Attorney General's Manual

on the

Administrative Procedure Act

Prepared by the

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NOTE CONCERNING MANNER OF CITATION OF LEGISLATIVE MATERIAL

The legislative history of the Administrative Procedure Act really begins with the Final Report of the Attorney General's Committee on Administrative Procedure (cited hereinafter as Final Report). This Report led to the introduction in Congress of the so-called majority and minority bills, respectively designated as S. 675 and S. 674, 77th Cong., 1st sess. These bills, together with S. 918, formed the basis for the extensive and valuable hearings held in 1941 before a subcommittee of the Senate Committee on the Judiciary (cited hereinafter as Senate Hearings (1941)). In 1945, the House Committee on the Judiciary held brief hearings (cited hereinafter as House Hearings (1945)) on various administrative procedure bills, of which H.R. 1203, 79th Cong., 1st sess., was the precursor of the present Act. Also in June 1945, the Senate Committee on the Judiciary issued a comparative print, with comments, which is an essential part of the legislative history. The Committee reports on the Act are Sen. Rep. 752, 79th Cong., 1st sess. (cited hereinafter as Sen. Rep.). and H.R. Rep. 1980, 79th Cong., 2nd sess. (cited hereinafter as H.R. Rep.). In October 1945, the Attorney General, at the request of the Senate Committee on the Judiciary, submitted a letter, with memorandum attached, setting forth the understanding of the Department of Justice as to the purpose and meaning of the various provisions of the bill (S. 7). This letter and memorandum constitute Appendix B of the Senate Committee Report and have been printed as Appendix B to this manual.

There may be obtained from the Government Printing Office Sen. Doc. No. 248, 79th Cong., 2nd sess., entitled "Administrative Procedure Act—Legislative History" (cited hereinafter as Sen. Doc.), which contains the Senate and House debates on the Administrative Procedure Act, together with all the documents mentioned above, except the Final Report of the Attorney General's Committee on Administrative Procedure and the Senate Hearings (1941). Wherever appropriate, there will be two citations, one to the particular report or hearing in which the legislative material appears, the other a parenthetical reference to the corresponding page in the Senate Document.

I

FUNDAMENTAL CONCEPTS

a. *Basic Purposes of the Administrative Procedure Act*

The Administrative Procedure Act may be said to have four basic purposes:

1. To require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3).

2. To provide for public participation in the rule making process (sec. 4).

3. To prescribe uniform standards for the conduct of formal rule making (sec. 4(b) and adjudicatory proceedings (sec. 5), i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8).

4. To restate the law of judicial review (sec. 10).

b. *Coverage of the Administrative Procedure Act*

The Administrative Procedure Act applies, with certain exceptions to be discussed, to every agency and authority of the Government. Section 2(a) of the Act reads, in part, as follows:

> "Agency" means 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. Nothing in this Act shall be construed to repeal delegations of authority as provided by law.

It will be seen from the above that agency is defined as each authority of the Government of the United States, whether or not within or subject to review by another agency. This definition was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units which may have all the attributes of an agency insofar as rule making and adjudication are concerned.[1] For example, the Federal Security Agency is composed of many

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1 The legislative history of section 2(a) illustrates clearly the broad scope of the term "agency." In the Senate Comparative Print of June 1945, the term agency was explained as follows (p. 2): "It is necessary to define agency as 'authority' rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or 'divisions' to have final authority. 'Authority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus, 'divisions' of the Interstate Commerce Commission and the judicial officers of the Department of Agriculture would be 'agencies' within this definition." (Sen. Doc. p. 13). And in the Senate Report the following appears at page 10: "The word 'authority' is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization." (Sen. Doc. p. 196). See also H.R. Rep. p. 19 (Sen. Doc. p. 253).

authorities which, while subject to the overall supervision of that agency, are generally independent in the exercise of their functions. Thus, the Social Security Administration within the Federal Security Agency is in complete charge of the Unemployment Compensation provisions of the Social Security Act. By virtue of the definition contained in section 2(a) of the Administrative Procedure Act, the Social Security Administration is an agency, as is its parent organization, the Federal Security Agency.

The Administrative Procedure Act applies to every authority of the Government of the United States other than Congress, the courts, the governments of the possessions, Territories, and the District of Columbia (sec. 2(a)). The term "courts" is not limited to constitutional courts, but includes the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and similar courts. Sen. Rep. p. 38 (Sen. Doc. p. 408).

While the Administrative Procedure Act covers generally all agencies of the United States, certain agencies and certain functions are specifically exempted from all the requirements of the Act with the exception of the public information requirements of section 3. Section 2(a) states, in part: "Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947;[2] Veterans' Emergency Housing Act[3] of 1946; and the Housing and Rent Act of 1947.[4]"

It will be helpful to consider each of these exceptions separately:

(1) "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them." This definition is intended to embrace such agencies as the National Railroad Adjustment Board, composed

2 This exception was added by Public Law 30, 80th Cong., 1st sess.
3 This exception was added by Public Laws 663 and 719, 79th Cong., 2d sess.
4 This exception was added by Public Law 129, 80th Cong., 1st sess.

of representatives of employers and employees. In addition, it includes agencies which have a tripartite composition in that they are composed of representatives of industry, labor and the public, such as the Railroad Retirement Board and special fact finding boards. H.R. Rep. p. 19 (Sen. Doc. p. 253); 92 Cong. Rec. 2152, 5649 (Sen. Doc. pp. 307, 355). The exemption, it will be seen, is not limited to boards which convene only occasionally, with per diem compensation, to determine, arbitrate or mediate particular disputes, but also includes similar boards or agencies composed wholly or partly of full-time paid officers of the Federal Government.

(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, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; Sugar Control Extension Act of 1947; Veterans' Emergency Housing Act of 1946; and the Housing and Rent Act of 1947." The functions thus exempted on the ground of their temporary nature may be classified, as to their termination, as follows:

(a) "On the termination of present hostilities"—A considerable number of statutes authorizing wartime programs and controls limit the duration of these functions by such phrases as "in time of war", "for the duration of the war", "upon cessation of hostilities as proclaimed by the President", "upon the termination of the unlimited national emergency proclaimed by the President on May 27, 1941", etc. It is clear from the legislative history of section 2(a) that the exemption is not to be limited to functions derived from statutes which provide for expiration "on the termination of present hostilities" *sic*, but rather extends to all functions which are limited as to duration by phrases such as those quoted above. House Hearings (1945) pp. 36-37 (Sen. Doc. pp. 82-83); 92 Cong. Rec., 5649 (Sen. Doc. p. 355). It is also clear that this exemption for temporary war functions is in no way affected by the circumstance that they may be continued in existence for a considerable period of time after combat operations have ceased. It is well established that statutes authorizing such temporary agencies and functions remain

in effect until a formal state of peace is restored or some earlier termination date is made effective by appropriate governmental action. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919); and the Attorney General's letter to the President, dated September 1, 1945, in H.R. Doc. 282, 79th Cong., 1st sess., p. 49. The conclusion that the exemption is not measured by the duration of actual combat operations is confirmed by the fact that this Act, containing the exemption, did not become law until June 11, 1946.

(b) "Within any fixed period thereafter (after the termination of present hostilities)"—This phrase provides exemption for functions which terminate, for example, "six months after the termination of the unlimited national emergency proclaimed by the President on May 27, 1941." It is unnecessary to repeat the discussion under (a), *supra*, as the meaning of the phrase "termination of present hostilities."

(c) "On or before July 1, 1947"—This encompasses such functions as expire on or before that date.

(d) The functions conferred by the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, the Surplus Property Act of 1944, the Veterans' Emergency Housing Act of 1946, the Sugar Control Extension Act of 1947 and the Housing and Rent Act of 1947 are specifically exempted, regardless of their expiration date. Thus the War Assets Administration, insofar as its functions are derived from the Surplus Property Act, is not subject to the provision of the Act, with the exception of section 3.

The foregoing agencies and functions have been specifically exempted from all the provisions of the Act with the exception of section 3. This means, in effect, that the rule making provisions of section 4, the adjudication provisions of section 5, and the judicial review provisions of section 10 are not applicable to them. These broad exceptions, accordingly, must be borne in mind in connection with the discussion of the other sections of the Act. Specific exceptions to various sections will be noted in the discussion of such sections.

c.—*Distinction Between Rule Making and Adjudication*

The Administrative Procedure Act prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rule making or adjudication is of fundamental importance.

"Rule" and "rule making", and "order" and "adjudication" are defined in section 2 as follows:

> (c) *Rule and rule making.* "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, cost, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.
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> (d) *Order and adjudication.* "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.
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> (e) *License and licensing.* "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.

Since the definition of adjudication is largely a residual one, i.e., "other than rule making but including licensing", it is logical to determine first the scope of rule making. The definition of rule is not limited to substantive rules, but embraces interpretative, organizational and procedural rules as well.[5] Of particular importance is the fact that "rule" includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law. Accordingly, the approval of a corporate reorganization by the Securities and Exchange Commission, the prescription of future rates for a single named utility by the Federal Power Commission, and similar agency actions, although applicable only to named persons, constitute rule making. H.R. Rep. p. 49, fn. 1 (Sen. Doc. p. 283).

As applied to the various proceedings of Federal agencies, the definitions of "rule" and "rule making", and "order" and "adjudication" leave many questions as to whether particular proceedings are rule making or adjudication. For example, the question arises whether agency action on certain types of applications is to be deemed rule making or licensing (adjudication), in view of the fact that there is apparent overlapping between the defini-

[5] Note that section 4 (apart from 4(d)) is applicable only to substantive rules, i.e., rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards.

tion of "rule" in section 2(c) and of "license" in section 2(e). Thus, "rule" includes the "approval * * * for the future * * *", and "license" is defined to include "any agency permit, certificate, approval * * * or other form of permission."

An obvious principle of construction is that agency proceedings which fall within one of the specific categories of section 2(c), e.g., determining rates for the future, must be regarded as rule making, rather than as coming under the general and residual definition of adjudication. Furthermore, the listing of specific subjects in section 2 (c) as rule making is not intended to be exclusive. It is illustrative only. H.R. Rep. 20 (Sen. Doc. p. 254). Thus, in determining whether agency action on a particular type of application is "rule making", the purposes of the statute involved and the considerations which the agency is required to weigh in granting or withholding its approval will be relevant; if the factors governing such approval are the same, for example, as the agency would be required to apply in approving a recapitalization or reorganization (clearly rule making), this circumstance would tend to support the conclusion that agency action on such an application is rule making.

More broadly, the entire Act is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. Sen. Rep. p. 39 (Sen. Doc. p. 225); 92 Cong. Rec. 5648 (Sen. Doc. p. 353).

Not only were the draftsmen and proponents of the bill aware of this realistic distinction between rule making and adjudication, but they shaped the entire Act around it. Even in formal rule making proceedings subject to sections 7 and 8, the Act leaves the hearing officer entirely free to consult with any other member of the agency's staff. In fact, the intermediate decision may be made by the agency itself or by a responsible officer other than the hearing officer. This reflects the fact that the purpose of the rule making proceeding is to determine policy. Policy is not made in Federal agencies by individual hearing examiners; rather it is formulated by the agency heads relying heavily upon the the expert staffs which have been hired for that purpose. And so the Act recognizes that in rule making the intermediate decisions will be more useful to the parties in advising them of the real issues in the case if such decisions reflect the views of the agency heads or of their responsible officers who assist them in determining policy. In sharp contrast is the procedure required in cases of adjudication subject to section 5(c). There the hearing officer who presides at the hearing and observes the witnesses must personally prepare the initial or recommended decision required by section 8. Also, in such adjudicatory cases, the agency officers who performed investigative or prosecuting functions in that or a factually related case may not participate in the making of decisions. These requirements reflect the characteristics of adjudication discussed above.

The foregoing discussion indicates that the residual definition of "adjudication" in section 2(d) was intended to include such proceedings as the following:

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, respectively.
2. The determination of claims for money, such as compensation claims under the Longshoremen's and Harbor Workers' Compensation Act, and claims under Title II (Old Age and Survivors' Insurance) of the Social Security Act.

3. Reparation proceedings in which the agency determines whether a shipper or other consumer is entitled to damages arising out of the alleged *past* unreasonableness of rates.
4. The determination of individual claims for benefits, such as grants-in-aid and subsidies.
5. Licensing proceedings, including the grant, denial, renewal, revocation, suspension, etc. of, for example, radio broadcasting licenses, certificates of public convenience and necessity, airman certificates, and the like.

II

SECTION 3—PUBLIC INFORMATION

The purpose of section 3 is to assist the public in dealing with administrative agencies by requiring agencies to make their administrative materials available in precise and current form. Section 3 should be construed broadly in the light of this purpose so as to make such material most useful to the public. The public information requirements of section 3 do not supersede the Federal Register Act (44 U.S.C. 301 *et seq.*). They are to be integrated with the existing program for publication of material in the Federal Register and the Code of Federal Regulations. The Federal Register Regulations (11 F.R. 9833) govern the manner in which documents are to be prepared prior to submission to the Division of the Federal Register. All materials issued under section 3(a) of the Act will be included in the Code of Federal Regulations and should be prepared accordingly. The Division of the Federal Register is prepared to offer assistance to the agencies in this respect.

AGENCIES SUBJECT TO SECTION 3

This section, unlike the other provisions of the Act, is applicable to all agencies of the United States, excluding Congress, the courts, and the governments of the Territories, possessions, and the District of Columbia. Every agency, whether or not it has rule making or adjudicating functions, must comply with this section. Section 2(a), defining agencies, states specifically that even the exemption for the functions enumerated in the last sentence of that section does not extend to section 3. Accordingly, agencies performing temporary war functions must comply with this section.

EXCEPTIONS TO REQUIREMENTS OF SECTION 3

Two exceptions have been made to section 3, namely:

"(1) *Any function of the United States requiring secrecy in the public interest.*" This would include the confidential operations of any agency, such as the confidential operations of the Federal Bureau of Investigation and the Secret Service and, in general, those aspects of any agency's law enforcement procedures the disclosure of which would reduce the utility of such