"RULE MAKING," "ADJUDICATION" AND EXEMPTIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT

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The Administrative Procedure Act became law on June 11, 1945. Leaving aside the public information and judicial review provisions, the Act prescribes procedures to be followed by federal administrative agencies in exercising adjudicatory and substantive rule making functions. The scope of the Act, i.e., the applicability of its various requirements, is defined largely by the definitions and exemptions set forth in the Act. The exemption provisions are particularly important because of the draftsmen’s understandable difficulty in defining the agency functions which were to be subject to the Act. The purpose of this article is to suggest a pattern for interpretation of the classification and exemption provisions of the Act under which proceedings of essentially the same nature will be governed by the same procedural requirements. This should be the dominant rule in construing the definition and exemption provisions.

EXEMPTED AGENCIES AND FUNCTIONS

"Agency" is defined in section 2 (a) of the Act as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia". Section 2 (a) also provides that the following agencies and functions shall be subject only to the public information requirements of Section 3 of the Act: (1) representative arbitration or conciliation agencies such as the Railway Adjustment Board, (2) courts martial and military commissions, (3) "military or naval authority exercised in the field in time of war or in occupied territory", (4) "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947," such as price control and priorities, and (5) "the functions conferred by the following statutes: Selective Training and Service Act of 1940;

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Contract Settlement Act of 1944; Surplus Property Act of 1944; and the Veterans Emergency Housing Act of 1946".2 These exemptions, coupled with the exemption of "military, naval, or foreign affairs functions" from the provisions relating to rule making and adjudication, result in the Administrative Procedure Act having no application (apart from the publication requirements) to administrative rule making and adjudication involving military, naval, or foreign affairs functions, the temporary war agencies and functions, the Selective Service System, and certain arbitration and conciliation activities.

DISTINCTION BETWEEN RULE MAKING AND ADJUDICATION

Under the Act, there are important differences between the procedures prescribed for rule making and adjudication. Thus, the initial question in the application of the Act is whether a particular agency function is rule making or adjudication. "Rule making" and "rule", and "adjudication" and "order" (i.e., the act of adjudication) are defined in Section 2 as follows:

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

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

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

The striking feature of the definition of "rule" is that it must be of "future effect".3 A rule may be of either "general or particular

2. The exemption for functions conferred by the Veterans Emergency Housing Act of 1946 was added by Public Laws 663 and 719, 79th Cong., 2d Sess. (1946).
3. Rules as agency statements designed "to describe the organization, procedure, or practice requirements of any agency" are subject only to the publication requirements of § 3 (a), and will not be discussed hereafter.
applicability", i.e., it may apply to a class or to a named person. But it must be of future effect—implementing, interpreting, or prescribing law or policy. In addition to this general definition, "rule" is further defined to include "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof," etc. Two points should be made with respect to these specific matters included in rule making: (1) agency action relating to any of these matters is a rule regardless of whether such action applies to a class of persons or to a single person; and (2) the enumerated activities are not intended to constitute an exclusive definition of "rule" but are intended only to be illustrative.\(^4\)

Adjudication is defined as "agency process for the formulation of an order". An order is "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing". That is, adjudication is defined as agency action other than rule making and including licensing. Thus, in determining whether a particular agency function is rule making or adjudication, the first rule of construction is to determine whether it falls within the more affirmative and specific definition of "rule" in Section 2 (c); if not, it is adjudication.

Licensing, which is thus included in the definition of "adjudication," is defined as "agency process respecting the grant, renewal, denial, etc., of a license." "License" is defined as including "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission". This definition of "license" in terms of agency "approval" or "permission" obviously overlaps the definition of "rule" as the "approval or prescription for the future" of the specified and illustrative agency functions. The area of overlap is indicated by the query as to whether the determination of an application for approval of the merger of two railroads under Section 5 of the Interstate Commerce Act,\(^5\) or for approval of a new issue of securities pursuant to Section 7 of the Public Utility Holding Company Act,\(^6\) is rule making or adjudication.\(^7\)

\(^4\) H. R. REP. No. 1980, p. 20; SEN. Doc. No. 248, p. 254: "The specification of some of the activities that are rule making is included to illustrate and to embrace them in the definition beyond question."


\(^7\) However in many cases, this apparent overlap does not create major difficulties. In the merger and security issue examples given above, the respective statutes require hearing and decision on the record; thus, §§ 7 and 8 of the Act would be applicable to such proceedings regardless of whether they are classified as rule making or licensing (adjudication). Furthermore, even if such proceedings be regarded as "licensing", they clearly involve "determining applications for initial licenses", which is exempt from the separation of functions requirements of § 5 (c) and which is classified with rule making for the purposes or §§ 7 (c) and 8 (a). However, there are several, though
The first rule of construction has been noted—look first to the definition of rule in Section 2 (c); if the particular agency action has "future effect" and falls within one of the specific classes there listed, such as wages, it is a rule, and escapes the residual definition of adjudication. But this rule of construction is insufficient because the specific enumeration of activities included in rule making is only illustrative. Thus, how shall we classify applications for loans, benefits, subsidies, and grants-in-aid, and claims under the Old Age and Survivors’ insurance provisions of the Social Security Act? The answer can be supplied only by seeking a more functional distinction between rule making and adjudication.

The legislative history. The various drafts of S. 7, the bill which was enacted, indicate that the definitions were considerably revised rather late in the game, considering that the history of the bill dates back to 1941. As S. 7 was originally introduced in the Senate in January 1945, "rule" was defined as "the whole or any part of any agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency"; "Order" was described as "the whole or any part of the final disposition or judgment (whether or not affirmative, negative, or declaratory in form) of any agency," and "adjudication" as agency "process, in a particular instance other
than rule making but including licensing.” In the Senate Comparative Committee Print it was stated that “The definition of rule making and rule follows essentially the definitions of the Federal Register Act in which the essential language is ‘general applicability’ and legal ‘effect’.” And as to the definition of adjudication it was said that “the words ‘other than rule making’ serve to make the essential distinction.” In the Comparative Committee Print revised text, however, the definition of “rule making” was revised to read “agency process for the formulation, amendment, or repeal of a rule and includes rate making or wage or price fixing”, and the following comment was made:

“The House Judiciary Committee hearings and some of the agency comments disclose a misunderstanding that ‘rule making’ includes rate making or price or wage fixing, although both on principle, under the repeated decisions of the Supreme Court, and by the specific language of subsection 2 (c) such functions are definitely rule making. The classification of these functions as rule making, which they properly are, is important because many provisions of the bill do not apply to rule making. If deemed necessary the language of the definition may be amplified by adding, after the word ‘include’ in the second sentence, the words ‘the prescription for the future of rates, wages, facilities, appliances, services, allowances therefor, or of valuations, costs, accounting, or practices bearing thereon.’”

It was apparently deemed necessary to make the suggested amplification, because as S. 7 was reported by the Judiciary Committee and passed by the Senate, Section 2 (c) read as follows:

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

At this point, then, “rule” was defined as “agency statement of general applicability” plus, by virtue of the definition of “rule making” the approval or prescription for the future of rates, wages, etc. Such “approval or prescription for the future” of the specified subjects could be of either general or particular applicability.11

This tremendous broadening of the concept of "rule" and the con-
sequent narrowing of "adjudication" was apparently designed to meet
agency insistence that flexible procedures must be provided for cases
characterized by the shaping of broad policies upon the basis of masses
of technical data—cases in which it would be idle to expect an effective
determination from a single hearing officer as required for adjudication
procedures. At this point, however, the "rule" definition was some-
what confused. It had started with the concept of agency action of
general applicability. Now it had been enlarged to include agency
action of particular applicability and future effect with respect to im-
portant classes of matters.

As S. 7 was reported by the House Committee on the Judiciary
in May 1946, the definitions of "rule" and "order" were in their pres-
ent form. The definition of "rule" was recast as "any agency state-
ment of general or particular applicability and future effect". In a
footnote in Appendix A of the House Committee report, it is ex-
plained that "The change of the language to embrace specifically rules
of 'particular' as well as 'general' applicability is necessary in order to
avoid controversy and assure coverage of rule making addressed to
named persons. The Senate Committee report so interprets the provi-
sion, and the other changes are likewise in conformity with the Senate
Committee report (p. 11)." At the same time the word "injunctive"
was added to the definition of order in Section 2 (d). It was stated
that "This addition is prompted by the fact that some people interpret
'future effect' as used in defining rule making, to include injunctive
action, whereas the latter is traditionally and clearly adjudication. It is
made even more necessary that this matter be clarified because of the
amendment of Section 2 (c) to embrace clearly particularized rule
making as set forth in note 1."

Thus, in terms of what the draftsmen actually did, the definition
of "rule" ended up with the entire emphasis on "future effect" and
"approval or prescription for the future". The conventional emphasis
on "general applicability" was thrown overboard, and "injunctive"

12. See testimony of I. C. C. Commissioner Aitchison before House Judiciary Sub-
committee in June 1945. SEN. Doc. No. 248, pp. 91 et seq.
No. 1980, p. 20; SEN. Doc. No. 248, p. 254: "Injunctive" action is a common deter-
mination of past or existing lawfulness, although the remedy or sanction is in form
cast as a command or restriction for the future rather than as a fine, assessment of
damages or other present penalty.
15. See the Model State Administrative Procedure Act (in 1944 Handbook of the
National Conference of Commissioners on Uniform State Laws, p. 329), in which the
distinction is between "rule" and "contested case." Rule is defined as "every regula-
tion, standard, or statement of policy or interpretation of general application and future
effect." Also, Pennsylvania's Administrative Agency Law, PA. STAT. ANN., tit. 71,
§ 1710.1 (Purdon, Supp. 1945); Illinois Administrative Review Act, ILL. REV. STAT.,
was added to the definition of “order” and “adjudication” to assure that such matters as orders to cease and desist from unfair methods of competition and unfair labor practices would be classified as adjudication.

The final result was characterized as follows in the report of the House Committee on the Judiciary: “‘Rules’ formally prescribe a course of conduct for the future rather than pronounce past or existing rights or liabilities. ** The term ‘order’ is essentially and necessarily defined to exclude rules. ‘Licensing’ is specifically included to remove any question, since licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance.16

Significantly, while the definitions of “rule” and “order” were being drastically rewritten, the principal operating sections—4, 5, 7 and 8—remained largely untouched. This suggests that the definitions were adjusted in order to fit the operating provisions to the needs of various agency functions, and that the rationalization of the definitions lies in the impact of those provisions upon various types of such functions.

The procedural background. In cases of adjudication subject to the hearing requirements of Section 5 of the Act, the hearing must be conducted by a presiding officer or examiner appointed in accordance with Section 11, unless the hearing is conducted by the agency, or by a member of the body comprising the agency, or by a special statutory hearing officer or board. Section 11 assures a substantial degree of independence for hearing examiners by providing that they shall be removed only for good cause as determined after hearing by the Civil Service Commission, and that they shall perform no duties inconsistent with their duties and responsibilities as examiners. Section 5 (b) re-

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2. H. R. REP. No. 1980, p. 20; SEN. Doc. No. 248, p. 254. Again, Representative Walter, in explaining the Administrative Procedure Bill to the House, distinguished rule making from adjudication as follows: “First, there are the legislative functions of administrative agencies, where they issue general or particular regulations which in form or effect are like the statutes of the Congress. . . . The second kind of administrative operation is found in those familiar situations in which an officer or agency determines the particular case just as, in other fields of law, the courts determine cases. . . .” 70 CONG. REC. 5754 (May 24, 1946); SEN. Doc. No. 248, pp. 352-353.
3. A more functional distinction was set forth in the memorandum which Attorney General Clark addressed to the Senate Committee on the Judiciary in October 1945: “. . . Proceedings are classed as rule making under this act most merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience. . . . In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged; in such cases, special procedural safeguards should be provided to insure fair judgments on the facts as they may properly appear of record. . . .” SEN. REP. No. 752, p. 39; SEN. Doc. No. 248, p. 225.
quires the agency to provide the parties with an opportunity for informal adjustment or settlement of the matters in issue before the hearing in adjudicatory cases.

If the case goes to hearing, Section 7 (a) provides that the proceeding must be conducted in an impartial manner. By Section 7 (b) the presiding officer is vested with specified powers appropriate for the effective conduct of the hearing. He may not be subject to the supervision or direction of any agency official who is engaged in performing investigative or prosecuting functions; during the hearing or in preparing his initial or recommended decision, he may not obtain evidentiary or factual material otherwise than from the record made in the hearing. Finally, he is prohibited by Section 5 (c) from obtaining advice or assistance from any agency official who has performed investigative or prosecuting functions in that or a related case.

Upon the completion of the hearing, the examiner who presided at the hearing, i.e., observed and heard the witnesses, must prepare a decision which will include "(1) findings and conclusions, as well as the reason or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." The parties must be given an opportunity to submit proposed findings or conclusions to the hearing examiner prior to his decision, as well as exceptions to his decision when issued and served upon the parties. The agency may provide that the hearing examiner's decision shall constitute an "initial" decision which will become the agency's final decision unless the parties appeal or the agency reviews it on its own motion; in the alternative, the agency may provide that the examiner's decision shall be a "recommended" decision with the agency issuing a separate final decision. In adjudicatory cases subject to Section 5 (c), the agency officers who engaged in the performance of investigative or prosecuting functions in that or a factually related case may not participate in or advise on the decisions by the presiding officer or the agency itself.

The rule making provisions of Section 4 are designed to provide for public participation in the making of substantive rules by federal agencies. Prior to the issuance, amendment or repeal of substantive rules, an agency must publish in the Federal Register a notice of the proposed rule making proceedings to be held, the legal authority under which the rule is proposed and "either the terms or substance of the proposed rule or a description of the subjects and issues involved". Thereafter, "the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same
orally in any manner.” Thus, the quoted language gives the agency a choice of rule making procedures—formal or informal hearing, the submission of written views or any combination of such procedures. However, if the rules in question “are required by [some other] statute to be made on the record after opportunity for an agency hearing,” the public rule making proceedings must consist of a formal hearing and decision in accordance with Sections 7 and 8. Thus, the Administrative Procedure Act provides for formal and informal rule making procedures, depending upon the substantive statute involved. In addition, Section 4 (c) requires that substantive rules (other than rules “granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy”) be published in the Federal Register or personally served not less than thirty days prior to their effective date, “except as otherwise provided by the agency upon good cause found and published with the rule.”

Formal rule making proceedings, i.e., those which are governed by Sections 7 and 8, are not subject to the requirements of Section 5. Accordingly, in such proceedings, the hearing officer is free to consult with any other members of the agency’s staff, with the intended result that his initial or recommended decision reflects not merely his personal views but rather that collective judgment of the agency’s staff which will more effectively apprise the parties of the real issues of policy and law which they must meet in order to prevail. Toward that same end, Section 8 (a) provides that in rule making cases the agency may even take the case from the hearing officer and itself issue a “tentative” decision or require any of its responsible officers to recommend a decision. Furthermore, in rule making, Section 7 (c) permits an agency to require submission of all or part of the evidence in written form. In either case, the parties may submit proposed findings

17. The legislative history indicates that with respect to rule making, a statutory requirement merely that a hearing be held, without the further requirement, express or implied, that such rules be “made on the record,” is to be construed only as requiring an informal hearing in which interested persons may express their views. See the Federal Seed Act, 53 STAT. 1275 (1939), 7 U. S. C. § 1561 (1940). On the other hand, the Federal Food, Drug and Cosmetic Act, 52 STAT. 1055 (1938), 21 U. S. C. § 371 (1940) expressly requires that substantive rules be formulated solely upon the basis of evidence adduced at the statutory hearing. Hearings before the Senate Subcommittee on the Judiciary on S. 674 (Administrative Procedure), 77th Cong., 1st Sess., 78-81, 1468 (1941).

Examples of rule making procedures which must consist of a hearing in accordance with §§ 7 and 8 are proceedings under the Natural Gas Act, 52 STAT. 821 (1938), 15 U. S. C. § 717 (1940), to establish wholesale rates for natural gas transmitted in interstate commerce, and the issuance of rules under the Federal Food, Drug and Cosmetic Act, supra. Both of these statutes require in effect that such rules “be made on the record after opportunity for an agency hearing.” On the other hand, the public rule making proceedings prior to the issuance or amendment of proxy rules under § 14 of the Securities Exchange Act, 48 STAT. 881 (1934), 15 U. S. C. § 78n (1940), may consist of the informal procedures described in § 4 (b) because that act does not require a hearing and decision on the record with respect to such rules.
and conclusions and exceptions. The important permitted difference from the procedure in adjudicatory cases is that in formal rule making the intermediate decision, i.e., the "initial" or "recommended" or "tentative" decision need not be made by the officer who heard the evidence, and the separation of functions requirements of Section 5 (c) are not applicable. This distinction reflects the consideration that in rule making policy is dominant, rather than accusatory or disciplinary elements, and consequently such factors as the demeanor of witnesses are of little significance. This in turn is based upon the realization that in the development of policy the agency relies upon the collective expertness of its staff rather than upon the impressions and judgment of a single hearing officer, no matter how competent he may be.18

From the legislative history and the pattern of the required procedures, logical and practical concepts of rule making and adjudication appear. Rule making is agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy. In rule making, disciplinary or accusatory elements are absent. Typically, the issues relate not to the evidentiary facts, as to which the demeanor of witnesses would often be important, but rather to the inferences to be drawn from the facts or as to the predictions of future trends to be based upon them. In such proceedings, the hearing officer is entirely free to consult any other members of the agency's staff, as is the agency itself. This reflects the purpose of the proceeding—to determine future policy. Policy is not shaped or determined in federal agencies by individual hearing examiners; rather, it is formulated by the agency heads relying heavily upon the expert staffs which have been hired for that purpose. As Representative Walter recognized, in this situation the initial or recommended decisions will be more helpful to the parties in advising them of the real issues which they must meet in their final arguments to the agency, if such intermediate decisions reflect the views of the agency heads or of their responsible officers who assist them in determining policy.

Adjudication, conversely, is concerned with the determination of past and present rights and liabilities. Typically, there is involved a determination as to whether past conduct was unlawful, so that the

18. This consideration was clearly articulated by Representative Walter in explaining §5 (c) to the House, as follows: "However, the subsection does not apply in determining applications for initial licenses, because it is felt that the determination of such matters is much like rule making and hence the parties will be better served if the proposed decision—later required by section 8—reflects the views of the responsible officers in the agencies whether or not they have actually taken the evidence." [Italics supplied.] 79 Cong. Rec. 5757 (May 24, 1946); Sen. Doc. No. 248, p. 361.
proceeding is characterized by an accusatory flavor and may result in
disciplinary action. Inevitably, in such proceedings, issues of fact
often are sharply controverted, with the consequence that the demean-
or of witnesses becomes important and should be observed by an
agency officer who will play a substantial role in the decision.

Classification of proceedings. Applying this test, it is clear that
agency action upon an application for approval of a merger or consol-
idation is rule making. In the first place, such a determination is
closely akin to the "approval or prescription for the future of * * *
corporate or financial structures or reorganizations thereof", which
is a part of the definition of rule making in Section 2(c). On the
other hand, the application may be said to seek an agency "approval"
or "permission", i.e., a license. This apparent overlap vanishes upon
application of the rule of construction that the specifically enumerated
matters in Section 2 (c) control the general functional definition of
"license" in Section 2 (e).19 More important, however, the deter-
mination of an application for approval of a merger or a consolidation
is based entirely on broad considerations of public policy, and is in no
sense accusatory or disciplinary in nature. For example, under Sec-
tion 5 (2) of the Interstate Commerce Act, the Commission, in pass-
ing upon proposed mergers or consolidations of carriers,20 is required
to consider not merely the broad concept of the public interest but also
(1) the effect of the proposed transaction upon adequate transporta-
tion service to the public, (2) the effect upon the public interest of the
inclusion, or failure to include, other railroads in the territory involved
in the proposed transaction, (3) the total fixed charges involved in the
proposed transaction, and (4) the interest of the carrier employees
affected.21

Similarly, the action of the Securities and Exchange Commiss-
ion pursuant to Section 7 of the Public Utility Holding Company
Act, or of the Interstate Commerce Commission under Section 20 (a)
of the Interstate Commerce Act, in determining applications for permis-
sion to issue securities, is rule making. Not only are such agency
actions akin to "approval or prescription for the future of * * *
corporate or financial structures or reorganization thereof", but they

19. In the Chicago Junction Case, 264 U. S. 258 (1924), the determination after
a hearing required by § 5 (2) of the Interstate Commerce Act, supra note 5, of an
application for approval of a merger was held to be "quasi-judicial" action. Obviously,
such holdings will rarely afford guidance in applying the classifications of the Admin-
istrative Procedure Act.

20. It might also be argued that "license" ordinarily connotes a continuing permis-
sion, in contrast to approval of a transaction which, when consummated, is practically
irrevocable.

21. See also Civil Aeronautics Act of 1938, § 408, 52 Stat. 977 (1938), 49 U. S. C.
§ 488 (1940).
devolve upon considerations of policy, and are not characterized by accusatory and disciplinary elements. The factual issues in such proceedings are overshadowed by the policy shaping conclusions to be drawn from the facts.

Under the statutory definitions of "rule making" and "adjudication" as interpreted above, the following examples of agency action will illustrate the basic dichotomy of the Act:

A. Rule Making

1. Agency statements of general applicability, i.e., applicable to all persons in a class, and future effect designed to implement, interpret, or prescribe law or policy. This is administrative rule making in the customary sense, an example of which is the proxy rules issued by the Securities and Exchange Commission under Section 14 of the Securities Exchange Act.22

2. The determination for the future of rates, prices and wages—either minimum, maximum or specific—whether for a class or industry or for a single person.

3. The approval or prescription for the future of corporate or financial structures or reorganizations, including such related acts as mergers, consolidations and security issues. Also, such approval or prescription of "facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing." Some illustrative examples of these specified classes of rules are as follows:

   (a) "Corporate or financial structures or reorganizations thereof"—the Securities and Exchange Commission's approval of simplification plans pursuant to Section 11 of the Public Utility Holding Company Act;

   (b) "Mergers or consolidations"—the Federal Communications Commission's approval of consolidation of telephone companies under Section 221 of the Communications Act of 1934; 23

   (c) "Facilities"—the Interstate Commerce Commission's order that a rail carrier provide itself with safe and adequate appliances, pursuant to Section 1 (21) of the Interstate Commerce Act;

22. Supra note 17.
(d) "Valuations"—proceedings pursuant to Section 19 (a) of the interstate Commerce Act to ascertain the value of carriers' property;

(e) "Cost"—determinations by the Federal Power Commission of the cost of licensed hydro-electric power projects pursuant to the Federal Power Act; 24

(f) "Accounting"—the prescription of uniform systems of accounts (which would also be included under (I) above) and the determination of how a particular item or group of items shall be carried in the accounts—addressed either to a class or a single person.

B. ADJUDICATION

1. Proceedings instituted by the Federal Trade Commission and the National Labor Relations Board leading to the issuance of orders to cease and desist from unfair methods of competition or unfair labor practices.

2. Licensing proceedings within the definition of Section 2 (e). This includes the granting, denial, renewal, revocation, suspension, etc. of, for example, radio broadcasting licenses, alcohol permits, certificates of public convenience and necessity, airmen's certificates, seamen's licenses, security registrations, membership in the Federal Reserve System, and permission to an alien to enter the United States.

3. The determination of claims for money or benefits, such as compensation claims under the Longshoremen's and Harbor-workers' Compensation Act, 25 and claims under Title II (Old Age and Survivors' Insurance) of the Social Security Act.

4. Reparation proceedings in which the agency determines whether a shipper or other consumer is entitled to damages arising out of alleged past unreasonableness of rates.

5. The determination of claims for benefits, such as grants-in-aid and subsidies.

It is also clear that certain types of agency action are neither rule making nor adjudication. Thus, investigations of aircraft accidents by the Civil Aeronautics Board, pursuant to Title VII of the Civil Aeronautics Act, result merely in findings of cause and recommendations; such investigations do not result in the issuance of an order (adjudication) or of an agency statement prescribing future conduct (rule making). In addition, there are undoubtedly many ministerial acts per-

formed by administrative agencies and officials, i.e., where they are performing some non-discretionary act prescribed by a statute or administrative rule. Where agency action is devoid of discretion, the agency is neither prescribing future conduct nor adjudicating past or present rights.

**Exceptions to Rule Making and Adjudication Requirements**

*Rule making.* There are various exceptions to Section 4 which have the residual effect of limiting the procedural requirements of that section to substantive rules of a regulatory nature, i.e., prescribing the future conduct of persons. Thus, the procedural and publication requirements of Section 4 do not apply to interpretative rules, general statements of policy, or to rules of agency organization, procedure and practice. Furthermore, the publication requirement of Section 4 (c) does not apply to substantive rules “granting or recognizing exemption or relieving restriction.” Thus, an agency “rule” which results in permitting or authorizing a person to do something which he would otherwise be prohibited from doing by a statute or by some other rule, may be made effective without regard to the requirement of publication thirty days prior to effective date.

In addition, rules are exempt from all provisions of Section 4 to the extent that they involve “(1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” Thus, the rule making requirements of the Act do not apply to rules relating to the internal or “housekeeping” operations of the Federal Government and its agencies, nor to the proprietary functions of the Federal Government. The last exemption is vast—including the lending, pension, and grant-in-aid programs and such operations as the Tennessee Valley Authority and the management of the public domain. In brief, therefore, the public rule making and publication requirements apply only to substantive rules of a regulatory nature.

*Adjudication—requirement of hearing and decision on the record.* The requirements of Sections 7 and 8 apply to cases of adjudication which are governed by Section 5.26 Thus, the exemptions from Section 5 carry through to Sections 7 and 8: First, Section 5 (and, accordingly, Sections 7 and 8) applies only to cases of “adjudication required by statute to be determined on the record after opportunity for an agency hearing.” This provision is extremely significant because the residual nature of the definitions of “order” and “adjudication”

26. As to rule making subject to §§ 7 and 8, see pp. 629-630, supra.
in Section 2 (d) tends to classify as adjudication all governmental action which is not embraced by the definition of "rule" in Section 2 (c). Limiting the application of Sections 5, 7 and 8 to adjudicatory cases "required by statute to be determined on the record after opportunity for an agency hearing," results generally in applying the formal procedural requirements of the Act only to those agency proceedings which are usually thought of as adjudication—such as proceedings looking to the issuance of cease and desist orders, licensing proceedings, and the disposition of certain types of money claims.27

It should be noted that Sections 5, 7 and 8 apply only where a statute requires determinations (a) on the record and (b) after opportunity for an agency hearing. It appears that the "opportunity for an agency hearing" must be required by a statute—and that a due process requirement of a hearing will not bring a proceeding within Section 5.28

The further condition in the introductory clause of Section 5—"required by statute to be determined on the record"—is, in the absence of legislative intent to the contrary, ordinarily to be inferred from the statutory requirement of a hearing. With respect to rule making, it was concluded,29 that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record", but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it should be inferred, unless a statute required otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication. In fact, it generally is assumed that where a statute provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, the provision for a hearing implies the further requirement of decision in accordance with evidence adduced at the hearing.30 As a general proposition, therefore, it would seem that every case of adjudication within the meaning of

27. See Senate Comparative Committee Print of June 1945, p. 7; Sen. Doc. No. 248, p. 21: "The introductory clause removes from the operation of sections 5, 7 and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing. . . . Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress usually intentionally or traditionally refrained from requiring an administrative hearing."
28. The administrative procedure bill (S. 7) earlier read "required by law," but this was changed to read "required by statute" as at present. The legislative history repeatedly refers to "hearings required by Congress."
29. See note 17 supra.
30. See the Chicago Junction Case, 264 U. S. 258 (1924).
Section 2 (d), and which is required by statute to be determined after opportunity for an agency hearing, is subject to the provisions of Sections 5, 7 and 8 unless the context indicates a contrary legislative intention.

By reason of the residual scope of the concept of adjudication, it appears to include the determination of individual claims for money, benefits, loans, grants-in-aid and subsidies. It was noted above that a principal purpose of the hearing and decision on the record requirements of Section 5 was to exclude from the formal procedural requirements "pensions, claims, and a variety of similar matters in which Congress usually intentionally or traditionally refrained from requiring an administrative hearing." With respect to claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act and claims for old-age and survivors' benefits under Title II of the Social Security Act, those statutes provide for hearings in such a context that it is clear that the determination of such claims is adjudication subject to Sections 5, 7 and 8. On the other hand, the Philippine Rehabilitation Act of 1946 provides for hearings prior to the denial of claims for compensation for war damage. However, the express exclusion of judicial review of the Commission's determinations, coupled with statutory instruction to consider certain factors which would not necessarily be matters of record, and the extraterritorial aspect of the Commission's operations, all suggest strongly that the mere requirement of a hearing in this situation is not sufficient to subject the determination of such claims to the Administrative Procedure Act.

The problems of formal administrative procedure are rarely thought of in the context of lending, subsidy, and grant-in-aid programs. Thus, the statutes under which the Reconstruction Finance Corporation functions do not require hearings to be held in connection with proposed loans. The writer is not aware of any serious suggestion that such lending activities should be conducted other than by essentially "business" procedures. However, the last Congress enacted the Hospital Survey and Construction Act to authorize the making of grants-in-aid to States for hospital construction. It is provided that prior to the denial of a State's application by the Public Health Service, the State must be given an opportunity for a hearing, after which the agency decision is reviewable on the record in a circuit court.

31. This conclusion is implicit in the reference in § 7 (c) to "determining claims for money or benefits." See also note supra.
32. Both statutes provide for the taking of "evidence" and for judicial review in a United States District Court on the record made in the agency proceeding.
of appeals, subject to the "substantial evidence" rule! In this context, it is difficult to contend that the determination of such applications would not be governed by the Administrative Procedure Act.

Under the Merchant Marine Act of 1936, the Maritime Commission administers a program of operating-differential subsidies to American ship operators to offset competitive disadvantages arising out of the lower operating costs of foreign ships. The statute provides that "no contract for an operating-differential subsidy shall be made by the Commission ** until and unless the Commission, after a full and complete investigation and hearing, shall determine that an operating-differential subsidy is necessary to meet competition of foreign-flag ships." There is no provision for judicial review, and no person has ever sought review. In view of the business or proprietary nature of such a program, together with the powerful considerations of foreign and naval policy which inevitably underlie it, it may be doubted whether Congress ever contemplated that the use of the word "hearing" would import into the administration of such a program all of the requirements of Sections 5, 7 and 8 of the Administrative Procedure Act.

The situations just discussed demonstrate that in the future legislative draftsmen must use the word "hearing" with full appreciation of the procedural consequences which may follow from the Administrative Procedure Act. Where it is desired to provide for informal hearings as an opportunity merely for the expression of views, it is suggested that the phrase "informal hearing" be employed together with an explanation in the Committee reports that such phrase is intended to preclude application of Sections 5, 7 and 8 of the Administrative Procedure Act.

"Formal" adjudications excepted from Section 5. Six types of adjudicatory proceedings are excepted from the provisions of Section 5 (and therefore, Sections 7 and 8) and thus further limit the definition of "adjudication" for the purposes of the Act. They are as follows: (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pur-

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36. The procedural necessities of such a program were well characterized in the monograph of the Attorney General's Committee on the Maritime Commission as follows: "The nature of the task is such that a mere formal hearing and a decision upon evidence introduced would be clumsy, if not futile. All information compiled by the Division of Research, whether strictly reliable or consisting in enlightened opinions founded upon hearsay must play its part. Decisions must grow, not from typewritten transcripts of evidence, but from conference and negotiation, from independent research and study, from the combined opinions of experts in numerous highly specialized fields." Sen. Doc. No. 186, 76th Cong., 3d Sess. 25 (1940).
suant to Section II; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives. These exceptions apply even though in such cases a statute requires a hearing and decision on the record made in the hearing.\textsuperscript{37}

The imposition of formal procedural requirements appears to have been regarded as superfluous with respect to (1) and (5), on the ground that such proceedings were subject to judicial control, as undesirable in the case of (2) and (4), and as not appropriate in cases of (3) and (6) because the decision would be based upon the results of an inspection, test or election. These exceptions relate to special situations and are not inconsistent with the broad dichotomy between rule making and adjudication.

The exception for matters "subject to a subsequent trial of the law and the facts de novo in any court" is exemplified by the reparation orders issued under the Interstate Commerce Act and the Packers and Stockyards Act\textsuperscript{38} which carry only prima facie weight in court.\textsuperscript{39}

The second exception applies to all proceedings involving the selection or tenure of Federal officers and employees, except that proceedings for the removal of Section II hearing examiners will be subject to Sections 5, 7 and 8.\textsuperscript{40} "Proceedings in which decisions rest solely on inspections, tests, or elections" were excepted because "those methods of determination do not lend themselves to the hearing process."\textsuperscript{41} This exception, like the others, appears to be applicable even where a statute requires a hearing and decision on the record. Accordingly, the words "rest solely" must mean that the exception applies where all the issues involved in the decision would be determined, in the absence of a request for a hearing, upon the basis of an inspection, test, or election. The report of the Attorney General's Committee suggests the following proceedings as resting solely upon inspections, tests, or elections: the grading of grain under the Grain Standards Act,\textsuperscript{42} the determination of applications for airmen's certificates under Section 602 of the Civil Aeronautics Act and locomotive inspections under


\textsuperscript{38} 42 Stat. 159 (1921), 7 U. S. C. § 181 (1940).

\textsuperscript{39} Senate Comparative Committee Print of June 1945, p. 8; Sen. Doc. No. 248, p. 22.


Section 29 of the Interstate Commerce Act. In all three examples, the statutes provide for hearings. In such cases, therefore hearings which may be requested by the parties need not be conducted in accordance with Sections 5, 7 and 8, although it is possible that the agencies will do so as a matter of policy.

The exception for "cases in which an agency is acting as an agent for a court" was apparently intended to cover the functions of the Interstate Commerce Commission and the Securities and Exchange Commission under the Bankruptcy Act. The final exception for "the certification of employee representatives such as the Labor Board operations under Section 9 (c) of the National Labor Relations Act, is included because those determinations rest so largely upon an election or the availability of an election." It also exempts the certification of employee representatives by the National Mediation Board pursuant to Section 2 (9) of the Railway Labor Act.

The Exceptions to Section 5 (c)

The heart of Section 5 is in the separation of functions requirements of Subsection 5 (c) which constitute the principal difference between formal rule making and formal adjudication procedures under the Act. Subsection 5 (c) exempts from its requirements "determining applications for initial licenses" and "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers."

Applications for initial licenses. The exemption from the separation of functions requirements of Section 5 (c) of agency proceedings to determine applications for initial licenses, together with corresponding exceptions in Sections 7 (c) and 8 (a), has the effect of treating such proceedings, in all important respects, in the same manner as rule making. A question arises as to whether the phrase "applications for initial licenses" is restricted to applications for original licenses, or whether it extends to any application for a license or for modification of an existing license. The question is important because in modern licensing programs a large number of the proceedings relate to applications by licensees for modification of their existing licenses.

"License" is defined broadly and generically in Section 2 (e) as including "the whole or any part of any agency permit * * * approval,

43. Senate Hearings, supra note 41, at 1457.
or other form of permission". "Initial license" is not defined. As S. 7 was introduced in the Senate, the exception read as "determining applications for licenses". In Committee, it was changed to "initial licenses". The Committee reports suggest, although not unequivocally, that the function of the word "initial" is to distinguish applications for licenses in the generic sense of any agency "permit", "approval" or "permission" which would include applications for modification, from applications for renewals of licenses which were clearly intended to be subject to subsection 5 (c).

More revealing is the stated rationale for the exception. Thus, in the Committee reports: "The exemption of applications for initial licenses frees from the requirements of the section such matters as the granting of certificates of convenience and necessity, upon the theory that in most licensing cases the original application may be much like rule making." And more precisely, as stated by Representative Walter to the House: "However, the subsection does not apply in determining applications for initial licenses, because it is felt that the determination of such matters is much like rule making and hence the parties will be better served if the proposed decision—later required by Section 8—reflects the views of the responsible officers in the agencies whether or not they have actually taken the evidence." At this point, the intended scope of the exemption becomes apparent—to apply the formal rule making procedures to those phases of licensing in which, like rule making, the determining of future policy is dominant and in which, therefore, the decisions are to be made institutionally by the agency heads and their staffs without regard to separation of functions.

Agencies exercising such licensing powers as are vested in the Civil Aeronautics Board and the Federal Power Commission receive large numbers of applications by licensees for modification of their original licenses. Such applications present the same type of policy issues as did the original applications. In some cases of extension of routes or expansion of facilities, the agency could either modify an existing license or go through the motions of issuing a new and separate license. In other cases, an existing licensee may be applying for a route extension by way of a modification of his existing license or certificate, while another person has filed an "original" application for a "new"
route over the same route. Obviously, the scope of the exception for initial licensing should not depend upon such procedural accidents. Accordingly, in view of the purpose of the exception, the phrase "applications for initial licenses" should be construed to include applications by licensees for modification of their existing licenses. This gives full weight to the suggestion in Section 2 (e) that any agency "approval" or "permission" is a license, regardless of whether it is in addition to or related to an earlier license. Only by such a construction can the same procedures be applied to formal rule making and to those aspects of licensing which are dominated by policy making considerations and in which the accusatory and disciplinary factors are absent. In this way, the basic dichotomy of the Act between rule or policy making and adjudication is preserved, because Section 5 (c) will remain applicable to licensing proceedings involving the renewal, revocation, suspension, annulment, withdrawal, or the agency—initiated modification or amendment of licenses i.e., all those phases of licensing in which the accusatory or disciplinary factors are, or may be, present.

Validity or application of rates, etc. of public utilities or carriers. The last sentence of Section 5 (c) also exempts from its provisions "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers." This exception originally read "in determining * * * the past reasonableness of rates." 52 The exemption was apparently created on the ground that questions as to the past reasonableness of rates are sometimes consolidated with the making of future rates—a rule making function—and that the exception would encourage such consolidation. In the House, the exemption was broadened to include facilities and practices of public utilities or carriers on the ground that such matters also are often consolidated with rule making. 53 It should be noted, however, that this broad exemption is granted independently of whether the particular proceedings are in fact consolidated with rule making. At first glance, this exception destroys the logical classification of proceedings which has been urged in this discussion. For example, section 1002 (c) of the Civil Aeronautics Act provides that "If the [Board] finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiation, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the [Board] shall issue an appropriate order to compel such person to comply therewith." Proceedings under this section with respect

to certain provisions under Title IV—“Air Carrier Economic Regulation”—could involve strong accusatory or disciplinary elements, as in the case of proceedings under the National Labor Relations Act leading to an order to cease and desist from unfair labor practices. All that can be said with respect to this provision is that the Congress recognized the inconsistency, but was apparently convinced of the necessity of exempting such matters from section 5 (c) so as to permit their ready consolidation in related rule making proceedings. It is possible that this exception also reflects the belief that in dealing with unusually intricate matters such as tariffs and rate schedules both the agency heads and hearing examiners should be permitted to obtain assistance from any source. This would be a fair inference from the expressed desire not to handicap the Interstate Commerce Commission, together with Commissioner Aitchison’s testimony in 1945. These proceedings will still be distinguished from rule making and initial licensing in that, by reason of Section 8 (a), an intermediate decision, either initial or recommended, must be prepared by an officer qualified to preside pursuant to Section 7 (a) although not necessarily the one who heard the evidence.

SUMMARY

Far more than is generally realized, the procedures of many federal agencies were already in substantial conformity with the principles of the Administrative Procedure Act. Particularly, many changes in procedure were made to comply with the recommendations of the Attorney General’s Committee on Administrative Procedure. Thus it may well be that the principal result of the Act will be to bring about a desirable degree of uniformity in federal administrative procedure. Any such uniformity is predicated upon working out a logical distinction between rule making and adjudication and upon interpreting and integrating the various exceptions with this basic distinction. The separation of functions requirements of Section 5 (c) and the newly dignified status of the intermediate decision should be applied to adjudicatory action—to those cases in which the accusatory, punitive, or reparatory factors are dominant; cases which are determined in terms of policy rather than in terms of evaluating the conduct of individuals should be subject to the more flexible rule making procedures. When the government in its proprietary or non-regulatory capacity is administering subsidy, grant-in-aid, and loan programs, the formal procedures of this Act should be substituted for “business” procedures only where the Congress definitely indicates such an intention.

54. 79 Cong. Rec. 2104 (March 12, 1946); Hearings before the Committee on the Judiciary, H. R., on Administrative Procedure, 79th Cong., 1st Sess. 55, 56 (1945); Sen. Doc. No. 248, pp. 307, 102.