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

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[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-

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[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 Wars[27] 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

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[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 259–269.

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 act [31] brought experts outside the Government into the task of rule-making [32] 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 1918 [34] provided for a temporary Advisory

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[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 1925 [35] 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

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[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, 1938, 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 1903 [37] and as supplemented in 1910 [38] 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. 28, 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 amendment [45] 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 1939 [49] 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 recommendtions 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

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[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, 1930, 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 1938 [61] 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 hearing [62] 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 construction [64] or one which governs as discretionary a

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[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 decide [68] or from a supposed necessity imposed

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[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

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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)]; 83 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 kind 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. 176 (1935). In a leading cease, rule-making proceedings have been distinguished from adjudicatory proceedings for procedural purposes. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933).

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

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[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 forward [72] 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 sought [75] 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

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[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.

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