions with respect to the procedures of the Interstate Commerce Commission. A second circumstance is the Maritime Commission's current and complete revision of its rules of procedure. Many of the suggestions included in Monograph No. 4, "United States Maritime Commission," Sen. Doc. No. 186 (76th Cong., 3d sess.) part 4, have been embodied in the proposed rules. The Committee notes with approval the Commission's proposal to extend its uses of informal methods of adjudication, of prehearing conferences, and of a shortened procedure similar to that utilized by the Interstate Commerce Commission. In respect of the Maritime Commission's activities, it may be observed that, in general, the Committee's recommendations in Chapter II, relating to delegation; in Chapter III, relating to informal methods of adjudication; in Chapter IV, relating to hearing commissioners; and in Chapter VI, relating to rule-making procedures, are applicable.

EXHIBIT 1

A BILL

PREFATORY EXPLANATION

In the attached exhibit the Committee has put in the form of proposed legislation those of its principal recommendations for improvement in the administrative process which it believes susceptible of legislative treatment. Three members of the Committee recommend a much more elaborate effort in the form of a "Code of Standards of Fair Administrative Procedure." In brief space it is impossible to analyze in detail each section of the proposed code appended to the separate statement below. The majority of the Committee therefore explains broadly why it has not joined in recommending its adoption.

To the majority the idea of a code complete and rounded was attractive when proposed. In order that the proposal might be fully examined, the Committee has materially delayed its final report. As its consideration proceeded, the majority became convinced that much of the code was unrelated to facts of more than isolated incidence and that many of its sections were inapplicable as a practical matter to many agencies. They also became convinced that the attempt to apply certain of its provisions to the new scheme of hearing commissioners was impossible at the present time, since it could not be known in advance precisely what collateral changes, as a practical matter, that scheme would produce.

It has been urged upon the Committee that an important function of the code is to serve as a guide to administrators. The majority, however, believe that this function is better performed by the report itself, which was drafted with the intent that it should serve as a guide to administrative officials. For, when principles of the kind which are stated in the report are translated into legislative form, one of two results will almost certainly occur. First, if the provisions are to retain the necessary flexibility, they become merely hortatory. They appear to prescribe a uniform procedure and to erect standards; but, in fact and in application, they dissolve and permit whatever in the opinion of the administrator is practicable and necessary. The provisions of the code relating to rule-making procedure furnish an illustration of this. The code provides "without limiting the adoption of any other procedures" that "agencies are authorized to utilize in situations deemed appropriate by them any one or more of" described types of procedures—all of which now may be and are used.

Or the code commands the obvious, in situations where disobedience of the command will, without the code, vitiate administrative action. This is so of such provisions as that which announce that "investigative powers or means of any agency shall be exercised only

by the authorized representatives of such agency and for its authorized purposes." The majority does not believe that legislation is useful which says either "do as you please" or "do nothing which is lawless."

The second result of a code, in the absence of exhaustive study, is to catch far more than is intended whenever the sections do more than exhort, and lay down specific requirements. Their impact thus may be harmful and surely is unpredictable. The present code, for example, requires "formal adjudication" in cases before the Federal Reserve System, the effect of which upon the exercise of its licensing powers the majority cannot foresee. It has been impossible to review the possible consequences of its many provisions upon the whole field of the administrative process. In the view of the majority this difficulty is not solved by the provisions of the code which vests the President with power to suspend the operation of any part of the code "as to any type of function or proceeding of any agency whenever he finds it impracticable or unworkable." On the contrary, the fact that it is necessary to designate the President to make findings, which none of the Committee members is now prepared to make, concerning the application of the code underscores the reason for the majority's reluctance to join in urging the enactment of the code. To do so seems to the majority to subject the solid advances in procedural reform which are now possible to competing pressures for exemption and extensions.

In this state of the problem, it has seemed to a majority of the Committee the part of wisdom to be content at this time with the several major steps already proposed. Experience with the operation of the new proposals, and further study by Congress, the agencies, and the suggested Office of Federal Administrative Procedure, are needed before the attempt can safely be made to prescribe by statute for a greater uniformity either of principle or of practice.

A BILL

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

TITLE I. GENERAL PROVISIONS AND OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE

SECTION 1. *Declaration of General Policy.*—The exercise of all administrative powers, insofar as they affect private rights, privileges, or immunities, should be effected by established procedures designed to assure the adequate protection of private interests and to effectuate the declared policies of Congress. While procedures should be adapted to the necessities and differences of legislation and of the subject matter involved, they should in any event be made known to all interested persons. Administrative adjudication should be attended by procedures which assure due notice, adequate opportunity to present and meet evidence and argument, and prompt decision.

SEC. 2. *Definitions.*—As used in this act—(a) "Agency" means any department, board, commission, authority, corporation, administration, independent establishment, or other subdivision of the executive branch of the Government of the United States which is empowered

by law to determine the rights, duties, immunities, or privileges of persons, other than persons in their capacity as employees of the United States, by the making of rules and regulations or by adjudications which are unreviewable except by the courts. Where the context warrants, "agency" means more particularly the officer or group of officers within an agency as above defined who are not subordinate or responsible to any other officer therein.

(b) "Agency tribunal" means the officer or group of officers within an agency whose decisions in adjudication are unreviewable except by the courts.

SEC. 3. *Delegation of Authority.*—(a) Subject to such supervision, direction, review, or reconsideration as it may prescribe, every agency or agency tribunal is authorized to delegate to its responsible members, officers, employees, committees, or administrative boards power to manage its internal affairs; to dispose informally of requests, complaints, applications, and cases; to issue complaints, show-cause orders, or other moving papers; and to govern matters of preliminary, initial, intermediate, or ancillary procedure.

(b) Every agency tribunal having more than a single member may delegate to one or more of its members, subject to review or reconsideration by it, the power to decide cases after hearing or on appeal.

(c) Where the ultimate authority in any agency is vested in a single individual, he may delegate any of his powers of final adjudication to one or more agency tribunals with such membership as he may prescribe.

SEC. 4. *Right to counsel.*—Every person appearing or summoned in any administrative proceeding shall be allowed the assistance of counsel.

SEC. 5. *Office of Federal Administrative Procedure.*—(1) There shall be appointed by the President, by and with the advice of the Senate, an officer to be known as the Director of Federal Administrative Procedure (hereafter referred to as the Director), who shall hold office for the term of seven years or until a successor has been appointed, and shall receive an annual salary of \$10,000.

(2) There shall be at the seat of government an establishment to be known as the Office of Federal Administrative Procedure composed of the Director, a Justice of the United States Court of Appeals for the District of Columbia designated by its Chief Justice, and the Director of the Administrative Office of the United States Courts, who shall serve without extra compensation.

(3) The Director shall have authority to appoint, without regard for the provisions of the Civil Service laws, an executive secretary and such attorneys, investigators, and experts as are deemed necessary to perform the functions and duties vested in the Director and Office of Federal Administrative Procedure, and he shall fix their compensation according to the Classification Act of 1923, as amended. The Director shall appoint such other employees with regard to existing laws applicable to the appointment and compensation of officers and employees of the United States, as he may from time to time find necessary.

SEC. 6. *Advisory Committees.*—(1) The Director shall designate from time to time, as occasion requires, the administrative establishments of the United States which are agencies within the meaning of this Act.

TITLE II—ADMINISTRATIVE RULE-MAKING

SEC. 201. *Rules and other information required to be published.*—

(1) *Internal organization and structure.*—Every agency shall promptly make available and currently maintain a statement of its internal organization, insofar as it may affect the public in its dealings with the agency, specifying (a) its officers and types of personnel; (b) its subdivisions; and (c) the places of business or operation, duties, functions, and general authority or jurisdiction of each of the foregoing.

(2) *Publication of policies, interpretations, and rules.*—All general policies and interpretations of law, where they have been adopted; rules, regulations, and procedures, whether formal or informal; prescribed forms and instructions with respect to reports or other material required to be filed shall be made available to the public.

SEC. 202. *Formulation of rules.*—Every agency shall designate one or more units, committees, boards, officers, or employees to receive suggestions and expedite the making, amendment, or revision of rules, subject to the control and supervision of the agency.

SEC. 203. *Effective date of rules.*—No regulation hereafter promulgated by an agency shall take effect until 45 days after the date of its initial publication in the Federal Register unless the regulation or the statute by authority of which it is promulgated provides a longer period; but this limitation upon the time when a regulation takes effect may be reduced or eliminated by certification of the agency, published with the regulation in the Federal Register, that stated circumstances require the effective date to be advanced as specified.

SEC. 204. *Formal requests for regulations.*—Any person may file with an agency a petition requesting the promulgation or amendment of a rule in which the petitioner has an interest. Such petition shall be submitted in such form and with such content as may be prescribed by each agency.

SEC. 205. *Reports to Congress.*—Annually, in its report to Congress or otherwise, each agency shall transmit all rules promulgated by it during the preceding 12 months, together with such explanatory material relating to substance or procedure as may be appropriate. The agency shall also include a summary of formal requests with respect to regulations received by it pursuant to section 204 of this title since its last report, and the reasons for its refusal of such of these requests as may have been refused.

SEC. 206. *Time of taking effect.*—This title shall take effect 30 days after the date of enactment of this act.

TITLE III—ADMINISTRATIVE ADJUDICATION

SECTION 301. *Application of title.*—The provisions of sections 302 to 309, inclusive, of this title shall be applicable only to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing. They shall not apply to—

(a) Proceedings in which a hearing for the purpose of receiving evidence is held before the agency tribunal, or before one or more individual members of an agency tribunal; or

(b) Proceedings which, pursuant to a law of the United States, are conducted before an officer of one of the States; or

(c) Proceedings which precede the issuance of a rule, regulation, or order involving the future governance or control of persons not required by law to be parties to the proceedings; or

(d) Matters concerning the conduct of the military or naval establishments, or the selection or procurement of men or materials for the armed forces of the United States; or

(e) The selection, appointment, promotion, dismissal, discipline, or retirement of an employee or officer of the United States, other than a hearing commissioner as provided hereinafter in this title; or

(f) Matters relating to the patent or trade-mark laws.

SEC. 302. *Appointment and removal of hearing commissioners.*—

(1) *Hearing commissioners.*—In each agency entrusted with the duty of deciding cases, there shall be appointed such number of officers to be known as hearing commissioners as the agency may from time to time find necessary for the proper hearing of cases. In any agency in which five or more hearing commissioners have been appointed, one of their number shall be designated by the agency as the chief hearing commissioner.

(2) *Salaries.*—The salary of a hearing commissioner shall be \$7,500 per annum and of a chief hearing commissioner, \$8,500 per annum, and shall be paid from appropriations for salaries and contingent expenses of the agencies to which they may be appointed; but if the Director of Federal Administrative Procedure shall certify, upon application of an agency, that certain of the cases coming before that agency are of an uncomplicated character, it shall be permissible to fix the salaries of hearing commissioners assigned to such cases at \$5,000 per annum, and such hearing commissioners shall be assigned to no other types of cases.

(3) *Selection and appointment.*—A hearing commissioner may be selected and appointed without regard for the provisions of the civil service or other laws applicable to the employment and compensation of officers and employees of the United States. He shall be nominated by the agency, and shall be appointed by the Office of Federal Administrative Procedure if that office finds him to be qualified by training, experience, and character to discharge the responsibilities of the position. The Director is authorized and instructed to make such investigations as may be necessary in order to enable the office to pass upon the qualifications of nominees.

(4) *Basis of nominations.*—In the nomination or appointment of hearing commissioners no political test or qualification shall be permitted or given consideration, but all nominations and appointments shall be made on the basis of merit and efficiency alone.

(5) *Term of office.*—Each hearing commissioner shall be appointed for the term of 7 years, and shall be removable, within that period, only (a) Upon charges, first submitted to him, by the agency that he has been guilty of malfeasance in office or has been neglectful or inefficient in the performance of duty; or

(b) Upon charges of like effect, first submitted to him, by the Attorney General of the United States, which the Attorney General is authorized to make in his discretion after investigation of any complaint against a hearing commissioner made to him by a person other than the agency; or

(c) Upon certification by the Director, after application by the agency, that lack of official business or insufficiency of appropriations renders necessary the termination of the hearing commissioner's appointment.

(6) *Removal.*—(a) If removal of a hearing commissioner is sought on stated charges, he may within 5 days after service of such charges demand a hearing upon them before the Office of Federal Administrative Procedure; or, if it so directs, before a trial board consisting of the Director and two other individuals designated by the Office. The decision of the office or the trial board shall be accompanied by findings of fact based upon a record of the hearing, and shall not be subject to review in any other forum.

Pending determination of the trial, a hearing commissioner against whom charges have been brought shall be suspended from office. If the Office or trial board concludes that cause for removal has been shown, the hearing commissioner shall be deemed to have been removed from office as of the date when the charges were served upon him. But if it be concluded that no cause for removal has been shown, the hearing commissioner shall at once be restored unless his term of office has expired, and he shall be paid the salary which would have accrued to him but for the suspension.

(b) If removal of a hearing commissioner is upon certification as provided in paragraph 5, subsection (c), of this section, a hearing commissioner so removed shall be placed upon an eligible list for reappointment, and he shall remain upon the list, if he so desires, for the balance of his term of office; and during that period no new appointments of hearing commissioners shall be made in the agency by which he has been employed except from among persons whose names appear on such list.

(7) *Provisional appointment.*—A hearing commissioner may be appointed in the manner provided in paragraphs (3) and (4) of this section for a provisional period not to exceed 1 year. At the conclusion of the provisional period he shall either be appointed for a full term of 7 years or be relieved from further employment as a hearing commissioner in the agency of which he has been a part. During the provisional period he may be removed solely within the discretion of the agency.

(8) *Temporary appointment.*—Without reference to the provisions of this section relative to the compensation or tenure of hearing commissioners, the agency may with the approval of the Director designate and assign a temporary commissioner for the purpose of hearing a particular case or, alternatively, for a period not in excess of 30 days, when either (a) the volume of cases arising within the agency is so inconsiderable that appointment of a hearing commissioner is not justified; or

(b) Because of vacancy in the office of hearing commissioner, insufficiency of available personnel, or other temporary cause the as-

signment of one or more temporary hearing commissioners is required to permit the expeditious disposition of cases which await hearing or decision.

The assignment of a temporary hearing commissioner may be extended and renewed from time to time for additional periods upon certification, as provided in section 305 of this act, that the need for such assignment has not terminated and that the public interest will be served by its renewal.

In designating temporary hearing commissioners, an agency shall so far as feasible utilize the services of a hearing commissioner attached to another agency, if the consent of that agency is obtained. The salaries of hearing commissioners temporarily assigned from one agency to another shall, during the assignment, be paid by the agency to which they are assigned.

(9) *Powers of provisional and temporary hearing commissioners.*—Provisional and temporary hearing commissioners shall have the powers and perform the duties of hearing commissioners.

SEC. 303. *Hearing of cases.*—(1) *Hearing before hearing commissioner.*—Subject to the provisions of this section, every case not within the exceptions stated in section 301 of this act shall be heard before one or more hearing commissioners.

(2) *When no hearing required.*—No case in which the facts are agreed need be presented for hearing before or consideration by a hearing commissioner if the agency tribunal otherwise directs.

(3) *Defaults.*—Notwithstanding the provisions of other acts, no agency shall be required to hold hearings when the parties in interest have failed to answer, if so required, a complaint or other process of like effect duly served upon them, or to appear when notified.

SEC. 304. *Powers and duties of hearing commissioner.*—(1) *Powers at hearing.*—A hearing commissioner shall have power—

(a) To administer oaths and affirmations, and take affidavits;

(b) To issue subpoenas requiring the attendance and testimony of witnesses and the production of books, contracts, papers, documents, and other evidence;

(c) To examine witnesses and receive evidence;

(d) To cause testimony to be taken by deposition;

(e) To regulate all proceedings in every hearing before him and, subject to the established rules and regulations of the agency tribunal, to do all acts and take all measures necessary for the efficient conduct of the hearing;

(f) To exclude evidence which is immaterial, irrelevant, unduly repetitious, or not of the sort upon which responsible persons are accustomed to rely in serious affairs.

(2) *Disobedience of lawful order.*—If any person in proceedings before a hearing commissioner disobeys or resists any lawful order or process, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath or affirmation as a witness, or thereafter refuses to be examined according to law, the agency of which the hearing commissioner is an officer shall certify the facts to the district court having jurisdiction, which shall thereupon promptly hear the evidence as to the acts complained of, and, if the evidence so warrants, order compliance or punish such person in the same manner and to the same extent as for contempt of the court.

(3) *Prehearing conferences.*—In cases referred to him for that purpose, a hearing commissioner shall have power to initiate, conduct, or participate in prehearing proceedings looking toward informal settlement or other disposition of matters in controversy; and he shall have power to direct the parties or their representatives to appear before him for a conference to consider—

- (a) The simplification of the issues;
- (b) The necessity or desirability of amendments to the pleadings;
- (c) The possibility of obtaining stipulations of fact and of documents which will avoid unnecessary proof;
- (d) The limitation of the number of expert witnesses;
- (e) Such other matters as may aid in the disposition of the case.

(4) *Hearing commissioner's decision.*—Except as otherwise provided in this act, when the evidence has been heard by a hearing commissioner opportunity shall be given to the parties in interest to request findings of fact and conclusions of law, and to file briefs or argue orally in accordance with the procedure prescribed by the rules of the agency. The hearing commissioner shall find the facts, formulate the conclusions of law, and enter a decision in the case. Such findings, conclusions, and decision shall be stated in writing, served upon all parties in interest, reported to the agency tribunal, and become part of the record; but in any case wherein he deems it appropriate to do so, the hearing commissioner may announce his decision orally on the record, and shall be required to state his findings, conclusions, and decision more fully and in written form only if requested to do so by a party or by the agency tribunal.

SECTION 305. *Powers and duties of chief hearing commissioner.*—

(1) *Power to hear cases.*—A chief hearing commissioner shall have the powers and duties conferred on hearing commissioners by Section 304 of this act.

(2) *Other powers and duties.*—It shall be the duty of the chief hearing commissioner of an agency to—

- (a) Assign hearing commissioners to cases;
- (b) Certify to the agency that the accumulation or urgency of cases awaiting hearing or decision is such as to require the designation of one or more temporary hearing commissioners, for the purpose of hearing a named case or such cases within a period of not to exceed thirty days as may be assigned;

(c) Certify to the agency that the public interest requires the extension of the designation of a temporary hearing commissioner for such further period, not to exceed thirty days, as may be stated by him, subject to the possibility of subsequent additional extension upon his further certification of continuing necessity;

(d) Assign another hearing commissioner to a case in which the hearing commissioner originally assigned is unable to complete the hearing;

(e) Direct that the findings of fact, conclusions, and decision in any case be prepared and issued by a hearing commissioner other than the one who presided at the hearing if the latter by reason of death, illness, removal from office, termination of appointment, or unforeseen exigency is unable to prepare the same within a reasonable time; provided, however, that the hearing commissioner to whom such assignment is made may order such reargument or retrial as he may deem necessary to a just decision.

(3) *Agencies where no chief hearing commissioner.*—In an agency which has no chief hearing commissioner, the powers and duties assigned to the chief hearing commissioner by paragraph (2) of this section and by Section 306 of this act shall be exercised by the agency tribunal or by an official of the agency designated for that purpose by the agency tribunal.

SECTION 306. *Disqualification of a hearing commissioner.*—Any party may file with the chief hearing commissioner a timely affidavit of disqualification of any hearing commissioner assigned to hear any case, setting forth with particularity the grounds of alleged disqualification. After such hearing or investigation as the chief hearing commissioner may deem proper, he shall promptly either find the affidavit without merit and direct the case to proceed as assigned or else assign another hearing commissioner to the case. Where such an affidavit is found to be without merit, the affidavit, any record made thereon, and the memorandum decision and order of the chief hearing commissioner shall be made a part of the record. A hearing commissioner shall withdraw from any case in respect of which he deems himself disqualified for any reason.

SECTION 307. *Cases when no decision by hearing commissioner required.*—(1) *Certification of existence of novel or complex questions.* Upon the conclusion of the hearing in any case the hearing commissioner may certify to the agency tribunal any questions or propositions of law concerning which instructions are desired for the proper decision of the case. Thereupon the agency tribunal may either give binding instructions on the questions and propositions certified or may require that the entire record in the case be transmitted to it for consideration and decision.

(2) *Transfer of case on petition.* Upon the conclusion of the hearing in any case the agency tribunal, on petition of any private party therein and for good cause shown, may direct that the entire record in the case be forthwith transmitted to it for consideration and decision.

(3) *Opportunity to present argument.* In any case brought before an agency tribunal pursuant to this section, the parties shall be afforded opportunity to request findings of fact and conclusions of law, and to file briefs or argue orally before the agency tribunal.

SECTION 308. *Effect of decision of hearing commissioner.*—(1) *Finality when no appeal taken or review ordered.* In the absence of timely appeal to the agency tribunal, a decision of a hearing commissioner shall without further proceedings become the final decision of the agency tribunal, and as such enforceable or reviewable to the same extent and in the same manner as though it had been duly entered by the agency tribunal as its decision, judgment, order, award, or other ultimate determination in the case; except that the agency head may on its own motion direct that a decision of a hearing commissioner be reviewed by it after notice to the parties and within such period of time and in accordance with such rules as it may prescribe.

(2) *Reopening of hearing commissioner's decision.*—To the same extent and in the same manner as may be permissible in respect of its own final decision, the agency tribunal may reopen and alter, modify, or set aside in whole or in part any decision of a hearing commissioner

which has been unappealed and which has become final by operation of time.

SECTION 309. *Review of hearing commissioner's decision by agency tribunal.*—(1) *Assignment of errors on appeal.*—When an appeal is taken to the agency tribunal from the decision of a hearing commissioner, the appellant shall set forth with particularity each error asserted, and only such questions as are specified by the appellant's petition for review and such portions of the record as are specified in the supporting brief need be considered by the agency. Where the appellant asserts that the hearing commissioner's findings of fact are against the weight of the evidence, the agency may limit its consideration of this ground of appeal to the inquiry whether the portions of the record cited disclose that the findings are clearly against the weight of the evidence.

(2) *Powers of agency tribunal on appeal.*—Upon the review of any case the agency tribunal shall afford parties reasonable opportunity for submitting argument. The agency tribunal shall have jurisdiction to remand the case to the hearing commissioner for the purpose of receiving further evidence or making additional findings, or to affirm, reverse, modify, or set aside in whole or in part the decision of the hearing commissioner, or itself to make any finding which in its judgment is proper upon the record. But if its findings differ materially from those of the hearing commissioner, the agency tribunal shall file with its decision a statement explaining the grounds of its determinations, with appropriate references to the record.

SECTION 310. *Record on appeal to courts.*—In any proceeding for judicial review, restraint, or enforcement of an administrative order or other determination, it shall not be necessary to print the complete record and exhibits in the case unless the court so orders. The moving party shall print as a supplement or appendix to his brief (which may be separately bound) the pertinent pleadings, orders, decisions, opinions, findings, and conclusions of both the agency tribunal and the hearing commissioner, together with relevant docket entries arranged chronologically and such other relevant portions of the record as it is desired that the court shall read. Omissions shall be indicated, reference shall be made to the pages of the typewritten transcript, and the names of witnesses shall be indexed. The responding party shall similarly print such additional portions of the record as it is desired the court shall read. The courts of the United States may by rule amplify or modify the provisions of this section to further its purpose.

SECTION 311. *Mistake of remedy not to preclude judicial review.*—When, in a case pending in any United States court to review an order or determination of an agency, the order or determination is subject to judicial review, but by a procedure or before a court different from that chosen by the person seeking review, the court may, instead of denying relief, take one or more of the following courses of action, on such conditions as it may deem just—

(a) Proceed, if it has jurisdiction, as if the proper remedy had been sought; or permit or direct such amendment, rehearing, or remand to a lower court as it deems appropriate for a proper review of the order; or

(b) Permit transfer of the case to a court having jurisdiction to review the order.

SECTION 312. *Time of taking effect.*—Sections 310, 311, and 313 of this title shall take effect at once. The remaining sections of this title shall take effect on January first, 1942, or in any particular agency at any prior date upon order thereof, when such agency shall conclude that available personnel and appropriations permit such provisions, or any portion thereof, to become operative.

SECTION 313. *Rules and regulations.*—Each agency shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title.

TITLE IV—DECLARATORY RULINGS

SECTION 401. *Power to issue rulings.*—Each agency tribunal shall have power to issue declaratory rulings concerning rights, status, and other legal relations arising under the statute or the several statutes committed to its administration or arising under its regulations, in order to terminate a controversy or remove an uncertainty. The agency tribunal may refuse to render or enter a declaratory ruling where such ruling if made would not terminate the uncertainty or controversy giving rise to the proceeding, or would itself be of uncertain future application, or is deemed to have been sought for the purpose of delay, or would impede the determination of other proceedings then pending, or, in the judgment of the agency tribunal, would be premature or otherwise inexpedient.

SECTION 402. *Effect.*—A declaratory ruling issued by an agency tribunal shall, in the absence of reversal after appropriate judicial proceedings, have the same force and effect, and be binding in the same manner, as a final order or other determination of that agency tribunal.

SECTION 403. *Parties.*—When a declaratory ruling is sought, all persons shall be made parties who have or claim any legal interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

SECTION 404. *Judicial review.*—Judicial review of a declaratory ruling made by an agency tribunal may be had in the manner and to the same extent as final orders or other determinations of that agency tribunal; except that this title shall not be deemed to modify existing provisions of law applicable to closing agreements concerning internal revenue tax matters. Refusal of a request that a declaratory ruling be made shall not be subject to review in any manner.

ADDITIONAL VIEWS AND RECOMMENDATIONS OF MESSRS. McFARLAND, STASON, AND VANDERBILT

Administrative agencies are staffed for the most part by intelligent, capable, hard-working, and conscientious men and women. No careful student of administrative law would impair their efficiency, yet all desire that their procedures promote justice, fairness, and responsiveness to the public will, as in a democracy they should. "The objective of this committee," as the President of the United States stated in his message of December 18 (House Document No. 986, 76th Congress, 3d Session, page 4) vetoing the Logan-Walter Bill, "is not to hamper administrative tribunals, but to suggest improvements, to make the process more workable and more just, and to avoid confusions, and uncertainties and litigations." From the standpoint of the citizen as the Committee recognizes again and again in its studies and report, there are unnecessary defects, confusions, and uncertainties in existing procedures.

The report of the Committee represents a composite of studies, views, and recommendations which, if carried out, would go very far toward effecting major improvement. We have asked the privilege of adding further views and recommendations in order to secure, as we see it, a more adequate solution of present difficulties. In so doing, we have accepted the major outlines of the report and, in order to simplify the matter as well as in recognition of the adjustments necessary in any joint inquiry, we have departed as little as possible from the solutions suggested by the full Committee. Indeed, in this separate statement we have made free and full use of the studies, views, and experience of all our associates.

The three principal topics with respect to which, in our judgment, the report or recommendations fall short are (1) the separation of prosecuting and judicial functions, (2) the scope and practice of judicial review, and (3) the need for a legislative statement of standards of fair procedure.

I. THE SEPARATION OF FUNCTIONS

History and tradition have given English-speaking peoples a governmental pattern which they regard as the essence of fair adjudication. They regard the legislature as the first forum in matters between the government and the citizens; in the legislature, made up of representatives of all the people, their needs are presented and general solutions devised. The investigator or prosecutor follows; it is his duty to enforce the law by discovering wrongdoing and bringing wrongdoers to justice. But the prosecutor is not allowed to judge as well as to prosecute. Instead, he must prepare his case, summon witnesses, and present reliable evidence at a hearing before

a court which is independent of the prosecutor. Even a judge in a court of law is not the sole judge. A jury of citizens must first say whether they approve the imposition of criminal penalties or money damages. The judge may then say whether, notwithstanding the permission given by the jury, the imposition of penalties or damages is "lawful." Not even then is the process finished, for the right of appeal to a higher tribunal has come to be regarded almost as essential as the right to a trial.

In the administrative process, however, these stages of making and applying law have been telescoped into a single agency. In this concentration customary and separate procedures have disappeared. The legislature no longer prescribes the rules but in large part leaves this function to the administrative agency. And administrative rules are usually incomplete, since it is easier for an administrative agency to judge each case as it arises than to formulate rules. The agency which prescribes rules is also the investigator, the prosecutor, the judge, and to a large extent the appellate tribunal. It is given a staggering load of work and must necessarily delegate many of these functions to subordinates. One employee acts as prosecutor, another as presiding judge, and another as appellate judge. There is no jury. The litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere.

Moreover, the consolidation of functions has done more than enable a single agency to act successively as legislator, investigator, prosecutor, jury, judge, and appellate tribunal. Agencies are empowered to act in several of these capacities at a single stage of proceedings. As investigator, an administrative agency, after making its own rules and regulations, may often summon witnesses and examine them in secret—a privilege otherwise accorded only to grand juries and denied to such important public officers as the Attorney General and the officials of the Department of Justice. It may, under some statutes, "visit" or inspect premises without a warrant—a power accorded no other public agency except a judge or a jury, and then only after a case has been instituted and the parties apprised of the charges against them. It may threaten the imposition of penalties if its demands for information are not met—a power otherwise accorded only to judges, and then only after valid subpoenas have issued. It may threaten to impose regulations—a power otherwise accorded only to Congress. It may threaten to prosecute and to judge—a power otherwise divided between the Department of Justice and the courts. It may threaten to withhold benefits—a prerogative otherwise accorded only to Congress. Though this is not the normal course of administration, the exercise of such power is restrained only by human forbearance.

Origins of the combination of functions.—Concentration of administrative powers has been brought about by a combination of historical, legal, and practical factors. We may discern certain significant stages in the evolution of administrative justice. The Executive Branch, because of its responsiveness to political pressures, so often handled administrative functions, including investigations and prosecutions, in a dilatory, vacillating, or partisan manner that

independent agencies were established by Congress to provide a measure of continuity and uniformity in law enforcement. The most significant step in this connection was the creation of the Interstate Commerce Commission to regulate railroads. Having established independent agencies, it was convenient to confer upon them all types of functions relating to a given subject. It seemed plausibly unnecessary to create two administrative agencies for a single subject, one to make rules, to investigate, and to prosecute and another one to judge. The existing courts were not utilized because they were too few, were not specialized, and were limited by constitutional interpretation as to the functions they could perform. Having come to combine functions in independent agencies, it was but a step to confer similar functions upon bureaus and officers of the executive departments.

When, however, enough people are affected, when matters seem to warrant a reorganization, when someone has studied a particular field sufficiently to make detailed recommendations, specialized and separate tribunals for adjudication have occasionally been established. Thus we have the Court of Claims, the Customs Court, and the Board of Tax Appeals (which is a court in all but name). A court may be created for special functions, its members need not be lawyers, their terms may be limited as are those of administrators, and their functions may be prescribed and fitted to any administrative problem. It is as simple to create a special court as to create a board or new commission. The essential demand is that adjudication in contested cases be vested in an independent group, whether a court (such as the Court of Claims) or a board (such as the Board of Tax Appeals).

The place of administrative justice.—In emergencies, or to meet new problems speedily, it is ordinarily not feasible to devise such a whole new system. It may be necessary to vest consolidated powers in a single agency in order to reorganize some familiar field or to initiate a new field of governmental control. Thus the Interstate Commerce Commission was created to undertake railroad rate regulation when state regulation broke down. The Federal Trade Commission was created to develop a modern body of fair trade practice law; the Radio Commission, to govern a new science; the Labor Board, to initiate a new labor policy; and the Securities Commission, to regulate a field which, unregulated, had brought the nation to the brink of disaster. The point is that, in such cases, there may not be time or information in which or upon which to debate or devise more than a rudimentary system. Something must be done quickly, and something is done.

But, once established, such agencies need not be, and should not be, regarded as fixed and immutable. They may be fitted into the traditional governmental structure as the subjects they administer become clarified so that Congress can intelligently deal with them. Nevertheless, the strong tendency to avoid creating new governmental units and the difficulty in reaching agreement on reorganizations make readjustment difficult.

These views and problems are not new. They have often been voiced, and nowhere in stronger or more reasoned language than in the recommendations of President Franklin D. Roosevelt. On Janu-

ary 12, 1937, the President transmitted to Congress the report of his Committee on Administrative Management, together with a special message in which (Report with Special Studies, 1937, pp. iii-v) he said:

I have examined this report carefully and thoughtfully, and am convinced that it is a great document of permanent importance. * * * The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution.

The plan submitted by the President included the separation of judicial from all other functions performed by any agency, whether an independent board or commission or a bureau within an executive department. The report states (pp. 32-33, 39-40) that:

The Executive Branch of the Government of the United States has * * * grown up without plan or design. * * * To look at it now, no one would ever recognize the structure which the founding fathers erected a century and a half ago. * * * Commissions have been the result of legislative groping rather than the pursuit of a consistent policy. * * * They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. * * * There is a conflict of principle involved in their make-up and functions. * * * They are vested with duties of administration * * * and at the same time they are given important judicial work. * * * The evils resulting from this confusion of principles are insidious and far-reaching. * * * Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself.

A complete and drastic program of separation was posed.¹

The report of the present Committee discusses the principal points of the problem in part B of chapter IV, but reaches the conclusion that the adjudication of contested cases by agencies which do not also investigate and prosecute them would be unwise if not definitely harmful to both the Government and the citizen. It is said that "an administrative agency is not one man or a few men but many," that an agency is not "a collective person," and that it is not true that "the same person is doing both" the job of prosecuting and judging. But every agency is actually controlled by a few officials, who work in close cooperation. It is said, in the Committee report, that there would be a division of responsibility for policy if one agency could

¹ The proposal was (pp. 41-42) that regular agencies should "be divided into an administrative section and a judicial section. * * * The judicial section * * * would be wholly independent. * * * Its members would be appointed by the President with the approval of the Senate for long, staggered terms and would be removable only for causes stated in the statute. * * * The administrative section * * * would formulate rules, initiate action, investigate complaints. * * * It would of course do all the purely administrative or sublegislative work now done by the commissions—in short all the work which is not essentially judicial in nature. The judicial section would sit as an impartial, independent body to make decisions affecting the public interest and private rights. * * * This proposed plan * * * guarantees the complete independence and neutrality for that part of the work which must be performed after the manner of a court."

See the special studies and more detailed explanations and recommendations which were transmitted to Congress as a part of this report at pages 207-210, 215-219, 222-223, 230-239.

settle cases by consent but only a separate agency could decide disputed cases, yet this is what the Department of Justice and the courts do in the judicial system as we know it and it is what takes place in the administration of the tax, customs, and criminal law. It is said that separation would mean hindrance of "amicable disposition of cases" and "a break-down of responsibility." But this has not been true of the Department of Justice, which must go to the courts with contested cases, nor of the Bureau of Internal Revenue, which must go to the Board of Tax Appeals with contested tax matters. Finally, it is argued that the prosecuting agency would have to litigate to find out what policy to pursue. But, as a matter of fact, through possession of the rule-making power and the guidance of statutes, the prosecuting agency may, in the same way as the Commissioner of Internal Revenue does, so prescribe policies that any separate adjudicating tribunal will chiefly do no more than apply those policies to the facts of individual cases.

The Committee report nevertheless takes the position that the "commingling of functions of investigation or advocacy with the function of deciding are * * * plainly undesirable." Such commingling, it believes, may be avoided "by appropriate internal division of labor." To this end the Committee has recommended specially selected hearing officers of fixed compensation and tenure of office who shall themselves perform no prosecuting functions. At the risk of some repetition of the excellent analysis of the subject by the Committee, we think we should outline just what we mean by the separation of functions and wherein we recommend its application.

Degrees, methods, and points of separation of functions.—There are, of course, different degrees and points of separation of functions. Many functions are properly of the clerical, investigatory, or prosecuting type. These include the keeping of records, the receipt of applications, the investigation of complaints, the initiation of formal action by way of complaints or stop orders, the informal disposition of matters capable of agreed settlement, and a variety of similar activities.² It is only the formal adjudication of contested matters—the taking of evidence and the decision of contested cases—that requires separation. It is not necessary, in our judgment, that there be a series of separations but only that there be some adequate separation in the ultimate determination of contested cases. The problem is, therefore, how and in what respects the separation of hearing and deciding from all other functions should be attempted.

In the first place, there are obvious difficulties in such separation in areas of administrative law in which the practice of administrative discretion is large—for example, the function of passing upon licenses or applications for benefits. In general we believe that, so far and so

² Rule making has always been recognized as a purely administrative or executive function. The Bureau of Internal Revenue, for example, both makes rules and prosecutes tax disputes. As a practical matter, rule making may properly be vested in an agency which is also a prosecutor, for several reasons: In making rules, the prosecutor announces his view or interpretation of the law, so that the citizen knows (if rules are adequate) what to expect—which is a great advantage both to the citizen and to the Government. Rules apply in the future, to all who come within their terms, and ordinarily cannot be regarded as motivated by bias against a particular person. An improper rule is easily spotted, readily reviewable by the courts on its application to given facts, and subject to legislative and popular correction or criticism; whereas an adjudication is narrowly applied and, if the losing party complains, he is likely to be dismissed as merely a discontented litigant. We think, therefore, that the rule-making power is properly granted to agencies which also investigate and prosecute cases. Moreover, the alternative is to combine rule-making with adjudication of cases; whereas experience has shown that rule making is slighted when so combined and the law is kept vague and indefinite, because it is simpler to make adjudications in cases as they arise than to state general rules or policies.

rapidly as possible, the legislative standards under which such discretionary powers are exercised should be made more precise. Unless and until such discretion is reduced, separation of functions is peculiarly difficult since, if functions are separated, two agencies would determine policy. In the meantime, we believe, in these cases there should be both a practical form of "internal" separation and a broad power of review by an independent administrative tribunal or specialized court.

Secondly, an agency may properly adjudicate cases between two private parties, rather than between the Government and a party. This sort of administrative function is found in the reparation cases of the Interstate Commerce Commission and the Department of Agriculture. Here the agency does not prosecute. Its function is typically judicial. But, peculiarly enough, in the instances mentioned complete trials *de novo* in the courts, rather than mere review, are required because of constitutional provisions—where least needed. These cases pose a problem not of separation but whether such adjudication ought not in the first instance be vested in the courts, as the Interstate Commerce Commission has recommended with respect to its own reparation jurisdiction.

Thirdly, in cases involving factual issues between the investigating or prosecuting agents of the Government and private parties, the same agency should not issue complaints, prosecute the proceedings thereunder, and adjudicate the cases where there is no opportunity for the citizen to have a readjudication by an independent tribunal. This is the typical situation where the prosecutor-judge combination is criticized. In practice, it takes two forms—either the agency initiates proceedings on its own motion, or private parties make complaints and the agency then makes those complaints its own (as often happens in prosecuting attorneys' offices). But these differences in form are not significant. Here we think complete separation, with adjudication by wholly independent agencies, is normally to be preferred.

"Internal" separation of functions.—As a general policy, the whole Committee agrees that at least a separation of functions within each agency should be provided. The principal recommendation in its report deals with the creation of special commissioners who shall hear and initially decide contested cases. We agree that, in the absence of complete separation, this general plan could be made to aid greatly in producing impartiality in administrative adjudication, if coupled with adequate provision for judicial review and the enactment of a code of standards of fair procedure. But in our judgment the plan cannot fully achieve the complete independence that is essential for the exercise of the adjudicatory function; and therefore, as an exclusive means of separation, it should be confined to those cases where complete separation of functions is not possible.

Special problems are raised where there is no complete separation of functions, but an agency attempts to separate functions within its own staff. First, can there be a practical separation of prosecuting and deciding functions where both are subject to one ultimate authority? To a limited extent, we think it may be possible to achieve such a separation. Secondly, is it proper for an agency, which must decide cases, to supervise generally the institution and prosecution of such cases? We think such supervision is inevitable,

given the organization of prosecuting and deciding functions within a single governmental unit which must have a single ultimate head. While the effectiveness of any form of internal separation is thereby limited, such supervision is a necessary part of the present system of administrative justice. Thirdly, is it proper for deciding officers to participate in attempted settlements or informal determinations? Here again, for the same reasons, complete separation of functions is impossible within a single agency. Fourthly, shall deciding officers go beyond the formal record in contested proceedings and, after formal proceedings are commenced, consult with the agency's own prosecuting attorneys, investigators, experts, and specialists? Emphatically, we think (and the Committee fully agrees) that at this stage of procedure deciding officers should, except for proper use of official notice and clerical help, confine their consideration strictly to matters of record produced during formal proceedings.

At best, internal separation of functions is difficult to achieve. It can succeed only to the degree that it is definitely framed, accepted, and acted upon by the entire personnel of a given agency. Even then there are definite limitations to such a segregation of investigating and prosecuting from hearing and deciding functions. So long as both investigators and prosecutors, on the one hand, and hearing and deciding officers, on the other, are subject to the same superior authority, there is an inevitable commingling of all these functions. Hearing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting. Of course, this dependence may be diminished by various devices, as the Committee has very rightly attempted. We think it clear, however, that such dependents cannot be eliminated by measures short of complete segregation into independent agencies.

II. JUDICIAL REVIEW

The problem of separation of functions and the problem of judicial review are interrelated. Where there is no separation of adjudicating functions, or where there is merely a partial or "internal" separation, the reviewing function of the courts is of paramount importance. Where powers of legislation, investigation, prosecution, adjudication, and appellate review are merged in a single agency, we believe, as does the Committee, that the courts must exercise broad authority to prevent abuses of power. In chapter VI of its report, the Committee, after sketching the outlines of the authority of the courts over administrative determinations, concludes that no change by legislative act should be attempted "so long as the courts continue to discharge conscientiously the functions of review" as they now exist. We believe, however, that Congress should prescribe the scope of judicial review rather than leave it to the courts to venture into this controversial field upon their own initiative and without needed statutory direction.

Judicial review is one of the important balances of our governmental system. It should not be too broad and searching or it will hamper administrative efficiency. It should not be so restricted

or so devitalized as to fail as a check upon palpable administrative error or abuse of power. The proper dividing line between the power of administration and that of the courts is not easy to draw, but the attempt to draw it intelligently must be made and certainly every effort should be made to eliminate the more obvious defects.

Deficiencies and uncertainties in present practice.—We have been asked by the President to “detect existing deficiencies.” These, while perfectly clear and definite to those who are familiar with judicial review in action, are nevertheless elusive if discussed in the barren terms of existing statutes or the stereotyped formulas enunciated by the courts. We shall attempt to enumerate some of them, therefore, in nontechnical language.

(1) Certainly the haphazard, uncertain, and variable results of the present system or lack of system of judicial review constitute a major “deficiency.” As is well stated in Chapter VI of the committee report, the general statutory phrases now in use,³ purporting to express the the congressional intent as to the scope of judicial review of administrative determinations of facts, are freely interpreted by the courts. Wide variations in results in specific cases defy explanation. Furthermore, a fundamental change is taking place in the concepts of the scope of judicial review hitherto derived from the implications of due process, separation of powers, and the nature of judicial power under Article III of the Constitution, so that the question is likely to loom even larger in the future than it has in the past. The opinion of the majority of the Supreme Court handed down last June in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, and touched upon in chapter VI of the Committee report, forces us to the conclusion that, in the future, fact issues involving due process, equal protection, and doubtless also other constitutional guarantees will in all probability no longer be subject to court review as a matter of constitutional right. Since cases involving these issues generally deal with important interests and often raise questions of high emotional or political content, it follows that the present state of uncertainty constitutes an even greater defect than heretofore, and the importance of proper attention to judicial review of fact determinations is very great.

(2) The present scope of judicial review is also subject to question in view of one of the prevalent interpretations of the “substantial evidence” rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called “substantial evidence” is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the deci-

³The Communications Act of 1934 provides with respect to permits and licenses “that the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious.” The Federal Trade Commission Act provides that “the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.” The National Labor Relations Act contains a similar provision. The Securities and Exchange Act provides that conclusiveness shall attach to the findings of the Commission as to the facts if they are “supported by substantial evidence.” Similar phraseology is found in the case of the Federal Alcohol Administration Act, the Federal Power Act, the Fair Labor Standards Act, and the Bituminous Coal Act. The Interstate Commerce Act provides as to reparations cases that the findings of the Commission shall be “prima facie evidence” of the matters recited therein. Under the Walsh-Healey Act the findings of the Secretary of Labor are conclusive “if supported by the preponderance of the evidence.” Under the Commodities Exchange Act, orders of the Commission reviewing or revoking designations of contract markets must be supported “by the weight of the evidence.”

sion without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions *clearly* contrary to the *manifest* weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error.

(3) The present statutory formulas of judicial review fail to take account of differences between the various types of fact determinations, not only as between agencies but also within a single agency. Some fact determinations involve highly technical matters and require special experience and training; others involve technology in small degree or not at all. Some impinge heavily upon private rights; others do so lightly, if at all. Some are intended to be merely preliminary to the exercise of validly conferred administrative discretion; others involve no discretionary element but are quite objective. Some are rendered by long-established, well-tried tribunals in whom all persons have confidence; some come from new and hurriedly organized agencies. Yet, for the most part all these different types of fact determinations are cast into a single mold, with a single general formula for judicial review. The lack of a reasoned approach to the problem is obvious. It is small wonder that the courts sometimes feel entitled and, indeed, obliged to indulge in free interpretation of the statutory language of review.

(4) The present standards of judicial review are unsatisfactory because of the very manner of their establishment. The scope of review is, in effect, determined by the usual case-to-case procedure of the courts. This results in a microscopic view of the field as each point is determined in the line of demarcation. The process is unfair to litigants and burdensome to the courts. We think it would be a major improvement if the several types of issues decided by each administrative agency were enumerated and precise and definite language were adopted to indicate the intended scope of review for each type. This, if it is to be done at all, must be done by Congress itself. The present piece-work process is not likely to produce anything more satisfactory than a patchwork result.

Recommendations.—Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review—including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and

discretionary authority of each agency. We have framed such a provision in the appendix to this statement.

In the second place, Congress should classify types of cases and provide special degrees of review as to each. If, for example, Congress should feel that important issues arising under a regulatory statute, involving the limits of interstate commerce, should be protected by a closer judicial scrutiny than other issues, those issues could be singled out for review according to the "weight of evidence" or some other appropriate formula. On the other hand, and again to offer only a single example, if Congress should desire only a minimum of review of fact questions arising under employees' compensation legislation, these too could be singled out for special treatment.

Without attempting to analyze the various types of cases and to formulate the proper standard of review to be applied to each, a few general observations may be made. First, though the judiciary cannot be expected to do the work of administration, it should be utilized to protect against clear error. The graver the possible effects of the error, the more searching should be the judicial power of review. Secondly, when discretionary power is validly conferred by Congress upon an administrative agency, the courts should not interfere in its exercise unless there is an obvious abuse of discretion. Thirdly, the courts should pay due attention to the fact that the decision under review has been rendered by a tribunal trained by experience to decide the questions at issue. Fourthly, since *manifestly* incorrect decisions by administrative agencies should not be permitted to stand, the "substantial evidence" rule, if it means a more restricted review, should be clarified by more precise legislative language.

The Committee has concluded in chapter VI of its report that in any given case—

the court should review the proceeding sufficiently to be satisfied that administrative determination is not arbitrary and is within permissible bounds of administrative discretion. * * * The Congress has power to regulate the extent of the courts' participation. When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires.

In view of existing deficiencies, we think it not sufficient to await and rely solely upon the benefits of a reorganization of subordinate administrative hearing officers and their procedure as recommended by the Committee, although such reorganization, if adequately directed by statute and faithfully carried out, will be productive of much good. It is unsatisfactory to the citizen and unfair to the courts to provide for judicial review without defining its scope. In effect the courts are asked to choose between themselves and other public agencies, they are asked to assume or deny themselves power of review, and they are made a party to the result of conflicting statutory interpretations. Under these circumstances, it is natural that the courts should lean backwards to deny themselves powers which Congress has not clearly conferred upon them.

III. LEGISLATIVE STANDARDS OF FAIR PROCEDURE

As the report of the Committee states, "the administrative process * * * is as old as the Government itself." But, in a practical sense, it is the phenomenon of a single generation. It is needless again to emphasize the fact that Federal administrative agencies have developed from their primitive estate of a generation ago until they are now an enterprise of gigantic proportions, far overshadowing in power, personnel, and prestige the largest industrial establishments. Administrative rule making and administrative adjudication are all-pervasive—they affect in a vital way virtually every man, woman, and child in the land. Yet, without implying criticism of those in authority, it may be said that the structure has so grown, without the benefit of an over-all guiding hand to appraise and improve, that now there are few who deny that reexamination and corrective measures are greatly to be desired.

Elsewhere the term "haphazard" has been used in reference to administrative agencies, though the term "formless" may better characterize the bulk of present-day administrative procedures. Indeed, if our committee studies reveal anything at all, they show that the numerous Federal administrative agencies have developed amorphously on the procedural side, with only rudimentary rule making procedures, with substantial defects in adjudicatory practices, and lacking in useful form and pattern of action. This lack of procedural pattern is a sin of omission rather than commission, but it has brought its train of disagreeable consequences.

Administrative agencies have been devised by Congress under the pressure of events for the exercise of new powers in new fields. Yet Congress has rarely undertaken to state the principles under which they shall operate. Views as to their proper method of operation range from entire absence of restrictions to and beyond the requirement of full judicial procedure, as in jury trials at common law. Not only has Congress given the agencies themselves little direction, it has given the public and the reviewing courts almost no indication of its desires as to their methods of operation.

Of course, whatever the procedure or lack of procedure, most citizens acquiesce in the judgment of "the Government." Those of modest means or humble interests rarely question a decision by a Federal official. Others feel that, no matter what the outcome, their business or their pocketbooks suffer by a contest. Anyone must recognize the uncertainties of such a contest. For these reasons, it is the more necessary to devise methods, and constantly improve them, by which the exercise of the diverse and far-reaching powers of the national Government will be kept more nearly within those channels of justice which everyone feels to be desirable. At the same time, we must take care that we do not cripple the nation by elaborate routines which stultify rather than aid the purposes of Government.

Suggested remedies.—In the absence of a complete separation of functions (as discussed under I above) and in addition to a proper and practical system of judicial review (as discussed under II above),

various procedural devices are available and are essential to promote fair adjudication and to remove uncertainties and confusions.

Since this Committee was created, a measure known as the Logan-Walter Bill (H. R. 6324, 76th Cong., 3d sess.) has received much attention as a solution of the problems of administrative law and procedure. Indeed, this proposal has assumed such prominence that it would be confusing to make recommendations on the same subject without indicating wherein our recommendations differ, and why. It was passed by both Houses of Congress and failed of enactment only by the veto of the President. The veto was placed in part on the ground that this Committee was about to make its report.

The Logan-Walter Bill, however, merely directs administrative agencies to make rules and regulations, provides a method for making adjudications, and hands the result to the courts for review of both rules and adjudications—without tangible directions. Moreover, it provides a single and rigid method for the making of rules or regulations, regardless of the kinds of rules or the practical needs of the subject; and it seems to contemplate judicial review of rules even in the absence of controversy. These and other important defects in that proposal are indicated more specifically in the appendix to this statement.

The measure proposed by this Committee, which is Exhibit I of its report, embodies in legislative form some of the essential conclusions of the Committee, although its report as a whole ranges over much more ground. That proposal, in essence, provides for the selection and functions of "hearing commissioners" (Sections 5-7 of Title I, and Title III) to replace the now common "trial examiners." These new officers are to be given powers to make decisions where present trial examiners are authorized only to make recommendations.

The significance of a reorganization of the hearing and decision process in the field of administrative justice is not to be minimized. A revision of the status and powers of hearing officers, such as the Committee suggests, involves a salutary change in the dynamics of the system. It aims at responsibility and simplicity, where anonymity and formlessness now exist. It enables parties to come face to face with an officer who is to hear, and decide in the first instance, any contested case. It necessarily aims at recruiting competent and independent officers for this purpose, without unduly dividing responsibility for the execution of public policy. Our point is, however, that it is insufficient merely to provide the means for the reorganization of the present process—it requires also the express legislative statement of a number of directions or standards as to the operation of that reorganized process.

The need for a legislative statement of standards of fair procedure.—In some quarters there is a fear of unduly hampering the freedom of action of administrative agencies, and a conviction that it is either impossible or unwise to provide by legislation for the great variety of administrative subjects and processes. The answer, we think, is to identify the few basic considerations and express them in legislative statements of policy, of principles, or of standards for the guidance of administrators, subject always to reasonable variation to meet varying needs. Modern legislation, by which the most intimate and vital interests of society are governed, is cast for the better part in similar terms. To say that man can be so governed,

but that the agents of the state cannot or should not be so governed, is a recognition of rejected forms of government. To govern the courts by weighty tradition, a bulky "Judicial Code," and uniform rules of practice but to give administrators only slight statutory attention is at least questionable in a democracy.

Administrative agencies are peculiarly sensitive to procedural and substantive provisions of statute, however general their terms—far more than to the statements of courts. Where controversy is stirred over a specific agency, we have only to look to the legislation under which it acts. If Congress has given constant attention, as it has to the Interstate Commerce Commission, a better result has been achieved. Without impairing government, a legislative statement of principles will go far toward dispelling the cloud that hovers over the administrative process. It will guide administrators and protect the citizen far more than the judicial review of particular administrative cases, which is available only to those few who can afford it. What is needed is not a detailed code but a set of principles and a statement of legislative policy. The prescribed pattern need not be, and should not be, a rigid mold. There should be ample room for necessary changes and full allowance for differing needs of different agencies.

Such a statement would be of invaluable assistance to the private persons on whom powers of government impinge, for they could learn more readily and clearly when, where, and how to proceed. Greater cooperation with Government officials would be assured. It would be of inestimable value to government itself by helping to alleviate the disrespect, distrust, and fear now felt by too large a percentage of citizens. Finally, there is reason to believe that administrative officials would welcome the assistance of general procedural instructions which, instead of leaving them groping in the dark, would furnish a pattern of action.

There is another and perhaps even more important reason for formulating such a statement of the essentials of administrative procedure—a reason which involves the fundamentals of modern government. An adequate pattern of procedure is imperatively needed to serve as a guide to and check upon administrative officials in the exercise of their discretionary powers. Little has been said in the committee report regarding administrative discretion, but we know the great extent to which discretionary powers figure in contemporary government. The administrative agency is a principal means of injecting the element of discretion into government, and bringing the judgment of men to bear upon the multitude of situations which arise in the daily enforcement of statutes. Such discretionary power is a necessary adjunct of present-day government, but people generally do not blind themselves to the possibilities of abuse which it affords. No more satisfactory way can be found of minimizing abuses, or the fear of abuses, than by legislative statement of standards of administrative procedure to chart the course of action, to insure publicity of process, to give the citizen every reasonable opportunity to present his case, and to insure that public officials act under circumstances calculated to produce a fair and prompt result.

Manifestly, Congress must provide alternative procedures for the making of the various kinds of rules and regulations which administrative agencies issue. In the matter of administrative adjudica-

tion, Congress should say whether or not, and in what respects, there shall be notice; whether a party is entitled to see the evidence and know the witnesses against him; whether consideration of cases shall be confined to the record or whether administrators shall be entitled to roam at large in securing additional private and untested information; whether deciding officers shall make the decisions they purport to make or whether anonymous persons shall do so; whether the uncertainties in judicial review shall be dispelled and such review simplified; and a group of similar or related subjects.

Upon such a statement of fundamentals any number of different formal procedures may be predicated. Some uniformity should be provided in the essentials. As Justice Brandeis (dissenting in *Burdeau v. McDowell*, 256 U. S. 465, 477) once said, "In the development of our liberty, insistence upon procedural regularity has been a large factor." To care for all possible contingencies, we propose that the President be given authority to suspend the operation of any provision as to any type of function or proceeding of any agency whenever he finds it impracticable or unworkable, upon full publicity and a report to Congress in connection with each suspension order. Such a provision, we think, is a necessary part of any legislation in this field.

One further purpose must be served by any such legislative statement. In several respects most agencies lack one or more essential powers of administration. A galaxy of regulatory statutes, for example, speaks solely in terms of the Secretary of Agriculture, thus ignoring the essential need for the Secretary to utilize assistance. Again, agencies are without formal direction or authority to issue types of rules or regulations which are indispensable if the citizen is to be informed of the organization and policy of any agency. Congress should recognize, specify, and confer these and other necessary powers. Otherwise, administration is unduly complicated; necessity leads to subterfuge, inactivity, hardship to the citizen, or the public, and unwarranted expense to the Government; and the cry for justice is thwarted by lack of the simple means to do justice.

A judge is surrounded by an elaborate and traditional system, but an administrator is often plucked from private pursuits and given scant guidance. He must have direction, for he has no established practice to show him the way. He must have a staff and auxiliary powers because he has no grand jury, state's attorney, or police to aid him. He must have discretion to organize and manage his job, because the pressure of events has allowed Congress no time to organize it for him. Within broad limits his judgment must be honored, because existing appellate tribunals have been organized for, and are busy with, different tasks. Such direction and such aid can be given or authorized only by Congress.

As a tangible illustration of the foregoing suggestions, we have appended to this statement what we conceive to be a basis for an administrative code of procedural powers and standards. In it we have embodied, among other things, the essential proposals and recommendations of the whole Committee as expressed in its report. An explanation of its titles and provisions is given in the form of notes.

APPENDIX B

FEDERAL ADMINISTRATIVE ACTIVITY AFFECTING PRIVATE INTERESTS BY RULE MAKING OR ADJUDICATION

In the following pages an effort is made to describe in brief compass the ends to which rule making and adjudication are directed by Federal administrative agencies whose operations involve persons outside the Government itself.⁴ A description so limited falls far short of a catalog of all administrative activity. For, while the promulgation of regulations and the deliberate process of adjudication intended to affect private interests play important roles in the operation of the Federal system, they are by no means encountered throughout the whole area of administrative functioning. Indeed, there are in our present organization many activities of a so-called service or managerial character which no doubt overshadow in importance those phases of governmental work which, from a legal point of view, affect private rights. The program of the Tennessee Valley Authority, for example, may more vitally determine the interests of power producers and consumers than may a more immediate and traditional attempt at rate regulation. The activities of lending agencies, such as the Reconstruction Finance Corporation, may for practical purposes determine whether a business is to continue in existence just as fully as though the agency had the authority to grant or refuse a license.

Nor can a description of administrative activity be completely developed if the work of agencies as aids to other branches of the Government be overlooked. Investigations made for Congress by one of the several administrative agencies may in the last analysis more sweepingly affect private interests than would the direct regulatory activity of the agency itself, for the investigations may give rise to new and more embracing statutory controls than any previously existing. Investigations which have in the past been conducted for Congress by the Interstate Commerce Commission, the Federal Trade

⁴ These agencies include the Commodity Exchange Commission, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, Federal Power Commission, Federal Reserve System, Federal Security Agency (Social Security Board, Public Health Service, and Food and Drug Administration), Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, National Mediation Board, National Railroad Adjustment Board, Railroad Retirement Board, Securities and Exchange Commission, United States Board of Tax Appeals, United States Employees' Compensation Commission, United States Maritime Commission, United States Tariff Commission, Veterans' Administration, and the following Departments: Agriculture (Agricultural Marketing Service, Commodity Exchange Administration, Agricultural Adjustment Administration, Bureau of Animal Industry, Bureau of Entomology and Plant Quarantine, and Sugar Division); Commerce (Civil Aeronautics Administration, Bureau of Marine Inspection and Navigation, and Patent Office); Interior (Bituminous Coal Division, General Land Office, Division of Grazing, Office of Indian Affairs, Bureau of Fisheries, and Bureau of Biological Survey); Justice (Immigration and Naturalization Service); Labor (Division of Public Contracts, Wage and Hour Division, and Children's Bureau); Post Office; State (Passport Division and Division of Controls); Treasury (Bureau of Internal Revenue, Processing Tax Board of Review, Bureau of the Comptroller of the Currency, and Bureau of Customs); and War (Office of the Chief of Engineers).

Commission, and the Maritime Commission are well known. But inquiries of this type are not limited to the named agencies. The Federal Communications Commission, for example, has but recently completed investigations into such dissimilar topics as, on the one hand, the telephone industry (including the manufacture and sale of telephone instruments and equipment), and, on the other hand, problems of safety on the Great Lakes and inland waterways.

Another limitation on the scope of the present descriptive statement must be noted. Many Federal agencies exercise power to make rules or determinations affecting private interests and at the same time engage in activities which involve neither rule making nor adjudication. In the following discussion of the agencies' work, no attempt has been made to set forth the latter type of functions, though of course they may constitute the major part of a particular agency's duties. Illustrations will readily occur. The War Department, for example, engages in regulatory work to some extent, though its work of that description is all but eclipsed by the more important military activities of the Department. So, too, the rule making and adjudication undertaken by the Post Office Department are merely incidental to its major function of delivering the mails. Nor is this mingling of "executive functions" with adjudication or rule making by the same agency something which is limited to the large and long-established departments. The Maritime Commission, for example, which is a somewhat recent recruit to the ranks of the so-called independent regulatory commissions, has exercised important powers which affected private rights; but at the same time it discharged responsibilities, bulking large in the totality of its activity, relative to the formulation and execution of a long-range program for replacements and additions to the American Merchant Marine; relative to the conducting of a training service for Merchant Marine personnel; relative to the ownership, building, buying, selling, chartering, and operation of ships; relative to the financing of private construction of vessels; relative to the administration of a general insurance fund to insure the Government's interest in privately owned vessels; and relative to the insurance of preferred ship mortgages.

Nonregulatory rule making and adjudication.—Within the range of rule making or adjudication which affects private interests may be found many activities which are not of a regulatory character. The Patent Office, for example, administers the patent laws and has charge of all matters pertaining to letters patent for inventions and the registration of trade-marks, prints, and labels. Similarly, on the rule-making side, the Secretary of Agriculture engages in an activity which is of a service rather than of a regulatory character when he establishes standards under the Cotton Standards Act, the Tobacco Standards Act, the Federal Seed Act, the Wool Standards Act, and the Grain Standards Act. Under the last named of these statutes, the Secretary establishes standards of quality and condition for corn, wheat, rye, oats, barley, flaxseed, and "such other grains as in his judgment the usages of the trade may warrant and permit." In doing so, the Secretary is in effect defining terms, the common understanding of which will facilitate trade in the products which have been standardized and which will reduce the area of dispute concerning fulfillment of contracts executed in good faith.

Benefactions.—In the field of benefactions, a field which has broadened with the years, the administrative determinations, though made after a process of adjudication, are obviously not part of any program of control or regulation, but are merely ascertainment of entitlement to Federal gifts. One may put aside the administrative methods of the various agencies which apply relief statutes; for these methods find their inspiration in traditions having little in common with those which gave rise to the determination of rights by more formal processes. Attention is accordingly now directed only toward those agencies which disburse benefits after there has been opportunity for some type of hearing.

In this group the first named, because it is of the most ancient lineage, is the Veterans' Administration. That agency, in addition to maintaining hospitals, veterans' homes, and other extensive services, administers laws relative to the relief of and providing benefits for former members of the military or naval forces or their dependents—pensions, insurance, hospital and domiciliary care, adjusted compensation (bonus), burial expenses, and retirement pay.

Also engaged in disbursing monetary benefits to individuals is the Social Security Board. That body does more than merely exercise a substantial measure of supervision and control over State agencies administering Federally aided programs of unemployment compensation, aid to dependent children, maternal and child welfare, aid to the blind, vocational rehabilitation and public health work, and old-age assistance. It also directly administers an extensive system of old-age and survivors insurance for the protection of workers in covered employments.

Somewhat similar to the Social Security Board is the Railroad Retirement Board, which executes not only an old-age and survivors insurance and pension program, but also a system of unemployment insurance for employees of express or sleeping-car companies; carriers by railroad; and companies owned or controlled by them which perform any service in connection with transportation by railroads.

The Department of the Interior, by reason of its jurisdiction over the public domain, also engages in activities which are benefactory in character, although at the present time the emphasis of the Department is more upon the conservation of the public resources than on their dispensation to individuals who are seeking the transfer of public property to themselves.⁵ Through its Grazing Service the Department grants grazing privileges on the public range; and through its General Land Office it conducts a program looking toward the disposal, lease, and utilization of public lands of the United States, including mineral bearing lands. The Department also engages in benefactory activities through its Office of Indian Affairs. The enormous size and complexity of the tasks of that unit of the Department make description difficult. The authority of the Office ranges from the management of the most vital aspects of the economic

⁵ This emphasis runs through all of the Department's work—so much so, indeed, that it has been widely proposed that its name should be altered to Department of Conservation. Its extensive rule-making power, exercised through such branches of the Department as the Bureau of Biological Survey, the Bureau of Fisheries, and the Grazing Service, is sought to be employed in such a manner as to achieve a maximum use of natural resources consistent with their proper conservation.

life of the Indians to the improvement of their health and sanitation, and the operation of schools. Its program is intended "to help the Indians, racially and individually, to support themselves economically, and to determine their own future."

Another type of adjudication involving a benefit program occurs in the United States Employees' Compensation Commission, which is that branch of the Federal Government charged with the duty of administering workmen's compensation laws—the various acts protecting Federal employees, military and naval reservists on training duty in time of peace, and workers on relief projects; the Longshoremen's and Harbor Workers' Compensation Act; and the District of Columbia Compensation Act.⁶

It would be a mistake, however, to suppose that all benefactions which are distributed through administrative activity are, like those thus far mentioned, of relatively small amounts. On the contrary, some Federal benefactions are sufficiently large to be known as subsidies and to be dispensed as such. For example, the Maritime Commission, charged with the duty of fostering, developing, and encouraging the maintenance of an adequate merchant marine, grants construction and operating subsidies so that American flagships may be built and maintained on the seas. Somewhat similarly, but by a different method, the Civil Aeronautics Administration is engaged in subsidizing the operation of air lines. That agency fixes air mail rates with a view to giving compensation to air carriers "sufficient to insure the performance of such [air mail] service and, together with all other revenues of the air carrier, to enable such carrier, under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." The Post Office Department, by determining whether certain mail matter may be admitted to the second-class mailing privilege, is another agency which in effect determines that a subsidy may be granted. The Department ascertains which periodical publications shall be given preferential postal rates and handling in accordance with "the historic policy of encouraging by low postal rates the dissemination of current intelligence." So important is the second-class mailing privilege that in *Lewis Publishing Company v. Wyman*, 152 Fed. 787, 793, the opinion was expressed that no publication of the type to which that privilege is granted "could exist for any length of time if required not only to pay the third-class postage, but to prepare it for the mails as such matter."

Collection agencies.—Other Federal agencies are engaged in securing the revenues which are necessary to permit the operation of our governmental system. As an incident of their revenue-collecting work they may utilize rule-making or adjudicatory processes.

The Bureau of Internal Revenue (and related review bodies, the Board of Tax Appeals and the Processing Tax Board of Review) is, of course, the revenue-gathering organization which affects the largest

⁶ Ancillary to its work in connection with adjudication of workmen's compensation claims is the United States Employees' Compensation Commission's control over insurance companies and self-insurers under the District of Columbia and Longshoremen's and Harbor Workers' Compensation Acts.

number of individuals and which comes to mind at once in this connection. Of more remote origin than the Bureau of Internal Revenue and of great practical as well as historical importance is the Bureau of Customs of the Department of the Treasury. In this category, too, are the Railroad Retirement Board, which, with the same general powers and procedures as are utilized in other circumstances by the Bureau of Internal Revenue, collects from employers the "contributions" which are due from them under the Railroad Employment Insurance Act of 1938; and the Bureau of Marine Inspection and Navigation, which, through the several collectors of customs, administers the tonnage-tax laws.

Banks and banking.—Federal concern with problems of banks and banking practices has been markedly on the increase in recent decades. Yet that concern has not been directed solely toward the regulation of banks; on the contrary, the bulk of Federal activity is in the direction of furnishing services and facilities to banking institutions. Through the Federal Reserve System, for example, an instrumentality is provided for holding the legal reserves of member banks, offering facilities for fluid transfer of such reserves and ready discounting of eligible paper, furnishing currency for circulation, and establishing machinery for the ready collection and crediting of checks at par. Similarly, the Federal Home Loan Bank System has been established to provide a credit reserve for the thrift and home-financing institutions of the United States; that is, building and loan, savings and loan, and homestead associations, savings and cooperative banks, insurance companies, and similar home-financing concerns. Through the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation, insurance has been provided for deposits in banks and savings and loan associations, respectively.

At the same time, banks are regulated for the protection of depositors by the Bureau of the Comptroller of the Currency, by the Federal Deposit Insurance Corporation, by the Federal Reserve System, and by the Federal Home Loan Bank System through control over entry into the business, regulation of operations to guard against unsound or illegal practices, supervision over capital adjustments, and restrictions upon establishment and relocation of branches. The Federal Reserve System, moreover, is devised to exert a measure of control over credit, through five chief instruments of regulation, namely, regulation of discount rates, regulation of margin requirements, regulation of reserve requirements, open-market operations, and regulation of maximum rates of interest on deposits.

Wages and working conditions.—Through a variety of agencies the Federal Government has manifested interest in wages and working conditions.

The Fair Labor Standards Act of 1938, administered by the Wage and Hour Division and the Children's Bureau of the Department of Labor, affects more workers than does any other single statute in this field. That Act prescribes minimum hourly rates of pay for industries in interstate commerce, and establishes maximum hours—now forty hours per week—after which it is required that wages be paid at an overtime rate. The Act provides that the Administrator of the Wage and Hour Division, upon recommendation of industry

committees described by the statute, may issue orders calling for the payment of wages in particular industries at rates higher than the minima prescribed by the statute itself.

Another statute affecting numerous employees and also administered by the Department of Labor is the Walsh-Healey Act. This statute, the enforcement of which is entrusted to the Division of Public Contracts, provides that in performing certain types of Government contracts contractors must undertake to pay their employees "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work * * *." The Act is not self-executing in respect of its minimum wage provisions, but becomes operative in this particular only when the prevailing minimum wages have been determined for a particular industry by the Secretary of Labor.⁷ Like the Fair Labor Standards Act, too, the Walsh-Healey Act and its appurtenant regulations limit hours of labor to forty hours per week, with a provision that additional hours must be compensated at overtime rates; no more than eight hours are permitted to be worked in any one day at normal wage rates. Moreover, the Walsh-Healey Act, as does the Fair Labor Standards Act of 1938, contains prohibitions against certain types of child labor; and it requires that those contractors with the Government who are affected by the statute must stipulate that "working conditions which are insanitary or hazardous or dangerous to the health and safety of employees" engaged in performing Government contracts, will not be permitted.

It is not only in the Department of Labor, however, that authority over wages and working conditions has been lodged. The Maritime Commission, for example, has been given power to fix minimum manning scales, minimum wage scales, and minimum working conditions for men on the merchant vessels which receive operating-differential subsidies and on the vessels operated by the Commission itself. This power involves the Commission's inspection of individual vessels to determine the requirements relating to them, as well as inspection of vessels when they reach port in order to assure conformity with the requirements the Commission may have laid down.

Under the Sugar Act of 1937 the Secretary of Agriculture may make certain payments (in the nature of an agricultural subsidy) to domestic sugar-cane and sugar-beet producers if named conditions are met. Among these are nonemployment of child labor and payment of fair and reasonable minimum wages to field labor.

In transportation by air and land Congress has chosen to confer the power upon administrative agencies to regulate hours of labor. In the interest of safety the Civil Aeronautics Administration has been authorized to prescribe the maximum hours or periods of service of airmen and other employees of air carriers, as has been the Interstate Commerce Commission in respect of certain classes of transportation employees.

Labor relations.—Bordering the matters just discussed is the field of employer-employee relations. In this area a number of Federal agencies are at work.

⁷ In this respect, the Walsh-Healey Act differs from the Bacon-Davis Act, also administered by the Department of Labor, which requires that all public-works contracts must contain a clause assuring the payment of wages at prevailing rates.

Engaged in various types of mediatory and conciliatory activities are the United States Conciliation Service of the Department of Labor, the Maritime Labor Board, and a National Mediation Board, the last named having the additional duty of investigating and certifying who are the representatives of a carrier's employees for collective-bargaining purposes.

Also concerned with labor relations in the railroad industry is the National Railroad Adjustment Board, which through its four divisions has the function of adjusting controversies "between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

The declared purpose of the National Labor Relations Act is to remove obstructions to interstate commerce by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection." To aid in achieving this end the statute created the National Labor Relations Board, empowered to order cessation of unfair labor practices or standards of conduct by employers which have a tendency to impair the right of employees to organize and to bargain collectively through representatives of their own choosing. The Board is also directed to investigate the question whether there is a representative selected by a majority of employees in an appropriate bargaining unit, and to certify the representative so selected as the exclusive bargaining agency for the employees in that unit.

The principles embodied in the National Labor Relations Act are given specific application by the Bituminous Coal Act of 1937, which declares the public policy of the United States to be that employees of coal producers shall have the right to organize and bargain collectively without interference, and which forbids the purchase by the United States or any of its agencies of coal found by the Bituminous Coal Division to have been produced in contravention of the statute.

Rates and charges.—Federal preoccupation with rates and charges for services of various sorts is evidenced in the assignment of duties to many of the administrative establishments.

The Interstate Commerce Commission, with its broad and now well-established powers over land transportation companies, is of course the prototype of the agencies which are engaged in rate making. Powers modeled upon those of the Interstate Commerce Commission are exercised by the Civil Aeronautics Administration with respect to air transport companies and, until recent partial amalgamation with the Interstate Commerce Commission, by the United States Maritime Commission in the field of marine transportation. The last-named agency, for example, was empowered to enforce statutory prohibitions against giving rebates or using discriminatory or other unfair methods by carriers of water-borne commerce, so that shippers and competing carriers may be protected from unjust treatment. Common carriers by water were required to secure Commission approval of agreements and schedules concerning rates, competition, and pooling and were forbidden to indulge such unfair practices as false billing,

false classification, false weighing, preferences or prejudices, or inducing insurers not to give competing carriers favorable rates of insurance. The Commission was further empowered to determine whether rates were unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters. Affirmatively, it could fix just and reasonable rates for carriers other than those engaged in foreign commerce, and could enforce appropriate regulations relating to handling, storing, and delivering property.

The Communications Act of 1934, whose enforcement is entrusted to the Federal Communications Commission, regulates interstate and foreign communications by wire and radio, and persons engaged in those activities, for the declared purpose (among others) of making available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." To that end the Federal Communications Commission may fix just and reasonable rates for telephone and telegraph companies, which are already under a statutory command to avoid excessive, discriminatory or unduly preferential charges and practices.

The Federal Power Commission has the authority to regulate the transmission and sale at wholesale of electric energy or natural gas in interstate commerce, to the extent that those matters are not subject to state regulation; exercise of this authority involves broad supervision over rates and service of power and natural gas companies.

The Secretary of War has been empowered to prescribe rates and charges of toll bridges, a power which he has employed when complaints have been substantiated that schedules in force involved excessive charges or preferential or prejudicial treatment of certain classes of traffic.

The Secretary of Agriculture has been given important rate-making powers, not only with respect to services of a public utility character, but also with respect to certain types of personal services. Under the Packers and Stockyards Act the Secretary is authorized to assure the furnishing of reasonable stockyard services at fair rates without discrimination; this authority entails the fixing of rates upon property of hypothetically ascertainable value, namely, the stockyards themselves. In addition, the Secretary may, under the same statute, fix the rates and prescribe the services to be rendered by market agencies and live poultry handlers; in doing so, the Secretary establishes fees for personal services rendered. A similar power is exercised by the Secretary under the Grain Standards Act; that statute contemplates his fixing the fees which may properly be charged by licensed grain inspectors.

Control over competition.—The Federal Government has long manifested concern lest businesses be destroyed or damaged either by monopolies or by methods of competition which placed scrupulous businessmen at a disadvantage. Expressive of this concern is the Federal Trade Commission Act of 1914, which provides in part that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." The Federal Trade Commission, created by that act, was empowered and directed to prevent such unfair methods of competition. In 1938 the statute was amended to prohibit dissemination of false advertising calculated to induce the purchase of devices, drugs, or

cosmetics. In addition, various unfair methods of competition are specifically named—for example, price discrimination which affects competition, some types of commercial bribery, tying contracts, lessening of competition by purchases of stock of rival corporations, and so on.

Similarly motivated are provisions of the statute whose administration has been entrusted to what was formerly the Federal Alcohol Administration, now absorbed by the Alcohol Tax Unit of the Bureau of Internal Revenue. The purpose of the statute is to maintain competition in the liquor industry. It therefore prescribes certain predatory practices which would tend to result in the control of retail outlets by a few powerful producers or wholesalers of alcoholic beverages—for example, exclusive outlet agreements, "tied houses," commercial bribery, and the like. Further, advertising and bottle labeling must not be false, must not contain disparagement of competitors, and must otherwise avoid what might constitute an unfair method of competition.

Another example of congressional interest in this field of control may be found in the Packers and Stockyards Act, which makes it unlawful for any packer to engage in unfair, discriminatory, or deceptive practices or to carry on his business in such fashion that commerce will be restrained, that monopoly will be created, or that price control will be facilitated. Others than packers are bidden by the statute to pursue a course of fair dealing, for it is made "unlawful for any stockyard owner, market agency, or dealer, to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device" in connection with his business. More recently the act has been extended by empowering the Secretary of Agriculture to prevent unfair, deceptive, and fraudulent practices and devices in the handling of live poultry which have caused loss to producers and unduly high prices to consumers and which have constituted a restraint and burden upon interstate commerce.

The Secretary of Agriculture is authorized by another statute, the Grain Standards Act of 1916, to proceed against (and to publish his findings with reference to) any person believed by him to have been guilty of misrepresentation, fraud, or deceit in connection with the certification or shipment of grain in interstate or foreign commerce.

The Bituminous Coal Division, acting under the Bituminous Coal Act of 1937, is charged with the duty of preventing unfair trade practices in the marketing of coals; the Act sets forth a group of unfair methods of competition, in the main resembling those which are in a general fashion already within the jurisdiction of the Federal Trade Commission.

The Tariff Commission has a responsibility to protect United States businesses against the necessity of competing at an unfair disadvantage with goods produced abroad. Thus, it is responsible for making inquiries looking toward tariff adjustments in order to equalize the differences in costs of production in the United States and the principal competing country. Further, it is directed to discover foreign discrimination against American goods and to recommend appropriate action to the President either in terms of new or additional duties or in terms of excluding from importation any

products of the country in question.⁸ The Tariff Act of 1930, moreover, places upon the Tariff Commission the responsibility of giving substance to the statutory denunciation of unfair methods of competition and unfair acts in the importation of merchandise into the United States which tend "to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States."

Congressional concern with the possibility that monopolies may be formed by coalition of separate businesses is instanced by the power given to the Federal Communications Commission in the communications field, the Alcohol Tax Unit (replacing the Federal Alcohol Administration) in respect of alcoholic beverages, and the Board of Governors of the Federal Reserve System in respect of banks to prevent undesirable interlocking directorates. Similarly, the Civil Aeronautics Act prohibits certain relationships, such as interlocking directorates, between an air carrier and any other person who is common carrier or who is engaged in any phase of aeronautics, unless it is shown to the Civil Aeronautics Board's satisfaction "that the public interest will not be adversely affected thereby"; a like power to control interlocking directorates is had by the Interstate Commerce Commission. So, too, the Federal Power Commission may prevent interlocking directorates in two or more power companies, in a power company and a bank or underwriter dealing with power companies, or in a power company and an electrical-equipment supplier; and the Federal Power Commission is also given control over the sale, lease, merger, and consolidation of facilities of power and gas companies, and the acquisition of the securities of one such company by another.⁹

But while administrative agencies have been given important powers to prevent the destruction of competition, they have also in a number of instances been given authority to seek the wasteful avoidance of competition. Thus, for example, certificates of public necessity and convenience must be secured from the Interstate Commerce Commission before railroads or motor carriers may undertake to add to existing competition; the Civil Aeronautics Board may similarly control entry into business of new air transportation companies; the Federal Communications Commission, by the issuing of licenses for radio broadcasting stations, can prevent excessive competition from interfering with effective utilization of the channels of radio communication; the Federal Power Commission is given authority to license all projects for development of power on navigable waterways and on nonnavigable streams subject to the control of Congress under the commerce power.

Likewise, agencies have been authorized by Congress to engage in regulatory measures intended to reduce harmful competition among producers and to bring order into industries which have been damaged by too much, rather than too little, rivalry. Thus, the Bituminous Coal Division is empowered by the Bituminous Coal Act of 1937 to es-

⁸ The Secretary of the Treasury has a somewhat similar duty to perform in connection with the imposition by him of countervailing duties when imported goods have been subsidized by manufacturers' or exporters' bounties abroad. The same may be said of the Secretary's power in respect of dumping duties.

⁹ Comparable powers have been granted by statute to other agencies such as the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Communications Commission, which share regulatory authority in the "public utility" field.

establish minimum prices for coal at the mine at a level which will, on the average, return the costs of production. And the Department of Agriculture, under the Agricultural Marketing Act of 1937, is charged with the duty of effectuating a policy of establishing and maintaining such orderly marketing conditions as will provide farmers with a purchasing power equivalent to that which they enjoyed at a designated period in the past. This it seeks to do by agreements or orders which are, in effect, codes prescribing the amount of production, distribution of surplus, methods of distribution, and the like. The codes may forbid unfair practices, including the selling of products at prices lower than those fixed by the agreements or orders.¹⁰

Protection of consumers, purchasers, and shippers.—Many agencies are engaged in some phase of activity having as its purpose the protection of consumers, purchasers, or shippers against the consequences of misrepresentation or other unconscionable business practices.

The Federal Trade Commission, under Section 12 (a) of the Federal Trade Commission Act, seeks to restrain the dissemination of false advertisements which may induce the purchase of drugs, devices, or cosmetics.

The Food and Drug Administration of the Federal Security Agency has power to seize adulterated or misbranded foods, drugs, or cosmetics and to prosecute the shipper,¹¹ while new drugs and foods are denied the channels of interstate commerce until their safety has been approved. The Food and Drug Administration, moreover, has authority to promulgate food standards having the force and effect of law, relating to the identity and quality of foods and to reasonable standards of fill of containers.

The Post Office Department through its authority to issue fraud orders barring continued use of postal facilities in furtherance of fraudulent schemes, is in a position to prevent the victimization of unwary consumers and purchasers by those whose business is carried on through the mails.¹²

The Alcohol Tax Unit (having absorbed the functions of the Federal Alcohol Administration) protects consumers of alcoholic beverages by supervising the labeling and advertising practices of the liquor industry; requirements have been made with respect to standards of identity for each of the various types of alcoholic beverages, with respect to mandatory informative material intended fully to apprise the consumer of the identity and quality of the product, and with respect to avoidance of false or misleading material, such as claims of therapeutic value.

The Bituminous Coal Division may proceed against those who intentionally misrepresent coal sizes or analyses, or who disseminate false or deceptive statements, in advertising or otherwise, regarding size, quality, preparation, or origin of coal.

¹⁰ Somewhat similar authority is given the Secretary of Agriculture by the Sugar Act of 1937, which contemplates that the sugar requirements of American consumers will be annually determined by the Secretary, who will in accordance with that determination fix marketing or import quotas for the several domestic and foreign sugar-producing areas supplying the American market.

¹¹ A similar power is conferred upon the Secretary of Agriculture with respect to insecticides and fungicides.

¹² The Post Office Department has also been given the power to exclude from the mails obscene publications and other material which statutes have declared to be nonmailable.

The Department of Agriculture administers the Meat Inspection Act, the Animal Quarantine Act, and other statutes related to the development of the livestock and meat industries of the United States, and to the protection of consumers of meat products. It enforces also the Plant Quarantine Act, which regulates imports and interstate movement of plants in order to prevent the introduction or spread of plant diseases and of plants which are hosts to insect pests.

Investors receive protection from administrative establishments other than the Securities and Exchange Commission, which is commonly thought of as the outstanding protective agency in this field. The Interstate Commerce Commission, for example, exerts supervisory control over railroad and motor carrier financing, just as, with respect to some security issues, the Federal Power Commission may exercise authority over the financing of a power or gas company. It is nevertheless true that the Securities and Exchange Commission is preeminent in this area. Among the statutes administered by that agency are the Securities Act of 1933, sometimes known as the "Truth-in-Securities Act," which is intended to provide "full and fair disclosure of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof * * *." The Securities Exchange Act of 1934 is a statute intended "to provide for the regulation of securities exchanges and of over-the-counter markets * * * to prevent inequitable and unfair practices on such exchanges and markets * * *." Under this law the Securities and Exchange Commission directly supervises the securities markets, restricts borrowing, guards against a manipulation of security prices, and enforces segregation and limitation of functions of exchange members, brokers, and dealers. The Public Utility Holding Company Act of 1935, also administered by the Securities and Exchange Commission, imposes upon holding companies, their subsidiaries, and affiliates requirements of Federal approval of the major financial transactions of their managements in order to safeguard investments in the companies.¹³

The Commodity Exchange Commission and the Secretary of Agriculture, performing functions prescribed by the Commodity Exchange Act, engage in activities somewhat parallel to those of the Securities and Exchange Commission. The Commodity Exchange Act is designed to regulate trading in futures and dealings on exchanges in wheat, cotton, rice, corn, oats, barley, flaxseed, grain sorghums, mill feeds, eggs, Irish potatoes, and wool tops. The act gives authority to control the designation of boards of trade, to register merchants and brokers using such facilities, and to make regulations relating to futures trading with a view to eliminating manipulation and deceit, limiting speculative transactions, and preventing misuse of customers' funds by brokers.

The Secretary of Agriculture has additional powers to protect shippers and purchasers under the Perishable Agricultural Com-

¹³ The Public Utility Holding Company Act, in addition to imposing requirements of Federal approval of the financial transactions of the managements of holding company systems, also seeks affirmatively to assure some simplification of corporate structure and some measure of geographical integration of the systems. By striking at intrasystem loans, service contracts, and the like, the statute seeks to end abuses which in some instances had produced waste and high rates.

modities Act and the Grain Standards Act. The former act, aimed at unfair practices by which brokers or commission merchants or dealers might injure shippers of perishable agricultural commodities, may give rise to license revocation proceedings or reparation suits before the Secretary of Agriculture. Under the latter act the Secretary of Agriculture reviews and revises gradings of licensed grain inspectors upon application of any interested party, fixes inspectors' fees, and takes disciplinary action in cases of misrepresentation, fraud, or deceit in connection with the certification or shipment of grain in interstate or foreign commerce.

Safety.—Physical safety, particularly in connection with transportation operations, is sought to be furthered by a number of agencies. Among them may be prominently mentioned the Interstate Commerce Commission, with its work of locomotive inspection, its power to require the installation of appropriate safety appliances and the utilization of adequate equipment, its supervisory power over the operations of motor carriers, its enforcement of regulations governing the transportation of explosives, and so on.

Also prominent in this area is the Bureau of Marine Inspection and Navigation of the Department of Commerce, which has jurisdiction to inspect vessels; investigate marine casualties; grant licenses and certificates to officers and seamen (and suspend or revoke them when warranted); impose, remit, and mitigate fines and other penalties for violations of the navigation laws; and prepare and promulgate regulations governing construction, equipment, personnel, operation and load lines of vessels, all in order to promote safety at sea.

Participating in the governmental effort to secure the safety of life and property at sea is the Federal Communications Commission which has power to regulate the equipment of vessels with respect to radio installations and to inspect their radio equipment and apparatus. Like the Bureau of Marine Inspection and Navigation, the Federal Communications Commission has authority to issue occupational licenses; it licenses radio operators upon being satisfied that the licensees are capable of giving effective service, and it may revoke the licenses if their holders prove themselves to be unworthy.¹⁴

The Civil Aeronautics Administration also has broad powers to secure safe operation of aircraft. Not only does it have opportunity to control the issuance of airmen certificates, required before one may

¹⁴ It should be emphasized that occupational licenses of this Commission and of other Federal governmental agencies are not in every instance related to matters of physical safety. It is not only the radio operators of ships at sea who must obtain a license from the Federal Communications Commission, for no person may use or operate any apparatus for radio transmission until he has first secured the Commission's consent. Other instances of occupational licenses which are issued for purposes of control not related to safety may be found in the Department of Agriculture. The Secretary of Agriculture licenses grain inspectors to apply the standards he has laid down for the grading of grain; here, the consideration is proved capacity of the inspectors to understand and accurately to apply the technical standards that have been promulgated and their work is supervised by the Secretary to assure their faithful observance of the responsibilities lodged in them. Under the Perishable Agricultural Commodities Act and the Packers and Stockyards Act, respectively, the Secretary of Agriculture licenses persons handling or marketing produce and persons handling live poultry; under both these acts the purpose of the license is to protect producers against unprincipled persons who might injure them economically in the process of marketing their products. Even the various seamen's certificates which are issued by the Bureau of Marine Inspection and Navigation are not wholly related to matters of safety at sea, for all members of the crew, including those (such as cooks and waiters) who have no part in the navigation of the vessel, must secure certificates from the Bureau permitting their employment. In this instance the purpose of the licenses is to assure some measure of control over discipline and standards of service in the American merchant marine.

serve in any capacity in connection with any civil aircraft used in air commerce, but in addition the Administration may grant or withhold aircraft certificates covering aircraft and the component parts of aircraft. Operation of an aircraft in air commerce without appropriate certificates is prohibited. Aircraft certificates relate both to the airworthiness of an individual craft and also to the general type of aircraft to which the certificate pertains. As an incident to the issuance by it of these production certificates, the Civil Aeronautics Administration is authorized to prescribe standards governing design, materials, workmanship, construction, and performance of aircraft engines and propellers. It has a similar authority with respect to appliances for use in and the inspection and servicing of aircraft. Moreover, the Administration prescribes traffic rules which govern flight operations and may fix the maximum hours of airmen to insure their fitness to perform the tasks entrusted to them.

The War Department, in connection with its power over the placing of obstructions in navigable waters, plays an important role in assuring safe and unimpeded navigation. Incident to its general power is the authority to establish anchorage grounds and harbor lines, to remove wrecks from navigable waters, and to regulate the floating of logs and the dumping of dredgings and other refuse in navigable waters.

Liquor regulation.—Regulation of the liquor business has been undertaken by the Federal Government as well as by the governments of States and their subdivisions. With the exception of brewers, retailers, and State monopolies, all units of the liquor industry must secure permits whose duration is conditioned on compliance with and observance of all Federal laws relating to alcoholic beverages. Permits issued by the Federal Alcohol Administration before its absorption by the Alcohol Tax Unit have brought some 15,000 licensees, most of them wholesalers, within the observation of a Federal administrative agency; several thousand permits have been revoked, annulled, or voluntarily canceled.

Licensing power is also exercised over certain activities collateral to liquor production itself, such as, for example, the manufacture and sale of industrial alcohol, beverage containers, and the like; but this power, which is exercised by the Secretary of the Treasury and the Commissioner of Internal Revenue, has as its clear purpose control over potential instrumentalities of tax evasion, rather than regulation or supervision over the affected business as such.

Munitions control.—Through the Division of Controls, the Secretary of State administers various congressional enactments governing the trade in implements of war. This involves, among other supervisory activities, registering manufacturers, exporters, and importers of arms, ammunition, and military implements; and issuing (or denying) licenses for the exportation and importation of these articles, as well as for the exportation of tin-plate scrap and of helium gas.

Citizenship; aliens.—The Department of State exercises the often vitally important function of determining the citizenship of applicants for American passports or protection, the granting of which is conditioned upon proof of American citizenship. Its work in this regard may involve resolution of difficult questions relating to the acquisition

and loss of American nationality, dual nationality, and the right of a person to demand governmental intervention in his behalf when involved in difficulties abroad.

The Immigration and Naturalization Service of the Department of Justice, formerly of the Department of Labor, administers statutes relating to the admission, exclusion, and deportation of aliens and the naturalization of aliens who lawfully reside in the United States.