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## A Hearing Examiner Comments on the APA and the Rule Making or Adjudication Controversy

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## A HEARING EXAMINER COMMENTS ON THE APA AND THE RULE MAKING OR ADJUDICATION CONTROVERSY

*This is the first published commentary from the center of the administrative process, the hearing examiner. This article approaches from a pragmatic viewpoint the importance of administrative procedures, legislative history behind the Congressional definitions, and court decisions and judicial commentary dealing with the increasing conflict between rule making and adjudication. The article concludes with suggestions on how best to meet the problem of the rule making-adjudication dichotomy under present laws.*

ROBERT R. BOYD\*

### HISTORICAL PERSPECTIVE

The Administrative Procedure Act, the foundation of federal administrative law, has been in effect for twenty-three years.<sup>1</sup> At its passage, this federal act was considered one of the most significant bills of the century.<sup>2</sup> To obtain the required support for enactment, the Administrative Procedure Act was not as far-reaching as originally anticipated. Many years of practical application, however, have demonstrated that the scope of the Act was sufficient and its successful utilization has increased its significance in the field of administrative law.

Senator Pat McCarran, then Chairman of the Committee on the Judiciary, United States Senate, described the act as follows:

The Administrative Procedure Act is a strongly marked, long sought, and widely heralded advance in democratic government. It embarks upon a new field of legislation of broad application in the "administrative" area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other. Although it is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as

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1. 5 U.S.C. §§ 551-59, 701-06 (Supp. II, 1967).

2. ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 297 (1946).

well as those invested with executive authority. It upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men.<sup>3</sup>

The extent to which the Act has realized the aims of justice as so eloquently stated by Senator McCarran is still very much debated, but the importance of the Act, and of achieving those aims has never been disputed.

There are some thirty federal departments and agencies which conduct the bulk of administrative proceedings affecting private rights.<sup>4</sup> The functions of the various departments range from the regulation of television licenses worth millions of dollars to the processing of applications for amateur or citizen band licenses; from the processing of an application to merge railroads of the magnitude of the New York Central and the Pennsylvania to authorizing truck transportation of a particular commodity over a specific route. In fact, federal agency determinations affect almost every area of public welfare and business activity.

The adequacy of the governmental processes through which these programs are administered is an obvious matter of concern, both public and private. The rising volume of proceedings has resulted in paralyzing backlogs, and in many areas excessive delays in official action have severely prejudiced private undertakings and perhaps slowed the national economic growth. Frequently, attempts at across-the-board solutions have not adequately taken into account the variety of private interests affected, with resulting unfairness to many.

The importance of federal administrative law has long been recognized. Development of the idea of an Administrative Conference as the best means to improve agency procedures spans almost twenty years. During this period two temporary, experimental Administrative Conferences were held, the first on the call of President Eisenhower in 1953, the second in 1961 by President Kennedy. Both Conferences were chaired by Judge E. Barrett Prettyman of the United States Court of Appeals for the District of Columbia. Both Conferences recommended that a permanent Administrative Conference be created by statute. Legislation for this purpose was enacted by the 88th Congress.

Monumental problems are yet to come. One need not be a demog-

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3. *Id.*, McCarran, *Foreword*.

4. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, INTERIM REPORT (1969).

rather to readily understand that our population growth and movement will vastly complicate our daily lives as we move into the last quarter of the twentieth century. With this will come more and increasingly complex regulation. By 1975 our population will rise from 205 to 230 million. More than seventy-five percent of our people will dwell in cities, and about half of them will be living in three highly concentrated urban zones—along the Atlantic, in California, and in the Chicago-Detroit-Cleveland region. Even today seventy-five percent of the nation's productive capacity is concentrated on two percent of its land area. Any society so concentrated runs the risk of becoming a complex, frustrating place in which to work and live. Something must be done, and only collective governmental action can possibly cope with future escalating problems.

Although maintaining a progressive administrative process is perhaps an over-simplification of the goal of the Administrative Conference and those persons intimately connected with administrative law, some adjustments in our procedures will be necessary if we are to timely and adequately meet the needs of the future.

#### A FREQUENTLY MENTIONED PROBLEM

In 1967, the Office of the Attorney General of the United States prepared a staff report dealing with problems of the administrative process.<sup>5</sup> The report listed eighty problems; however, the present article deals primarily with only one of those problems. The difficulty was stated by the Attorney General as follows:

*Breakdown of rulemaking—adjudication dichotomy*—As Federal programs and administrative proceedings thereunder have proliferated, the kinds of proceedings have become more numerous and more various. Is it now satisfactory to treat all formal proceedings under the Administrative Procedure Act as either rulemaking under section 4 or adjudication under section 5—or would it be useful to consider particularized ratemaking entirely apart from general rulemaking, and develop a new, separate section to govern those cases? Are the various kinds of adjudication now covered by section 5 so dissimilar that the section should be subdivided among licensing, enforcement, claims adjudications, status determinations, etc., each under a separate section of the Act?<sup>6</sup>

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5. ATT'Y GEN., SOME ACKNOWLEDGED PROBLEMS OF THE ADMINISTRATIVE PROCESS (1967).

6. *Id.* at 2.

Any study on the difference between rule making and adjudication must begin with the basic definitions as stated in Section 2 of the Administrative Procedure Act.

(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, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) **ORDER 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.<sup>7</sup>

Upon casual consideration, the definitions appear adequate as the former goes to considerable length to specify the matters to be included, and the latter states in effect that what is not included in "rule making" is by the process of exclusion brought within the scope of "adjudication." The categorical determination, however, may be both difficult, and very important procedurally, as will be seen. Relying solely upon the definitions, what label would be put upon a proceeding looking to the reasonableness of existing rates; to the reasonableness of toll charges over bridges spanning navigable streams; to removing a multi-million dollar aircraft from service; to removing expensive railroad equipment and highway vehicles from service; to Federal Trade Commission action placing certain commodities and in effect certain businesses out of the market; to Food and Drug Administration actions in controlling commodities and markets; to the determination of disability claims under the Social Security Act by the Department of Health, Education and Welfare; to the granting of individual exemptions, or waivers, in respect to a wide range of Federal Regulations many critical to the relative competitive standing of those within and without the regulations; to the withholding of medical certificates from airline pilots by the Federal

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7. 5 U.S.C. §§ 551(c)-(d) (Supp. II, 1967).

Aviation Administration; to the suspension by the Federal Aviation Administration of pilot and mechanic certificates; to similar action by the Coast Guard against the employment papers of Merchant Marine officers and seamen; and, to the withholding by the Post Office Department of second class mailing rights or the suspension of such rights? These are merely passing examples and the labels in most instances are now attached either by precedent or by statute. Hopefully, however, the point in semantics is made. Would it have been better if rule making had been defined in its traditional sense, that is, "a rule or regulation of general applicability for the future" while an in-between definition and appropriate, separate procedure was established for the gray area cases?

The legislative history of the Act shows that the statutory definitions were discussed or explained many times in the course of the Congressional deliberations. The Congressional commentary over its passage deserves re-emphasis in our appraisal of the intent behind the law.

The Senate Judiciary Committee, in commenting on the definition of rule making, stated that the essential language is "general applicability" and "legal effect," and that the procedure in rule making differs from adjudication in essential respects.<sup>8</sup> It pointed out that if deemed necessary the definition might be amplified by adding after the word "include," the words "the prescription for the future of rates, wages, prices, facilities, appliances, services, allowances therefor or of valuations, costs, accounting or practices bearing thereon." The Committee also emphasized that there are only two basic types of administrative justice and that everything other than rule making is adjudication. It was later emphasized that activities are defined as rules to the extent that, whether of general or particular applicability, they formally prescribe a course of conduct for the future rather than merely pronounce existing rights or liabilities.<sup>9</sup> The Attorney General's interpretation is especially noteworthy:

In section 2(c) the phrase "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances," etc., is not, of course, intended to be an exhaustive enumeration of the types of subject matter of rule making. Specification of these particular subjects is deemed desirable, however, because there is

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8. ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 14 (1946).

9. *Id.* at 197.

no unanimity of recognition that they are, in fact, rule making. The phrase "for the future" is designed to differentiate, for example, between the process of prescribing rates for the future and the process of determining the lawfulness of rates charged in the past. The latter, of course, is "adjudication" and not "rule making." (*Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co.*, 284 U.S. 370.)

The definitions of "rule making" and "adjudication," set forth in subsections (c) and (d) of section 2, are especially significant. The basic scheme underlying this legislation is to classify all administrative proceedings into these two categories. The pattern is familiar to those who have examined the various proposals for administrative procedure legislation which have been introduced during the past few years; it appears also in the recommendations of the Attorney General's Committee on Administrative Procedure. Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience. As defined in subsection (c), for example, rule making includes not only the formulation of rules of general applicability but also the formulation of agency action whether of general or particular applicability, relating to the types of subject matter enumerated in subsection (c). In many instances of adjudication, on the other hand, the accusatory element is strong, and individual compliance or behavior is challenged; in such cases, special procedural safeguards should be provided to insure fair judgments on the facts as they may properly appear of record. The statute carefully differentiates between these two basically different classes of proceedings so as to avoid, on the one hand, too cumbersome a procedure and to require, on the other hand, an adequate procedure.<sup>10</sup>

The summation by the Attorney General is especially significant for its emphasis upon the accusatory element in adjudication. This, in the early days of the APA, was the heart of an adjudicatory proceeding, and it is still the most important single element in the entire range of administrative law. Traditionally, a full hearing is required when a person has been accused. Does it apply, however, to corporations accused of violating regulations which could result in the withdrawal or revocation of valuable rights or licenses? After having invested a life's savings

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10. *Id.* at 225.

in a certain business requiring governmental approval, is one to lose it all at the whim of a public official? The age-old argument about the government's right freely to give or revoke a license, which is theoretically the property of the public, does not really answer the aims of justice. Procedural safeguards are still important and the accusatory nature of a number of these actions has not yet brought all of them under the adjudication provisions of the Administrative Procedure Act. Perhaps not all of them require the full range of procedural treatment but the point is that the accusatory element, alone, is not sufficient.

The House Committee Report also emphasizes the importance of distinguishing between rule making and adjudication, pointing out that upon this distinction rests the further decision as to whether to follow Section 4 or Section 5 of the Act.<sup>11</sup> The House and Senate both clearly viewed rule making as prescribing a course of conduct for the future, thus following the traditional meaning of the term. Recognizing, however, that gray areas would exist, the House specifically enumerated a number of activities so as "to embrace them in the definition beyond question." Representative Walter of Pennsylvania commented at length on the rule making or adjudication crossroads, pointing out that there was great confusion in the terms; that rule making is the legislative function of the administrative agencies; that the term "rule making" was improperly used to embrace the decision of particular cases; that rules or regulations were sometimes wrongly called by other terms; and that the confusion over terms and invention of new terms must be minimized, hopefully by the passage of the APA. He stressed that rule making was to be the agencies' legislative function in prescribing future law whereas adjudication was to be the judicial function of the agencies and would embrace all decisions in matters other than rule making.<sup>12</sup> The provision in the definition of rule making embracing rules of "particular" as well as "general" applicability was inserted solely to assure coverage of rule making addressed to named persons.<sup>13</sup> It was not intended to broaden the meaning of rule making in any way.

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11. *Id.* at 254.

12. *Id.* at 355.

13. *Id.* at 283 n.1.

The change of the language to embrace specifically rules of "particular" as well as "general" applicability is necessary in order to avoid controversy and assure coverage of rule making addressed to named persons. The Senate committee report so interprets the provision, and the other changes are likewise in conformity with the Senate committee report (p. 11). The phrase "future effect" does not preclude agencies from considering and, so far as



The Congressional intent is helpful in determining whether a proceeding is rule making or adjudication, but the definitions still fall short in many instances. One of the foremost scholars in this field, Professor Kenneth Culp Davis has written at length on this subject.<sup>14</sup> He emphasizes that rule making resembles the enactment of a statute and questions whether efforts to define it further have been successful. This in effect is stating that the traditional meaning of rule making is what Congress should have confined itself to, and that additional matters merely added to the confusion. Certainly it would be easier to label a rule making proceeding if the traditional meaning were applied (a rule of general applicability for the future) but this would certainly overburden the adjudica-

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legally authorized, dealing with past transactions in prescribing rules for the future.

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

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

(d) "Valuations"—proceedings pursuant to Section 19(a) of the Interstate Commerce Act to ascertain the value of carriers' property;

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

(f) "Accounting"—the prescription of uniform systems of accounts (which would also be included under (1) above) and the determination of how a particular item or group of items shall be carried in the accounts—addressed either to a class or a single person.

#### B. Adjudication

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

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

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

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

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

14. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.11 (1958).

tory route beyond the intent of Congress. Nor would the aims of good government be served by this degree of judicialization in the borderline cases. The suggestion that the choice should be made based on a good practical result would certainly be meritorious, but there is a question as to whether the classifier has this freedom under the statute. If Congress says it is adjudication by definition how can the label be changed by administrative decision at a lower level? Of course, Professor Davis is mainly prodding thought on this while also urging flexibility when not foreclosed by definition.<sup>15</sup> And certainly there are a number of instances when the definitions are so far removed from the problem at hand as to enable the flexibility he suggests. One question he raises can certainly be firmly answered based on the experiences of this writer: that is, that the process of finding disputed facts from conflicting evidence is an adjudication, regardless of the label, and that there is no other adequate means of determining disputed facts.<sup>16</sup>

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15. *Id.* § 5.01, at 293.

16. A "rule" or a "regulation" is the product of administrative legislation. Perhaps the best guide to distinguishing rule making from adjudication is the simple observation that rule making resembles the enactment of a statute and adjudication resembles what a court does when it decides a case. Efforts to push definitions further have fallen short of success, although some have been helpful. When these terms must be given meaning in concrete cases, the meaning may well draw to some extent from the needs of each particular case, for judicial judgments are generally wiser on limited facts and circumstances than on abstractions and generalities.

The APA definition of a "rule" as an "agency statement of general or particular applicability and future effect" is unsatisfactory if taken literally, for it includes cease and desist orders and orders for the payment of money. But the words "or particular" may be interpreted to mean only that what is otherwise a rule does not become an order merely because it applies to named parties. The legislative history gives support to the idea that the most important criterion for classifying an activity under the Act is the practical desirability or undesirability of applying section 5, which does not affect rule making.

A few unanswered questions illustrate some remaining puzzles. . . . Is the determination of what rate is reasonable adjudication when the purpose is reparation and rule making when no reparation is involved? . . . *Is inspection of an airplane or a ship or a locomotive adjudication even when it involves formulation of a new rule or a new application of an old rule?* . . . Is the process of determining broad policy or substantive law in the nature of legislation or rule making no matter what kind of proceeding it is attached to, and *is the process of finding disputed facts from conflicting evidence in the nature of adjudication no matter what kind of proceeding it is attached to?*

Of course the way to solve problems of classifying activities which analytically fall into more than one category or into no category is to *keep*

Turning to an author with practical experience in working under the Act, and of making the categorical determination as to type of case, Warren E. Baker, then General Counsel of the Federal Communications Commission,<sup>17</sup> states the problem as follows:

The cornerstone of the procedural requirements set forth in the Administrative Procedure Act, which became law in 1946, was the dichotomy between adjudication and rule-making. Stated very simply, rule-making is agency action regulating future conduct and is intended to implement and prescribe law or policy while adjudication is intended to cover application of law and policy to past conduct or to licensing determinations. Nevertheless, just as court decisions in applying law to specific cases may lay down new law and policy for the future, agency adjudication also has a prospective application. In the eleven years since the enactment of the Administrative Procedure Act, the procedural requirements applicable to the two different activities have been extensively refined by court decisions. Nevertheless, rather than being greatly clarified, the demarcation between these two has become somewhat blurred. Furthermore, interpretative decisions have made it more apparent that there is a broad area for agency action in which policies are formulated by rule on the one hand, or by *ad hoc* adjudication on the other, solely at the discretion of the agency.<sup>18</sup>

Baker continues that the case-by-case adjudication should be favored when based on the following considerations: the complex or varying factual nature of the problem; need for accumulating expertise; and inability to foresee the problem.<sup>19</sup> On the other hand, the following are listed as considerations favoring the use of rule making: desirability of definitive guides to agency action; avoidance of retroactivity; sound administration; appropriateness of rule making techniques; and

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*an eye on producing a good practical result in the particular case.* The various provisions of Section 5 apply only to adjudication, never to rule making. The ideas of both courts and agencies about the desirability or undesirability of applying the requirements of Section 5 to a particular proceeding should assist the classification in each case. Except when the meaning of authoritative words is beyond dispute, the choice of labels should depend largely upon judgments concerning practical results.

*Id.* § 5.02, at 289 (emphasis added).

17. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROB. 658 (1957).

18. *Id.*

19. *Id.* at 661-62.

reviewability.<sup>20</sup> The importance of the observations made is that rule making is a sounder way of proceeding than the case by case record on general declarations of policy, but that the choice of using either procedure should be retained.

Also very helpful when considering the rule making-adjudication dichotomy are the views of Robert W. Ginnane, then an attorney in the Assistant Solicitor's Office, Department of Justice, now General Counsel of the Interstate Commerce Commission, who in 1947 in analyzing the APA, classified various activities as either adjudication or rule making under the relatively new Act.<sup>21</sup> His early classifications have proven to be legally correct by actual application over the ensuing years, but it should be noted that many of the problems today stem from legislation and regulations passed subsequent to 1947. The question is not so much whether the definitions were adequate in 1947, but whether they will be adequate for the future. His examples under "adjudication" are very incomplete in present day terms but this is undoubtedly due to the early date of his article and the statutes enacted and precedents established since then. However, the types of proceedings that he placed in the adjudication class have remained firmly in that category for over thirty years. It is interesting to note that while rate making for the future, and mergers or consolidations, are placed in the rule making category, the Interstate Commerce Commission has followed its policy, established long before Mr. Ginnane arrived, of

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20. *Id.* at 662-65.

21. 95 U. Pa. L. Rev. 621, 632-33 (1947). Mr. Ginnane gives the following examples of agency action in each of the two basic categories:

A. Rule Making

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

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

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

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

handling almost all of its proceedings at the oral hearing stage as trial type adversary proceedings. The only significant distinction it has made, at least until recently, is that the procedural requirements of general notice, public information, and participation, have been complied with in rule making cases. In this respect it should also be noted that if broad notice is given, and liberal participation allowed, as required by statute, the process of adjudication always has all the necessary ingredients of compliance with due process and fair administrative procedures. The trouble is that the process has more than is really needed for many rule making proposals of the traditional type. The fact that the Interstate Commerce Commission has handled rule making proposals in the carrier-safety field as adversary proceedings has been the subject of some criticism, particularly by Professor Davis. It should be remembered, however, that facts are an essential foundation in safety cases, as contrasted with statements of position, and that facts can usually best be determined upon exposure to cross-examination. In theory cross-examination is not allowed under the usual rule making approach.

In regard to merger proceedings, classified as rule making by Mr. Ginnane in 1947, it would probably be an understatement to say that in reality they have proven to be among the most adversary of proceedings ever to come before the Interstate Commerce Commission, and the most complex. It is also clear that they are handled in trial type hearings and every ingredient of an adjudication is afforded in their proceeding to final decision.

"Over-judicialization" is the term in vogue to criticize the handling of rule making through adjudicative procedures. One of the subjects listed for study by the Administrative Conference in 1968 was described as:

*Over-judicialization of administrative proceedings*—Agency procedures for establishing the rights of private parties tend to be patterned after familiar court processes, even in rulemaking, ratemaking, licensing, and other kinds of administrative proceedings in which courtroom techniques are not always well suited to the kinds of determinations required. The Conference might usefully inquire, in connection with particular programs, as to the extent to which agency procedures should be removed from this mold and be tailored more specifically to the needs of the job the agency is required to do.<sup>22</sup>

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22. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, INTERIM REPORT (1969).

The Interim Report of the Conference did not contain a recommendation on this subject, but apparently it is still under consideration.

The Interstate Commerce Commission is not alone, among the agencies, in relying heavily upon the adjudicatory procedure rather than the less judicial rule making approach. The National Labor Relations Board, though having some of the most truly adversary cases, also has rule making responsibilities in the traditional sense. Section 6 of the National Labor Relations Act empowers the Board "to make . . . , in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."<sup>23</sup> The Board has made rules under this statutory authority, but it has never taken the rule making approach. Its rules have all emanated from adjudicatory processes.

The landmark case on this question is *NLRB v. Wyman Gordon Company*.<sup>24</sup> In an adjudicatory proceeding, the Board had announced earlier, in *Excelsior Underwear Inc.*,<sup>25</sup> a rule for future application in matters involving questions of whether there is to be union representation, and by which union, if any. The rule required employers, if requested, to provide unions with the names and addresses of employees eligible to vote in representation elections. This was a departure from the past, a new policy, and thus the Board declined to apply it in *Excelsior*, that case being the mere vehicle for enactment.

In deciding whether the general rule of *Excelsior* was valid, the Supreme Court gave four written opinions. The decision of the Court was delivered by Mr. Justice Fortas, joined by Chief Justice Warren and Justices Stewart and White. A concurring-in-the-result opinion was given by Justice Black, joined by Justices Brennan and Marshall. Justices Douglas and Harlan each entered his own dissenting opinion. The four viewpoints thus recorded run the gamut of reasoning on the requirements of procedure in rule making. The prevailing result in the *Wyman-Gordon* case upholds the validity of the *Excelsior* rule but only because the respondent was specifically directed by the Board to submit a list of names and addresses of employees for use by the unions in connection with the election. The opinion points out that "absent this direction by the Board, the respondent was under no compulsion to furnish the list because no statute and no validly adopted rule required it to do so."<sup>26</sup>

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23. 29 U.S.C. § 156 (1964).

24. 89 S. Ct. 1426 (1969).

25. 156 N.L.R.B. 1236 (1966).

26. 89 S. Ct. at 1430.

The majority opinion is significant in its emphasis that the rule making provisions of the act were designed to assure fairness by requiring broad public notice and opportunity to participate; moreover, it stressed that the provisions of the Administrative Procedure Act, insofar as it pertains to the making of "rules of general application," constitute a statutory command that cannot be avoided merely for agency convenience, or merely to obtain a good practical result.

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See Friendly, *The Federal Administrative Agencies* 36-52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents. But this is far from saying, as the Solicitor General suggests, that commands, decisions, or policies announced in adjudication are "rules" in the sense that they must, without more, be obeyed by the affected public.<sup>27</sup>

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27. *Id.* at 1429-30.

The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. See H. R. Rep. No. 1980, 79th Cong., 2d Sess., 21-26 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 13-16 (1945). They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The "rule" created in *Excelsior* was not published in the Federal Register which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the "hearing," whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule-making.

The Solicitor General does not deny that the Board ignored the rule-making provisions of the Administrative Procedure Act. But he appears to argue that *Excelsior's* command is a valid substantive regulation, binding upon this respondent as such, because the Board promulgated it in the *Excelsior* proceeding, in which the requirements for valid adjudication had been met. This argument misses the point. There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. But that is not what the Board did in *Excelsior*. The Board did not even apply the rule it made to the parties in the adjudicatory proceedings, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule: *i.e.*, to exercise its quasilegislative power.

The dissenting opinions not only agree that the *Excelsior* rule was invalid because the APA rule making procedures were not followed, but that the specific order issued to the respondent was invalid as well since it was based on the *Excelsior* rule.

The three Justices concurring in the result, but viewing the *Excelsior* rule as valid, found that *Excelsior* was in fact an adjudication.<sup>28</sup> The surprising point in the concurring opinion is the liberal view taken toward freedom of choice in the agency to proceed by general rule or by ad hoc litigation. So long as procedural safeguards are satisfied, namely, notice and opportunity to participate, the label would be unimportant. In fully assessing this, it should be noted that publication in the Federal Register is merely a device known to be sufficiently broad to cover most legal requirements for notice. It is a useless gesture, and specifically excepted under the statute, when it is known that all interested parties have actual notice as is the situation in many areas of government activity. Despite the lack of unanimity in *Wyman-Gordon* the law now appears to be that the making of a rule, in the traditional sense, done solely in an adjudicatory proceeding, is not valid for general

28. *Id.* at 1429.

Thus, although it is true that the adjudicatory approach frees an administrative agency from the procedural requirements specified for rule making, the Act permits this to be done whenever the action involved can satisfy the definition of "adjudication" and then imposes separate procedural requirements that must be met in adjudication. Under these circumstances, so long as the matter involved can be dealt with in a way satisfying the definition of either "rule making" or "adjudication" under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rule making or adjudication. Our decision in *Securities Comm'n v. Chenery Corp.*, 332 U. S. 194 (1947), though it did not involve the Labor Board or the Administrative Procedure Act, is therefore equally applicable here. As we explained in that case, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*, at 203, 67 S. Ct., at 1580.

In the present case there is no dispute that all the procedural safeguards required for "adjudication" were fully satisfied in connection with the Board's *Excelsior* decision, and it seems plain to me that that decision did constitute "adjudication" within the meaning of the Administrative Procedure Act, even though the requirement was to be prospectively applied. See *Great Northern R. Co. v. Sunburst Co.*, 287 U. S. 358 (1932). The Board did not abstractly decide out of the blue to announce a brand new rule of law to govern labor activities in the future, but rather established the procedure as a direct consequence of the proper exercise of its adjudicatory powers.

*Id.* at 1433.



application. But it may be held valid in specific instances provided the respondent had full notice and the action is something that could have been done even without a rule of general application.

One should not hastily conclude, however, that the *Wyman-Gordon* decision means the end of rule making by the ad hoc or case-by-case approach. The making of a rule, or establishment of a policy, cannot be completely avoided in adjudicatory proceedings. Precedent cases arise just as frequently, perhaps, in administrative law as they do in other branches of the law, and nearly every precedent-setting decision contains some elements of a new policy or even of a new rule for future application. Of course, some decisions made in adjudications may be followed by rule making proceedings, and in some circumstances this is perhaps the best way to avoid any question as to the validity of a rule. For example, in *Drawbar Extensions on Wydroframe-60 Boxcars*,<sup>29</sup> petitioners sought an order against the nation's railroads to the end that certain boxcars already in use be removed from service because they were unsafe and violated the Safety Appliance Acts. Millions of dollars in research and development had gone into these boxcars, and certain railroads had them in use after making large capital investments. Although much liberality prevails, in some areas, regarding procedures in safety matters, it is clear that under existing laws an order could not be entered against the respondents in this proceeding unless based on a true adjudication providing all elements of due process. In this adjudication, the Commission, as an incident to its ultimate finding, found that there was no longer "a necessity in present day railroading for trainmen, conductors, and brakemen or other operating employees to move from car to car over their roof running boards."<sup>30</sup> This was, in effect, a finding that the fifty-year-old requirement for roof running boards on boxcars should be abandoned. The requirement was lifted shortly thereafter however, in a proceeding which gave notice and invited public participation as required for rule making under Section 4 of the APA. Considerations of time and expense do not recommend this double-barrelled approach in all instances but in certain circumstances it may be advisable.

Much has been said about rule making in adjudicatory proceedings, most of it critical, but little has been said about the converse situation. Of course, the statutory language in Section 5 stating that it applies "in every case of adjudication required by statute to be determined on the

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29. 322 I.C.C. 620 (1963).

30. *Id.* at 623.

record after opportunity for an agency hearing" is intended to specify when the adjudicatory approach is to be used.<sup>31</sup> But it does not cover the entire range of administrative actions, some reaching even private liberties as in *Wong Yang Sung v. McGrath*,<sup>32</sup> and others leading to the confiscation of property. Due process requires that in these cases all elements of adjudication be afforded. There are a number of statutes that are unclear on the route to be taken, although presumably when the statute does not expressly require a hearing and determination on the record the less involved route may be followed. An example of a statute leaving some questions as to the measure of formalism required before making determinations is the Safety Appliance Act.<sup>33</sup> This Act provides that certain rules may be changed "after full hearing," and it subsequently states that certain other rules, standards, and instructions relating to power brakes may be changed "after hearing, by order."<sup>34</sup> The terms "after hearing" and "after full hearing" are repeated several times in the various provisions of the Act. At the time of its passage the jurisdiction to change the requirements was given to the Interstate Commerce Commission. Congress was well aware of the formal type hearings held by the Commission, and it is hard to conceive of what is meant by "full hearing" unless it means a formal hearing with the right to cross-examine. In this connection it should be noted that "informal hearing" is the term often used to denote the rule making approach whereas formal hearing refers to the adjudicatory route.<sup>35</sup>

In *Automotive Parts & Accessories Ass'n v. Boyd* one of the issues was whether the rule making procedures provided by Section 4(b) (informal rule making) of the Administrative Procedure Act (APA) were appropriate for the promulgation of this safety standard, or whether the Safety Act required the more stringent procedures of Sections 7 and 8 of the APA (formal rule making).<sup>36</sup> In responding to this issue, the Court acknowledged that the Safety Act was subject to the APA. It then pointed out that the APA provides for both informal and formal proceedings, and that the legislative history of the Safety Act

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31. 5 U.S.C. § 554(a) (Supp. II, 1967).

32. 339 U.S. 33 (1950).

33. 45 U.S.C. § 9 (1964). The Safety Appliance Act is one act, consolidating a number of enactments over a period of years, dealing with safety appliances and power brakes on railroads operating in interstate commerce.

34. *Id.*

35. See, e.g., *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968); *Borden Co. v. Freeman*, 256 F. Supp. 592, 601, *aff'd*, 369 F.2d 404 (3rd Cir. 1966); *Wisconsin Tel. Co. v. PCS*, 232 Wis. 274, 287 N.W. 122 (1939).

36. 407 F.2d at 333.

indicated an intent to permit the Secretary of Transportation to proceed under either procedure as he determined most appropriate to the problem at hand. This was not even a close case, it was clearly rule making in the traditional sense.

The fundamental problems arise when departures are made in individual cases, when exceptions are made to the general rule, and certain parties are exempted while others throughout the nation are made to comply. Equal treatment under the law is the hard core problem. The more informally these exemptions are handled, the more probable the variants, for the public will not be aware of what is happening. The party in the same situation may not even know that his competitor has had the burden lifted. For example, under what is usually called the Signal Inspection Act, rail carriers may be required to install expensive signal systems or train-stop/train-control devices.<sup>37</sup> The statute further provided that such systems or devices, once installed, cannot be removed without approval of the Department of Transportation. Applications are received almost daily seeking to discontinue expensive signals or devices on the ground that operations have changed and that they are no longer needed. The real issue is safety, and the interested parties are the carrier, the railroad operating employees who work and ride on the trains, and the travelling public. Usually only the employees protest and often they are apprehensive about their safety and wish to be heard. The statute does not specify a hearing in this circumstance, except that another provision in the same part of the Interstate Commerce Act provides that "representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this act affecting such employees."<sup>38</sup> The transfer of administration of the Signal Inspection Act to the Department of Transportation was not intended to affect the right of employees to a hearing in any way. But, to what type of hearing are they entitled?

The mere opportunity to file comments is a hearing to some degree. If the case properly may be placed in the rule making category, the opportunity to file comments may be all that interested parties are entitled to as a matter of right. In reality, however, the cases often involve strong adversary feelings between management and labor, and statements of position, so often the content of written comments in rule making, are virtually useless. The problem is to ascertain the facts, or

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37. 49 U.S.C. § 26 (1964).

38. *See Brotherhood of Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 526 (1947).

at least to determine who is exaggerating the safety circumstances; cross-examination is very helpful in solving this type of issue.

Another typical gray area case is *In the Matter of the Walt Whitman and Benjamin Franklin Bridge Tolls* (not printed),<sup>39</sup> a proceeding before the Federal Highway Administration, in 1968, concerning the reasonableness of the toll charges over the bridges between Philadelphia, Pennsylvania, and Camden, New Jersey. The charges in issue had already been placed in effect, and the ultimate question concerned the reasonableness of existing charges rather than the fixing of reasonable charges for the future. Therefore, under most precedents, the case was truly an adjudication; but the hundreds of thousands of members of the interested public were concerned about the continuation of the charges for the future. The Federal Highway Administration was under great pressure to determine this proceeding very expeditiously as the commitments made by the bond houses to raise the necessary monies, 325 million dollars, were in danger of being withdrawn unless a decision could be made in the current money market.

It made a great difference, as a practical matter, which type of hearing should be afforded in this case. Were it determined to be a legislative type of hearing, thousands of individuals appeared anxious to come in and state their opposition to the proposal. Government officials, at both the federal and local levels, were anxious to state their positions. The support emanated from the fact that two new bridges and a commuter rail facility were to be built by using the increased funds. Congress had delegated the authority for the development of the Delaware Valley Basin and the building of needed facilities to the Delaware River Port Authority. It was the responsibility of the Authority to build the facilities needed and to raise the revenue necessary for such facilities. The questions were whether the Authority was inflating its needs and minimizing expected revenue, and whether the extent and method of financing reflected sound judgment. These issues would never be developed by numerous legislative or speech-making appearances. Only by the testimony of experts, and by subjecting those experts to skilled cross-examination would the record provide the proper answer in this very involved matter. The question of whether the hearing was rule making or adjudication was raised on the record early in the proceeding. High ranking public officials wished to testify without being exposed to cross-examination. Advocacy by some for an informal hearing was strong. The examiner was convinced that the case should be

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39. Decision of the Hearing Examiner served August 1, 1968.

handled as an adjudication, and there were three factors facilitating his adherence to this determination. First, there was the long standing precedent that the determination of the reasonableness of existing rates was adjudication. Second, the order of the administrator assigning the case cited 5 U.S.C. §§ 554-58 (Supp. II, 1964), the adjudication provisions. Third, the United States Court of Appeals for the District of Columbia had held in a similar bridge toll case that a quasi-judicial type hearing must be afforded.<sup>40</sup> In reality, the parties were adverse, and by holding a formal hearing under strict control a proper record was developed and a timely decision issued. There was sufficient flexibility within the trial-type procedure to show proper deference to public officials.

*Baer Bros. v. Denver & R.G.R.R.*,<sup>41</sup> is a pre-APA decision commenting upon the distinction between quasi-judicial and quasi-legislative duties. The determination of the reasonableness of past rates, and awarding reparation where found unreasonable in the past, was found by the court to be a quasi-judicial function. It followed that this determination required a trial-type hearing. On the other hand, fixing rates for the future was termed an essentially different matter, a quasi-legislative function. In commenting on this Judge Henry J. Friendly states:

It is rather notable that after going to such pains to draw a sharp distinction between past and future ratemaking, the Supreme Court sensibly added that "testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order."<sup>42</sup>

Some other comments of Judge Friendly, are simply too impressive to overlook on this subject:

Although I call the process of applying such standards, whether for the past or for the future, "administrative adjudication," I have no intention of indulging in the sport, once so popular, of attempting to determine how far such action is judicial or legislative or executive, even "softened with a quasi." However it may be with others, my own litmus paper is not

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40. *Clarksburg-Columbus Short Route Bridge Co. v. Woodring*, 89 F.2d 788 (D.C. Cir. 1937).

41. 233 U.S. 479 (1914).

42. H. FRIENDLY, *FEDERAL ADMINISTRATIVE AGENCIES*, 9-10 (1962).

sensitive enough for me to do the job. I am told, for example, that the decision whether there shall be a new air route between A and B is quasi-legislative, as is also the decision whether the route shall go through C and D or through E and F, but that determination whether G or H airline should run it is quasi-judicial; frankly I do not see why—as Professor Manley Hudson used to say, to our discomfiture, “I get it all—but the ‘therefore.’”<sup>43</sup>

Judge Friendly's comments appear to be fully concurred in by the federal hearing examiner corps, and there appears no group or section of the bar more fully qualified, from day-to-day experience, to give practical assistance on this sometimes elusive subject than are these trial judges for the federal agencies. This is perhaps an immodest statement, for it is often noted that examiners are sometimes accused of institutional bias regarding their respect for judicialization. However, it can hardly be denied that they are more intimately involved with the decisional processes of administrative agencies in orally heard cases than any other segment of the federal bar—they both conduct the hearing and make the initial decision. It must also be conceded that their conduct of the hearing and their initial decision constitute the single most contributory factor in the entire decisional process. As part of a recent hearing before the Personnel Committee, Administrative Conference of the United States, concerning the subject of changing the title of hearing or trial examiner to administrative trial judge, NLRB Trial Examiner Herzel H. E. Plain, Chairman, Committee on Title Change, Federal Trial Examiners Conference, urged subsequent to the hearing that certain viewpoints of the examiners be included in the record of the hearing, including the following pertinent here:

The testimony in the April 15 hearing noted that “over-judicialization” has been the slogan of the remnant of the opposition to the reforms in decision making effected by the Administrative Procedure Act of 1946, and cited the great value to the administrative process, seen by a keen student of the process (Prof. Lloyd D. Musolf, “Federal Examiners and the Conflict of Law and Administration,” p. 180), in using the judicial analogy and the court tradition in administering the examiner's office. (Transcript pp. 95-97.)

We would also like to note, for the record, that the statutory

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43. *Id.* at 8-9.

distinctions between adjudication and rulemaking have had little material effect on the agency examiners' conduct of administrative hearings or trials and initial decision making.

In the first place, the distinctions under the Administrative Procedure Act dichotomy between rule-making, as a legislative function, and adjudication, as a judicial function, are both artificial and blurred. Thus, ratemaking for a past period is adjudicatory, while prospective ratemaking is rulemaking, though both may be determined in the same hearing and on the same evidence. Licensing, including modification, renewal, or revocation thereof, is adjudicatory notwithstanding the fact that licensing may involve broad policy considerations and many applicants in vast areas; and while initial licensing is accorded some of the attributes of rulemaking (such as exemption from the separation of functions requirement), it nevertheless remains adjudicatory in concept. As the Supreme Court recently observed in *N.L.R.B. v. Wyman-Gordon Company*, 394 U. S. 759, 89 S. Ct. 1426, 1432, concurring opinion Mr. Justices Black, Brennan, Marshall (April 23, 1969):

"Most administrative agencies, like the Labor Board here, are granted two functions by the legislation creating them: (1) the power under certain conditions to make rules having the effect of laws, that is, generally speaking, quasi-legislative power; and (2) the power to hear and adjudicate particular controversies, that is quasi-judicial power. The line between these two functions is not always a clear one and in fact the two functions merge at many points."

In the second place, even if there were a satisfactory means for drawing clear lines between the two functions, the distinction has brought no meaningful consequence in the case-by-case application of standards in decision making whether for the past or for the future. . . .<sup>44</sup>

It should be emphasized that one of the main motivations in some agencies to use the rule making approach, rather than adjudication, where the statute is silent, is freedom to make the final decision within or without the record, regardless of the separation of functions doctrine. In true rule making, particularly in the safety field, this enables a complete interplay of staff work, and technical expertise, throughout

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44. Letter from Herzel H. E. Plain to Dale W. Hardin, Chairman, Personnel Committee, Administrative Conference of the United States, July 23, 1969 on file in Office of Hearings and Proceedings and Hearing Examiner, Federal Railroad Administration, Department of Transportation.

all stages of the decisional process, and much is to be said for this freedom in truly non-adversary situations. In the hearing itself, however, there is little difference. The main difference in theory is that no cross-examination is allowed in a rule making case as there is no adverse party. As a practical matter, however, there are always clarifying questions to be asked and rarely are they ruled out. The delays so often found in adversary proceedings, sometimes under the due process claims, are just as likely to arise in rule making proceedings under a different guise, depending upon the rules of practice of the agency.

#### SOME THOUGHTS FOR IMPROVEMENT WITHIN THE PRESENT FRAMEWORK

Constitutional due process, and the particular statute being administered, are the constant limitations upon administrative law. Flexibility within these limitations is the simple answer, as Professor Davis has emphasized. Much flexibility already exists, of course, depending upon the statute involved. For example, as was pointed out in the *Automotive Parts* case, the APA provides for both informal and formal proceedings. In that case the Act being administered gave the Agency freedom to use either procedure. It may use the procedure determined to be most appropriate for the problem at hand. If the problem includes an issue of fact, then a trial-type hearing is certainly the most reliable vehicle, of the two types of hearings, for determining what the fact is. It has been suggested, and with considerable merit, that certain types of proceedings may be divided, with practicality, so that issues of facts may be resolved in an adjudicatory hearing while other issues may take the rule making route. This is a novel approach perhaps, but in practice many hearings are already being conducted wherein most, if not all, cross-examination deals with questions of fact.

The dilemma of categorizing a proceeding as either rule making or adjudication should be resolved as early in the process as practicable, but it need not always be made prior to the hearing stage. Broad public notice and invitations to comment and/or participate can be given expeditiously by direct notice, and through the Federal Register in many matters as soon as they arise. In many cases the responses to the notice, the interest shown, and the comments received, give considerable indication as to how best to handle a particular proposal. For example, comments merely for or against a policy but not questioning the factual basis of a proposal may indicate that informal handling



would be adequate. On the other hand, responses showing a challenge to the premise upon which a matter is based, questioning the expertise behind a proposal, or indicating that the basic facts are controverted, show that adjudication may be the best route to follow in order to reach a fair and just result. One of the most difficult evidentiary problems in all the law is the determination of which expert to believe from an array of equally qualified but contraminded authorities. At least some measure of cross-examination, thus some element of adjudication, is essential in this type of situation. In the event it is a technical problem, as frequently arises in the field of safety, and the statute does not require "determination on the record," the free interplay of staff work and merging of staff functions may still occur in the decisional process. But a truth-exposing record would also be available.

A firm label, either rule making or adjudication, is often not required unless there is to be an oral hearing. The courts give great weight to the language of the statute and to the agency's judgment and expertise as to whether an oral hearing is necessary.<sup>45</sup> An oral hearing is to present evidence, facts; as often stated, argument or statements of position may in most cases be presented just as well in writing. This means, therefore, that the main purpose of an oral hearing is to determine the truth about factual situations, and to weed out half truths, or exaggerations or plain false statements. Flexibility to allow cross-examination is almost essential to accomplish this end. If this be over-judicialization in the eyes of some, what then is the harm done? The noteworthy delay in administrative proceedings is not due to cross-examination of witnesses. The real delay in most administrative proceedings is in the time allowed for pleadings, and the multiplicity of pleadings afforded. The liberality of some agencies in extending the time allowed for pleadings is also a factor in the slowness of our administrative processes. An example of how flexibility in the handling of a proceeding together with prompt and firm pleading dates, combined with an expeditious and soundly based decision is the aforementioned *Bridge Toll* case. The hearing in that proceeding, preceded by a prehearing conference, began on June 26, and ended on July 2, 1968. The formal record included 1,150 pages of transcript and 92 exhibits. Since daily copies of the transcript were available, the hearing examiner gave the parties two weeks, until July 16, to file briefs. The examiner's decision was served August 1, 1968, the parties were given fifteen days

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45. *ICC v. Jersey City*, N. J., 322 U.S. 503 (1944).

to file exceptions, exceptions were filed, and the final decision of the Federal Highway Administrator was issued on September 11, 1968.

Flexibility, and expedition, cannot be had, however, unless authority and responsibility are properly delegated. An excellent example of Rules of Practice which accomplish both these ends are those adopted by the Federal Highway Administration on January 16, 1969.<sup>46</sup> They provide, that once a proceeding is turned over to a hearing examiner he shall have the power to take any action (with an exception not here pertinent), and to make all needful rules and regulations to govern the conduct of the proceeding, to insure a fair and impartial hearing, and to avoid delay in the disposition of the proceeding. Among the powers specifically delegated to him, but not limited thereto, are the following:

- (1) To administer oaths and affirmations.
- (2) To issue orders permitting inspection and examination of lands, buildings, equipment, and any other physical thing and the copying of any document.
- (3) To issue subpoenas for the attendance of witnesses and the production of evidence as authorized by law.
- (4) To take or cause depositions to be taken.
- (5) To rule on offers of proof and receive evidence.
- (6) To regulate the course of the hearing and the conduct of participants in it.
- (7) To consider and rule upon all procedural and other motions, except motions which, under this Part, are made directly to the Administrator.
- (8) To hold conferences for settlement, simplification of issues, or any other proper purpose.
- (9) To make and file initial decisions.
- (10) To take any other action authorized by these rules and permitted by law.<sup>47</sup>

Agencies differ, of course, in the complexity and subject matter of the duties performed, in the number of cases presented for decision, in the number of hearing examiners assigned, and in many other ways. The principle still holds, however, that appropriate and clear-cut delegation of authority, as well as responsibility, is essential for good management practices, and this is as true in law as in other fields of endeavor.

To handle a proceeding to produce "a good practical result," as

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46. 49 C.F.R. § 386 (Supp. 1969).

47. *Id.*

Professor Davis has urged, is an unquestioned goal, and certainly is the intention of all agencies of the United States. It is much easier said than done. As pointed out above, the one position in the pattern of administrative decision-making most apt to influence a "good practical result" is the hearing examiner who conducts the hearing and makes the initial decision. Flexibility is the answer, but it must also be properly placed; it must begin with the hearing examiner. In gray area cases the label to be attached, whether rule making or adjudication, could well be left to the judgment of the hearing examiner with an eye to producing the best practical result in an expeditious, proper, and fair manner. True rule making in the traditional sense, that is, the making of a rule for general application in the future, is not a problem except when there is conflict within the statute itself, for example, within the Safety Appliance Acts and their provision for "full hearing."

It cannot be overemphasized that flexibility does not mean unlimited questioning, and cluttered records full of repetitive and superfluous testimony. On the contrary, and most importantly, it means that the hearing examiner would have the duty and responsibility to confine cross-examination to issues appropriate for cross-examination, and while this line is sometimes difficult to ascertain, it can be done with a great measure of fairness. Every effort must be made to minimize what is so common in the administrative process—the witness under oath whose testimony degenerates to pure argument, both on direct and cross-examination. Federal hearing examiners, like other members of the legal profession, and like judges in the judicial process, differ in their abilities and their patience and devotion to duty. They are presently inclined to be more liberal than judges in the judicial process, as indeed they should, as the field of administrative law is much more flexible than common law. The agencies themselves and the various reviewing United States Circuit Courts of Appeals have made the examiner corps reluctant to cut off evidence or to exclude exhibits that may have some remote bearing but usually are of little or no help. With proper support from the reviewing authorities, the line on evidence and cross-examination can be properly drawn.

The main theme of this article is that the answer lies with the key person in the process—with the trier of the case. Success or failure of the entire administrative law system depends on the quality of the work done at this crucial place in the movement of cases to a final determination. In this context, this commentary would be remiss if it did

not take note of the article written in 1964 by Howard C. Westwood of the District of Columbia Bar,<sup>48</sup> an active attorney before the bars of the Federal administrative agencies, particularly the Civil Aeronautics Board. This writer agrees with much of what is said in his article. There is no question but that the agencies take too long to dispose of their business, even though some have made strenuous efforts in recent years to expedite their decision-making processes. It is a mistake, however, to minimize these delays by pointing out that the parties themselves are usually agreeable to the delays, for example, in licensing cases. The public also has a stake in these matters, and if there is a public convenience and necessity for a certain service, it should not be delayed merely because all the particular parties to the matter are agreeable to the "let it slide" approach. The public expense is increased when proceedings are prolonged, and this should not be taken lightly. Of course, there should be no such preoccupation with delay as to swing the pendulum too far in the other direction. Concern with delay should never lead to ill-considered action.

In true rule making cases the suggestions of Mr. Westwood are certainly meritorious and are, in fact, being extensively used in some agencies. In adjudications, however, to the extent the label must be attached, this examiner, while agreeing that cross-examination could be limited, does not subscribe to the theory that the "examiner would look to the lawyer as his primary means of education on the facts." Certainly to some extent the lawyer would be looked to for an explanation of the facts and of their significance, and how they tie together. Of course, skilled cross-examination is always an important method of educating the hearing examiner as to the facts. Briefs, after the hearing or oral argument at the end of the hearing, are helpful in many of the more involved cases, but they are not needed in many of the routine situations. In many agencies the hearings last only a few hours and the transcript is short. Oral arguments at the end of such "short" cases are nearly always welcome and usually give helpful summations, but briefs in such instances usually serve little purpose simply because they are not needed, and frequently are a delaying tactic.

The suggestion that the examiner, in consultation with the lawyers, should direct attention to the points on which pleadings and oral argument should be concentrated is very meritorious. A feeling of guilt

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48. Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964).

exists here on this point—perhaps hundreds of briefs have been filed in this office which were simply broadside summations with no effort even being made in many instances to focus on the real case-determining issues. In retrospect, it is clear that the blame for this wasted professional time and ability, and purposeless delay, must be shared at all procedural phases of the administrative process, including the hearing examiner. It is also admitted that Mr. Westwood may be correct when he says “the administrative hearing officer very often is in a daze by the end of the hearing and gets the case organized only after he has worried over the exhibits, the transcript and the briefs many weeks or even months, by which time he has completely lost contact with the parties.”<sup>49</sup> One wonders, however, if he is the only one in a daze after a long involved hearing, and whether it would be better if the hearing examiner insisted on interrupting the hearing at every point when something was presented which was then not clear to him. In the writer’s experience as a hearing examiner, the momentary lack of clarity is usually eliminated as the hearing progresses and certainly upon a review of the record, and that the attorneys before the bar more adequately present a clearer picture if they are interrupted only infrequently. Of course, free use of conferences among the examiner and counsel is certainly helpful in many cases, including pre-hearing as well as in-hearing conferences.

Notice has been taken of the learned article by Professor Shapiro cited by Justice Douglas in the *Wyman-Gordon* case.<sup>50</sup> Professor Shapiro repeatedly suggests that one of the main weaknesses in the development of administrative policy at the federal level is the failure to make full use of rule making power. This observation may be well taken, but it hinges upon the distinction between making policy and deciding controversies. This starts the cycle all over again.

One thing is clear. We will face a staggering caseload in the years to come in the field of administrative law. Continued emphasis upon quality, as well as a far greater number of federal hearing examiners will be needed. The number of federal hearing examiners, or administrative trial judges, as the Honorable Tom C. Clark would call them, will far exceed the number of judges presently being appointed by the President of the United States to serve in the judiciary. The emphasis,

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49. *Id.* at 661.

50. Shapiro, *The Choice of Rule Making or Adjudication in the Development of Administrative Policy*, 79 HARV. L. REV. 921 (1965).

however, at this time should be upon quality, not numbers—quality of the performance at the trial stage, and quality in the initial decision. With quality, in fact, constantly increasing at this level, and with appropriate delegation of authority and sufficient power to render decisions, great strides will be made toward meeting the awesome needs of the future.